This Article will focus on the complex relationship between custom and Customary Law, through the example of New-Caledonia. Indeed, this French overseas territory has a unique sui generis status with regard to the French Constitution and its principle of indivisibility. In the contemporary history of the Island, several layers of law have always coexisted, forming a complex legal pluralism that has resulted, during the second half of the 20th Century, in the institutionalisation of a legal dualism – hence the recognition of a Customary Law that is on an equal footing with the Common Law. This is one of the accomplishments claimed by the Kanak ‘independantistes’, who also promoted a cultural identity quest, which especially acquired a renewed importance attributed to custom and customary practices. Given the necessary changes and adaptations that both custom and Customary Law have been going through for almost forty years, they have never been clearly differentiated. This Article will argue that these two disciplines do not pertain to the same register of enunciation (Latour, 2006), and that if both are hybrid entities, then Customary Law is more law than custom. I will support this argument by showing that Customary Law extensively uses Common Law technicalities, principally through the mobilisation of legal fiction (Thomas, 2011), producing recombinant effects (Strathern, 2005).

I. INTRODUCTION

As New Caledonia is on the verge of deciding, by referendum, if there will be a definitive separation or an irreversible continuation of its existence as part of the French Republic, there are many issues that surround both possible outcomes. While official independence would require an important in-depth strengthening of the already sketched institutions, retaining New Caledonia
within the French institutional framework would signify the pursuit of a unique status of autonomy. No matter what result the referendum holds, the current level of autonomy cannot be diminished – unless it is through a Constitutional amendment. This is not the first time that France has had to deal with an established legal dualism within its otherwise very centralised legal framework. Indeed, the Noumea Accord (1998) established an institutionalised legal dualism where French Statutory Law and the Customary Law had to coexist.

The issues at stake here are numerous and varied. One of them is the all too often neglected complex relationship between Customary Law and custom. This point will be the focus of this Article, by trying to emphasise the difference between custom and Customary Law in the light of the recent Caledonian history. It is important to stress how, contrary to the current designation and common understanding, they are very different repertoires (or registers). Custom is indeed ‘something else’,¹ an ‘enunciation register’² probably closer to politics than to judicial language. Customary Law is clearly inventing itself through hybridisation processes, dealing with colonial heritage and contemporary Common Law standards. While the transformation of custom into (Customary) Law tends to essentialise it and to change its ‘nature’, custom’s processes usually tend to be those of negotiability – including power struggles within socio-political hierarchies. Custom, as a concept, belongs to the anthropological sphere, but Customary Law is of a hybrid nature. I will argue that it is probably closer to law than to custom. As for custom and politics, the tension which lies between the individual and the collective (be it society or a community), is managed through the search for a social balance. Whilst in law (as in Customary Law), the opposition is drawn between custom and rules, that is to say tradition and laws.³ Additionally, law is about individuals. Only individual cases are judged, and one can imagine the legal difficulty in dealing with collective responsibility for instance. Thus, both Customary Law and custom are going through a process of re-conceptualisation, or evolution, through the interaction between processes of decolonisation and the rise of an autochthonous discourse; this can be phrased in terms of external/internal sovereignty and identity quest.

This Article aims to analyse how these processes interact and play with one another, even though they happen in very different public domains. In order to do so, an academic literary review of anthropologists and historians, as well as jurists that have looked into related subjects, will be discussed. Moreover, in order to situate the Article within the context, some contemporary judicial cases will be studied in depth and primary-source materials, such as the Charter of the Kanak People or the Accord de Noumea, will be critically analysed.

The main concepts mobilised will be the legal fiction that Thomas, in particular, defined as being a technicality as well as a source of power of the law. 4 It is the voluntary and official deformation of Truth, in order to translate – and thereby create - the facts, instead of revealing them. Thomas additionally postulates that law is, in a way, a disparate assemblage of texts without authors, very analogous to customs. Through the study of a chosen selection of cases, we will see that Customary Law uses this technicality at least as efficiently as Common Law. The second important notion is Strathern’s powerful ‘recombinant effect’, which is the ability to reassemble old facts or traditions in a new innovative way. 5 It is the capacity to present the new in the frame of the old and vice versa. If law is not the only discipline to possess this quality, it is the discipline where this occurrence is most deliberate. I will focus on the recombinant effect of Customary Law on family organisation through specific judicial cases.

From here, I will start with a review of the historical background in the first part, reviewing the basis of traditional law and the survival of the custom despite the Régime de l’Indigénat and the Reservations. Following this is the rise of a particular civil status, 6 through the institutional re-evaluation of the Accord de Matignon and Noumea of customary practices and lifestyles. This recognition of custom does not always happen smoothly and it will be important to mention the different issues surrounding the efforts of preservation and unification of the custom. The clearest examples are the written work of the Customary Senate on the Common Values of the Kanak People 7 and the Charter

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4 Yan Thomas in Olivier Cayla and others (eds), Les Opérations du Droit (EHESS-Gallimard-Seuil 2011).
5 Marilyn Strathern, Kinship, Law and the Unexpected: Relatives are Always a Surprise (CUP 2005).
6 I will use the terms ‘particular status’, ‘particular civil status’ and ‘customary status’ interchangeably.
7 Sénat Coutumier ‘Synthèse Finale: Socle Commun des Valeurs Kanak’ (Senat Coutumier de la Nouvelle-Calédonie, 2013) <http://www.senat-coutumier.nc/images/sampledata/pdf/SOCLE_2014.pdf> accessed 7 July 2014. This is a collective research study commissioned by the Customary Senate and pursued in conjunction with the Chiefdoms and the Councils of Elders during eight months from May to December 2013; resulting in the adoption of the Charter of the Kanak People in April 2014.
of the Kanak People. The second part presents the main argument which is that Customary Law is law because of two major truths: the ‘recombinant effect’ of Customary Law on customary practices, family organisation in particular, as well as the use of legal fictions.

II. HISTORICAL BACKGROUND: FROM NEGATION TO RECOGNITION

2.1 Traditional Law

Jean-Loup Vivier reminds us that the Kanak People used to be a hierarchical society, where life was governed by precise rules referred to as ‘the custom’. These customary norms ruled aspects of life that French Law would not take into account and made custom something very different to law. It uses a different register of enunciation, closer to politics, as the importance of speech and words demonstrate, than to law.

If the customary rules were frequently formulated and respected by the clan, bigger sanctions were decided by the elders, in a context where wars and greater violence were a frequent alternative to cordial exchanges or agreements between groups. As a consequence, the distinction between conflicts that should have been ruled customarily or through a power struggle was very uncertain.

