

# THE PROTECTION OF THE ETHNIC AUTONOMY OF KANAKS IN NEW CALEDONIA

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## I. INTRODUCTION

The law regarding the treatment of minorities and ethnic groups has become an important component in the comprehensive system that protects international human rights. This law recognises the right of ethnic groups in a multiracial state to retain and develop their language and culture. This concept of autonomy breaks through traditional notions about the state and ethnic groups by allowing collective rights to be vested in an ethnic group in the same way as they can be vested in the individual.<sup>1</sup>

The sources of this growing area of law are derived principally from various international treaties that seek to protect human rights and fundamental freedoms. The most important of these treaties are the 1950 European Convention on Human Rights, (including its Protocols) and the 1966 International Covenant on Civil and Political Rights. Both these documents have been ratified and acceded to by France.<sup>2</sup> Article 14 of the European Convention and article 2 of the International Covenant guarantee a number of individual as well as collective rights and freedoms, such as freedom from discrimination on the basis of sex, race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status. Other relevant human rights treaties include the 1966 International Covenant on Economic, Social and Cultural Rights, the 1965 International Convention on the Elimination of all Forms of Racial Discrimination, and the 1961 European Social

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1. For a detailed discussion of this concept, see Otto Kimminich, *The Organization of Multinational States*, 37 LAW AND STATE 7, 16 (1988).

2. France ratified the European Convention on 3 May 1974. M.J. BOWMAN & DAVID J. HARRIS, *MULTILATERAL TREATIES: INDEX AND CURRENT STATUS* 163 (London Butterworths 1984). France signified its accession to the International Covenant on Civil and Political Rights on 4 November 1980. *Id.* at 304.

Charter, all of which have been either acceded to or ratified by France.<sup>3</sup> The French government's ratification of or accession to these treaties clearly places treaty obligations on her to comply with their terms. The French approach towards protecting the group autonomy of the Kanaks may therefore be justifiably evaluated by reference to the standards set by the treaties and the international human rights regime to which France is legally committed.

For present purposes, the most important of these rights is the collective right of ethnic minorities in a multiracial state to retain and develop their own culture and language. This right is expressed in Article 27 of the International Covenant on Civil and Political Rights which specifically states:

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

To ensure effective protection of this right, the rules of international law require states with multiracial communities to embody this right in relevant municipal legal rules. While the Declaration of the Commission on Human Rights on the point is still yet to be adopted, there is general agreement among states that Article 27 of the Covenant creates affirmative obligations on the states.<sup>4</sup>

Upon accession to the Covenant, France expressed reservations about the applicability of Article 27. According to France, "[i]n the light of article 2 of the Constitution of the French Republic, the French Government declares that article 27 is not applicable so far as the Republic is concerned."<sup>5</sup> Notwithstanding these reservations, it is pertinent to point out that Article 2 of the French Constitution embodies objectives and wording which are substantially the same as those of Article 27 of the Covenant. It states, in part, that "[the Republic of France] shall ensure equality before the law for all citizens without distinction of origin, race, or religion. It shall respect all beliefs. . ." (emphasis added). The reservations therefore do not exempt France from complying with the terms of Article 27. Indeed, as stated in the Federal Republic of Germany's declaration to

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3. France signified its accession to the International Covenant on Economic, Social and Cultural Rights on 4 November 1980. BOWMAN & HARRIS, *supra* note 2, at 303. The International Convention on the Elimination of all Forms of Racial Discrimination was acceded to on 28 July 1971. *Id.* at 299. The European Social Charter was acceded to on 9 March 1973. *Id.* at 262.

4. See F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic Religious and Linguistic Minorities* 36, U.N. Doc. E/CN.4/Sub.2/384/Rev. 1 (1979); J.N. Saxena, *International Protection of Minorities and Individual Human Rights*, 23 INDIAN J. INT'L. LAW 38, 49 (1983); L.B. Sohn, *The Rights of Minorities*, in THE INTERNATIONAL BILL OF RIGHTS 270, 282 (Louis Henkin ed. 1981).

5. UNITED NATIONS, STATUS OF INTERNATIONAL INSTRUMENTS 35 (1987).

the United Nations Secretary-General following the French government's declaration concerning Article 27 of the Covenant:

[t]he Federal Government refers to the declaration on article 27 made by the French Government and stresses in this context the great importance attaching to the rights guaranteed by article 27. It interprets the French declaration as meaning that the Constitution of the French Republic already fully guarantees the individual [sic] rights protected by article 27.<sup>6</sup>

It may be recalled that when New Caledonia was classified by the United Nations as a non self-governing territory and included in the U.N. decolonisation list in 1946, France was seriously opposed to the U.N. action. In response, France took immediate steps in 1946 to make New Caledonia a French overseas territory. Even today France maintains that in accordance with Article 2 of the French Constitution, which states that France is an indivisible, secular, democratic and social Republic, New Caledonia is an integral part of her sovereign state. France does not recognise the inalienable right of the peoples of New Caledonia to self-determination and independence under the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples.

New Caledonia's status as an overseas territory converted the Kanaks into a minority ethnic group within the Republic of France and, in accordance with international law, France recognised their autonomy. This recognition took the form of a constitutional guarantee which conferred the *statut civil particulier* (a special civil status, also known as the particular civil status) on all Kanaks. To ensure enjoyment of this status, the French authorities evolved a complicated system of protection based upon the *droit particulier* (i.e. the law governing the *statut civil particulier*), the substance and application of which define the scope of autonomy that the Kanaks have.

