

Kanak case of New Caledonia

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Little is known about the origins of the Kanak People.

Kanak people came from Austronesia to New Caledonia by sea around 1100 BC. They mainly lived on coastal sides of the island. Remaining potteries with geometric motifs, known as Lapita, are thought to have religious significance. Social organization was built on clanship within a collective framework. Linguistic diversity and complex relations between clans were set up, known as customaries routes. The social clanship was and is still founded on a common ancestor and a common living place.

Historically, Kanak relied on agriculture, fishing and gathering however now many of them depend on market economy.

Their first contact with European culture took place on the 4th of September 1774, when James Cook landed in the north of the main island. He named it New Caledonia. Numerous explorers came to the Island : Christian colonization took place with the London Missionary Society, which wished to extend its religious purpose to Melanesia after Polynesia (Loyalty Islands in 1841, 1842). Catholic missionary also arrived in main Island (1843).

Official colonization dates from 24th September 1853 when marine general Febvrier-Despointes wrote to Théodore Duclos, French Minister of colonies : “New Caledonia will allow France to be present in the Pacific for the interests of its military and commercial marine”. Violent confrontation occurred with forced displacement and loss of traditional lands. On the 23rd of June 1878, in La Foa, under the direction of Ataï, a rebellion was initiated. 600 Kanak were killed, as were 200 Europeans. 1500 Kanak people were exiled. Another rebellion took place in 1917. The Franco-Kanak confrontation has been a long-standing traumatism made of colonization, local wars, epidemiologist constraints. Half of the population remained in 1921 (27.000 Kanak) in comparison to 1853 (60.000).

The terra nullius doctrine was applied to New Caledonia. Indigenous reservations were designated and as of 1887 a special Code was drafted for Kanak people which was a racial and a discriminatory one. In 1900 a special tax was added in order to make Kanak men work outside of the reservations and to reinforce the colonial budget.

* The author thanks his student Molly Wright for her rewriting in English (Miami University in Oxford, Ohio, USA, international relations and French studies).

Mainly, New Caledonia's colonization was, as in Australia, of penal nature. The famous Louise Michel (1830-1905) - an important figure in the Paris Commune of 1871, an anarchist, a school teacher and a medical worker - was deported to the Ile des Pins ¹. The fate of the Island was and still is founded on the discovery of ore, especially nickel, in 1864. The island contains about 7,100,000 tonnes of nickel, ie. about 10% of the world's nickel reserves.

After world war II, legal colonization was abolished thanks to the commitment of France to cease "arbitrary colonization" ². The 2009 census that was allowed, as a single exception France, to use ethnic data in New Caledonia pointed out that the Kanak population is estimated to be 99.078 individuals, which is just over 40% of the entire population of New Caledonia. The Kanak population is distributed as such : 94% of the population reside in the Loyalty Islands Province ; 74% for the north Province, 27 % for the south Province. In addition to Kanak people belonging to a Melanesian cultural group, they are also French nationals, which poses a challenge for the French Republic, which pretends not to recognize local and social singularities when defending the principles of liberty and equality. The path to understand the Kanak situation is full of contradictions.

Due to this broken history, the relationships between Kanak and non-Kanak remain difficult and are often made of unsurpassable constraints, whether real or not:

Here, the unsaid/silent is a real institution ...
All of New Caledonia has always worked like this ...
How to write without rancor ?
How to take the necessary distance, find the
serenity and make sure that writing is not only:
"Revenge of the vanquished"? ³

Antoine Leca, Professor of Law at Aix-Marseille University, has observed a meaningful analysis of the current studies of Kanak people. On one side, according to him, there is the "Metro-Caledonian anthropological school" (a school of taught) which is conceived as a desperate history ; on the other side, there is the "Franco-civil law school" (another school of taught) where Kanak law circumscribes the

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She once said : "Now that we all know the rich are thieves. If our parents cannot drive them from the earth When we grow up We'll make mincemeat of them."

2 "Faithful to its traditional mission, France desires to guide the peoples under its responsibility towards the freedom to administer themselves and to manage their own affairs democratically; eschewing all systems of colonization founded upon arbitrary rule, it guarantees to all equal access to public office and the individual or collective exercise of the rights and freedoms Proclaimed or confirmed herein", according to the last paragraph of the Preamble of the 1946 Constitution that has a constitutional force in France.

3 Louis José Barbançon, *La terre des non-dits*, 1992. Barbançon Louis José, 1992, à compte d'auteur, La Mothe-Achard, 132 p.

case-law of the French courts, mainly those of New-Caledonia ⁴. This last school has been notably built by a judge involved in academic research, Régis Lafargue. Acting as a judge of the Court of Appeals of Noumea, fostering the “Judiciary Custom”, he was also writing papers on the Kanak issue ⁵.

Antoine Leca has initiated a comprehension of legal issues thanks to the concept of *Kanak Civil Customary Law* ⁶. According to him, Kanak Civil Customary Law does not include all customary practices and has a bi-cultural foundation. Also, Kanak Civil Customary Law is not French law.

In this short presentation we have chosen to present a broad view of the Kanak issue and to focus on the issue of decolonization, allowing for a wide understanding of the situation. How could the Kanak people be decolonized ? This is the main purpose of this presentation. It goes through the New Caledonia’s political status (I) and through the legal status of Kanak people (II).

