French Private Law in New Caledonia: 75 Years after Decolonisation

Eric Descheemaeker
Professor of Law, Melbourne Law School[*]

New Caledonia, an archipelago lying about 1,500km east of Brisbane in the South Pacific Ocean, holds a very distinctive place within the French legal order, of which it has been a part since 1853 and will, following three successive no's in a series of (non-binding) referendums on the question of independence, remain part of for the foreseeable future.[1]

For one thing, as a former colony – from 1853 to 1946 – and, since then, an overseas territory of the French Republic,[2] it has been caught in the complex and fascinating history of French colonial then post-colonial law,[3] to-ing and fro-ing between two models of colonial law that have been present since the beginning of the imperial adventure: a model that could be described as "symmetrical", whereby the law over the seas would reflect the law on the European side of those seas (generally known as "*identité législative*"); and an "asymmetrical" model, whereby the law of the overseas would be marked by the existence of its own specific laws ("*spécialité législative*"). Importantly, however, those distinctive rules would also have been decreed by the central organs of government in Paris – legislative or, in some cases, executive – or their representatives in those territories. This is a story shared by all French overseas territories, which all ceased (on paper at least) being colonies in 1946, when the Constitution of the Fourth Republic came into effect. This is true, if in markedly different ways, both of the four "historical" (former) colonies of Martinique, Guadeloupe, French Guiana and Réunion, and of the other territories – including the South Pacific territories of French Polynesia, New Caledonia and Wallis-and-Futuna.

For another thing, however, New Caledonia has also undergone a constitutional evolution which is unique within the French legal order (in fact, probably unique in the history of European constitutionalism), with implications not just for public law but also – the focus of this article – the private law applicable in the territory. Because, transparently, of the strife for independence which had threatened to bring the island into a civil war in the 1980s, the French parliament

---

[*] This paper builds on a lecture given at the Royal Academy for Overseas Sciences in Brussels on 7 February 2023. A debt of gratitude is owed to Prof. Wim Decock (Université catholique de Louvain) for his generous hospitality in Belgium and stimulating discussions over the years.

[1] Legal literature on New Caledonia in English is scarce. A point of entry, not restricted to law, is Caroline Gravelat (ed), *Understanding New Caledonia* (Noumea: PUNC, 2021), available at https://unc.nc/understanding-new-caledonia. For a summary of the historical and institutional context, see Eric Descheemaeker, "La Nouvelle-Calédonie après la sortie de l'Accord de Nouméa", 74 *Revue internationale de droit comparé* (2022) 177.

[2] "Overseas territory" is meant, throughout this article, in an untechnical sense of the term. New Caledonia was a "*territoire d'outre-mer*", a TOM (i.e. an overseas territory in a narrower and technical sense of the term, as opposed to other forms of constitutional statuses applicable to non-European parts of France) from 1946 to 1999; since 1999 it has been known as a "sui generis overseas collectivity".

[3] Now generally known as "*droit de l'outre-mer*", i.e. "overseas law"; but this is simply a new name put on an ancient and uninterrupted body of law tracing its roots to the 16th century.

decided in 1999 to operate a massive, indeed unprecedented, transfer of competences to New Caledonia in its capacity as an infra-national territorial collectivity of France. In short, virtually all powers outside of the traditional regal prerogatives were transferred from Paris to Noumea (the chief city on the main island), where a New Caledonian "government" and "congress" were set up at the same time. This includes most aspects of what would typically be regarded as coming within the purview of private law.[4] Given that regal competences, fuzzy-edged though they might be, are often regarded as the irreducible core of what a State or State-approximating entity must be invested with to merit the qualificative of "sovereign" in the international order, it is difficult to see how more powers could be handed over to New Caledonia without its becoming, at least de facto, independent. (Indeed, some have suggested that, already in the current arrangement, it could be regarded as an "associated State", much like Niue in respect of New Zealand or Micronesia of the United States of America.)

The ambition of this article, which examines the thoroughly understudied *private law* dimension of this devolutionary process, three quarters of a century after New Caledonia was (along with the rest of the French Empire) decolonised formally, is twofold. First, to sketch out this transfer of competences and its consequences on the applicable sources of private law today, looking both at its "European" (in the sense of non-indigenous)[5] and its indigenous dimensions. Because the independentist struggle has been, and remains, virtually indistinguishable from the roughly 40% of the population who identify as native (called "Kanaks" in French, virtually all of whom voted "yes" in the independence referendums even as very few non-natives did), the devolution of powers in the field of private law was accompanied by a large-scale – and again probably unparalleled within former European colonies with an autochthonous population – expansion of the scope of application of Kanak customary law[6] as a source of (private) law. Second, the article aims to provide a critical assessment of these reforms; in particular, to highlight how they have proved to be a misguided answer to what can justifiably be regarded as a legitimate pursuit: namely, greater recognition for the territorial and human diversity of France, against the background of a strongly Jacobinist – i.e. centralizing and uniformising – tendency harking back at least to the French Revolution. Because scholars with an interest in post-colonial law and/or indigenous (legal or non-legal) issues tend to be ideologically committed to decolonisation as independence, and to assuming that multiplying sources of law is in principle a good thing (a form of "legal pluralism"), these issues have typically been ignored in the literature. This is what this piece aims to remedy.

I. Background: The Constitutional Context

[4] Competences to be handed over to New Caledonia are listed in art. 22 of Organic Law No 99-209 of 19 March 1999 (note that the transfer was not immediate; the handover has been progressive and is by no means complete yet). Under art. 99, the congress of New Caledonia can pass a "*loi du pays*" (primary legislation that applies to New Caledonia only) in respect, among other matters, of "fundamental principles pertaining to the law of property, real rights, and civil and commercial obligations".

[5] Throughout this article "European", within inverted commas, is used to mean not indigenous to New Caledonia (in the sense of autochthonous).

[6] Typically referred to in French as "the custom" (*la coutume*), in the singular and without qualificative.

Some constitutional context must first be provided in order to understand the nature and significance of developments pertaining to private law.

The Noumea Accord and the Organic Law of 1999

As mentioned, a twofold and momentous development took place in 1998 concerning New Caledonia. Instead of organising the independence referendum that was set to happen under the earlier, 1988, agreements known as "Matignon-Oudinot", themselves the then French executive's attempt to bring to an end the profound civil unrest that had mired the island throughout the 1980s, it was agreed between the French government and representatives of independentist as well as loyalist parties, in the light of the return to civil peace, to postpone the consultation(s) on self-determination by 15 to 20 years and, instead, to operate a large-scale transfer of competences from Paris (i.e. the French Republic) to Noumea (i.e. the territorial collectivity, infra-national and non-sovereign, of New Caledonia). These transfers were agreed in principle in the (politically major but legally non-binding) Noumea Accord, which was turned into law through an Organic Law in 1999, and then entrenched constitutionally by inserting into the Constitution of the Fifth Republic a new Title XIII, entitled "transitory provisions applicable to New Caledonia". (Provisions pertaining to private law specifically are returned to in Part II below.)