This paper focuses on the form and content of the *statut civil particulier* with a view to determining the extent to which it guarantees the autonomy of the Kanaks in New Caledonia. The paper examines the institutional framework available for its implementation, and the consistency of the principles and application of the *droit particulier* with the international legal requirements for the protection of Kanak autonomy. Within this context, the modus operandi of the *droit particulier* is highlighted in order to show its socioeconomic impact on Kanak customs, traditions, land and land-holding practices, and to underscore the political significance of adequately protecting the Kanaks' autonomy.

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6. *Id.* at 88.

## II. LEGAL REQUIREMENTS OF ETHNIC AUTONOMY

To the extent that the International Covenant on Civil and Political Rights addresses the crucially important subject of autonomy, it indicates a clear, if not universal, recognition that multiracial (or multinational, as it is increasingly being known) states have a legal obligation to protect the autonomy of ethnic minorities. The twin values emphasised in Article 27 of the Covenant are ethnicity and cultural autonomy. These values embody the goal of international human rights law to protect the equality and autonomy of ethnic minorities in multiracial states. What do they involve as far as the legal system is concerned and what obligations do they place on states parties?

The concept of ethnicity emphasises not the isolated existence (or the interest therein) of the individual, but his existence in the community. The underlying rationale for this is the social psychological thesis that the formation of the individual self is not possible without the experience of that self from the perspective of other members of the social group into which the individual has integrated. As expressed by Mead, "[t]he individual experiences himself as such, not directly, but only indirectly from the particularist [sic] standpoints of other individual members from the same social group, or from the generalized standpoint of the social group as a whole to which he belongs."<sup>7</sup> The fundamental prerequisite for the enjoyment of the right of personal autonomy is therefore membership in a human community that has special ethnic characteristics that the law protects.<sup>8</sup>

The concept requires, inter alia, the recognition of local custom as a separate and distinct source of law. This recognition may take the form of a constitutional guarantee, or be based upon special legislation, special administrative measures or simple recognition of private institutions that represent the interests of the ethnic minority group. Recognition may also mean granting the ethnic group the status of a juristic person or granting it a bundle of rights which protect their group existence and group identity.<sup>9</sup> Experts on the law of ethnic groups agree, however, that the most preferable mode of recognition is through the constitution or special laws.<sup>10</sup>

Hence it would accord with the form of ethnicity if the basic response of the legal system is to establish legal principles, procedures and institutions which recognise, enforce and uphold the customs of the ethnic minority group. Indeed, the uniqueness of Article 27 of the Covenant lies in its adoption of the pre-World War

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7. GEORGE H. MEAD, *MIND, SELF AND SOCIETY* 138 (Charles Morris ed., 1962).

8. Kimminich, *supra* note 1, at 11.

9. Capotorti, *supra* note 4, at 12.

10. *Id.*

II International Protection of Minorities System in which the centrality of institutions is recognised in the form of provisions granting autonomy and an equitable share of state funds to support the institutional structures.<sup>11</sup>

With regard to the content of the legal protection, attention is concentrated on culture and language. Many writers, however, maintain that the scope and content of the legal protection cannot be laid down in general terms but depend very much on the particular situation of the minority group in question.<sup>12</sup> Even though this in fact seems to be the general state practice, other writers suggest that the minimum institutional infrastructure for protecting the personal autonomy of minorities should include what Magnet calls the principle of structural ethnicity.<sup>13</sup> This refers to the capacity of the ethnic group to perpetuate itself, control leakage, resist assimilation and propagate its beliefs and practices. In practical terms, the principle requires states to provide the following:

1. political structures through which the group can interact with other groups, particularly the dominant or governing groups in the society;
2. economic structures to dampen the assimilating pressures exerted by the mainstream economy;
3. mechanisms for propagating and transmitting the group's beliefs (ethnic schools, religious institutions and ethnic associations);
4. mechanisms of group definition, i.e., legal right to define membership by excluding or including individuals;
5. defensive mechanisms that can restrict the group's members from exposure to alternative norms, values and practices.<sup>14</sup>

Cultural autonomy is a significant aspect of group autonomy. It emphasises the voluntary identification of the members of the ethnic minority group with the traditions and history of the group. Its most important requirement is that the cultural practices of the ethnic minority group be generally recognised as equal to those of mainstream society.<sup>15</sup>

In light of the obligations imposed by Article 27 of the Covenant, the application of these principles requires states to adopt affirmative measures to preserve cultural autonomy. Such measures

11. *Id.* at 19, n. 21.

12. Kimminich, *supra* note 1, at 15.

13. J.E. Magnet, *Multiculturalism and Collective Rights: Approaches to Section 27*, in *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 759* (G. Beaudoin & E. Ratushny eds., 2d ed. 1979).

14. *Id.* at 760.

15. See WARWICK A. MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* (1983).

include allocating government funds to ethnic minority groups so that they can provide educational opportunities, cultural events, religious ceremonies and other related activities that will develop the essential attributes of the group's cultural personality and express them in ways that can be internalised by individuals.<sup>16</sup> This means that any legal system which is oriented around cultural autonomy must pay scrupulous regard to the interests of the individual and the need for the ethnic minority group to preserve and enhance its culture. This will in turn promote racial harmony.