I – Decolonizing New Caledonia: the political cause of Kanak people within the Nouméa Agreement, 1998.

The decolonizing process of New Caledonia concerns article 46 of UN declaration on the Indigenous Peoples’ Rights (2007). But whereas article 46 prohibits any territorial sovereignty, the Noumea Agreement allows a referendum vote for independency. The intention of the decolonizing process is to build a common / shared destiny.

During the “events” years (1984-1988) New Caledonia faced a quasi-civil war, as 300 people were killed in the context of a non-effective process of decolonization. Between the first and the second presidential Elections Day, a dramatic kidnapping at a police station happened in Ouvea, one of the three Loyalty islands. Interestingly, the two presidential candidates (Mitterrand and Chirac) were associated with the issue, as the first was the acting President of France and the latter was the acting Prime Minister. The

4 Antoine Leca, Compte rendus de « La coutume kanak dans l’État. Perspectives coloniales et postcoloniales sur la Nouvelle-Calédonie », *Cahiers du Pacifique Sud Contemporain*, hors-série n° 3, dir. C. Demmer et B. Trépied, L’Harmattan, Paris, 2017 (274 p.) et de *L’intégration de la coutume dans le corpus normatif contemporain en Nouvelle-Calédonie*, dir. E. Cornut et P. Deumier, 2016 (553 p.), to be published in *Droit et Cultures*, 2018.

5 Régis Lafargue, *La coutume face à son destin. Réflexion sur la coutume judiciaire en Nouvelle-Calédonie et la résilience des ordres juridiques infra-étatiques*, LGDJ, Droit et société 22, 2010, 417 p. See Laurent Sermet, in *Memoriam* - as Régis passed off too young - *Peuples autochtones : regards Pacifique*, Presses électroniques de la Maison de la Mélanésie-Paul de Deckker, 2016, pp. 5-6.

6 Antoine Leca, *Introduction au droit civil coutumier kanak*, Aix-en-Provence, PUAM, Collection Droit d’Outre-mer, 2e éd. 2016. See also Antoine Leca, « Un phénomène juridique nouveau entre Koutum et droit français : le droit civil coutumier kanak », in *Peuples autochtones : regards Pacifique*, Laurent Sermet dir., Presses électroniques de la Maison de la Mélanésie-Paul de Deckker, 2016, pp. 153-159.

result was terrible : 17 implicated young Kanak men were killed in a cave by the French army forces. After the elections, as Mitterrand won, his new Prime Minister Michel Rocard signed the Matignon Agreement as the first real step to bring peace again, in 1988. Ten years after, as political forces of New Caledonia were not ready to access independence, a new agreement was locally signed and adopted for a second provisory period of 20 years.

This Nouméa agreement may be qualified, for the purpose of indigenous people's rights, as a treaty between the French Government local political forces and Kanak political forces, namely : The Kanak Nationalist Movement (FLNKS) and The Pro-Unity Movement (RPCR).

The agreement was incorporated into constitutional law and the French Constitution was amended with a special title dedicated to the provisional clauses related to New Caledonia. It was also completed with a 1999 organic law of constitutional nature whose purpose was to implement legal and technical solutions.

1 – The Kanak identity recognition v. the double compromise

The main victory for the Kanak cause does not lie in the provisions of the agreement, nor in the organic law, but in the official recognition that : *“The Kanak people were indeed the first inhabitants of the land and were subject to dispossession and colonization”*. The agreement is open to independence as a political choice ⁷.

The main objective of the agreement is to build a new society composed of all the populations of New Caledonia. First : Kanak inhabitants. Second : French settlers who disparagingly called "Caldoche" ⁸. Third : Metropolitan French working and moving there, and non-French origin populations (Asian-Pacific origin).

This new society, as prescribed by the agreement, is intending to share a common future and a common destiny. The political compromise is to overlap the territory issue : what part of the islands would become independent and with whom ? Some Kanak may not wish to access independence ; some non-Kanak people may wish it. Indeed the Kanak issue becomes a subsidiary one as the main one is to live together, today and tomorrow, in a united island whatever its political statute may be.

The second political compromise is about the conditions of voter access. To vote in the 2018-2022 referendum, the elector has to prove to be a citizen of New Caledonia, Metropolitan French not having a long term residence will not be allowed to vote in order to leave this issue to those interested in living together in the land on the long term. It is believed that the elector's intention and the balance of the

⁷ Frédéric Angleviel, *Comprendre les referendums de 2018-2022 en Nouvelle-Calédonie. La France ou l'indépendance. Décryptages historiques, socio-économiques et communautaristes*, Edilivre, 2018, 462 p.

⁸ As Olivia said, and as Myrielle agreed : « when I live in New Caledonia, I identify myself as a Caldoche ; when I stay in France, I identify myself as a Caledonian ; when I travel in Europe, I am a French » (L.Sermet *Interview* Noumea, December 2017).

vote will reveal a choice, unforced, exterior and true. To allow this voting restriction, it was decided to adopt chapter XIII of the constitution as a result of the Nouméa Agreement (art. 76§1⁹).