2.2 Indigénat and Reservations: The Colonial Effect

In the French imperial context, nationality was divorced from citizenship, with the Indigénat established for the first time in Algeria in 1856. The same was done in New Caledonia because it was presumed that the civil code could not be

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9 Strathern (n 5).
10 Thomas (n 4).
12 Latour (n 2).
applied to indigenous people whose customs were seen as archaic. As a result, a law was promulgated on 18 July 1887 in Noumea which, passing from extension to extension, would define the juridical boundaries of the Régime de l’Indigénat, sometimes erroneously called Code de l’Indigénat, while not even constituting a homogeneous codified ensemble. It was more of a disparate assemblage of legal texts adapted to local particularities, particularly repressive in New Caledonia, which can be defined as a ‘permanent temporary situation’.

However, the pretence of a ‘civilising mission’ justifying the establishment of the Indigénat was not really a goal, as the inflexibility of status – closely linked to racial stereotypes – dismissed any attempts at assimilation. An official definition of ‘Indigène’ was only made by Decree n° 681 on 3 September 1915, thus making it the occasion to reinforce the regime.

This dissociation between nationality and citizenship opened a gap in the juridical space where the principle of exceptionality governed, neglecting the fundamental republican principle of equality. It was the creation of passive subjects unto an imposed sovereignty.

Paradoxically, no mention of a personal or particular status was officially made in New Caledonia for the Kanak People before 1930. Prior to this, the mention of a particular status was only made to prevent the intervention of Common Law and the application of the civil code in indigenous matters. Similarly, accession to French citizenship was not possible before 1932.

The Indigénat was always criticised within the Parliament, particularly during the 1900-1914 period. Merle denounces the non-respect of the separation of powers, especially because it was the colonial administration that made justice and had punitive powers under the Code de l’Indigénat, making arbitrary

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18 ibid.
decisions routine. Mamdani referred to this as ‘colonial despotism’, namely the absence of the separation of powers.

In the meantime, a decree from 1898 restructured the administration of the tribes, giving extensive powers to the Chiefdoms and reorganising them according to a colonial recreation of the custom. However, this happened without any attempt at codification. One could suggest that the spatial and racial segregation replaced the need for codification. The territory was divided into districts ruled by Big (or administrative) Chiefs, who were responsible for the maintenance of public order in their respective areas. Their duties were to collect taxes or provide a workforce for example and they were backed by compelling punitive powers. The Chiefs were established as a relay between the ‘subjects’ and the colonial police. The Chiefs could be sanctioned if they did not obey the Administration of Indigenous Affairs (‘Syndic des Affaires Indigènes’) and this happened quite often. The decree also established ‘small’ tribal Chiefs and a ‘council of elders’ in each village.

The tribe was considered as a collective moral person, held responsible for offences committed by its members, and they were circumscribed to the reservation that they could not leave without official authorisation. However, despite the colonial rearrangement of the Chiefdoms and a new spatial organisation, internal indigenous matters were not taken into consideration. There was no serious attempt at the codification of custom, as was done in African colonies for example. There was strong evidence to suggest that the administration was more or less waiting for the ‘natural extinction’ of the Kanak People, as the population had been severely diminishing since the beginning of colonisation, reaching its smallest demographic level around 1917, the year of the last major Kanak revolt. This position of non-interference in Kanak interrelations concerning all private law matters, in particular, allowed

19 Merle (n 15) 158.
22 Merle (n 15).
23 These punitive powers were to be exercised by the police force (Gendarmerie), which was more generally responsible for the surveillance of indigenous populations.
24 Bensa and Salomon (n 12) 172.
25 Merle (n 15) 28-30.
26 Muckle (n 16) 40-44.
the Kanak People to continue living according to custom, thereby preserving a strong cultural identity.\footnote{Fotu Trolue, ‘Custom and the Magistrate: Approach and Practice in New Caledonia’ in Paul De Deckker and Jean-Yves Faberon (eds), Custom and the Law (Asia Pacific Press 2001).}

### 2.3 The Preservation of Custom Despite Colonisation (Secrecy, Orality, Reservations)

The reservations and the non-codification of custom have allowed the latter to remain almost intact. Demmer shows how the importance of the secrecy and the orality of custom facilitated this preservation by permitting greater flexibility.\footnote{Demmer (n 21) 7-9.} Kanak Chiefdoms were hence political spaces, neither completely autonomous nor frozen in a precolonial model, but constantly evolving and negotiating between different sources of legitimacy. Demmer also observes that the ritual dimension of the Chiefdoms tended to weaken in practice but the symbolism of the chief’s incarnation of the group was still important.\footnote{ibid.} She adds that a political configuration is never fixed or completely changeable. What makes the permanence possible in the long term is the upholding of the secrets of the past. It is widely known that the Chiefdoms were not always like they are today and that the impact of colonisation indeed consecrated a new social order, but keeping secret the rites and the custom is what confers upon them their strength. Furthermore, it is through the manipulation of the secret that changes can still happen or be prevented. Arguably, what works for the Chiefdoms could work for Customary Law, to a certain extent. As has been made evident through the example of the Kanak People, it seems essential to maintain some secrecy through the non-codification and the maintenance of orality in its processes. Otherwise the original flexibility would be lost.

Conversely, it was the very Chiefdoms that felt a need for a written document in order for custom to be unified through common customary values and to go back to the roots of the custom and reaffirm its strength. It was a specific identity movement, also linked to a context of economic development around the fast growing mining exploration requiring the Chiefdoms to change so as to ‘conform to the norm’ of the development process. The Charter of the Kanak People, ratified on 16 April 2014, is proof that deep changes have occurred in the expression of custom and regarding the conditions of its very existence.

Similarly, Trépied notes that power structures in the Kanak world are largely based, on the one hand, on colonial influences; and also, on the other influences...
suitable to the Kanak world. The complex articulation between colonial configurations and Kanak political logics was the entry pass to the electoral tribunes for some important Kanak chiefs and notables. This mix of influences was certainly the key to autonomist claims and a new space for the Kanak People on the political and institutional scene. Customary Law is probably the best example to illustrate this.

2.4 The Revival of Custom For Recognition Claims (From Indigeneity to Autochthony)

The abolition of the *Regime de l’Indigénat* in 1946 initiated a new dynamic between local and national power relations. The Kanak People, still in Reservations, became French citizens, but of a distinct kind. It is interesting to note how the emancipatory struggle of the Kanak People went through semantic changes. The ‘Kanak discourse’ of the 1970s precedes the ‘autochthonous discourse’ of the 1990s; which was based on the contemporary United Nations (UN) definition of the term and not as a euphemism of the term ‘indigenous’ in the 1950s. Melanesian ethnic groups were replaced by unified autochthonous claims. The ‘*Indigène*’ was replaced by the ‘autochthon’; the ‘Canaques’ by the ‘Kanak’; and the traditional by the customary.