These transfers were described in the Constitution itself as "irrevocable".[7] Naturally, this is a logical impossibility, for a parliament cannot bind its successors; and the very provision that declares them irrevocable could be repealed at any time following the requisite procedure. Nonetheless, along with the sheer magnitude of the transfers, and indeed the prospect of a referendary process on independence in the late 2010s (itself designed with a ratcheting mechanism, as well as a limited franchise, both of which institutionally favoured the "leave" over the "remain" vote), it is evidence enough that the only envisioned way out of the "transitional" period was independence. At that point, twenty years or so after the Noumea Accord, it would only have remained to transfer regal powers to a newly independent "Kanaky" (or, more likely, for it to enter into a compact of association with France, along the lines of Niue or Micronesia, to the effect that New Caledonia would – in the exercise of its sovereignty – have delegated the exercise of these competences to France. On that scenario, very little would have changed beyond the brute fact of the accession of New Caledonia to a sovereign status in the international order).

Devolution of powers and the thirst for independence

This large-scale devolution of powers was evidently meant to address, i.e. to quench, the thirst for independence on the island. The deal was to give New Caledonians self-rule in return for preserving French sovereignty (at least in the short- to medium-term, though it stands to reason that the hope might also have been to deflate independentism longer-term, by removing at least some of its causes). Quite apart from the intrinsic merits of self-rule for an overseas territory, the question whether it was a rational answer to independentism – indeed violent independentism – is much less self-evident than it appears. History suggests that people who truly want independence are unlikely to compromise for anything less than that; indeed it is entirely plausible to suspect that they primarily, indeed perhaps only, want the symbolic dimension of independence: to be one's own master, if only on paper (– have a seat at the United Nations, etc).

[7] Constitution of the Fifth Republic, art. 77 ("*de façon définitive*").

This is all the truer in a New Caledonian context where it is often said – and experience has borne this fact out time and again and again, to the point where it becomes difficult to deny its truth – that what "independentists" want is independence *without the consequences of independence*, in the sense that they are neither able nor willing to run the country on a day-to-day basis. This is true not just of the traditional regal prerogatives – no one has ever suggested that there would, or could or should, be a New Caledonian diplomatic network, a New Caledonian defence force, a New Caledonian judiciary, etc; but indeed beyond. Who in New Caledonia wants, for instance, to assume the responsibility for training New Caledonian doctors, nurses, teachers, or even believes it to be a possibility? For those who support it, independence seems to be a question of principle. This is naturally their prerogative; but it should be borne in mind that questions of principle are likely to be amenable only to answers that are equally "of principle".

The indigenous dimension

Now, because all of this happened in response to an independentist movement, and the independentist movement has been from the very beginning, and continues to be, a *Kanak* movement (it is estimated that over 95% of Kanaks vote for independence, yet over 95% of – eligible – non-Kanaks, both European and non-European, vote to remain part of France),[8] the process of devolution was accompanied by a greatly expanded role for their customary law. "Recognising" customary law, as indeed the role of *la coutume* in most every aspect of New Caledonian social life, was observably a key aspect of post-1998 developments, even though it remains an open question whether this was ever meant to be more than tokenism – a *signal* addressed to a population that it would henceforth be treated with enhanced consideration, without much thought given to the question of how, if at all, these words were meant to be translated (a question that courts are one of the few institutions ever to be forced to answer in a way that goes beyond generalities).

The recognition of – Kanak – customary law in New Caledonia is a complex matter that defies summarising in a few paragraphs but, to simplify, and before returning in the next part to substantive points of private law, the following points can be noted from the perspective of the French legal order:[9]

• The existence of a "customary status", heir to the colonial distinction between citizens (typically of European origin, though citizenship could be granted to some natives and others on an ad hoc basis) and subjects – "*indigènes*" – was retained in a few overseas territories after the abolition, in 1946, of the Empire and the distinction between citizens and non-citizens among the permanent (non-foreign) population of these territories: namely, in New Caledonia, Mayotte and Wallis-and-Futuna.[10]

---

[8] On the ethnic makeup of the "yes" and "no" vote, see Pierre-Christophe Pantz, "La géographie électorale en Nouvelle-Calédonie, l'impasse référendaire ?" available at https://larje.unc.nc/fr/la-geographie-electorale-en-nouvelle-caledonie-limpasse-referendaire (last accessed 30 July 2023).

[9] Of course, people who believe that a customary law, especially of an indigenous type, can and should operate alongside a national legal order, neither being more authoritative than the other, will consider that this is only one perspective among others (in particular, customary law might have a different self-understanding). "Legal pluralism", in that sense, represents a situation where various legal claims co-exist without there being an external and higher authority to adjudicate between them. It renders any idea of a legal *system* (by nature unitary) impossible.

[10] See e.g. Valérie Parisot, « Le pluralisme juridique au sein de la République française. Invitation au voyage dans les outre-mer », in *Weitsicht in Versicherung und Wirtschaft. Gedächtnisschrift für Ulrich Hübner* (Heidelberg: C.

• Those French citizens (comprising, after the Lamine-Guèye Law of 1946, the entire population) who were of customary status were, in New Caledonia, a subset of indigenous people. It does not appear that anyone who was not ethnically a Kanak has ever been "of customary status".[11] On the other hand, many indigenous people were not subjected to this customary status: either because the law forced them out of it (for instance if they were born of one "customary" and one "common law" parent); or because they had opted out of it. Such renunciation was held irreversible; we also know that, as a matter of judicial practice, it was very commonly pressured onto people, if not effectively imposed on them (for instance by "European" judges eager not to engage with customary law).

• In New Caledonia as in the other territories, the traditional position (which still applies, at least in theory, in Mayotte and Wallis-and-Futuna) is that persons "of customary status" were subjected, to a real but limited degree, to their own customs. What this included is not a straightforward question, in particular in situations involving not just that person but others as well (who may or may not have been subjected to the same personal law); but essentially matters pertaining to civil status (*état civil*), family law, matrimonial regimes, inheritance, etc.[12] Everything else was regulated by French national law, referred to in that context as the "common law" (*droit commun*).[13]

• What uniquely happened in New Caledonia after 1998 was the – considerable – expansion of Kanak customary law beyond the above fields, concerned for the most part with (aspects of) the law of persons. Though it stopped short of seeping into public law (in particular the very controversial field of criminal law), it took the step – seemingly unparalleled in Western countries with a relevant colonial history –[14] of making customary law the default legal system applicable to customary-status persons in all "matters of civil law".[15]

F. Müller, 2012), 733, 746ff. Notably, this does not dovetail with territories where there exists a recognizably indigenous population (like in French Polynesia or Guyana; conversely it is difficult to describe the customary-status population of Mayotte as being "indigenous" to the island, given the history of migrations to and from that territory).