2 – The judicial validation of the limitation of voters to the referendum of self-determination in New Caledonia

The European Court of Human Rights dismissed the case in *Py v. France*¹⁰.

Bruno Py, a French national born in 1964 and living in Nancy (France), was appointed in 1995 to a position at the French University of the Pacific in Nouméa in New Caledonia. He was refused registration on the special electoral roll which would have enabled him to take part in the 1998 self-determination vote. Subsequently, the Ordinance of 19 March 1999 on the institutional organisation of New Caledonia brought in a 10-year residence condition for participating in elections to the Congress and provincial assemblies. In accordance with that law the applicant's registration on the special electoral roll in respect of Nouméa, which would have enabled him to participate in the elections to Congress, was refused.

He alleged that the restrictions imposed on his right to take part in the elections for the congressional and provincial assemblies of New Caledonia had violated the right to free elections guaranteed by Article 3 of Protocol No. 1 and constituted discrimination on grounds of national origin, in violation of Article 14 (prohibition of discrimination).

According to the French government, the reason for bringing in a residence condition was to ensure that the votes would reflect the will of "interested" persons and that the result would not be altered by a massive vote cast by recent arrivals on the territory who had no solid links to it. Furthermore, the restriction on the right to vote was a direct and necessary consequence of establishing Caledonian citizenship.

The court found that New Caledonia's current status amounted to a transitional phase prior to the acquisition of full sovereignty and was part of a process of self-determination. After a tormented political and institutional history, the 10-year residence condition had been a key factor in appeasing the deadly conflict.

9 Article 77, last paragraph of the French Constitution, also allows a shortage of voters to elect members of the Deliberative Assemblies of New Caledonia and the provinces. Vote is neither here universal despite the issue to Independence is not directly or indirectly concerned.

10 Eur Court on HR, *Py v. France*, 11 January 2005, (no. 66289/01).

In the court's opinion, the history and status of New Caledonia were such that they could be regarded as amounting to "local requirements" of a kind warranting the restrictions imposed on the applicant's right to vote. The court held unanimously that there had not been a violation of Article 3 of Protocol No. 1.

Previously in 1998, the French Conseil d'Etat had also dismissed the argument according to which the limitation of voters was against international law and constitutional law (see annex). As opposed to the court that accepted to enter into the substantial part of the debate, the French Conseil d'Etat remained on a formal approach :

Whereas Article 76 of the Constitution having intended to derogate from the other standards of constitutional value relating to electoral rights, the ground that the challenged provisions of the impugned decree are contrary to Articles 1 and 6 of the Declaration of the Rights of Man and of the Citizen, to which the preamble to the Constitution refers, or to Article 3 of the Constitution may only be set aside;

3 – The Nouméa agreement : the subsidiarisation of the Kanak Cause

To a certain extent, the Nouméa agreement is not in favor of the Kanak population, as it is approaching the issue via the perspective of a common destiny. The agreement may be analyzed as applying in French law Article 46 of the UN declaration on the *Indigenous Peoples' Rights* (2007) with a specific mention for a common / shared destiny.

The agreement is opening the door to a self-determination referendum to come during the fourth five-year congressional term. As stated in the Noumea Agreement, the question should be divided in three parts : transfer of reserved powers to the New Caledonia institutions ; access to independence ; the conversion of the NC citizenship onto a NC nationality. Interestingly, the agreement has also stated that the consultation should take place three consecutive times, in a case of no result. Behind this open proposal there is a remaining fact: 40% of the voters are in favor of independence. 60% of the alleged voters would wish to remain part of France with special conditions, perhaps as an associated state similar to New Zealand's state Niue.

The Agreement recognizes Kanak identity and also a Kanak dedicated institution, ie the Kanak Senate that has some advisory powers in the field of identity. It provides also for economic investment for the less populated and more impoverished parts, mostly Loyalty Islands and the North Province, in order to rebalance the country. The agreement establishes a gradual political decolonization in terms of irreversible powers transferred to the NC's institutions, namely : the government, the congress, and the three provinces, such as civil law, labor law, and fiscal matters. Non transferred competences are : justice, public order, security, defense, nationality, currency, budgeting, and international relations.

To a certain extent the agreement is of a federal nature : New Caledonia being part of France the single example of a federated territory existing for the purpose of decolonization. The only power not afforded to New Caledonia institutions is the drafting constitutional power. As such New Caledonia is not a federated state of France. The Noumea Agreement may be qualified as a territorial constitution signed by the French government and local political forces.

II – Legal decolonization of the Kanak people : what rights, institutions, and issues ?

The legal decolonization of the Kanak people issue mainly deals with the article 34 of UN declaration on the Indigenous Peoples' Rights (2007). The purpose of the section is to understand to what extent the Kanak people may get the right to promote, develop and maintain their institutional structures and their distinctive customs, including juridical systems.