### III. FORMS OF LEGAL RECOGNITION OF KANAK GROUP AUTONOMY

#### A. Recognition of the Special Status of Kanaks

The French Civil Code was made applicable to New Caledonia for the first time in 1866. Until 1946, however, the Kanaks were exempted from the provisions of the Code which related to personal status. This exemption, which applied to all the colonial subjects in almost all other French colonies, was based upon the French belief that Melanesians were primitive and uncivilized and therefore unworthy of French citizenship.<sup>17</sup> Indeed, the assumption was that the Kanaks had not attained the threshold of persons whose relations the Code was meant to govern. The Kanaks thus enjoyed no civil or political rights until 1946 when New Caledonia became a French overseas territory and citizenship was conferred on the inhabitants of the island.

After 1946, the right of citizenship led to the recognition of the personal status of the Kanaks coupled with their right, as an ethnic minority group, to be different. This significant development was based upon a principle affirmed by Article 82 of the 1946 Constitution of the French Republic, which was reproduced in Article 75 of the 1958 French Constitution. These constitutional provisions state that citizens of the Republic who do not have the common law civil status (i.e., status governed by the French Civil Code) shall retain their personal status (i.e., under customary law) as long as they do not renounce it. As a result, the personal status of Kanaks who retain their status is categorised as the *statut civil particulier* in contradistinction to the common law civil status of all other French citizens who are governed by the Civil Code. Today, almost all the Melanesian population of New Caledonia (numbering about 75,000, i.e., half of the total population) have retained their personal status. The *statut civil particulier* is a privileged domain which is governed

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16. See Magnet, *supra* note 13, at 772-6.

17. See M.C. Spencer, *New Caledonia in Crisis, Occasional Paper No. 1*, in THE AUSTRALIAN INSTITUTE OF INTERNATIONAL AFFAIRS (1985).

by customary law. This means that, unless they renounce this status, Kanaks are regulated by customary law.

The criteria for qualification for the *statut civil particulier*, is laid down by the *Service Territorial de l'Administration General* (S.T.A.G.) (i.e. the Territorial Service of General Administration). S.T.A.G. controls the registry of all births, deaths, marriages, divorces, and adoptions of all persons with the *statut civil particulier*. According to this body, a person must be a Melanesian born in the Territory of New Caledonia to qualify for treatment under the *statut civil particulier*. This raises the problematic question of the status of Melanesians born outside the territory. To date, there has not been any judicial decision on the issue. However, it is believed by legal experts that judicial disposition would favour granting such people the common law civil status.<sup>18</sup>

Article 75 of the Constitution provides the option for all Kanaks who are eighteen years and older to renounce the *statut civil particulier*. Renunciation has the effect of substituting the common law civil status for the *statut civil particulier*. According to a circular of 15 January 1963, which was confirmed by Decree 78-329 of 16 March 1978, the change must be effected through an order of the civil court in Noumea. Such a change, however, can only be made in favour of the common law civil status. Once this is done, the resulting common law civil status becomes irrevocable and hereditary.

The legal significance of the *statut civil particulier* is that customary instead of the French civil law applies in matters relating to personal status, family law, traditional land tenure, and succession. Also, persons with this status are exempted from military service abroad. The *statut civil particulier* is thus so closely linked with the rules of customary law that, to appreciate its relevance to the personal autonomy of the Kanaks, it is important to understand the exact position of customary law within the French legal system.

## B. Juridical Status of Customary Law

The doctrinal attitude of the French legal system towards customary law is ambiguous. Even though, in principle, custom operates as a source of law,<sup>19</sup> "[t]he notion of custom is regarded as antithetical to the basic framework of *droit écrit* or written law."<sup>20</sup> Because of its verbal character and variability, customary law is

18. See G. Agniel, *Mixed Jurisdictions of Civil and Customary Law in XIIth CONGRESS OF THE INTERNATIONAL ACADEMY OF COMPARATIVE LAW* 8 (1986).

19. Custom operates as a source of law at three different levels in French law: *custom secundum legem*, *praeter legem*, and *adversus legem*. For a detailed account of how this operates, see RENÉ DAVID & HENRY P. DE VRIES, *THE FRENCH LEGAL SYSTEM* 105 (1958).

20. *Id.* at 109.

often avoided by both legislators and judges. In New Caledonia, there does not exist in a strict sense any compilation much less a codification of customary rules of law. The only real attempt to codify the customary rules of Kanaks was undertaken in 1953/54 by the *Commission des Collectivités Caledoniennes*. This Commission's work was, however, abruptly terminated before any reasonable progress was made. The absence of codified rules of customary law has kept customary law outside the mainstream of the French legal system. Though outside the system, there is no doubt that in practice there is frequent resort to it; it is a well acknowledged fact that all the Kanak tribes are directly controlled by the observation of customary rules which, if violated, in principle, leads to the application of a customary sanction. The French authorities have not remained indifferent to this reality and, in consonance with it, have made attempts to officially recognise customary law.

### 1. The Recognition of Customary Law

Before 1946, the French approach to customary law reflected the attitudes mentioned above. The decree of judicial organization, 28 November 1866, limited access to the courts to citizens only. This position was reaffirmed by the decision of the Superior Court of Appeal of Noumea, 19 September 1933, which laid down the rule that the civil law courts could not hear disputes between two indigenous people. The Kanak population of New Caledonia therefore had no access to the courts and disputes between them were referred to the Office of Melanesian Affairs. In 1946, this office was abolished and replaced by the S.T.A.G. S.T.A.G.'s role in this process assumed particular importance because there was, and still is, no special customary court and because, until 1982, the civil law courts had no jurisdiction to apply customary law.