[11] However, New Caledonia residents of Wallisian-and-Futunan origin could, in some cases, be ruled by their own (Wallisian-and-Futunan) customary status, distinct from that of New Caledonia.

[12] Its being in the very nature of a personal status to travel with its holder, the New Caledonian customary status is, in principle, recognised everywhere at least within the territory of the French Republic. This means that e.g. a divorce between two persons of customary status should be pronounced using Kanak custom in Brest just as much as in Noumea. The difficulties, both theoretical and practical, raised by this transportability are enormous. In practice, they have been sidestepped on a case-by-case basis in those few situations where Kanak custom was potentially applicable outside of New Caledonia (in one instance, for example, a divorce between a member of the French navy and his wife, both "of [New Caledonian] customary status" but residing near the naval base of Brest in Brittany, was remitted to a court in Noumea for adjudication, albeit without any legal basis for the *renvoi*).

[13] On this generally, see Nicolas Balat, *Essai sur le droit commun* (Paris: LGDJ, 2016).

[14] This can be contrasted with, for instance, Australia – by far New Caledonia's most significant neighbouring country – where, despite indigenous law having become a matter of almost constant attention over the last three decades, and considerable developments having occurred in terms of the recognition of indigenous ownership or quasi-ownership of land, on the basis of factual relationships that pre-existed British colonisation between individuals or peoples and some lands (so-called "native title"), there has never been any suggestion that there existed, for instance, or should exist, an indigenous law of contract or indigenous law of torts.

[15] Organic Law of 1999, art. 7. On the meaning and scope of civil law, see Etienne Cornut, "la juridicité de la coutume kanak", 60 *Droit et cultures* (2010), 151, [17]ff. Note that "persons" can now include legal persons as well.

II. Private Law in New Caledonia: Sources and Content

Three sources of private law

As foreshadowed above, there now are three sources of private law in New Caledonia, which from the perspective of the French legal order all stand level, subject only to French constitutional law and European human rights protection (both of which apply in New Caledonia). First, national French law, enacted by the French parliament in Paris, which is mostly uniform, although it has always contained provisions which were specific to some or all overseas territories). Second, New Caledonian (non-indigenous) law, in the sense of New Caledonia-specific developments pertaining to matters progressively devolved after 1998, which as mentioned include the quasi-totality of private law (in particular "civil and commercial obligations"). Third, Kanak customary law, which is technically applicable *ratione personæ* rather than *ratione loci* and, as explained, governs certain matters – those pertaining to "civil law", a subset of devolved matters – that implicate relevant persons (a subset of the Kanak population provided, in practice, that they reside in New Caledonia).

This is very, indeed uniquely, complex; yet it falls short of being a form of legal pluralism, if at least is understood by "pluralism" the fact that there would exist different sets of norms competing over the same legal matter, with no established meta-rule to determine unequivocally which applies when. Here, the division of labour is, at least on paper, clear enough; in other words, each set of norms is given a particular field of application. Starting with the end, the third set of rules applies to those matters set out above, unless parties renounce its application in a given case (or perhaps, though this is disputed, it is silent on a given matter).[16] Unless it does, then "French-New Caledonian" law, comprised of the first two sets, applies. In turn, the relationship between the two is in theory clear: in devolved matters, all national law *that was applicable to New Caledonia* at the time of the handover of competences from Paris to Noumea continues to apply,[17] unless and until it is overruled by territorial legislation on the same subject-matter; on the other hand, no national law postdating it applies.[18] National French law continues to apply to non-devolved matters, which includes some limited areas of private law.

It is important to place the above points in their broader context to understand what is, and is not, unique to New Caledonia. The unparalleled reach of customary law was already mentioned, remembering however that the recognition of specific rules applying to persons "of customary status" is not new. As to non-indigenous law ("European", perhaps better described as "French-New Caledonian"), it is important to note that the possibility of its diverging between metropolitan France and overseas territories is not in any way novel. Indeed it is virtually as old as the colonial enterprise itself.

Symmetry and asymmetry in colonial and post-colonial law

---

[16] Cornut, *op. cit.* (n. 15), [28]-[32].

[17] See immediately below ("No separate systems of private law").

[18] Note that the cut-off point is a complex issue. For instance, despite civil law (including the law of persons) being one of the devolved matters under the Organic Law of 1999, the important law of 2013 legalising same-sex marriage in France has in fact been applying to New Caledonia: this is because it was promulgated a few weeks before the French parliament lost its law-making powers in respect of New Caledonia in these matters (1 July 2013) *and* the law was explicitly extended to the territory (Law No 2013-404 of 17 May 2013, art. 22).

To cut a long and complex story short, it can be said that the principle that law, including private law, which applies in overseas territories – originally colonies – need not have been the same as in metropolitan France has been the default position since at least the mid-18th century.[19] (In one sense, it could not have been otherwise before the revolutionary and Napoleonic era anyway, given that there was no unified French private law to start with. However, the view that the law applicable would be that which applied in Paris had gained early traction.)[20] The principle, known as "legislative speciality", survived the unification of French law hence the advent of a (quasi-) "national law".[21] It was reasonably easy to understand back when colonies were definitionally distinct from the country they were colonised by – New Caledonia, like the others, was a colony *of* France, but it was not France (in, say, 1900, Noumea was under French sovereignty; it was in the French Empire; but unambiguously it was not *in France*).

It is more interesting, indeed surprising (one might even want to say wrong, at least over against French law's self-understanding), to note that it also survived the end of the Empire. In 1946, all overseas territories became part of France – Noumea now was *in* France – yet only the four historical colonies of Martinique, Guadeloupe, French Guiana and Réunion were departmentalised. New Caledonia, along with other territories, remained in a form of limbo: so-called "overseas territories", which were (on paper) fully French yet not part of any *département*. It is hard not to think of, or indeed use, the word "colony" when one tries to analyse their status. Today New Caledonia is French, it is *in France*, but (save for very limited exceptions) national French law does not apply as a matter of course. Like all territories governed by the principle of "legislative speciality", it can however – though this is now heavily qualified by post-1998 developments –[22] be made to apply through a formal extension by the central parliament or government (acting alongside the local executive).[23]

No separate systems of private law

What makes the potential discrepancy, indeed chiasm, much less noticeable in practice is that most national legislation has in fact been extended to those territories (sometimes with – typically small – variations, some of which were indispensable because, for instance, territories like French Polynesia or New Caledonia have a different currency); first among these is, of course, the Civil Code.[24]

---

[19] Parisot, *op. cit.* (n. 10), 735.