I – Article 75 of the French Constitution and the Kanak normative exception

According to Article 75 of the Constitution of the Fifth Republic : *Citizens of the Republic who do not have ordinary civil status, the sole status referred to in Article 34¹¹, shall retain their personal status until such time as they have renounced the same.*

Coming from a colonial context, Article 75 C. establishes the primacy of civil law over personal law and expresses a constitutional subjective right (the right to retain or renounce its status) within an objective constitutional right to recognize the personal status. The primacy is illustrated by three characteristics: irreversibility of the renunciation of the statute of personal right; uniqueness of renunciation, which always goes in the direction of abandonment (from the personal status to the status of civil law) ; and universality of renunciation, which extends to the minor descendants of the renunciant.

In French overseas territories, there is a multitude of personal statuses, radically distant from each other, but all supposed to fall under Article 75 C. on the grounds of constitutional unification, which are the manifestations of legal pluralism in France. The diversity of statutes and the sociological pressure are such that it is more appropriate to think of Article 75 in terms of constitutional plurality. Three main categories of personal status must be identified: the common law of the personal status, the non-formalized right of the personal status, and the special right of the personal status (New Caledonia).

11 According to article 34 of the Constitution : *Statutes law shall also lay down the basic principles of ... systems of ownership, property rights and civil and commercial obligations.* It means that for civil status, the general one, the Parliament is competent whereas it is not the case for personal status, as is the Kanak status, which is composed of customary practices mainly related to Melanesian culture. Those practices are indeed integrated in French law as having the purpose to give norms for

First of all, the common law of personal status, applicable to both Mayotte and Wallis and Futuna, should be considered. This common right of personal status is reinforcing the ideal of republican integration and the prominence of common civil law. The second category of personal status does not originate in Article 75 C. It is not formalized and exists as a *para legem* rule. Observable in French Guiana and French Polynesia, the status derives from the need to take into account sociological realities.

The third category of personal status only applicable to Kanak of New Caledonia has the following characteristics:

- It finds its consecration in Article 77 of the Constitution combined with Articles 7 to 19 of the Organic Law of 1999 (see annex III). Should this personal status be also based on Article 75? It can be considered that the explicit reference, made by Article 7 of the Organic Law to Article 75C¹², makes it possible to base the personal status on the combined constitutional articles 75 and 77. Moreover, its content is determined in part by the organic law;
- The renunciation is reversible and the acquisition for the first time or again of the customary civil status is possible;
- The substantial field of the Kanak customary civil status applies to the whole of the civil law¹³;
- The Kanak customary civil status is considered to be equal with the civil status of common law, the Mayotte solution does not apply to it as affording primacy to civil status;
- The principles opposable to Kanak customary civil status are not found in the law but in the Constitution;
- The jurisdiction of civil court is competent but the judicial formation is completed by customary assessors.

2 – The accession to Kanak customary civil status : an exception in French personal status law

According to Article 13 of the Organic Law of 1999, as an obvious exception to article 75 C., : “*Anyone who has had customary civil status and who, for any reason whatsoever, has civil status under ordinary law, may renounce this status in favor of customary civil status*”. This article is the single exception for opening doors to re-entry into the personal status.

The Noumea Court of Appeals has pointed out an unprecedented situation, delivering an innovative judgement: the accession to personal status (September. 29, 2011¹⁴).

12 According to article 7 : *Persons whose personal status, within the meaning of Article 75 of the Constitution, is the Kanak customary civil status described by this law, shall be governed by custom of civil law nature*. This article means among other things that the penal sphere remain within French law.

13 The scope of Kanak customary civil status is very wide. It certainly comprises the legal issues relating to the family, childhood, filiation, land. It is also covering the areas of contract and liability.

14 « L'accession au statut civil coutumier kanak » – Cour d'appel de Nouméa 29 septembre 2011 – *Recueil Dalloz* 2011. 2904.

For the grounding foundations of this case the court took note that :

- the Noumea Agreement's guiding document generally is aimed to translate the sociological truth in the legal status of citizens;
- the signatories of the agreement have intended to correct the discrepancy observed between people's experience and their legal status in order to make personal status the central element in the protection of the cultural identity of individuals;
- the Organic Law n ° 99-209 of March 19th, 1999, which implements the Nouméa agreement, explicitly defines the possibility of a "return" to the customary status for the one who would have renounced in the course of its existence in favor of common law (Article 13, paragraph 1);
- in this first case, qualified as a "return" to the customary status, the court adds the possibility of an "accession" to the customary status for the one who, having never been himself a customary status, can justify having an ascendant customary status, under certain conditions;

About the facts, the court noticed, among other things ¹⁵, that : *“Mr. Saïto explained to the first judge "I do not know if Saïto is my father. But I have always lived in the tribe in a customary way [...] my father left in 1942, I have not heard from him since. I adopted [...] a girl [...] I have problems to go fully into the tribe because I am of common law ".*

As a result, the court admitted his accession request due to :

In the light of the applicant's social behavior, the principle of respect for private life, laid down in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, justifies the benefit of his this claim, ie. accession to the customary civil status'
;

The principle of the unavailability of the status of persons, invoked by the Public Prosecutor's Office in his oral observations, does not preclude the modification of his civil status, since the personal status constitutes an essential, if not the most important, element of the identity and therefore of the state of the person ;

Within the meaning of Article 15 of the Organic Law n ° 99-209 of 19 March 1999, everyone has the right to act to declare that he or she does not have customary civil status, and this action in claiming status is conditioned only by the proof of a durable and continuous possession of state corresponding to the civil status claimed.