The term ‘autochthon’ expresses the idea of the anteriority of a certain population’s presence on a territory. In the UN definition, it is closely linked to a political and/or economic situation of domination (often of a colonial nature), leading to claims related to identity, economy and politics. Hence, the ‘autochthonisation’ of independence claims aims to seek support on the international stage, where guarantees and human rights are offered to autochthonous minorities. Mokkadem also studies how the revolutionary actions of one nationalist leader, Éloi Machoro, unified indigenous groups into the Kanak People. It is a microanalysis through a personal political trajectory on a national movement, of a gradual identification of a population claiming

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30 Benoît Trépied, ‘“Deux Couleurs, un Seul Peuple?” Les Paradoxes de l’Union Calédonienne pré-Indépendantiste dans la Commune de Koné’ in Elsa Faugère and Isabelle Merle (eds), *La Nouvelle-Calédonie vers un Destin Commun?* (Karthala 2010).


32 Kanak was originally a pejorative term that was re-appropriated by the nationalist movements. The two ‘k’s are important because no word in French starts or finishes with the letter ‘k’.


the sovereignty of a country. To Graff the reaffirmation of the custom and the recognition of a Kanak identity go hand in hand with the replacement of negotiations about independence, through the promotion of an ‘internal sovereignty’ or ‘autonomy’ propositions.\textsuperscript{35} As Povinelli has shown for Aboriginals, with the proclamation of the Native Title Act in 1993, after the end of the \textit{Mabo} case,\textsuperscript{36} recognition can also be a way to reassert state sovereignty and the supremacy of liberalism.\textsuperscript{37} In their struggle for independence, the Kanak People had to use Western tools in order to be heard, especially international ones as the UN.\textsuperscript{38} Nevertheless, the UN’s golden rule of non-interference further contributed to the shift from independence claims to internal self-determination claims. However, this shift in the semantic domain does not mean that the tenants of the autochthonous discourse completely abandoned the idea of independence. Once the shift from \textit{Indigènes} to autochthons was made, the French State tended to create or recognise customary institutions, supposedly to allow a certain representativeness and visibility of this civilisation on the territory.

The Customary Senate was created in 1988\textsuperscript{39} and named as such in 1998.\textsuperscript{40} It is a consultative organ. The Congress of New Caledonia had to plead for the Customary Senate as existing for all the ‘\textit{lois du pays}’ (law of the land). It was through this that the Treaty of Nainville-les-Roches\textsuperscript{41} defined the abolition of colonialism as the recognition of the fact that the Melanesian Civilisation was equal to the other civilisations and to put in place customary institutions to

\begin{itemize}
\item \textsuperscript{35}Graff (n 31).
\item \textsuperscript{36}For further details on this case, please see \textit{Mabo and others v Queensland} (No 2) HCA 23, (1992) 175 CLR 1.
\item \textsuperscript{37}Elizabeth Povinelli, \textit{The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism} (Duke University Press 2002).
\item \textsuperscript{38}The Kanak People managed to be inscribed on the UN list of countries to be decolonised for the first time in 1946. France asked New Caledonia to be withdrawn from this list after the promotion of a new statute for New Caledonia in 1947. However, the ‘waltz of the statutes’ tended to be more and more repressive, taking rights back as soon as they were given. Kanak leaders asked to be re-inscribed on the list of countries to be decolonised on 2 December 1986, emphasising the right to self-determination of the Kanak People.
\item \textsuperscript{39}The \textit{Accord de Matignon-Oudinot} established a ‘Conseil Consultatif Coutumier’ (Consultative Customary Council).
\item \textsuperscript{40}The \textit{Accord de Nouméa} makes the change from the Consultative Customary Council to a Customary Senate.
\item \textsuperscript{41}12 July 1983. Treaty negotiated between the ‘Indépendantistes’, represented by Jean-Marie Tjibaou, the ‘Loyalists’, represented by Jacques Lafleur and the French government, represented by Georges Lemoine, State Secretary of the Oversea Territories. It recognises the Kanaks as the first occupants of New Caledonia and reassesses their inherent and active right to independence (‘\textit{droit actif et inné à l’indépendance}’); Isabelle Leblic, ‘Chronologie de la Nouvelle-Calédonie’ (2003) 117(2) Le Journal de la Société des Océanistes 299.
\end{itemize}
make the Kanak visible on the institutional landscape of the territory.\textsuperscript{42} It was also through this treaty that the leaders of the Kanak Independence Movement recognised the status of ‘victimes de l’Histoire’ with regards to the descendants of the settlers, which opened the way for the political project of a common destiny. After the physical re-conquest during the nationalist insurrection that happened between 1984 and 1988,\textsuperscript{43} the affirmation of a Customary Law became more about institutional conquest. However, Graff observes that this process of ‘autochthonisation’ subtly made the possibility of a complete independence obsolete by promoting a strong autonomy instead, through the concept of ‘internal sovereignty’.\textsuperscript{44} In particular, the Accord de Nouméa insisted on the fact that the recognition of Kanak sovereignty is a step towards a common sovereignty, not a separation\textsuperscript{45} (even if the ambiguity of the text allows for several interpretations).

III. RECOGNITION OF AND ISSUES SURROUNDING CUSTOM

3.1 The Institutional Recognition of Custom (Accords De Matignon and Nouméa)

As Thomas\textsuperscript{46} noted in his effort to identify the operations of laws: in order to be inviolable, the law either negates other laws for its own account, or negates itself for the sake of other laws or principles.\textsuperscript{47} In this case, French Law had to refute its principle of indivisibility in order to grant the autonomy required by the Accord de Matignon (1988), and later by the Accords de Nouméa-Oudinot (1998). Similarly, in order to reinterpret Article 75 of the French Constitution and to have the possibility of recognising a customary status, and consequently to establish legal pluralism for overseas territories, the principle of the unity of

\textsuperscript{42} Graff (n 31).

\textsuperscript{43} Called ‘Les Évènements’, like the Algerian war of independence. Nonetheless, there are some literary debates about how to name this period exactly. As the violence happened mainly between three actors – that is to say the State, the Kanak People and the ‘Caldoches’ (or white settlers) – I would argue that ‘nationalist insurrection’ would be the most appropriate term.

\textsuperscript{44} ibid.

\textsuperscript{45} Accord de Nouméa, 5 May 1998, Preamble, s 4: ‘Dix ans plus tard, il convient d’ouvrir une nouvelle étape, marquée par la pleine reconnaissance de l’identité kanak, préalable à la refondation d’un contrat social entre toutes les communautés qui vivent en Nouvelle-Calédonie, et par un partage de souveraineté avec la France, sur la voie de la pleine souveraineté’ (Ten years later, it has become necessary to move on to the next step, characterized by the full recognition of the Kanak identity, prior to the refoundation of a social contract between all the communities living in New-Caledonia and to share sovereignty with France, on the way to full sovereignty) (emphasis added).