[20] Ibid. See also Eric Wenzel, "Quel(s) droit(s) pour les colonies au temps du premier empire colonial ?", [2022] *Revue historique de droit français et étranger*, 209, which draws attention to the discrepancy between theory and practice in terms of the applicable sources of law.

[21] It is interesting to note, however, that *even within metropolitan France* there do exist local specificities, e.g. rules governing undivided estates in Corsica. However these remain, on any definition of the term, exceptional.

[22] See below ("The emergence of a 'French-New Caledonian' private law")

[23] With the opposite principle of "legislative identity" gradually gaining ground, even to some non-departmentalised overseas territories (now known as "collectivities"), this effectively means today the three South Pacific territories of New Caledonia, French Polynesia and Wallis and Futuna.

[24] There are manifold low-level difficulties. Parisot, *op. cit.* (n. 10), 738-40, mentions the fascinating example of art. 1152 Civil Code, where a second paragraph was inserted by statutory reforms in 1975 and 1985. Because these laws were not – for some reason, probably a mere oversight – extended to New Caledonia, a different version of art. 1152 applies there. This raises enormously difficult, yet completely ignored, issues of statutory interpretation, the precedential value of case law, etc.

The details would be not just painstaking, but indeed extremely difficult to list: as anyone familiar with the field comes to know very quickly, there exists a befuddling level of uncertainty about precisely *what norms* make up the normative corpus of these territories (a situation only made tenable due to their small size, which deflates most of the practical issues that might ensue). Still, the basic point is both simple enough and well-established: at least if we leave aside the post-1998 developments in New Caledonia,[25] the private law of those overseas territories, including New Caledonia, consisted in that of metropolitan France *as tweaked* in a limitative number of ways – sometimes through the addition of other norms; more commonly through the non-applicability of some metropolitan rules over (certain) seas. It also included some norms (as determined centrally) which applied solely to some or all overseas territories: again, these were numerous but almost invariably highly specific or technical; they did not deal with general principles of substantive law.[26] In that sense, for the most part, the asymmetrical character of the private law of these territories could be described as a series – if potentially a very long one – of *footnotes* added to the "national" law. As long as the list of footnotes does not threaten the "core" of the law, it is not difficult to understand how *differences within a legal system* are unlike *different legal systems*.

On that reading there never was an opportunity, nor indeed a need or a desire, to develop in these territories "over the seas" a private law that would have been distinct or separate, in a meaningful sense of the term, from that of metropolitan France, i.e. a different "system" of private law. For all intents and purposes, there is – or at least there was – a single "common law" for France *in metropolitan France and overseas*. There were naturally tweaks to it overseas, as indeed some could be found even in Europe – though of course many more in the non-departmentalised parts of the overseas (as one would expect). But this fell very much short of anything positively different, something that could be regarded as a different legal system and compared, in the traditional sense of comparative law, with that of "*la métropole*".

The emergence of a "French-New Caledonian" private law

The interesting question is whether this has now changed, or is now changing. Here the answer is likely to be yes but, importantly, not for the reasons one might think – or might have anticipated.

For the first time, it seems, in the history of French law, something like a distinct *system* of law (private and indeed public) has emerged within itself, where "distinct system" means something that is qualitatively different from the "common law of the land": not just a list of local twists, typically very small – the "footnotes" approach –; but something that can be regarded as having a self-standing existence and separate internal coherence – hence a "system".

It is not clear whether the devolution of powers to New Caledonia was ever intended to give birth, in time, to such an autonomous set of norms. In any event, what was anticipated was transparently that there would be new, distinctively New Caledonian, rules added to the national substrate, which, within their scope of application, would dislodge the national law.[27] However, whether this was ever meant to produce a separate New Caledonian system, indeed at what point

[25] And also the indigenous law dimension (in those territories where there is one).

[26] Again, this will not be true when it comes to the law applicable to non-citizens, before 1946: cf. for instance the Code noir – or rather Codes noirs, for there always were different versions of it that applied in different territories.

[27] The underlying logic (or assumption) here being, of course, that rules enacted in Noumea rather than Paris would be better suited to the socio-cultural specificity of the island. Whether this is true is, however, far from clear.

the accumulating differences would tip into something that could meaningfully be described as a distinct (if only autonomously so, i.e. not independent) legal system, was probably never given thought to.[28] What has in fact happened is, in any event, something that one can be virtually certain was never anticipated, predictable though it was: namely, that such divergence did in fact occur – or at least has begun to occur – but in a purely negative way; i.e. not because *New Caledonian* law evolved, but because *national law* did.

As explained, following the above constitutional developments, the French parliament has abdicated its own power to legislate in respect of most private law matters in New Caledonia. Because of this, not only do its laws not apply there as a matter of course; contrary to other territories ruled by the principle of "legislative speciality", *they could no longer be made to apply* through a formal process of extension. As a result, none of the changes to national law since the transfer of legislative powers over private law have been applicable in New Caledonia. This includes matters of far-reaching significance like insurance law and also, of course, the successive reforms of the Civil Code that were set in motion by the bicentenary of the Code in 2004 – paramount among which is the wholesale reform of contract law that came into effect in 2016. Here, the only option for "French-New Caledonian" law to remain in step with national law would have been for the congress of New Caledonia to vote territorial laws cutting and pasting the content of the various reforms that happened in Paris after the handover. This did not happen; in fact there is no trace of its having even been discussed on the island. What prevailed was simply indifference.

It might be too early to speak of a separate, autonomous, "system" of private law in New Caledonia (hence within French law). But this is clearly the general direction taken and, at the very least *some* areas of the law – contract being the most obvious example, but by no means the only one – can now be said to be meaningfully distinct. Again, though some changes did happen positively (e.g. labour law),[29] most took place in a purely negative way: thus, the "French-New Caledonian law of contracts", and indeed gradually ever-growing swathes of French-New Caledonian private law, simply are, or are going to be, old (national) French law.

Kanak private law

There remains to speak of the third source of private law, namely, Kanak indigenous law (which, as mentioned, being personal rather than territorial, could in principle apply beyond New Caledonia). Again, no more than very brief remarks can be made here:

• Customary law is a subset of the broader concept of Kanak "customs" (*la coutume*): it comprises those rules emanating from "the custom" (of the land, or the people of the land) which govern a legal matter where customary law applies. The law will be interpreted and applied, at first instance, by a single judge – in practice always a "European" judge – with the help of two "customary assessors".