After 1946, and particularly since 1958, the Constitution served as a reference point in legitimising the Kanaks' *statut civil particulier*, including their right to renounce that status in favour of the common law civil status. This recognition, in principle, gave Kanaks access to the civil law courts. Thereafter, until 1982, the jurisdiction of the courts over customary affairs was, in principle, based on the assumption that customary law should be applied only after thorough study of its rules. The Court of First Instance and the Court of Appeal of Noumea have made several pronouncements in customary matters, particularly in relation to succession.

The recognition of the *statut civil particulier* led to a conflict between the two different types of status and brought into clear focus the real difficulties arising from the co-existence of two competing systems of law (customary and civil law). In 1967, the Territorial Assembly of New Caledonia passed four resolutions

which were aimed at resolving some of these difficulties. The first one, Resolution No. 424 of 3rd April 1967 relating to the status of citizens with the *statut civil particulier*, clarified the legal relationship between the two types of civil status. According to this resolution, the applicable law in a matter involving persons of different types of civil status is determined as follows:

- (1) in a dispute between two persons with common law civil status, civil law applies;
- (2) in a dispute between two persons with different types of civil status, the civil law takes precedence over customary law and therefore applies exclusively; and
- (3) in a dispute between two persons with the *statut civil particulier*, the dispute can be resolved by the customary authorities without resort to the civil law courts.

It is important to note that with regard to disputes between two persons with the *statut civil particulier*, the resolution makes no reference whatsoever to the procedure or institution (e.g. a conflicts tribunal) which will resolve jurisdictional conflicts between customary and civil law. The administrative practice of seeking the prior agreement of the parties on which law they wish their case to be based has thus encouraged many Kanaks to exercise the option to submit their cases to the common law courts, made available by Article 2 of the Territorial Ordinance No. 82/877 of 15 October 1982. As a result, notwithstanding the option to have disputes settled by the customary authorities many Kanaks often resort to the common law (i.e., civil law) courts. As Agniel observes,

[t]he use of the common law . . . appears to be the norm in relations between individuals living in the territory whatever be their civil status. This results on the one hand from the absence of a written customary law and on the other from a lack of laws regulating the field of special status.<sup>21</sup>

The other resolutions are Nos. 11 of 20th June 1962 and 251 of 26 November 1965, both of which relate to the regulation of certificates for customary succession, and No. 116 of 14th May 1958 which addresses the procedures for determining ownership of lands in the context of land reform. On the whole, the solutions adopted by these resolutions were not comprehensive enough and they failed particularly to address the fundamental question of the jurisdiction of the courts in matters regulated by customary law. A fundamental shift in approach was therefore required.

The change was heralded in 1976 by the *Loi Barre* which declared that the domain of the state's competence includes the civil

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21. Agniel, *supra* note 18, at 6.

law except with regard to the *statut civil particulier*.<sup>22</sup> This means that the French parliament can legislate for the territory on all matters except customary law and thus, by implication, power was conferred on the territory to regulate matters pertaining to customary law. The upshot of this legislation was the passage of the Territorial Assembly Ordinance No. 82/877 of 15 October 1982 which established the position of customary assessors to assist the Civil Court of First Instance and the Court of Appeal of Noumea in their application of customary law. Customary assessors are therefore now able, at the request of the parties who are not satisfied with the decision of the traditional authorities, to sit in civil proceedings at the Court of First Instance and the Court of Appeal of Noumea in matters involving persons with the *statut civil particulier*. This innovation institutionalised, albeit indirectly, the recognition of customary law. Also, according to a decree of 15 September 1980, it is now possible for persons with the *statut civil particulier* to opt in writing to have the customary land succession rules apply to land held outside the reserves under civil law.

There were later attempts to extend the jurisdiction of the courts to disputes arising out of customary law.<sup>23</sup> However, the ordinances providing for this extension were abrogated by the *loi PONS* of 17 July 1986 (Article 49). Since then, the rules of customary law applied by the courts in New Caledonia have remained essentially unwritten with no express legal recognition or precise institutionalization of rules, procedures, organs, and structures. Nevertheless, customary law continues to be applied by the courts in civil matters permitted by the *statut civil particulier*.

#### IV. PARAMETERS OF THE *STATUT CIVIL PARTICULIER*

Notwithstanding the ambiguous juridical status of customary law in the French legal system, the judicial application of customary law in the situations permitted by the *statut civil particulier* plus the decisions of the S.T.A.G. and the resolutions of the Territorial Assembly of New Caledonia have evolved into a body of rules referred to as the *droit particulier*. This development has advanced the prospect of having Kanak customary law recognised within the French legal system. The rules of the *droit particulier* define the parameters of the *statut civil particulier* and provide the framework within which the traditional institutions that form the basis of customary law are given legal recognition. Because of its limitation to

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22. Law No. 76/1222 of 22 December 1976, Section 5, *Journal Officiel de la Nouvelle Calédonie*.

23. See, e.g., Ordinance of 82/880 of 15 November 1982 and Ordinance No. 85/1185 of 15 November 1985, *Journal Officiel de la Nouvelle Calédonie*.

the *statut civil particulier*, however, the *droit particulier* does not cover all aspects and details of Kanak customary law. Essentially, it deals with only civil (as opposed to criminal) cases covered by the *statut civil particulier*. The legal rules of the *droit particulier* are, however, outlined with particular reference to Kanak traditional institutions.