\textsuperscript{46} Thomas (n 4).

\textsuperscript{47} Yan Thomas, ‘De la “Sanction” et de la “Sainteté” des Lois à Rome. Remarques sur l’institution juridique de l’inviolabilité’ in Thomas (n 4).
French Law had to be annulled. Like the recognition – or perhaps the invention – of the Native Title Act in 1993 in Australia that the *Mabo* Case would later trigger, the *Accord de Nouméa* finally gave sovereignty back to the Kanak People, recognising their particular civil status. As the Australian government did a few years earlier, the French government did its ‘historical laundry’ by using law and order to re-evaluate the past in the shaping of the future. Finally, by recognising a sovereignty for the Kanak People – which was more theoretical than practical, as it was not synonymous with independence – the *Accord de Nouméa* is another illustration of Povinelli’s future-perfect theory, ‘we will have been wrong’,48 that modifies or attenuates the effects of the past in order to guarantee the future. The restitution of a ‘confiscated identity’ is conditional to the integration of this identity in a shared ‘common destiny’.49 As such, this treaty is a triangular power structure edged by politics, law and history. This structure produces a hybrid composition of Kanak logic reinforced with European technocratic rationalities.50 It is a sort of social contract that suspends the conflict by putting aside the possibility of an immediate independence, replacing it with a ‘shared sovereignty’.

It is interesting to note that Customary Law is not the only part of traditional society reprocessed in the light of the *Accord de Nouméa*. The attempts at codification similarly touch upon the linguistic issue, given the fact that today there are 28 Kanak languages. The institutional re-evaluation of these foundations of traditional society (language, law, education etc.) is probably the starting point of a process of normalisation of customs and traditions.51 What is important to note is that the Charter of the Kanak People and the formalisation of a Kanak language are Kanak claims but expressed in a French legal context. This means that all these recreations of Kanak customs are to be processed in the context of the *Accord de Noumea* and the strict juridical exigencies of

48 Povinelli (n 37) ch 4.
49 ‘La colonisation a porté atteinte à la dignité du peuple Kanak qu’elle a privé de son identité. Des hommes et des femmes ont perdu dans cette confrontation leur vie ou leur raisons de vivre. Des grandes souffrances en sont résultées. Il convient de faire mémoire de ces moments difficiles, de reconnaître les fautes, de restituer au peuple kanak son identité confisquée, ce qui équivaut pour lui à une reconnaissance de sa souveraineté, préalable à la fondation d’une nouvelle souveraineté, partagée dans un destin commun’ (Colonisation harmed the dignity of the Kanak people, and deprived it of its identity. Great suffering resulted from this. It is important to remember those difficult moments, to acknowledge the faults, to restitute to the Kanak People its confiscated identity, which means a recognition of its sovereignty prior to the foundation of a new sovereignty, shared in a common destiny). Preamble of the *Accord de Nouméa* (1998) para 3.
50 Mokkadem (n 34) 133.
professionalism. Yet being invested in such a mission is to retain the power of creating the customs – concerning law or languages – and to impose a certain vision of the criteria on the edge of the Kanak identity. Hence, to Saluén, any discourse on Kanak identity is necessarily performative; it never only aims to legitimise it but always aims to impose a certain definition of that identity.\footnote{52 ibid.} This is even more important as the Noumea Accord draws an allusive link between identity and sovereignty. Since the 1970s, the unveiling and the ‘construction’ of a discourse on this culture had as much an internal role as an external one. This also brings in the legitimacy issue with regard to the customary procedures of representation of the Kanak People. The Customary Senate, for example, which has to be consulted regarding any project concerning the Kanak identity, has already been accused of being conservative and promoting patriarchal values, leaving aside dominated people in the Kanak hierarchy.\footnote{53 Christine Demmer and Christine Salomon, ‘Droit Coutumier et Indépendance Kanak - L’Écriture d’un Droit Coutumier: une Volonté Partagée par l’Ensemble des Kanak?’ (Vacarme, 22 June 2013) <http://www.vacarme.org/article2263.html> accessed 7 October 2013.} The debates about the ‘invention’ or ‘creation’ of the contemporary Kanak culture, or even the evaluation of the degree of ‘authenticity’ of the contemporary custom, are probably not relevant here. It is sufficient to show how it is difficult for the Kanak People to think of themselves outside of the categories historically attributed to them; from indigenous/native (colonial formulation) to autochthon (United Nations formulation).

In the Charter of the Kanak People, custom is understood as encompassing spiritual values, lifestyle rules and customary practices. The need to have a definition and some common values was confirmed by the Customary Senate, which launched a research group founded on ‘common Kanak values’ (Socle Commun des Valeurs Kanak) that would, from now on, constitute the custom. While the importance of the secrecy and the orality of the custom was highlighted earlier, a century and a half of deep disruption have left the traditional custom in a grey area. It is surprising that the custom, which is older than French democratic institutions, has to use the tools of these very institutions to acquire legitimacy. It is a step further towards the unity of a varied Kanak population, divided into eight customary areas since the Accord de Nouméa. It is part of the process of reconstructing an identity by adapting it to contemporary times while securing traditions. The Charter aims to assert the underlying unity of the custom, despite a large variety of practices and degrees of engagement.

To further examine this simple argument that Custom is not easy to define, Filer’s study on the relationship of custom and law in Papua New Guinea is
useful. He observes how, in the local language, law and custom are represented by something possibly translatable as ‘roads’, which are very close to what is thought of as ideologies. He also notes that ‘traditional law’ was in fact replaced by ‘customary law’, strongly tainted by colonial and neo-customary influences. The law is indeed being constructed, including some non-legal notions or concepts. The custom is dissociated from the law, but is, in parallel, including new elements associable to ‘invented traditions’ or a ‘re-evaluation of ancestral law’, mainly in order to make land claims. Law and Custom are thus are two distinct ‘roads’ which, for Filer, ‘reify social relations’:

In that sense, the reality behind each metaphorical road is a form of public performance which reveals, displays, and dramatizes the social relations of everyday life, and thus provides a stage for the construction of male authority … The Road of Custom is a form of public performance with its own rules, qualities and outcomes.

Although the situation is quite different from that which can be found in New Caledonia, some commonalities are striking. As in Papua New Guinea, New Caledonia is going through a re-evaluation of its law and custom. If the Customary Law is clearly in construction, as the Customary Law as such comes from a colonial typology; the custom is being reprocessed, not only in order to reactivate some traditional principles, but also in order to modernise it and make it ‘acceptable’ in the public sphere. It is a display, a performance being played out for internal needs – to the ends of an identity quest and external needs – in order to access a hypothetical independence or at least a complete autonomy. Arguably, the drafting of the Charter of the Kanak People is a good illustration of this process: firstly because its written form automatically makes it a cultural hybrid object; and secondly because it is a specific effort for a specific self-representation to be portrayed. It is therefore not merely a way to fight a colonial legacy or to resist capitalism. It is an act of translation and not an ideology, as Filer finally concludes, but maybe a ‘cult’. The cult is the performative identity that the Kanak People are defining and is expressed in public ceremonies.