• Although customary law is almost invariably referred to in the singular, there officially exist eight "customary areas" (*aires coutumières*) in New Caledonia. When a dispute involves

[28] It is of course always difficult to prove negatives. Suffice it to say, no trace can be found in the literature. It seems reasonable, in such circumstances, to assume that absence of evidence amounts to evidence of absence.

[29] A New Caledonian Labour Code (*code du travail*) has been in force since 2008 – if admittedly one that largely mirrors the national one (albeit with some significant omissions and differences).

litigants from different areas, assessors will come from these areas. Beyond this, virtually no thought appears to have been given to the implication that there might exist several versions of it.

• Customary law is unwritten; much like the English common law, it can only come to be known ex post facto and from the bottom up, once a sufficient number of cases have been decided from which principles can be extracted. Although perfectly easy to understand from a common law perspective, this is fundamentally at odds with French or civilian ways of thinking about the law.

• Little is known about the meta-rules of customary law or, to put it differently, the way it works (and understands itself to work). What, for instance, of precedential value? How does it evolve and develop, if indeed it does? One thing that seems clear is that, contrary to the Anglo-Commonwealth common law, it cannot be altered by a statute of the congress of New Caledonia. The only thing that stands above it, within its sphere of application, is constitutional norms; it is not otherwise subject to national French or French-New Caledonian law.

• On the other hand, it is well accepted that it operates subject to human rights protections. But how exactly these constraints apply and how they interrelate with customary law (e.g. are they worked into it; do they apply as external checks; what happens if customary law is found wanting?, etc) are all unresolved issues. One reason for this is, evidently, the paucity of case law.

Indeed the scarcity of case law (alongside the dearth of academic scholarship, from either an internal or external perspective) is perhaps the one most fundamental issue when it comes to analysing customary law. Little can be said about it with certainty; were it not for the ongoing efforts of a team of scholars who have set up a database of decisions, this "little" would in fact be close to nothing.[30] What we do know, however, is that in principle Kanak customary law applies to a very broad range of legal matters. This, as mentioned, includes what would be regarded in the Roman-French tradition as the law of persons, the traditional bastion of customary law;[31] but it also applies to the rest of civil law, including such things as obligations or property. Uniquely, it seems, within former European colonies with an indigenous population – hence, at least potentially, an "indigenous law" – there is for instance, in New Caledonia, a *Kanak law of contract* and a *Kanak law of torts* (which would, in principle, apply when both parties are of customary status).

For the reasons mentioned, little can be known positively about it; it is, as it were, (indefinitely?) "in the making". More will be said below about the issues that this raises. Suffice here to mention that it is very hard to accept that Kanak customary law makes up, even potentially, a fully-fledged separate body of rules. For one thing, of course, whatever is delegated to customary law by the national ("European") legal system is determined by the latter, which forces onto the former its own categories (for instance substantive *vs* procedural law, civil *vs* commercial law, contract and tort, etc). Thus, customary law is only allowed to fill whatever boxes are carved out for it from the outside, whether or not these cohere with Kanak custom's self-understanding. For another thing, given these external constraints and the sheer lack of pre-existing legal materials with which to fill these boxes, coupled with the exceedingly small reach of Kanak

[30] See below, text to nn. 40ff.

[31] Note however that national French law has never surrendered some key areas of civil law, including of the law of persons: for instance, matters pertaining to nationality. These are "reserved matters".

customary law (both geographically and demographically)[32] and, indeed, the constant coming into contact with the very European legal system on which its existence, scope, mode of operation etc, depend – and which dwarfs it in every respect – it is impossible to see how that indigenous legal system could, *in practice*, ever be more than a series of appendices ("footnotes") affixed, again, to national French or French-New Caledonian law. (Paradoxically, the ethnocultural distance between the two legal normativities – to the point where it is in fact not clear that the former thinks of itself in those terms, which themselves are "European" – makes this more rather than less likely. For, the more impossible a mission, the more we can be sure that it will not be accomplished.)

III. Some Sceptical Thoughts

The above developments have already hinted at the fact that this fragmentation of the sources of private law – for the most part a post-1998 development, even though, as was seen, there already existed before 1998 a level of divergence between French national law and French-New Caledonian law – was strongly problematic. This is what this part expands on, looking both at the "European" and the indigenous dimensions of this ever-growing fragmentation of private law.

False answer, real issue

The – strongly – critical nature of the comments which follow make it all the more necessary to begin by highlighting two things. First, the issue these developments have been seeking to address is a very real one. It does not take much to accept as a starting point, as a matter both of historical reality and something akin to human nature, that the history of modern nation-States, none perhaps more than France since the Revolution, has been marked by attempts to centralise law-making (and indeed other forms of norm-making) in a way that has been profoundly destructive of society. When it comes to non-legal matters, the question seems beyond dispute: the way successive French Republics have, for instance, eradicated local languages and cultures could easily be regarded as a crime against humanity. With legal norms, however, matters become more complicated and a more nuanced answer might be in order. It could, for instance, be argued that principles like *pacta sunt servanda* or liability for harm caused by fault are, in some way, universal; and that nothing is gained by artificially drawing lines (which is what law does) in a variety of slightly different places, when one would suffice and would, in turn, allow mutual communication and intelligibility between territories – for territorial rules – and human groups – for personal rules –, which would otherwise be impeded. Still, it is at least possible that legal diversity would, like linguistic or cultural diversity, be a desirable good under certain conditions or circumstances. Nothing that follows is meant to deny this.

Second, and relatedly, it matters to emphasise that these sceptical thoughts are modest in their ambition. The question of what the "right" law for New Caledonia would be (if indeed the question is meaningful to ask, and admits of an answer, in the first place) is a massively difficult one, lying at the crossroads of "historical" French law, legal theory, post-colonial studies, legal anthropology, South Pacific studies, etc. Venturing into these foundational issues would take us far beyond the scope of the present paper. The argument that is made here is a narrow one, but one

[32] To give an order of magnitude, the population of New Caledonia (around 270,000 people) is roughly that of the 15th *arrondissement* of Paris.

which should be secure precisely because it does not have to go into these issues, logically prior though they might be. It simply aims to argue that *the specific state of affairs* which has emerged in the wake of post-1998 developments is observably wrong-headed, in both its indigenous and non-indigenous ("European") dimensions, and accordingly should be denounced as such. This, it is argued, can be recognised as true even if we have different views of (or indeed do not know) the criteria of rightness. That makes it, in a sense, an easy argument; it is nonetheless important because it has not been made before. Additionally it should yield some insights, *en creux*, as to the question of what a "right-headed" state of affairs might look like.