15 *“Mr. Saïto, who calls himself Poarairoua Minole César from the name of the clan who recognizes him as one of its members (see his letter dated August 8, 2011), was born in the civil law status, and was very quickly socially integrated into the life of the clans because of the sudden rupture of ties uniting him to his father, the year after his birth (in 1942); his father, like all Japanese nationals during the Second World War, was expelled from New Caledonia; that thus, the personal and family route of Mr. Saïto is totally and exclusively in the customary life of the clan and the tribe”.*

3 – The Kanak's right to land : an French approach of Native title

Kanak lands are benefiting from Article 18 of the Organic Law of 1999, for which : “*Customary land and property owned by persons having customary civil status are of customary nature. ...Customary lands are inalienable, non transferable, incommutable and unseizable*”.

Interestingly, the law applicable to the land derives from the status of the owner. It is to be understood as a strong link between land and man, obviously rejecting the legal Roman division between *res* and *personae* and the primacy of *personae* over *res*. This link has been perfectly recognized and admitted by the Noumea Court of Appeals ¹⁶.

In this judgement, the court reiterated the importance of Kanak normativity and spirituality as the foundation of customary law, quoting a previous decision of the Lifou First Instance Court ¹⁷. Then it added :

The indigenous normativity, which is the primary and essential source of judicial custom (the Law of Jurisdiction with Customary Assessors), emphasizes, first of all, that the "link to the land" is not a real right (right over res), but instead derives from personal rights, since it constitutes "a normative concept specific to customary society

16 CA Nouméa, 22 Mai 2014, Chambre coutumière Numéro R.G. : 12/101.

17 According to Tribunal de Lifou, 25 juillet 2012, nG10/80 Savot et Luevadua contre Grande chefferie du Gaïca, extraits : "the link to the land is the foundation of Kanak life. The earth is fertilized by the yam which is the fruit of the work of men. Men carry the yam that is the fruit of the earth. The ensemble bases the Kanak custom of bringing men and women together around their lands and their families. It is their anchorage [...] In no case the customary land is a direct right on the earth. It is a right by men and for men on earth. It expresses human heritages and not direct land ownership ... there is no direct link, that is to say, of real right, but rather personal and interpersonal links between the clans and the people. chieftaincies for the conservation and enjoyment of the land. These personal ties form the clan unity around the earth ... these links are always born from the reception of men by the clan master of the earth ... what the Lifou clan highlights is this necessary interdependence between the power of the great chief over men, and the land that the clans occupy, and whose great chief is the guarantor of harmony [...]. The grand chief does not exercise a vertical power but serves the clans [...] without the grand chief, the master clan of the land is nothing. Without the clan master of the earth the great leader is nothing either [...] There is therefore a deep communion of men between them, communion which the great chief expresses. This communion unites them to the earth. From this communion results the principle that custom unites men to each other and to the earth and unites the earth to men and to each other. This rule is general to the Kanak of the Great Earth and Drehu ".

affecting the identity and status of men in relation to a land in relation to which they define themselves" (Nouméa 11 October 2012, nG11 / 425 Pearou v. Kahea).

The term "link to land" in the Noumea Agreement covers a variety of situations: the primordial "obligations / rights" of the "original land clans" (so-called "masters of the land "), but also the prerogatives granted by these to "clans welcomed "(rights of use, occupation, etc.). This indigenous normativity underscores, finally, the fact beyond the "land" object land relates to the spiritual foundations, social cohesion, and principles of civilization of Kanak society, and that the violation of these rules may result in immaterial moral and spiritual harm.

When the Kanak issue of the of the link to the land went to the Court of Cassation ¹⁸ in Paris, it admitted the concept without using the term of Native title (titre indigène/ autochtone) but preferred to use the French legal terminology : “continuous, public, peaceful and unambiguous possession”. According to Régis Lafargue ¹⁹, with whom we agree, it is the incorporation of the concept of Native Title in French law that is at stake. For us, the fact that the Court of Cassation did found the right to the land on two possible legal grounds, either Article 18 of Organic Law 1999 or the “continuous, public, peaceful and unambiguous possession” allows this conclusion.

The very concept of Native title is nevertheless recognized by the Kanak Charter²⁰.

4 – The Kanak Charter as an act of decolonization and a declaration of spirituality, values, rights and duties

The charter has been formally adopted on April 26th, 2014 (see annex). It is intended to be a historical document, a legal declaration, but also an act of decolonization within the legal framework of the Republic and the Noumea Agreement.

As a decolonization act, the charter is “determining the place of customary law and the customary legitimacy in the management of the country’s affairs”. This is the first text in which the Kanak people, meeting in the Kanak People's Assembly, obviously uses the "we" in order to demonstrate its unity. This

18 Civ. 3ème, 21 mai 2014 n°12-25.432 (Rejet) : “Clan G ... did not provide proof of the customary character; within the meaning of Article 18 of the organic law of 19 March 1999, of the claimed property, nor of a continuous, public, peaceful and unambiguous possession”.