### A. The Family

The family unit is an important cell of social organization and is one of the institutions around which customary law operates. Although its legal status has been reduced today as an accessory to other forms of collective authority (such as the clan, which is recognised as the basic unit of customary society and the tribe), family ties among Kanaks who have either a maternal uncle or an eldest brother are very important. They are especially important in succession cases.

#### 1. Family Law

Article 40 of the Resolution of the Territorial Assembly No. 424 of 3 April 1967 provides that marriages between two spouses with the *statut civil particulier* are to be governed by customary law. Such marriages must be confirmed within 30 days by the mayor of the commune. Divorce proceedings can only be initiated by the husband, and, according to the decision of the Civil Tribunal of Noumea, the clan chiefs have exclusive jurisdiction.<sup>24</sup> The legal procedure for marriages and divorces between two citizens with the *statut civil particulier* is thus fairly settled.

The law regarding marriages and adoptions between people with different types of status (i.e. mixed marriages), however, is quite uncertain as there is still no settled rules regarding the legal consequences of such relationships. In the absence of any clear legal rules, problems arising in these areas are resolved by ad hoc pragmatic solutions. For instance, in situations of a mixed marriage, the only legal regulation is Article 42 of the Resolution of the Territorial Assembly No 424 of 3 April 1967 which provides that a mixed marriage can only be celebrated according to the rules of civil law. The conclusion derived from this regulation is that the spouse with the *statut civil particulier* is considered as automatically renouncing his/her status for the purposes of the marriage and its effects and that the marriage can only be dissolved according to the rules of civil law. The effect of this partial renunciation of status also means that the offsprings of the mixed marriage will automatically have the common law civil status which becomes irrevocable.

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24. Decision of 9 August 1984, *Journal Officiel de la Nouvelle Calédonie*.

This is in accord with the civil law principle that in cases of conflict between the common (i.e. civil) law and local (i.e. customary) law, the former takes precedence over the latter.<sup>25</sup> This indirect recognition of the common law civil status of the spouse and offsprings of a mixed marriage, as Agniel rightly points out, is inconsistent with the law that confers the *statut civil particulier*. This is because the renunciation of the *statut civil particulier* for the purpose of acquiring the common law civil status requires an express declaration before the civil court.<sup>26</sup>

Also, in a free mixed union (i.e. common law marriage between spouses of different types of status), there are no clear legal rules regarding the applicable status of children born as a result of such marriages. Administrative practice indicates, however, that once one of the parents with the common law civil status recognises the child (i.e. legitimation), the child acquires the common law civil status which is irrevocable even when the child reaches the age of majority.

In the area of adoption, the basic requirement under Kanak customary law is that there be consent by the families concerned.<sup>27</sup> In practice, this means consent by the maternal uncle, provided he has not renounced his status. Adoptions take place frequently without any administrative or judicial interference. The problem arises when a citizen with the *statut civil particulier* is adopted by parents with the common law civil status. Here too, as in the case of mixed marriages, administrative practice attempts to fill the gap in the *droit particulier* resulting from the absence of clear legal rules. Again, following the principle of the superiority of civil law over customary law, the adopted person is deemed to take the status of his/her adopting parents. Interestingly, there are no guidelines regarding the adoption of a child with civil status by parents with the *statut civil particulier*. In practice, such an adoption is discouraged, and the adopting parents are advised to change their status.

## B. The Tribe

The tribe is the base of the Kanak social structure. This social unit is an aggregate of clans which is legally recognised as a moral collective entity with administrative and civil responsibility for the maintenance of law and order within a specified area.<sup>28</sup> There are now three-hundred-and-thirty-six tribes in New Caledonia, each of which is represented by a village chief who, in principle, is ap-

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25. C. CIV., arts. 343-370/2.

26. See Agniel, *supra* note 18, at 10.

27. Resolution of 3 April 1967, art. 37, *Journal Officiel de la Nouvelle Calédonie*.

28. Prefectorial decision of 24 December 1967, *Journal Officiel de la Nouvelle Calédonie*.

pointed unanimously by the Council of Elders. The tribes are organised into districts (fifty-eight in total) which are headed by the great chiefs. Each district belongs to one of the ten counties or customary areas.<sup>29</sup> These counties are more or less administrative organisations.

It is important to stress that the tribe in New Caledonia is an artificial creation of the French colonial administration and does not correspond to the traditional organisations referred to in anthropological and sociological studies. It is an amorphous artificial unit consisting of a few hundreds of people grouped together in the native reserves without any necessary ancestral links. Native reserves are areas of land onto which the Kanaks were forced by the French colonial system of containment. This forced reorganisation, which has lasted for over a century, has left an indelible mark of social dislocation and cultural disorientation.

### C. Traditional Authorities

The traditional authorities that operate within the Kanak customary system are legally recognised. These include the great chiefs, village chiefs, chiefs of the clan and the Council of Elders. The great chiefs have administrative and customary powers which include controlling and administering the collective property in the native reserves. They also have the authority to resolve disputes where one of the parties is dissatisfied with the decision made by the Council of Elders. The village chiefs are responsible for public order within the tribe. They are the spokespersons of the great chiefs and the tribes and, as such, act as the intermediary between the administration and the tribes.