The "European" dimension

When it comes to the "European" dimension, what was highlighted above is the fact that the bulk of the divergence that has occurred since 1998 has been negative rather than positive, in the sense that it was brought about by changes in the national law that were not replicated locally, rather than territorial changes drawing it apart from the national mainstream. This makes passing judgement on it much easier, because it does not require to assess the suitedness for New Caledonia of some rules *designed* for New Caledonia (which, in turn, would require a sophisticated framework to explain the basis for the judgement). For the most part, it simply highlights the consequences of having passively allowed one body of rules to split in two.

It is, as a matter of fact, very hard to see how one could even try to justify such negative divergences between national French and French-New Caledonian law – all the more so because, as mentioned, it has clearly arisen out of apathy, no thought being given to its appropriateness. The 2016 reform of contract law is a case in point, though the same reasoning would apply to other areas. The reform was a wholesale attempt to modernise the French law of contracts, codifying 200 years of case law (including some *jurisprudence contra legem*) but also deliberately altering rules which – rightly or wrongly – were deemed unsuitable two centuries after the Code's promulgation. Linked to this, it altered the conceptual framework used by the law, the most obvious example being the removal of the concept of "*cause*" from the toolbox of French law. Whether the reform was right (and, again, on what basis this should be adjudged) is an open question; but what seems impossible to justify is that it would uniquely not apply to New Caledonia, thereby drawing a wedge between national law and French-New Caledonian law along these pre-/post-2016 lines. Other forms of divergence, meant to reflect something about New Caledonia, *might* be justifiable; but not these. It is absurd to have the old law still applying in a – tiny – portion of the country, for no other reason than an unintended consequence of the French parliament's self-oblation in matters of private law. Whether *la cause* is considered a helpful concept of contract law can depend on many considerations; but not on whether one examines the question from Paris or from Noumea. This much seems self-evident; indeed it does not appear to have ever been suggested otherwise.

The magnitude of the problems, practical as well as theoretical, that the existence of an autonomous system of private law in New Caledonia gradually diverging from national law due to its having been frozen in time, have not been properly comprehended yet. It gives rise to large-scale issues of internal conflicts of law, which do not even have accepted resolution mechanisms.[33] It also creates, of course, massive issues of access to the law, which can only get worse as time goes by (the only solution would be for action to be taken from the inside, most likely to realign

[33] Valérie Parisot, *Les conflits internes de lois* (Paris: IRJS, 2013), 2 vol, passim.

French-New Caledonian law on national law; but this seems very unlikely to happen due both to the unwelcome symbolism and the minuscule size of New Caledonia as a jurisdiction).

The one area which appears to have drawn some attention, academic and general (likely due to its impact on ordinary lives), is insurance law. As Nadège Mayer, writing in 2011, highlighted, "no one knows the rules of insurance law that apply in New Caledonia" any longer;[34] indeed some risks are now unable to be insured against on the island.[35] But the problem is a general one and, again, can only get worse with time. To return to the example of contract law, most French lawyers (advocates, judges, etc) in activity in 2023 have been trained under the pre-2016 law. But, soon enough, will come a point where a Paris-trained judge will need to learn old rules of law (and, which might be even more difficult, to *unlearn* some – but only some – articles, cases etc; in other words, to switch off part of his mind) if he is appointed in Noumea; and ditto for a university lecturer (virtually all of whom were trained elsewhere than the Université de Nouvelle-Calédonie). But who will teach them, and with what resources (textbooks, etc)? Also, if students learn the pre-2016 law in Noumea, but the new law in metropolitan France, what implications does this have, concretely, in terms of their ability to work as lawyers in their own country? This, without even mentioning that it is being assumed a clear line can be drawn between those bits of the law where French-New Caledonian law has remained the same as national French law and those where it has not. But if law, like language, is a system where every constituent part can only be understood in relation to the others, this is in fact impossible. What, for instance, should be made of a ruling of the Court of cassation on appeal from a metropolitan appellate court in respect of an article, the wording of which is the same in New Caledonia; yet the highest court's ruling makes reference to, or is otherwise informed by, legal norms which are not applicable there? The can of worms that has been opened cannot be closed again; and divergence has clearly come at a considerable price here. If there was an alleged benefit to be weighed against it, the question would be whether it was worth paying. Given that there does not appear to be any, the situation is simply indefensible.

As mentioned, the question is admittedly more difficult when it comes to *positive* divergences. Whether it is a "good" thing that e.g. there should be a separate New Caledonian Labour Code – and, a logically prior question, what the criteria for judgement would be – would deserve fuller discussion. Suffice in the present context to point out that there is in fact very little that is specifically *New Caledonian* in the 2008 Code du travail de Nouvelle-Calédonie. For the most part it was a compilation of pre-existing rules, many of which were being shared with metropolitan France, while others were already different due to the fact that there has long existed different rules of labour law for overseas territories.[36] Besides, the existence of a Labour Code *for New Caledonia* begs the question that New Caledonia is in fact the pertinent level of applicability for these rules (rather than, say, all South Pacific territories, all overseas territories, or all of France)? This is of course possible, but it would need to be demonstrated. Lurking behind the

---

[34] Nadège Meyer, "Rétrospective sur les transferts déjà réalisés, focus sur le droit du travail", in Sandrine Sana-Chaillé de Néré (ed.), *Le transfert à la Nouvelle-Calédonie de la compétence normative en droit civil et en droit commercial* (Noumea: LARJE, 2011), 19, 20 (available at https://larje.unc.nc/wp-content/uploads/sites/2/2011/01/Actes_Colloque_LARJE_2011.pdf).

[35] Ibid.

[36] This being the case, it is arguable that it is still an example of the "footnoting" approach mentioned above, if with the caveat that the background law was already multi-layered; and accordingly that it might also lack genuine autonomy vis-à-vis national law.

latter question is another, fundamental, one: *what sets New Caledonia apart?* Whatever the reasons invoked to justify divergence, it is very difficult to see how, if they are regarded as legitimate, they would not then justify separate rules for many other territories – not just overseas (though certainly those) but also within metropolitan France, which is also tremendously diverse in ethno-cultural (and other) terms.

The indigenous dimension

The above line of argument does not, however, appear to be applicable when it comes to the second dimension of the denationalisation of French law in New Caledonia. To the extent that Kanak customary law applies, it would seem (i) to be significantly different from "European" law; and (ii) to be justified by the very sort of territorially (or humanly) anchored considerations which, it was argued, make it at least possible that they should be welcomed in the name of the socio-cultural adequation between legal rules and the legal matters (and people) they govern. However, there exist – other – good reasons to reject these as well, at least in the guise under which they are currently being pressed into service.[37] Here too, several issues join forces to make this direct recognition highly problematic, *even if* one was willing to concede its prima facie desirability (a point on which no stance is taken here).