19 *L'intégration de la coutume dans le corpus normatif contemporain en Nouvelle-Calédonie*, dir. E. Cornut et P. Deumier, 2016, sp. p. 109

20 “The link to the land relates to the carnal and spiritual relation of a Clan with the natural space where its original hillock is located and where the Ancestor which first appeared and the successive natural land all along the Clan’s history. Broadly, the tie to the land reflects the affective relation binding a family/ Clan to the land”.

text may be seen as a treaty by and for the Kanak People aimed to guarantee its own rights and defends its customary values. The charter summarizes all Kanak values and fundamental principles of its civilization. As such and in the event of a New Caledonian Constitution, according to the Customary Senate it could find its place alongside the Declaration of the Rights of Man and the Citizen, of which it could become one of the components²¹. The charter pretends to re-balance the place of Kanak people within the society.

Values and spirituality form the Chapter 1 of the charter :

1 - LIFE is sacred. The **BLOOD**, source of life which runs in the veins of an individual, comes from the **UTERINE UNCLE**, which gives it the responsibility to follow the man/woman and to look over his/her journey through life from birth to death.

2 - THE NAME, given in Kanak language, links the person to its Clan and to the land. It describes the history of the Clan in the generational cycle of life in space and time.

3 - THE SPOKEN WORD issued from the spirit of the Ancestor and from custom is sacred. It sanctifies and feeds the different stages of a person's life, as well as the sociocultural and natural relations between the components of the Kanak Society. The spoken word expressed during a customary ceremony gives a sense and a meaning.

4 - THE LINK TO THE LAND relates to the carnal and spiritual relation of a Clan with the natural space where its original hillock is located and where the Ancestor which first appeared and the successive natural land all along the Clan's history. Broadly, the tie to the land reflects the affective relation binding a family/ Clan to the land;

5 - THE CUSTOMARY SPEECH is the expression of the customary word sanctified by all parties during a ceremony on the occasion of a specific and planned event.

6 - THE GENEALOGICAL SPEECH locates the history of Clans in time and space. It is recited in specific conditions by the beholders of this word through an irremovable definition.

7 - THE CUSTOMARY PATH or **PATH OF THE STRAW** is the mean, and the tool, of communication used by the Clans or Chieftainships to send a message to other Clans and Chieftainships. For the Chieftainships, it is materialised by people on a given journey set in advance by alliances and by bordering "houses" set up to be used as an "entrance door".

8 - The values of COHESION, HARMONY and CONSENSUS imply the permanent research of the **BALANCE** between a man,

21 <http://www.senat-coutumier.nc/le-senat-coutumier/les-politiques-publiques-kanak>

being a part of his group (family - Clan), his social group, Society and the surrounding nature.

9 - The values of **RESPECT**, **HUMILITY** and **PRIDE** allow each individual, each family, each Clan, each chieftainship to be inside this group, within the maternal and paternal relational system, in its chieftainships and the intergenerational and genealogical speech.

10 - **BELONGING** and **RELATIONSHIP** are the fundamental data of the Kanak person who is always referenced within its social group. Each person is always in the centre of two relational systems, maternal and paternal.

11 - **CUSTOMARY RELATIONSHIP** implies necessarily a customary exchange which is expressed during each customary event. The structuring of relationships is established through alliances. A customary gesture done in a particular sense necessarily implies a reciprocal customary gesture in return and at a given time. It is the rule of **RECIPROCITY** which is applied in customary relationships.

12 - **DIGNITY** marks the respect for the human being in touch with its condition as a man, a child, a woman, an elderly person, member of its Clan, a member of Society in touch with customary ethic;

13 - The **YAM** and **TARO** are the symbols of the Kanak custom. Their presences in customary ceremonies mark the anchoring of Clans on their lands; the same applies with the **PINE TREE** and the **COCONUT TREE** which are the borders of the Clan's hillocks and customary zones.

14 - “Ädi”, “Môô”, “bié”, “Mieû”, or “Hâgi” (Kanak currency) in its composition represents the man. It carries and crystallises the spoken words in every kind of ceremony. It is a determinative value in all the customs done on the mainland.

15 - **SOLIDARITY** and **SHARING**, as well as **WELCOMING** and **HOSPITALITY**, are marking the sociocultural relations and give a generous vision, opened and smiling, to a family / Clan, and the Chieftainship.

16 - The **WORK** in the sense of productive traditional activities, in the sense of fulfilling the needs of a family, of the Clan, and lets a person takes its own responsibilities and fulfills its **DUTIES** within the social structure.

17 - **CUSTOMARY FORGIVING** is a process with aiming at a **RECONCILIATION** which involves two or more parties in a conflict. The starting point is the will expressed by the parties to re-weave the broken bonds which started the conflict. The Custom

of forgiving is a reciprocal act ratified by all the groups or parties involved in the conflict.

18 - The search for **CONSENSUS**, the practice of the **COUNTER POWER**, of **FORGIVENESS** and the search for the **TRUTH** with the expression of **SINCERITY** and **GOODWILL** feeds the functioning of customary authorities. These values must be respected and developed by the natives living in Society.

All these humanist values must be respected and developed, individually and collectively, while living in Society.

Beyond the Kanak sphere, these values have a universal meaning and express the notions of Peace, Brotherhood, Solidarity, Justice, Respect, Humility, Responsibility and Honour.