As we have seen, custom is difficult to define; not only because it has various sources (colonial, precolonial, ‘invented traditions’ etc.) but moreover because it is characterised by a variety of uses and interpretations. It is time to move on from a debate between two simple oppositions, domination against resistance, or between tradition and inventions, as Le Meur suggests, to see the custom as a

54 Filer (n 1).
55 ibid 73.
governmental instrument problematising the relationship of the Kanak People with decolonisation, state-making and development.  

3.2 The Issues Surrounding Custom

For this discussion, I will use the example of the Bouillant épouse Kothi c/. Bearune case. This case highlights the difficulties of collaboration, which judges encounter in some cases with customary assessors. The problematic cases usually touch upon biological families and other social matters that are traditionally not recognised by the custom. In order to protest or indicate their disagreement, absenteeism is the main strategy implemented. The first audience was due on 19 March 1999 but one of the two customary assessors – whose presence was compulsory – did not attend. As a result, the audience was cancelled. Two new customary assessors were nominated on 3 May 1999 but neither of them showed up for the audience of 31 May 1999. That audience was also cancelled. The judgment of 21 June 1999 again nominated two new assessors and rescheduled the hearing for 2 August 1999. On this date, the two customary assessors claimed that this case did not concern them as the two parties were not customarily married and no customary ritual was ever made with regard to their relationship. They declared with honesty that they were not willing to assess this case. The judge’s answer was that the presence of two customary assessors is mandatory in cases concerning individuals under this particular civil status and that the subject matter of the case does not necessarily have to relate to custom. The judge stated that there was no way for her to force the assessors to attend, or to sanction those who did not come and as such, prejudice the investigation; there still remained an obligation to pass judgment however. The judge therefore declared that the case would be judged under the Common Law dispositions.

56 Pierre-Yves Le Meur, ‘Réflexions sur un oxymore. Le débat du “cadaster coutumier” en Nouvelle-Calédonie’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un destin commun ? (Karthala 2010).

57 Bouillant épouse Kothi c/. Bearune, Civil Tribunal of Noumea (judgment no 2082 of 30 August 1999).

58 The ruling of 15 October 1982 instituted the recourse to customary assessors in New Caledonia in the Court of first instance and in the Court of Appeal. Their mission is to assist the tribunal in the case of a dispute between persons of a particular status. The ‘customary tribunal’, constituting one civil judge and customary assessors (always in majority in the first instance) rules on conflicts that happen daily in tribes or clans. The customary assessors’ rulings are equal to a professional judge’s pronouncement. Concerning the Court of Appeal, their decisions also have the same weight as the professional magistrates’ decisions; Régis Lafargue, La Coutume Judiciaire en Nouvelle-Calédonie. Aux Sources d’un Droit Commun Coutumier’ (Rapport pour la Mission De Recherche Droit et Justice, 2002) <http://www.gip-recherche-justice.fr/?publication=la-coutume-judiciaire-en-nouvelle-caldonie-aux-sources-dun-droit-commun-coutumier> accessed 7 October 2013.

59 Lagargue (n 58); Bensa and Salomon (n 13).
Even though the main concern of this Article is not the evaluation of custom and does not aim to express any opinion about it, it is important to mention how the renewed attention given to custom does not go without tensions and polemics. As the Charter of the Kanak People mentions in its very first articles, Kanak society is organised by a patriarchal principle. Even with divergent interests between the clans and within them, authority is primarily founded on masculinity and seniority dominations. To avoid these, a certain amount of hierarchically disadvantaged Kanak persons tend to take advantage of the ‘Whites’ Justice’, notably women and young people. Among them are those who renounce their particular status in order to commit to the Common Law. Amongst them will be the socially marginalised or even those excluded from their familial groups. In their study on the relationship between the Kanak People and the French judicial system, Bensa and Salomon suggest that it is the increasing judicial power of Chiefs during the Indigénat period that reinforced the domination of already disadvantaged people in the Kanak hierarchy – once again, mainly young people and women.

A virulent debate started in the summer of 2013 when an article written by eight of the most renowned social scientists of the area heavily criticised the process of institutionalisation of the Customary Law and the resultant identity politics. While Salomon and Hamelin, in 2010, had already denounced the Customary Senate as a ‘bastion sexiste’ while writing on the conditions for Kanak women in relation to the custom and Customary Law; the Vacarme article again denounced the conservative order that the Customary Senate promotes. The collective of authors fear an essentialisation of a discriminatory Kanak custom that would privilege a noble and male hierarchical order, at the expense of a reality of claims of multi-affiliation. Several studies on Kanak youth from the eighties to recent times show how their aspirational lifestyle standards tend to be closer and closer to Western ideals, and how these young people

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60 Sénat Coutumier, ‘Charte du Peuple Kanak: Socle Commun des Valeurs Kanak et Principes Fondamentaux de la Civilisation Kanak’ (n 8), s2 para 1: ‘La société Kanak est une société patriarcale. Son système social fonctionne à partir d’une transmission des droits, des pouvoirs et des responsabilités basée sur l’homme’ (The Kanak society is a patriarchal society. Its social system is based on transmission of rights, power and responsibilities based on the man).

61 Bensa and Salomon (n 13).

62 Demmer and Salomon (n 53).

63 Christine Salomon and Christine Hamelin, ‘Vers un Changement de Normes de Genre’ in Elsa Faugère and Isabelle Merle (eds), La Nouvelle-Calédonie vers un destin commun ? (Karthala 2010).

sometimes feel constrained by the customary order. This is part of the reason for an increased recourse to the Common Law system from the 1960s, particularly for divorce cases, as they do not exist as such in the custom. Only a ‘dissolution of marriage’ is possible if the two clans agree to it. For Bensa and Salomon, as for the authors of the *Vacarme* article, the increasing recourse to the French legal system is the sign of a change in the social norms and a greater openness to alternative models of justice, as well as a new ideal of equality. Furthermore, Nicolas shows how the constant rise in the level of education of girls tends to transform gender roles and aspirations. Women complain more and more about the customary principles of non-participation of women in the public sphere and the principle of submission to men. However, Nicolas specifically says that Kanak female activists are in favour of an evolution of the custom rather than a systematic recourse to French institutions and Common Law (the ‘Whites’ Justice’ as found in Bensa and Salomon) concerning gender issues (principally conjugal violence). This is, similarly, the argument of the two responses made to this article by Poigoune, President of the League of Human Rights of New Caledonia and Isabelle Merle. The latter specifically regrets the underlying assumption that Common Law is better suited to protect disadvantaged groups. As Poigoune notes, the custom has already evolved a lot, as proven by the extension of the jurisdiction of Customary Law to new family organisations, for example; and as the number of cases rise, it is not impossible to think that the jurisprudence will still evolve towards a greater adaptation to modernity. Furthermore, as this Article argues, the recombinant power of law exercised through legal fictions makes Customary Law more law than custom.