The first issue is knowability – on a practical, and perhaps even fundamental, level. Kanak customs are unwritten, as customs invariably are to start with, though attempts may be made, later, to put them into writing (no such effort, however, has been made in the case of New Caledonia). It is all but inevitable, therefore, that customary law would not speak with one voice. In one sense, this is officially reflected in the recognition of eight "customary areas" in New Caledonia; but it is very difficult to accept that the problem of indeterminacy would not extend much further than that. All these unwritten norms will be in a state of flux, as social norms quasi-invariably are; and while there is probably a high degree of agreement (as always) in "easy" cases, it is hard to believe that there would be for difficult ones. It is in the nature of "hard" cases – the ones litigated about – to have arguments for and against. Even in modern European legal systems, a high degree of uncertainty remains (as overrulings and split courts amply demonstrate); but at least these have developed sophisticated ways of narrowing down the scope of such uncertainty so that the oracles of courts will come to reflect what "the law" says, rather than the opinions of individual adjudicators. Customary law not having any of these in-built mechanisms, we can have no confidence in the fact that the answer in these non-easy cases will be anything but the subjective opinion(s) of the customary assessors, which might vary from one to the next. If this is true, the legitimacy of custom as a source of law finds itself seriously undermined, for the first requirement of the rule of law is that the law should be knowable and stable (at least until altered).

Nor, relatedly, can we have much confidence in the fact that it is a complete system of norms in the way a European legal system would think of itself, with established ways of moving from the known to the unknown so as to answer, potentially, any legal question (in a way that is, again, at least *aiming to be* more than the subjective opinion of a particular judge). But what does

[37] Typically the main argument raised against the recognition of customary law is the fact that, in many respects, it goes – as a non-Western normative system, which in the modern era it will most often be – against certain (Western) values regarded as universal: to take but the most obvious example, the principle of equality between men and women, which is alien to the customs of Kanak people. This argument is left aside here simply because it involves issues too far-reaching to be addressed within the confines of this article.

"the custom" have to say, for instance, about a traffic accident between two Kanak parties? Who is liable; is the insurance contract even applicable, etc? No one seems to know the answer even to such elementary questions of daily relevance. In practice, in order to bypass difficulties both theoretical and practical, customary assessors will advise the (invariably "European") judge that customary law has not meant to dislodge the "common law" in this matter, hence the same Law of 5 July 1985 can apply as in metropolitan France.[38] Such practices, however, expose the magnitude of the difficulties, probably insurmountable, facing customary law if it were to take seriously (and the national legal order were to take seriously) its role as an *alternative legal system* in New Caledonia, tasked with providing a reasoned answer to any question of law coming within its purview.

This links to the third issue, that does not appear to have been raised before: namely, the extent to which customary law, at the point where it comes into contact with the legal system which has given it a role to play, truly is different from "European" (national French or French-New Caledonian) law – remembering, of course, that the less difference between the two there is, the less of a point there would be in recognising the latter as a distinct source of law (especially considering the difficulties, hence costs, considered above).

Let us take as a case in point tort law. On paper, as mentioned, there exists a Kanak – customary – law of torts, applicable to certain disputes (determined by the European legal order, which also sets the confines of such "tort law", a category which may or may not have any coherence, or even existence, from the internal perspective of Kanak custom). What it is, as explained, can only be reconstructed ex post facto based on court decisions. A team of academics led by Professors Cornut and Deumier has very helpfully set up a database of such decisions; and led a multi-year research project that led to the publication of a book analysing the existing case law (as of 2018).[39] The first thing to note, in this respect, is how scarce decisions can be: there was, for instance, a total of *one* reported judgment pertaining to contract.[40] This suggests that either parties of customary status prefer to opt-in for "European" law, or that they would not go to "European" courts to settle disputes regulated by customary law, both alternatives suggesting that there is in fact, interestingly, very little appetite on the part of Kanaks for the current (and itself "European") approach to the recognition and enforceability of their customary law.

However, perhaps the most striking aspect of the study, to this writer, was how *banal* the overall results appear to be. Professor Cornut's study examines the case law – 70 reported decisions – in respect of "civil interests" (*intérêts civils*), which seem to be no more than a different label for tort law ("extracontractual liability" in French terminology). In a very common-law fashion, it seeks to reconstruct principles from the bottom up. The 50-odd-page report, which is at present the only existing literature on the question (that would be available, for instance, to a judge wanting to understand the rules and principles he is meant to give effect to), makes for fascinating but, in a sense, also profoundly disappointing reading. It seems that Kanak tort law can be summarised as follows: liability is based on fault, which is understood very broadly, including

---

[38] I am grateful to judges of the Court of Appeal of Noumea for discussions on the practicalities of adjudication in cases involving customary law. There is virtually no published scholarship on this question despite its great significance, both theoretical and practical.

[39] Etienne Cornut and Pascale Deumier (eds), *La coutume kanak dans le pluralisme juridique calédonien* (Noumea: PUNC, 2018), introduction (for the project) and chapter I.4 (for tort law). The database is maintained at https://coutumier.unc.nc, though only accessible to registered users.

[40] Cornut and Deumier, *op. cit.* (n. 40), 24.

intentional fault, non-intentional fault, fault by omission, etc; it also requires the violation of a protected interest, whether the plaintiff's own or a collective interest; and pecuniary as well as non-pecuniary loss is compensatable.[41] From a European perspective, however, this would seem to be no more than the fundamental principles of tort law stripped to their barest core – a five-line summary of an entire treatise of, say, French or English law. The only difference is that these principles come with myriad upon myriad of question marks which, contrary to Kanak customary law, French or English law have strived to answer for hundreds of years. Apart from developments pertaining to "customary acts of forgiveness" (*pardons coutumiers*), which from a European perspective would be regarded as going to restorative justice or simply as being extra-legal, the reader is left wondering how national French law would not have reached the same results on the fact patterns reported by the author.