The charter is the foundation of a customary law system that can coexist, with bridges, with the civil law system. It will also provide references to the New Caledonian society to develop a new vision of the society they wish to create. The charter is a political act of indigenous law which aims to develop and further judicial custom, as previously mentioned, and customary practices as legal sources of law. The charter intends to lead to a new legal system called “co-operative legal pluralism”, which attempts to coexist, on the same level of equality and consideration, with official law.

François Féral analyzing the charter commented on the following issue : Is the charter a revolutionary document in that it contests the sovereign and legal unity of the French state and people? Or is it a reactionary act carried by a patriarchal and gerontocratic society weighing its influence ? Or an archaic guardianship over the individual and the youth ? ²²

Officially, the charter does not have any legal force in French law, as the Kanak People's Assembly does not have any legal recognition. Indirectly, local judges have used it widely and quickly for consolidating the judicial custom practice followed in New Caledonia ²³.

5 – The Customary Senate

²² « La Charte du Peuple Kanak creuset de politiques kanakes ? », Communication au Séminaire CHERPA : « Le peuple Kanak, quel droit ? », Institut d'Etudes Politiques, Aix-en-Provence, 27 novembre 2014 (sous la direction de Laurent Sermet),
in
https://www.academia.edu/11201339/la_charte_du_peuple_kanak_creuset_des_politiques_publiques_kanakes

²³ For the first judicial use of the Charter, see : CA Nouméa, 22 mai 2014, RG n° 12-101 (appel de TPI Nouméa, sect. Lifou, 22 juin 2011, RG n° 10/1).

The Organic Law, resulting from the Noumea Agreement, maintained the customary area councils and installed the customary Senate, instead of the previous advisory council. The Senate's powers have been extended and the Senate now has the right of initiative and of referral. It has legislative co-decision power and can be considered as "the second institution of the land, alongside the Congress". The powers of the customary councils only partially overlap those of the Senate: thus, they have a power of interpretation of the customary rules and minutes of palaver that the Senate does not have organically (Article 150 Organic Law 1999).

Alongside the customary institutions of New Caledonia, there are two institutions without any organic basis: the General Assembly of the eight customary areas and the Congress of the Kanak country.

In the new New Caledonian institutional balance, the legislative co-decision power, shared with the Congress, positions the customary Senate as an institution of a legislative nature. The Senate also has a number of advisory powers that also link it to executive, provincial, territorial, and / or national bodies.

The Organic Law distinguishes, in particular, two main fields of competence. On the one hand, under Article 142 Organic Law. The Senate has what we will call "hard" power. On the other hand, the Kanak identity appears to be an emblematic competence of the Senate (Articles 143, 144 and 145 Organic Law).

The predilection for Article 145 Organic Law is understandable in relation to the relatively precise definition that the Senate has for it: *"The Kanak identity is a global and societal legal concept which consecrates a people endowed with a civilization whose characteristic is a legal system based on collective rights which can exist only in perfect equality and harmony of treatment with the common law system based on individual rights"* ²⁴.

But in the organic sense, the invocation of the Kanak identity by the Senate leads it to exercise powers which are of an exclusively consultative nature. The Kanak People's Charter is a prime example. This was noted by the Senate and its transmission to the authorities (High Commissioner, President of the Government and Congress, Presidents of Customary Councils) was made on the basis of Article 145. From the point of view of the Senate, it appears as endowed with legality and as carrying a political project. But the limits of advisory power are clear: the charter has no particular echo in positive institutional law, except for the notable involvement of the local judiciary.

²⁴ See resolutions and recommendations of the congress of Mouli, Iaaï customary area, 28 and 29 Aug. 2009.

I - French Constitution amendment for the purpose of the Constitutionalization of the Noumea Agreement.

***Title XIII* - TRANSITIONAL PROVISIONS PERTAINING TO NEW CALEDONIA**

Article 76

The population of New Caledonia is called upon to vote by 31 December 1998 on the provisions of the agreement signed at Nouméa on 5 May 1998, published in the *Journal Officiel* of the French Republic on 27 May 1998.

Persons satisfying the requirements laid down in article 2 of Act No. 88-1028 of 9 November 1988 shall be eligible to take part in the vote.

The measures required to organize the voting process shall be taken by decree adopted after consultation with the Conseil d'État and discussion in the Council of Ministers.

Article 77

After approval of the agreement by the vote provided for in article 76, the Institutional Act passed after consultation with the Deliberative Assembly of New Caledonia shall determine, in order to ensure the development of New Caledonia in accordance with the guidelines set out in that agreement and in the manner required for its implementation:

- those of the State's powers which are to be definitively transferred to the institutions of New Caledonia, the applicable time frame and the manner in which said transfer shall be proceeded with, together with the apportionment of expenditure arising in connection therewith;
- the rules governing the organization and operation of the institutions of New Caledonia, in particular the circumstances in which certain kinds of decisions taken by the Deliberative Assembly of New Caledonia may be referred to the Constitutional Council for review before publication;
- the rules concerning citizenship, the electoral system, employment, and personal status as laid down by customary law;
- the conditions and the time limits within which the population concerned in New Caledonia is to vote on the attainment of full sovereignty.

