Codifying Customary Law in New-Caledonia: Custom's pen and paper

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This contribution wishes to explore the **codification of customs** related to the current institutionalization of a customary law in New-Caledonia. Indeed a "**customary**" or "**particular**" **status** has been maintained throughout the negotiated decolonization process, which means two things – on one hand for all civil litigations, a civil law judge and at least two **customary assessors** work together to take a decision; one the other, the recognition politics of the decolonization process lead to the institutionalization of specialized institutions such as the **Customary Senate**, to defend and promote the Kanak identity. The latter initiated the elaboration of a "common foundation of customary values" and the deriving **Charter of the Kanak People** ratified in 2014.

During my research field in New-Caledonia I focused more specifically on the **customary courts**. I attended several days of customary hearings in the three jurisdictions of the country. The customary chambers are constituted by a professional civil law judge, and customary assessors. Those are officially responsible for identifying and explaining the relevant customary law to the presiding professional judges (all of whom come from metropolitan France) required to adjudicate civil matters according to "Custom." The professional judge and the customary assessors have all an equal vote in determining the court's final decision[1]. As the "custom" flows from oral tradition, the growing body of jurisprudence elaborated by those customary chambers have actually contributed to the development of a consequent body of "legal /judicial custom"[2]. **The hypotheses of this contribution is that although less visible than neo-customary state institutions such as the customary Senate, those customary chambers have a genuine role of production of law and elicitation (or even shaping) of "Custom".**

During an interview I had with one of those professional judges having actively participated to the establishment of the customary chambers as they function today, here is what he told me about his vision of the institution inside which he works:

> « *Customary law is a construction elaborated by the jurisdictions with assessors. Custom existed before us, and it will exist after us. Customary law is the expression of the functioning of Kanak society on a legal level; in front of the court. The other possibility, if we do not take customary law into account, of its organization, of the jurisdiction that can express it, is to completely ignore a cultural reality, values that organize a society and to make legal decisions in function of our criteria which are those of the civil code.*»[3]

Clifford Geertz opposes fact and law where "is" and "ought to be" are the two sides of law's specificity because "**what it sees does as well**"[4]. One of law's technicalities rests on its capacity

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[1] Trépied, BenoîT, 'Urban Kanak Parents on Customary Trial: An Ethnography of the Customary Family Court of Nouméa, New Caledonia: Urban Kanak Parents on Customary Trial', *City & Society* 28, no. 1 (April 2016 r.): 99–122, doi:10.1111/ciso.12075.

[2] Lafargue, Régis, 'La Coutume Face à Son Destin', *Réflexions Sur La Coutume Judiciaire En Nouvelle-Calédonie et La Résilience Des Ordres Juridiques Infra-Étatiques. Paris, LGDJ*, 2010 r.

[3] Translation is mine. Interview with a judge from the Customary Court, New-Caledonia, July 21st, 2016

[4] Geertz, C., *Local Knowledge: Further Essays in Interpretive Anthropology* (Fontana Press, 1993), p. 173

to veil its operations under an appearance of permanency. To Sir Henry Maine, the efficacity of legal fictions rests on their ability to transform and mask the transformation[5].

In this light, there are two aspects of this interview exert that we are going to focus on. The first one is the concept of "custom" as a door or **means of conversion** for the law of facts. Indeed, throughout the processes of codification of customary law, the boundary between institutional legality and fluid social practices are negotiated through the selection and writing of customs, which are situated at the interface of two distinct worlds[6]. The codified customs are the living proof of the rooting of norms in (social) facts. In New-Caledonia as everywhere, the codification processes try to revitalize a precolonial indigeneity, through the hammering of the continuity of these customs from precolonial times until today. Here, we will draw on some comparative elements from Papua New Guinea, where customary law was integrated through the protection of a "**deeper underlying law**" that should prevail over the common law[7]. In PNG as in New-Caledonia, custom as a generic concept has become a way for indigenous people to signify their specificity, their difference.

This brings us to the second fiction from the exert that we are going to examine which is the idea of **permanency** itself. Using **a case of gender reassignment on the customary civil registration** from 2017 by the customary court of Noumea we will try to highlight the complex relation that is drawn by the customary court between law and custom and the tension between the blind spots of custom that necessitate production of law and a reshaping of custom and the idea immutability carried by the concept custom as defended by the Kanak nationalist groups.

The deconstruction of these two intertwined legal fictions ("custom as something else than law" and the idea of permanency of "customs") will allow us to show that this institutionalized customary law is an artefact of state administration relying on the colonial idea of the 'indigenous'. As a consequence, the boundary that is usually drawn between this 'customary law' and 'the law' (be it common law or civil law) is based on the assumption that the difference between "indigenous" and "non-indigenous" worlds is a given. This vision subscribes to a hypostatized, or bounded version of culture[8]. The idea of the 'indigenous' emerges only within the culture and practice of a state formation; as the idea of a "customary law" emerges only within the culture and the practice of law as conceived in Western culture. So, the relation between the indigenous and the non-indigenous, the customary and the legal, is not a relation between two external entities. This will help us to un-conceal the total imbrication of customary law and (common/ civil) law, where difference is a creative perception rather than linked to existing qualities of things considered discrete before they come into relation[9]. These dispositions will hopefully allow us to look at the political projects behind the different codification processes in New-Caledonia avoiding classical dichotomies such as domination versus subversion; emancipation versus recognition.

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[5] Maine, Henry Sumner, *Ancient Law. Its Connection with the Early History of Society and Its Relation to Modern Ideas*, New ed. (London Toronto New York: Reprint J.M. Dent & sons E.P. Dutton & co, 1930).

[6] Hermitte, Marie-Angèle, 'Le droit est un autre monde', *Enquête*, no. 7 (1998): 17–37.

[7] Except in some specific situations. See Mélissa Demian, "On the Repugnance of Customary Law", *Comparative Studies in Society and History*; Vol. 56, N°2, 2014, pp. 508–536

[8] Assier-Andrieu, Louis, 'Chapitre 8. Brève théorie culturelle du droit', in *Stateless Law. Evolving Boundaries of a discipline*, Ashgate, Juris Diversitas (Helge Dedek and Shauna Van Praagh, 2016), 83–103.

[9] Weiner, James, 'Eliciting Customary Law', *The Asia Pacific Journal of Anthropology* 7, no. 1 (4 January 2006): 15–25