In addition to these authorities, there is also the Territorial Consultative Council on Customary Affairs, which was established by Law No. 88-1028 of 9 November 1988 Relating to the Statutory Dispositions and Preparations for the Autonomy of New Caledonia. This body, consisting of representatives from all the customary areas of New Caledonia, must be consulted on all matters pertaining to the *statut civil particulier*, customary law, and customary land proposals by the three Provincial Assemblies and the Territorial Congress of New Caledonia.<sup>30</sup> It is, however, merely an advisory body and has no decision making powers. Other traditional authorities include the customary police who enforce the customary sanc-

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29. The customary areas of New Caledonia are Hoot Ma Waap, Paici, Camuki, Ajje, Aro, Xaracuu, Djubea Kapone, Nengone, Drehu, and Iaai.

30. Each of the customary areas in turn has a customary council whose composition is determined by the area's customary law. The function of these councils is to assist the Territorial Consultative Council and to advise the Provincial Assemblies on matters relating to the local customary law and customary land law.

tions imposed by the Council of Elders, and the customary assessors who advise the courts on customary matters.

#### D. Customary Land Tenure

The issue of land is central to the political struggle of the Kanaks for independence. The traditional Melanesian concept of property regards land as sacred, the very foundation of life and society. Its value transcends material wealth and profit. The land belongs to the masters of the land, i.e., the descendants of its first occupants, and is owned communally by the clan.<sup>31</sup> Since the clan is the land-owning unit, the individual's interest in it is based upon his membership in the clan. The proprietary right of the clan is vested in the village chief (not the great chief who traditionally wielded only political power) who exercises control and supervision over the land. Individual members of the clan have usufructuary rights over land allocated to them; they are entitled to the enjoyment of the fruits of their cultivation. Because of the sacred nature of the land, it is inalienable. User rights can be transferred to strangers only with the approval of the clan chief. Such transfers, however, do not constitute a sale nor do they necessarily include the plants on the land. The transferee is obliged to reciprocate the gesture of the transferor through offerings of gifts.

The Decree of 21 May 1980 gives legal recognition to this concept of *propriété clanique* by declaring that the land of the clan is the common property of the family groups of which the clan is composed. This Decree also recognises the Clan Council as the appropriate body for administering clan property and proclaims customary law as the law regulating such property. Although the French government recognises the Kanaks' right of ownership over occupied lands, it rejects their claim over land which was not occupied by them at the time of the inception of the native reserves. This has confined the Kanaks' ownership of land (i.e. lands subject to customary law) to land designated as native reserves.<sup>32</sup>

The native reserves have been proclaimed as inalienable and sacrosanct collective property, ownership and control over which is vested in the great chief who traditionally had no such authority.

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31. For a detailed discussion of Melanesian land holding and the problems associated with it, see MYRIAM DORNOY, *POLITICS IN NEW CALEDONIA* (1984); Alain Sausol, *New Caledonia: Colonization and Reaction*, in *LAND TENURE IN THE PACIFIC* 240, 240-260 (Ron Crocombe ed., 1987); ALAIN WARD, *LAND AND POLITICS IN NEW CALEDONIA* (1982).

32. Article 2 of the Lands Ordinance of 1985 clearly states: "no customary rights of usage may be recognised over the public domain; urban areas; existing establishments for public works, civil and military, as well as existing establishments necessary for the functioning of the public service; and areas reserved for public works to be established within 5 years."

Individual rights in the land consist of a combination of *usus*, *fructus*, and a limited *abusus* that allows the choice between cultivating the land and leaving it fallow. Furthermore, reserve lands cannot be leased or seized by people governed by the *statut civil particulier*, except through a procedure commenced by the customary authorities and the state for the purpose of constructing private dwellings.<sup>33</sup> This concept of collective property imposed by the French government under the system of native reserves has never been recognised by the Kanaks who, rejecting the attempt to adulterate their customs and traditions, have persistently maintained the inviolability of their traditional system of land tenure. The result of this impasse is a complex situation of contradictory and overlapping concepts of land ownership within the native reserves.

### E. Succession

The preamble of the Resolution of the Territorial Assembly No. 11 of 20 June 1962 authorises the distribution of property of deceased citizens with the *statut civil particulier* to be regulated by customary law. Since the family structure of the Kanaks is predominantly based upon matrilineity, succession under Kanak customary law is established principally through the maternal uncle rather than the father. The only exception to this rule is with regard to immovables acquired in conformity with the civil law which may be subject to patrilineal succession.<sup>34</sup> This means that a citizen with the *statut civil particulier* may opt to settle his/her succession of immovable property according to the rules of civil law if the property was acquired outside the native reserve.

The procedure for succession under customary law requires that after the death of a person with the *statut civil particulier*, anyone who has an interest in the deceased person's property may apply to the appropriate administrative department (i.e., the S.T.A.G.) for authority to hold a family or clan meeting to discuss the distribution of the property of the deceased. A record of the discussion, which may be challenged within thirty days, is drawn up by the officer of Melanesian Affairs, setting out the wishes of the family, clan, or Council of Elders. After the thirty day period, a certificate of inheritance or a certificate of title is drawn up by the S.T.A.G. which designates the person or persons (including persons with the common law civil status) who are entitled to inherit, and lists the property they are to inherit.

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33. See Alain Saussol, *La Propriété foncière melanesienne et le problème des réserves en Grande-Terre Neo-Caledonienne*, in LES CAHIERS DU PACIFIQUE (1971).

34. Decision No. 148 of 8 September 1980, *Journal Officiel de la Nouvelle Calédonie*.

## V. IMPLICATIONS FOR KANAK PERSONAL AUTONOMY

The paradigm of the French approach to the protection of Kanak personal autonomy is the *statut civil particulier* and the *droit particulier*. The examination of the *droit particulier* above reveals numerous gaps and inconsistencies within the substance and procedure of the law. In addition, there is a persistent disposition towards the superiority of the civil law over customary law. To what extent does the *statut civil particulier* and *droit particulier* adequately protect Kanak autonomy?