Any other measures required to give effect to the agreement referred to in article 76 shall be determined by statute.

For the purpose of defining the body of electors called upon to elect members of the Deliberative Assemblies of New Caledonia and the provinces, the list referred to in the Agreement mentioned in Article 76 hereof and Sections 188 and 189 of Institutional Act n° 99-209 of March 19th 1999 pertaining to New Caledonia is the list drawn up for the ballot provided for in Article 76 hereinabove which includes those persons not eligible to vote.

II – Organic Law for New Caledonia, 15 March 1999

TITLE I: CUSTOMARY CIVIL STATUS AND CUSTOMARY PROPERTY.

Article 7

Persons whose personal status, within the meaning of Article 75 of the Constitution, is the Kanak customary civil status described by this law, shall be governed by custom of civil law nature.

Article 8

The person who has the customary civil status is registered in a customary civil status register held in each commune by the registrars.

Article 9

In legal relationships between parties, one of which is of common law civil status and the other of customary civil status, common law applies.

In legal relationships between parties that are not of common law civil status but come under different personal statuses, common law applies unless the parties provide otherwise by express provision.

Article 10

A legitimate, natural or adopted child whose father and mother have customary civil status has customary civil status.

Article 11

Customary civil status may be claimed for the benefit of a minor by any person of customary civil status exercising parental authority in practice.

The application is rejected if the judge finds that the interests of the minor, or one of his ascendants, descendants or collaterals are insufficiently preserved. The juvenile capable of discernment is heard by the judge. The hearing of the minor may be dismissed by a specially reasoned decision.

The request for a change of status is published in a legal notice. Anyone who justifies a legitimate interest has a period of one month from the publication to form opposition.

Article 12

Any capable adult person aged twenty-one years whose father or mother has customary civil status and being in possession of status of a person of customary civil status for at least five years may apply for the status customary civil law.

The application is rejected if the judge finds that the interests of one of the ascendants, descendants, or collaterals of the applicant or the interests of his spouse are insufficiently preserved.

The request for a change of status is published in a legal notice. Anyone who justifies a legitimate interest has a period of one month from the publication to form opposition.

Article 13

Anyone who has had customary civil status and who, for any reason whatsoever, has civil status under ordinary law, may renounce this status in favor of customary civil status.

Within five years after the promulgation of this Act, any person who has proved that one of his ascendants had customary civil status may renounce the ordinary civil status in favor of customary civil status.

The motion is rejected if the judge finds that the interests of the spouse, ascendants, descendants, collaterals and third parties are insufficiently preserved. If the applicant has already exercised the option of waiving the ordinary civil status, the judge checks that the change of status does not affect the public order or the stability of legal situations.

Any person of customary civil status may renounce this status in favor of the civil status of common law. The application for the benefit of a minor is made by any person of customary civil status exercising parental authority de facto. The juvenile capable of discernment is heard by the judge. The hearing of the minor may be dismissed by a specially reasoned decision.

Article 14

The request for renunciation must come from a capable person.

The waiver is found by the judge. Within 15 days following the date on which the judge's decision has become res judicata, the birth certificate corresponding to the new status of the person concerned shall be drawn up in the register of the relevant civil status of the municipality of the place of birth at the request of the public prosecutor.

The birth certificate drawn up prior to the declaration of renunciation shall, at the request of the public prosecutor, bear the mention of renunciation and shall be considered null and void.

In case of return to the original civil status or abandoned, the mention of renunciation referred to in the previous paragraph is canceled at the diligence of the public prosecutor. The act can again be exploited.

The birth certificate corresponding to the abandoned civil status is, at the request of the public prosecutor, marked "renunciation" and is considered null and void.

Article 15

Everyone has the right to declare that he or she does not have customary civil status.

Article 16

Any request to apply for accession or return to customary civil status shall state the reasons for and specify the customary civil status register on which registration of the accession or return to the customary civil status will be made.

The judge is obliged to consult the competent customary authority.

Article 17

Judgments and rulings on disputes and petitions concerning customary civil status have effect even in respect to those who have not been parties or represented.

Any interested party is entitled to prosecute them by the third party on the condition to implicate the public prosecutor.

Article 18

Customary land and property owned by persons having customary civil status are of customary nature. Customary land consists of reserves, land allocated to local special interest groups, and land that has been or is allocated by local governments or public land institutions to respond to requests made for the link to land. They include state buildings that are assigned to customary owners.

Customary lands are inalienable, non transferable, incommutable and unseizable.

Article 19

The ordinary civil jurisdiction has sole jurisdiction to hear disputes and petitions concerning customary civil status or customary land. It is then supplemented by customary assessors under the conditions provided for by law.

By way of derogation from the first paragraph and unless one of the parties requests otherwise, the ordinary criminal jurisdiction, seized of a claim for damages and interest, rules on civil interests under the conditions provided for by law.

In the event of a request to the contrary from one of the parties, provided for in the second paragraph, the ordinary criminal jurisdiction shall order the referral to the ordinary civil court, sitting under the conditions set out in the first paragraph, for the purpose of ruling on the civil interests. The referral decision is a judicial administration measure that can not be appealed.