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66 Bensa and Salomon (n 13).
67 Salomon showed in her article ‘“Mettre au tribunal”, “Claquer un procès” : les Nouvelles ripostes des femmes Kanak en Nouvelle-Caledonie’ (2002) 24(1) Archives de Politique Criminelle 161, that Kanak women tend to resort increasingly more to Common Law, renouncing their particular status in order to get reparations, especially for divorces, sexual crimes and conjugal violence.
70 Lafargue (n 58).
IV. CUSTOMARY LAW IS NOT CUSTOM BUT LAW

4.1 The Beginnings of Customary Law

For the French to recognise Customary Law, some old and strong colonial legal fictions first had to be fought. The most obvious one was that which initially impeded any decolonisation, namely the principle of indivisibility of the French territory and of its colonies.

It went hand in hand with another principle hindering the recognition of any regional particularism, which was created at the period of the French unification, the principle of equality of all citizens. If this principle was largely overruled during the colonial era, it was a major obstacle for the recognition of Customary Law and what Garde calls ‘le fait Kanak’\(^71\) (‘the Kanak concept’), that is to say the importance of the custom that one cannot deny in the Kanak world. Since the \textit{Accord de Matignon}, there was an effort to redefine the classic notions of liberty and equality in order for republican principles to adapt to the cultural, religious or even legal heritage of some communities. However, if this effort of institutionalisation of the Customary Law is presented as a successful multicultural acceptance, the reality is a bit different. While Lafargue often speaks of the necessity for the legal system to take into account the ‘\textit{réalité sociologique}\(^72\) (the ‘sociological reality’), the affiliation to excessively hermetic juridical categories could have the effect of an instrument of ethnic segregation. The result could be more of ruptured relationships rather than social harmony. Hence, the image of multiculturalism that the Customary Law serves could, at first glance, be a sort of ‘distorting mirror’ which would occult the real ethno-cultural situation, polarised by two competing groups, leaving the other groups behind.

The other issue raised by Lafargue is that the ultimate aim of the recognition of the status was at first assimilation.\(^73\) The renunciation of the particular status was indeed irrevocable and univocal. A parent renouncing their particular status would deprive their children of the possibility of acquiring this status. Yet the renunciation of this status had exceptional repercussions in the social order. It could be seen as the desire to avoid the customary authority, whose legitimacy is thereby contested. The will of one individual would contradict the customs and the collective good of the clan. In this case, the renunciation of the particular civil status was possible only for persons that had already completely

\(^{71}\) François Garde, \textit{Les Institutions de la Nouvelle-Calédonie} (L’Harmattan 2001).

\(^{72}\) Lafargue (n 58).

\(^{73}\) ibid.
broken away from their ancestral way of life and integrated into the dominant society. As the renunciation of the particular status could be interpreted as a challenge to the customary authority, it would risk exposing the individual to marginalisation. The Melanesian society is already confronted by the constant erosion of its custom and could not react in any other way to this constitutional dispositive measure, perceived as a call for social desertion and disobedience.

In order to avoid these issues, the jurisprudence made some arrangements.74 First of all, the renunciation of the personal civil status is no longer irrevocable. It is possible to re-access the personal status under certain conditions. Secondly, the univocal character of the status is modified; it will still depend on filial relationships, but also on lifestyle. If a parent renounces their personal status for example, it is no longer automatically applicable to their children. Additionally, there is a universal jurisdiction regarding this status which follows the individual wherever they go. This application of the customary status is not limited to the territory of New Caledonia. Finally, even if a person renounces their personal status, jurisprudence has confirmed that a change in status would not necessarily lead to the application of the civil code, in accordance with the principle that no one can choose one’s judge or Law. For De Dekker, what has allowed for these changes that have diminished the pre-eminence of the Common Law over the Customary Law, was the link made between statutory affiliation and the notion of respect of private life and the right to dignity, highlighted in the European Convention on Human Rights.75 As a result of these new dispositions; what will truly determine the prevalence of one law over the other in the case of a conflict of norms? Will it be a legal fiction, so as to redefine the configuration of power?

This whole debate on statutory affiliation is paradoxical, as it tends to define the very affiliation of the individual to his or her tribe. While traditionally one’s status was determined by birth and the family into which one is born, the particular status tends to polarise the condition of membership. Therefore, its renunciation is frequently followed by marginalisation, if not exclusion, from the tribe. Hence, the particular customary status is simultaneously determined by, but also determinant of, the identity of a person.

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75 Paul De Dekker and Jean-Yves Faberon (eds), Custom and the Law (Asia Pacific Press 2001).
Another fiction would be that Customary Law is developed only through customary principles found in the ‘authentic’ precolonial traditional law, which is what gives it legitimacy. However, Lafargue76 points out that there are not one but three legal sources of Customary Law; namely the Oral (traditional law), the Common Law – (a palliative in case of ignorance of the traditional law), and the jurisprudentially-constructed Customary Law.

4.2 The Charter of the Kanak People: The Written Component

As such, the Charter is the basis of Customary Law. It is a work, not of mere codification, but of the identification of fundamental principles, maybe even ‘constitutional’ values, allowing for the construction of a ‘Kanak Law’. It is the literal systematisation, re-creation and sometimes re-discovery of Kanak customary values. Still, even if the comparison with a constitution is tempting, the Charter affirms several times that it aims for a ‘cooperative legal pluralism’. It is more a tool to upgrade the Customary Law to the level of legitimacy of the Common Law, rather than a tool of separation or independence. It is a translation of customary principles in an intelligible form for Western institutions. Thomas, in an article on the Roman ideas on the origin and the transmission of the law, reminds us how important the written form was for the Romans.77 While the origin of the law was seen as unimportant and never really explicited, the emphasis was put on the continuity and the transmission of the law. What mattered was the impersonality of law displayed in all the myths and legends, as well as the historical fictions that were supposed to explain its foundations. No name of a founder was associated to it, there was barely the recognition of some famous stages in the development of the law, but those few new developments merely reinitialised the temporal flux, inscribing themselves better in it and reminding us of the continuity principle.