### A. Ethnicity

The French government, in conferring the *statut civil particulier* on the Kanaks, has no doubt exhibited some degree of compliance with the legal requirements for the protection of Kanak ethnicity. The French government's efforts, however, fall short of the international legal requirement that Kanak custom be recognised as a separate and distinct source of law.

In the first place, as pointed out above, there is no special customary court or tribunal in charge of resolving jurisdictional conflicts between civil and customary law. While customary law is permitted to apply in certain civil cases, in practice and in law, the application is haphazard and unsystematic. Within a legal system characterised by codification, the customary law of the Kanaks is still unwritten and there has not been any systematic attempt to codify it or establish its principles on the basis of case law. Consequently, it has remained on the fringes of the legal system. Knowledge about it, apart from oral accounts from the customary assessors, inevitably is based upon the fragmented information provided by sociologists, legal anthropologists, and a few legal texts. As a result, its application in the courts is saddled with difficulties which tend to deepen the contradictions between customary and civil law. The customary rules become easily adulterated and eventually may disappear, leaving a vacuum which will be filled by the civil law.

Secondly, as indicated above, the restrictive coverage of the *droit particulier* means that not all Kanak customs are given legal recognition. In particular, the customary rules which require the application of criminal sanctions are not legally recognised. Moreover, the application of the *droit particulier* to the civil cases permitted by the *statut civil particulier* is, even by French legal standards, notoriously imprecise and unsystematic. The inconsistencies and uncertainties generated by this situation are exacerbated when the courts adopt, by analogy, civil law doctrines to solve customary law problems. While some of the legal solutions adopted by the

S.T.A.G. and the courts have the capacity to bring consistency into the *droit particulier*, this potential, in many instances, is lost to the overriding principle of the superiority of the civil law over customary law.

The inconsistency in granting the *statut civil particulier*, on the one hand, and in failing to provide the institutional infrastructure which gives it meaning, on the other, is the result of the inflexible French codified legal system which considers customary law inferior.

The main defence for not making Kanak customary law autonomous within the legal system seems to be that customary law is too verbal and variable to be enforceable. The obvious solution then is to codify customary law. That the French have so far refrained from doing so somewhat weakens their defence. One could interpret the French failure to recognise the independent authority of Kanak customary law to be a vestige of old colonial attitudes.

The contradictions and inadequacies of the *droit particulier* are, in several ways, profoundly at odds with the preservation of Kanak ethnicity. This is particularly noticeable in relation to the qualification for the *statut civil particulier*, the status of spouses and children born of mixed marriages, and the option to renounce the *statut civil particulier*.

The criterion required to be governed by the *statut civil particulier* (being born in New Caledonia), has severe implications for individual Kanaks as well as for the whole group. Since the status of a citizen determines the applicable rules of law in relation to family, property and succession, Kanaks born outside New Caledonia will have their status, family and property relations governed by the civil law. Apart from possibly dispossessing Kanaks born outside New Caledonia of their cultural heritage, this rule could ultimately lead to a reduction in the Kanak population and reinforce the dispossession already achieved by the declaration that vacant land is the domain of the state. These consequences clearly run counter to the international legal requirement that the ethnic minority group should have significant power to define its boundaries, and thus to establish and apply its own criteria for including or excluding members.

Similarly, the imposition of the common law civil status on spouses of mixed marriages and the offsprings of such marriages also contravenes the autonomy mandate. It not only denies such spouses and children the chance to opt for the *statut civil particulier*, but also denies the whole Kanak group the right to define and control its own membership. The potential disastrous effect on the Kanak population, customs and traditions cannot be over-emphasised.

The most incompatible aspect of the *droit particulier* with the group interests of the Kanaks is the option to renounce the *status civil particulier* in favour of the common law civil status (which becomes irrevocable). The exercise of this right has adverse implications for Kanak customs, traditions, land and land-holding.

In the first place, this option has made it possible for young Kanaks, eager to assert their individual existence within the communal society (native reserves) or seeking a total emancipation from the burdens of the extended family system, to realise their aspirations. Secondly, it has encouraged the desire for individual appropriation which is found particularly among Kanak public servants and others in regular employment who have acquired a European-type life-style. This group of Kanaks have seized the opportunity to renounce their status in order to free native reserve land in their possession of any customary encumbrances. The conversion of communal property into individual property allows them to sell or mortgage their allotment of land. In other words, the property is converted to civil property, which is governed by the French Civil Code. The option to renounce the *status civil particulier* in favour of the common law civil status has thus become a mechanism for the partition of Kanak traditional land within the native reserves with allotments to individuals under civil law titles. This again violates the structural ethnicity principle by deliberately exposing Kanaks to, indeed enticing them to adopt, French norms, values and practices.

This process of the individualisation of land is viewed by the French Administration as a path toward modernisation, productivity and development. Admittedly, the process has resulted in the upward social mobility of some Kanaks which by itself is not an unwelcome development. It can therefore be argued that the option to renounce is liberal and democratic. At the same time, it should be emphasised that in dealing with the particular political situation of New Caledonia, Western notions of liberalism and democracy may not be the appropriate ideals. Upward social mobility for Kanaks can be attained without disrupting or destroying Kanak culture and traditions. The acquisition of property through the individualization process imposes the renunciation or forfeiture of the historical rights of the customary owners over part of their patrimony. In addition, this process creates a new arbitrarily constituted landed aristocracy (the Kanak planter-class) whose cultural orientation tends to favour France. This consequence is not accidental.