This observation raises a threefold hypothesis: either (i) Kanak tort law follows a roughly similar outline to French or English (or German, Chinese, etc, law) because it follows a more or less universal template of interpersonal accountability for wrongful and/or harmful conduct; or (ii) Kanak tort law follows a roughly similar outline to French tort law because it has, unwittingly, been so strongly influenced by French law as to lose its specificity (those responsible for its production and transmission having been schooled by the French and educated into a French worldview for 170 years); or (iii) the report betrays a European observer's straightjacketing of customary law into his own familiar categories, thereby (also unwittingly) misrepresenting, to an extent, its distinctive normativity and the way it understands itself. What is interesting is that, *on any of these hypotheses*, the pointfulness of the enterprise that has been ongoing for 25 years can be brought into serious question. For, if customary law simply replicates, consciously or not, "European" law (and/or some sort of natural law), if possibly with a few tweaks, then it is in effect pointless (other than symbolically); and it becomes exceedingly difficult to justify the expenses of time and intelligence its recognition involves, doubtless over many generations. On the other hand, if the problem is that Kanak customary law is, as it were, "lost in translation", then we are faced with the fact that, if even the best educated and most benevolent "European" observers fail to understand customary law properly, the enterprise would seem to be doomed. There is no prospect in the even remotely foreseeable future of there coming through the ranks a sufficient number of people schooled in both the autochthonous worldview and European legal orders, who would be able to translate one into the words of the other without betraying it.

Getting out of the impasse

This leads to two (related) final remarks, one taking the above criticism one step further; yet the other possibly offering a way out of the impasse.

The first remark is that the recognition of customary law as a source of law within (here) the French national legal order would seem to misunderstand, in a profound sense, its nature. Like family traditions (which can be very elaborate and are indeed enforceable *in a sense*, but not the sense of the law), customs are, by their very nature, non-judicial. Wanting to have them enforced *in court*, following a code of procedure, etc, is, on that reading, a contradiction in terms. Worse, it represents an instance of the very thing it was originally meant to atone for, namely, a form of Eurocentrism imposing its own framework of rules, concepts and values onto natives. Truly recognising customary law would then mean recognising that it was never meant for "European"

[41] Cornut and Deumier, *op. cit.* (n. 40), 163ff.

tribunals; indeed, that *it is not law* in the "European" lawyer's sense of the term. This, by necessity, would terminate the enterprise of its legal enforcement – in one sense at least.

The second remark is that, *in another sense*, it would not. In fact, there might exist a straightforward way of reconciling the two. In itself, the idea that people might be wanting, and should be allowed – perhaps within some externally-imposed limits – to settle their disputes according to another set of norms (and possibly values) than the positive law of a sovereign State is perfectly trite. It underpins the entire body of law known as "alternative dispute resolution", a form of dispute settlement that has been markedly on the rise across the Western world over the last few decades. On that approach, customary law could simply be slotted into that existing framework as an additional method for parties to settle their own disputes *apart from the courts*.[42] True, this raises questions of its own: in particular as to the scope of the disputes (could they, for instance, venture beyond the fields or the persons currently covered by the legal recognition of Kanak customary law?); the element of voluntariness (should anyone prima facie concerned be able to opt out?); and of course whether the national legal order should set any limits to the outcome of disputes, and any remedies awarded, whether ex ante or through some appellate system involving the machinery of justice. The latter point is especially important because, to the extent that customary law is indeed different from European law – and there is no doubting that there are many fields where it would be, especially when it comes to family law (broadly understood) – it will often go against values cherished, at least on paper, by Westerners: for instance, personal autonomy or equality before the law.

These questions cannot be addressed in depth within the confines of this article; the only point here is to highlight that recognising customary law need not involve turning it into a *direct* source of law enforceable in court, as opposed to treating it as a social fact which – like any social fact – could, *indirectly*, have legal consequences. Arguably, the more indirect the recognition, the more potent it could in fact be (because not artificially constrained by the limits of the judicial system).

Conclusion

75 years after it was formally decolonised, New Caledonia has become, from a legal standpoint, a uniquely complex place. While colonial, then post-colonial, law has always been more difficult to understand than the law of metropolitan France (adding some norms and retracting others, often without clarifying the relationship between the different layers of applicable law, in a context where uncertainty as to the very content of the law was worsened, not just by this inherent complexity, but also by the small size of the relevant territories, the discrepancy between official norms and social norms, and the existence in some cases of an indigenous population), New Caledonia has brought this complexity to a new level in matters of private law. The two uniquely New Caledonian developments have been, on the one hand, the growth of Kanak customary law into something that can properly begin to be regarded as a "system of law" (if an incomplete one) and, on the other hand, the self-oblation of the national French parliament, which is no longer able to legislate on most matters of private law. This too has led to the emergence, if as noted for the

[42] In practice this is certainly already the case (as suggested by the tiny number of disputes that reach "European" courts), with the added specification that it would be happening below the radar.

most part in a purely negative way, of a separate "system" of law. New Caledonia has thus tipped into a different form of legal asymmetry, not just once, but twice.

What this article has sought to argue is that this twofold evolution has been profoundly misguided, indeed destructively so, *even if one was willing to accept as a starting point* the legitimacy of ethnoculturally specific principles of private law. What we have witnessed in New Caledonia is not the emergence of a "New Caledonian" system of private law which could be assessed on its own merits; it is the dismembering of a formerly coherent structure of private law. To the extent that ("European") French-New Caledonian law has diverged from national French law, this has for the most part not even been based on an attempt to provide the territory with a better suited set of rules. To the extent, on the other hand, that there have been attempts to recognise the ethnocultural specificity of the islands, these have been both unrealistically overambitious and probably rooted in a Western misreading of the nature of indigenous customs.

Where this leaves us is, of course, a separate question altogether. Wrongheaded though the solution pursued so far has been, the underlying issue remains: that of the profound (and probably equally destructive) centralising and uniformising tropism of French law – private as well as public. However, to the extent that greater respect should be had for the territorial and human diversity of the country, two things should be noted. First, one needs to think much more carefully about how this would be done; it is for instance unlikely that having more than one law of contract or tort applicable within the country is part of the answer (indeed, perhaps most of the "answer" lies outside the purview of the law altogether). Second, there is no principled reason to restrict the enquiry to New Caledonia, which was only singled out for differential treatment because of the violence in the 1980s, or indeed to overseas France. It is a question that is also acutely relevant to all the provinces and indeed peoples who make up metropolitan France, and who are no less diverse.

In the immediate future, the least bad way forward would likely be, first, to return to the (pre-1998) status quo ante, i.e. "un-devolve" private-law-making powers; second, to return to the (European) national law as the common law, with requisite local specificities *determined externally* (some unique to New Caledonia; others shared with some, or indeed all, other overseas territories); and, third, to roll back the scope of customary law to its traditional sphere of application. In the longer term, serious thought will need to be given to the questions of principle raised by the existence of profoundly diverse territories and human groups within France. But these will need to be thought through in their generality, starting with first principles; rather than ad hoc answers being rushed through in the (vain) hope of solving political issues which have, fundamentally, nothing to do with private law.