The link with the Charter of the Kanak People is obvious from here. Of importance is that it is a written document. Even if this Charter aims to preserve the flexibility of Customary Law, it had to adapt its principle of orality and secrecy in order to be appreciated. Again, this written document corresponds exactly to the usual layout of official law documents; there is a Preamble, there are chapters, there are paragraphs corresponding to articles, it was ratified in the end by the Chiefdoms of the eight customary areas, etc. For all that, by submitting to the exigencies of standardisation and the proceedings of ‘good practice’, is this document not in danger of falling into the ‘bullet-point

76 Lafargue (n 58).
77 Yan Thomas, ‘Idées Romaines sur l’Origine et la Transmission du Droit’ in Thomas (n 4).
scheme? If documents indeed have a special agency, even stranger to traditional customary practices, what will be the consequences of this document on customary practices? Is the document not symbolically more important than the text itself? Knowing that the agency of the bullet-point is not information or knowledge but lies elsewhere, could the same be said for this Charter? For example, could it not be said that this document is an aversion tactic to deflect the enemy’s aim, or to reflect back the will of the opponent? Is this document not a false mirror device reflecting the fear of a fading custom that the Kanak People think they see in the French technocrats’ intentions? For Strathern, bullet-points are not about information but about self-presentation, to oneself especially. It is about the constitution of a special persona aiming to please the audit. It is even more convincing in light of the fast development process which demands that Kanak identity fits the standards.

I will argue that by reaffirming and redesigning some aspects of the custom, it avoids a pure and simple codification of the Customary Law, which would alter its flexibility. The orality and the secrecy of Customary Law act like legal technicalities enabling the recombinant effect of Customary Law.

4.3 Jurisprudential Law: The Recombinant Power of Law (Family)

Until now, Customary Law was based, overall, on Jurisprudential Law. Lafargue, amongst others, observes on this subject that the judicial custom creates the applicable law but also designates for itself its domain of application, contributing to the enlargement of the restricted jurisdiction of the custom. He notably develops the example of the family. For example, the Customary Law literally created out of nothing a customary status for natural families, heavily remodelling the status of the legitimate family. In traditional law, the natural family is indeed not recognised and sometimes even condemned. Traditionally, customary weddings are the union of two clans, more so than the union of two individuals. Weddings are usually arranged when the individuals are quite young, not necessarily with their consent and divorce does not exist. There was a possibility of a dissolution of a marriage, but it was subject to the condition that the two clans of the two spouses would agree. Yet, sometimes, even if the separation was a factual reality, the

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78 For Strathern, the bullet point image symbolises a process of simplification, where the aesthetics of the document are more important than the text itself. Strathern links these processes to the standardisation of legal texts and the frame of “good practices”. See Marilyn Strathern, ‘Bullet-proofing. A tale from the United Kingdom’ in Annelise Riles (ed), Documents: Artifacts of Modern Knowledge (University of Michigan Press 2006).

79 Strathern (n 5) ch 1.

80 Lafargue (n 58).
dissolution would not be pronounced in order to put pressure on the partners to get back together. Once more, the interest of the group was more important than the individual interest. A marriage being an alliance between two tribes, dissolving the marriage means dissolving the alliance and thus disrupting the social balance.

Notwithstanding, the tendency is one of an individualisation of rights, including in matters concerning the choice of a partner and separations. Influenced by Western values, marriage is considered more and more as the union of two consenting individuals. On that account, the increasing liberty of dissolving an unwanted union goes hand in hand with the affirmation of a liberty once denied, namely that of marrying the partner of one’s choice. Indeed, jurisprudence has confirmed that if the two clans did not consent to the mutual desire for separation of the spouses, there is a judicial alternative, which is the equivalent to the creation of a right to separation. Consequently, without questioning the duality of the treatment of a ‘familial’ and a ‘judicial’ action, a genuine individual right to solicit the dissolution of a wedding has been created. This new right certainly goes hand in hand with the progressive affirmation of a right to marry – with a chosen partner and at a chosen time – that the traditional law used to deny. As such, the natural family is a legal fiction for the traditional law, if not an anomaly, being the result of a manifested contempt by the individual towards the familial authority. The jurisprudence has progressively extended its limited jurisdiction to the natural family, taking advantage of the fact that there was no mention of it in the Organic Law of 1999. If this position was contested by some customary assessors, the Customary Senate has recently rendered a recommendation for the Appeal Court of Nouméa in the case Teimboanou c/ Tein Mala (of 26th November 2001) comforting the tendency.81

Another example would be the custody of children with respect to a separated couple. As free unions are not recognised by the traditional law, for the custody to be transferred to one of the two partners, the various members of the interested clans have to consent to it. The customary formalities that aim to collect the consent of all the members composing the clan are not dispensable. In the Thidjite c/ Pibee case,82 the judge of Koné had to decide on the custody of a

81 Customary Senate, Recommendation of 13 August 2001: ‘entrent dans le champ du statut civil coutumier les litiges concernant l’enfant naturel reconnu coutumièrement par le père d’une part, et l’enfant naturel reconnu coutumièrement par le père préalablement à un mariage des parents d’autre part’ (the litigations falling under the jurisdiction of the customary status are those concerning a natural child recognised by the father on the one hand, and of a natural child customarily recognised by the father prior to a marriage on the other hand); Lafargue (n 58).
82 Thidjite c/ Pibee, Tribunal of Koné (judgment no 38 of 20 April 1994).
child whose transfer had not respected the customary formalities. The child was
given according to customary rituals from the mother’s family to the family of
the father. However, the child was returned without any customary formality to
the family of the mother, not long after, by a member of the paternal clan who
did not agree to this exchange. In the end, the child was reclaimed by both clans
at the same time. The judge finally chose a solution that reintroduced – in a
customary disguise – Common Law, by opting for joint parental custody. The
child would be left with the mother’s family but an alimony was fixed for the
father to participate in the child’s education. In this case, the natural family not
being recognised or ruled by the traditional law, the judge – in conjunction with
customary assessors – created the law without referring to an auxiliary law. He
chose a solution convergent with the Common Law in order to protect the
child’s best interests – in the sense the Common Law conceives it.

Based on these few examples, it seems that Customary Law has a very similar
effect to Common Law, as described by Strathern,83 in family and kinship
matters. It could mean the affirmation of a new model of family organisation
through customary jurisprudence. Strathern defines ‘recombinant’ as:

[I]n the sense that in taking apart different components of
motherhood and fatherhood one is also putting them together in new
ways, in both conception procedures and in rearing practices, and
then all over again in combinations of the two.84

It is the fact of ‘cutting and splicing so that elements work in relation to one
another in distinct ways’.85 In the case that has been discussed, the Customary
Law manages to insert the concept of joint custody; which implies at the same
time the recognition of a free union, the separation of this union, and an equal
right and duty of both parents to contribute to the education of the child. It is a
re-evaluation of the consequences of individual choices at the collective level
and a reaffirmation of individual rights (to choose one’s partner, to put an end
to a relationship and to have children out of marriage). It is a redefinition of the
family, now including natural families. Customary Law is here, in the very
same way as Common Law, offering a cultural facilitation that consists in re-
as well as de-traditionalising ways to deal with the family. It presents the new in
the frame of the old and vice versa, and by doing this it absorbs the anxiety
surrounding the uncertainties generated by the erosion of an old status created
by these new tendencies. The particularity here is that this recombinant effect,

83 Strathern (n 5).
84 ibid 25.
85 ibid.
as it touches the family organisation, necessarily also changes the custom. So could it be said that Customary Law is the new vector of change in the custom?