Consistent with the French policy of assimilation, the process of the individual ownership of land portends the gradual erosion of Kanak traditional values and the alienation of their land through the expansion of French law and culture. This strategy is probably based on the assumption that over a period of perhaps one or two

generations, a substantial number of Kanaks will have been fully assimilated into the French culture. Such assimilation would influence the outcome of the self-determination referendum in 1998 in favour of discouraging independence from France.<sup>35</sup>

This policy assumption, it must be pointed out, is as short-sighted as it is unrealistic. The history of the politics of New Caledonia indicates that, whatever the outcome of that referendum may be, in order to reach a permanent liberal/democratic solution of the political problems in New Caledonia, the issue of the peaceful co-existence of the Kanaks with the European settlers in the territory must be peacefully resolved. This, in turn, depends upon the adequacy of the protection of Kanak autonomy. It is therefore imperative, if a peaceful settlement to the New Caledonia crisis is to be achieved, that the strategies for decolonising the territory must take into serious account the Kanaks' need to preserve their ethnic identity.

### B. Cultural Autonomy

The French approach to the cultural autonomy of the Kanaks has been disappointing. Notwithstanding the long tradition of equality inherent in the French constitutional development, one cannot help but observe that the application of this principle has not been extended to Kanak culture. The constitutional guarantee of the *statut civil particulier* makes no provision for any special rights that protect the group existence or group identity of the Kanaks. Far from preserving and enhancing the culture and traditions of the Kanaks, the application of the *droit particulier*, as shown above, could have the effect of adulterating, disrupting and ultimately destroying Kanak culture. Even though there are no governmental restrictions on the use of the Kanak language, the French language remains the official one and is the only medium of instruction in the public schools. In addition, notwithstanding the sporadic creation of institutions like the Kanak Cultural, Scientific and Technical Office that was created under the special law of 15 October 182 relating to the economic development of the territory, governmental funding to support Kanak schools, Kanak language instruction, Kanak social welfare programmes or cultural activities leaves much to be desired.

It is heartening to note, however, that the recent political reorganisation of the territory under the Matignon Accord<sup>36</sup> (which is

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35. GEORGE K. TANHAM, *NEW CALEDONIA, THE FRAGILE PEACE* (1990).

36. This was a compromise agreement between France and the two major political parties of New Caledonia in 1988 on the issue of independence for the territory. See Michael A. Ntumu, *The Constitutional System of New Caledonia Under the Matignon Accord*, 11nd Conference of Pacific Islands Political Association (Univ. of Guam 1989).

meant to provide greater autonomy for the territory and implement strategies for its gradual decolonisation) provides some hope for the protection of Kanak cultural autonomy. This hope lies in the fact that the three existing provinces of the territory under the current political reorganisation (i.e., the Northern Province, the Southern Province and the Loyalty Islands) seem to be organised on the basis of ethnically distinct populations. In addition, each of these provinces enjoys extensive powers, including financial autonomy backed by a guaranteed share of state grants and the territorial budget. They also have control over economic development, investments, roads and airports, manpower training, promotion of local cultures, the teaching of vernacular languages, health and social policy, support to the communes for elementary education, youth, sport and leisure, cultural activities, land reform and land planning.<sup>37</sup> One can only hope that the Kanaks who control two of the three provinces (i.e. the Loyalty Islands and the Northern Province) will utilise the opportunity provided by the autonomy of the provinces to preserve, develop and enhance their cultural autonomy.

## VI. CONCLUSION

The legal protection of the autonomy of ethnic minority groups in multiracial states requires that the ethnic and cultural autonomy of the ethnic group be guaranteed. In applying this yardstick to the French practice towards the Kanaks in New Caledonia, by far, the strongest case for French compliance with the ethnicity principle rests upon the constitutional guarantee of the *statut civil particulier* of the Kanaks. To be meaningful, however, this achievement needs to be buttressed by the specific recognition of Kanak customary law as a separate and distinct source of law within the French legal system. The formal recognition of Kanak customary law without the creation of the necessary institutional infrastructure to support it falls short of the international legal requirements for the protection of ethnicity. Additionally, because of procedural and doctrinal ambiguity, the application of the *droit particulier* bristles with difficulties and inconsistencies which have resulted in adverse implications for Kanak customs, traditions, land and land-holding. Add to this the French attitude towards the protection of Kanak cultural autonomy, and the French attempts to protect Kanak autonomy is far from satisfactory.

If this situation is to be redressed, the Kanaks must seize the opportunity offered by the current political reorganisation under the Matignon Accord and adopt measures to recognise the autonomy of customary law as a separate and distinct source of law. Kanak cus-

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37. See Law No. 88-1028 of 9 November 1988, *Journal Officiel de la Nouvelle Calédonie*, 17 November 1988.

tomary law must be codified and a special court system must be established. To ensure the effectiveness of this system, particular attention must be paid to the development of clear and precise criteria for determining the jurisdiction of the customary court in order to avoid the problems caused by the overlapping jurisdiction between the civil and customary law. Finally, the Kanak provinces must employ their autonomous powers and financial resources within the new political structure to institute a radical land reform based upon customary law principles and establish the necessary institutional infrastructure through which the Kanaks can preserve and enhance their culture and language.