4.4 The Legal Technicalities: *Fictio Legis* (To Enlarge Its Jurisdiction)

In order to develop this point of the Article, it would be useful to review Thomas’ definition of the legal fiction. Thomas observes in the Roman Law that one of the law’s main techniques is the legal fiction, or *Fictio Legis*. He defines the fiction as a voluntary and official deformation of Truth, as it does not even undertake the research of Truth (contrary to the presumption for example). As soon as an obstacle comes in the way of the law, a legal fiction – positive or negative – is created in order to bypass it. It is a simple way of changing the law without contradicting the former norms. It is a very conservative process, as it consists of adapting the new to the old by giving the new the appearance of the old, instead of abandoning outdated notions or establishing new institutions. It allows for the conciliation between innovation and preservation by permitting only a half-measure progress. Thomas’ article is a discreet critique of lawyers’ visions of law, with a long-standing assumption that law discovers the fact instead of (re)creating it. Law does not make statements revealing the world. Rather Thomas argues that the world is the world in accordance with how law frames it through legal fictions. It is an ‘as if’ made up world because both sides of the distinction – law and facts – are being made up. This thesis is one of an exceptional artificiality of law, where law has a special power of commanding the real by changing it. By freeing law of any contradiction, practitioners invent the law and give it its autonomy. This echoes the thesis of Hermitte, who thinks of law as a one-direction translation into its own categories. It is a process of abstraction but still has an impact on reality. It changes the natural order through its abstractions and hence constitutes ‘another world’.

This returns us to the principal thesis of this Article, that custom and Customary Law play on two different registers of enunciation. While custom is more about politics, Customary Law is primarily law. By explicitly integrating the normative source in Customary Law (while Common Law often draws on different sources, including customs, without quoting them), it could be said that maybe Customary Law is just a different way of drafting and practising law. It might be a different ‘translation mechanism’ with its own categories.

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86 Yan Thomas, ‘Fictio Legis. L’Empire de la Fiction Romaine et ses Limites Médiévales’ in Thomas (n 4).

87 A positive fiction is the reality that one invents, whereas the negative fiction is the pure and simple negation of a reality.

Adding to the shifting practice of custom through the increasing number of written documents and the recombinant effect that was detected in Customary Law’s practice, attention must now be drawn to the use of legal fictions, largely implemented in order to introduce Common Law principles in the guise of custom.

The examples presented are of two consecutive judgments from the same day (20th April 1994) and both are judged by the decentralised section of the Koné Tribunal: Oudodopoe ép. Bova c/ Daoulo (n° 37)\(^9\) and Thidjite c/ Pibee (n° 38).\(^9\) Both cases concerned the duty to financially support children of separated parents. The approach followed by the judge was to link typical modern institutions, such as the divorce procedures, to the principles and spirit of the traditional law. In both cases, the Koné tribunal fixed alimonies for the natural father, founding that solution on the existence not of customary principles, but on a *natural* right. In a general manner, he nevertheless makes reference to the Customary Law to fix the amount of the contribution of the fathers, stating that the custom does value the ‘responsibility of education and of assistance’\(^9\). This approach became reliable jurisprudence, re-applied by the Tribunal of Lifou in 1997.\(^9\)

What this example shows is that Customary Law, when it falls short on customary principles to apply, does not hesitate to look to other sources of inspiration in order to enlarge its jurisdiction and adapt to new social or familial configurations. Here, the legal fiction resides in the invention of a natural right to assistance and education, applying even to children. This legal fiction allows the judge to rule in a situation where the traditional law would not have been able to intervene. Even if this newly created ‘natural right’ – supposedly greatly inspired by the naturalist approach prevailing at a time for human rights – is a pure abstraction, it has implications for the reality, even more so given the fact that Customary Law is mainly jurisprudential. As Roman practitioners did in their time, the legal fiction here allows for the recognition of the natural family without having to change the custom. It places the new in the frame of the old, giving it a traditional flavour.

V. CONCLUSION

The (re)construction process of the custom, as well as that of the Customary Law, are essential parts of the development of a New Caledonian citizenship. These two processes, however, take place on very different levels, as has been

\(^9\) Thidjite (n 82).
\(^9\) Lafargue (n 58).
\(^9\) Iwame c/ Ua, Lifou Tribunal (judgement no 117 of 10 December 1997).
demonstrated; they also aim for very different goals, even if they interact closely with one another. While the custom is clearly an identity quest and a manner of dealing with the colonial past, the Customary Law is already a step towards a more mixed New Caledonian citizenship, taking into account ethno-cultural differences. Both registers are going through a certain hybridisation and have to adapt to contemporary issues. The question of the use that will be made of the evolution of the Customary Law, with regards to potential independence, is left for future evolutions. Be that as it may, the whole process of affirmation of common Kanak values does not really take into account the national context in which it is inscribed. The assertion of the Kanak as a unified people is probably linked to the international context of the protection of indigenous rights that, as Coombe has noted, is a moment of fiction on the role of indigenous people and their expectations.\(^93\) One cannot help but notice that this process is one of essentialisation of indigenous peoples, who are entitled to maintain their cultural differences in order to maintain diversity. They become the ‘custodians’ or ‘stewards’ of the biodiversity of their areas, which has been made very clear in the Propositions of Orientations and Development for New Caledonia, from now until 2025.\(^94\) However, the People’s active participation in politics and development projects, especially in the North Province and the Loyalty Islands, implies that they will not be the marginalised key players they are supposed to be. Strathern\(^95\) and Greene\(^96\) even tend to claim that there is no such thing as authenticity but only performativity, so as to put together strategies cohering to an identity, which makes a claim irrefutable. If this is true for environmental claims and natural resources management, could it be similarly true for the claim to independence? Is the ‘autochthonisation’ and the ‘customarisation’ of Kanak identity quest a strategy to make the independence claim irrefutable?

I am conscious that the entire process cannot be reduced to this, but it is worth considering in relation to the multicultural pretensions that New Caledonian political leaders have for the island. For strong autochthonous claims and multiculturalism can be an explosive mix in a bad sense, as well as in a very productive way.


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