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*French Colonisation
in New Caledonia :*

*A Prostitution of
the Legal Process for
Colonial Exploitation
of the Kanaks?*

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LLM Seminar

The Law of Indigenous Peoples

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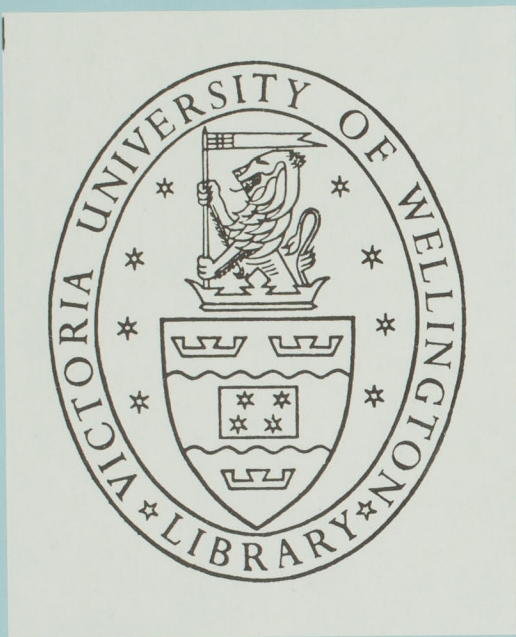
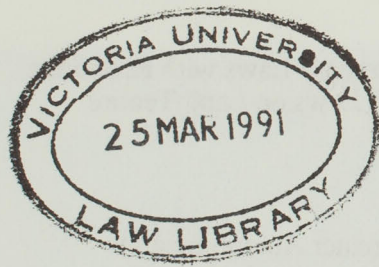


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Preface

Chapter 1

Much of the information contained in this piece on the Matignon Accords and other recent developments in New Caledonia was gathered during a recent trip to New Caledonia. I had the opportunity to interview the Procureur General (Attorney General) of New Caledonia, the current Director of ADRAF (Land and Rural Development Agency), a demographer at ORSTOM (Office of Scientific and Technical Research), a member of PALIKA's Governing Council and the Director of the University of the South Pacific.

Kanaks will be canvassed with the aim of resolving the manner in which France used the

There are many people to thank. I wish to express special thanks to Mr David Atkins, the New Zealand Consulate-General to New Caledonia without whose personal intervention it would not have been possible to meet such high ranking officials in New Caledonia on such short notice. Mr Atkins also deserves thanks for spending many hours discussing the situation in New Caledonia and accompanying me to a meeting with the Procureur General. I also wish to thank Dr. Peter Brown of the Modern Languages Department at Massey University and Mrs Dafilli of the French Embassy in Wellington for their assistance in translating many hours of taped interviews as well as articles written in French.

This paper exposes the devastating impact French colonialism has had on Kanak society and customary legal traditions. The reader is cautioned against ranking the record of French colonialism in New Caledonia with the experiences encountered elsewhere. Colonialism has bequeathed a legacy of problems in many areas of the world. Yet, as Lyons correctly points out, "play[ing] the game of comparing ... colonialisms, counting up the atrocities committed by each player would no doubt produce a high scoring game but one bound to end in a dishonourable draw".

My experiences in New Caledonia impressed upon me the complexity of the problems facing all of the ethnic groups in the territory. The Kanaks are struggling to achieve not only independence but also a balance between custom and economic development. The settler community is struggling to maintain their economic prosperity generated by French presence in the territory. And the French Government is struggling to reconcile the two polarised communities. In some respects, researching and writing on New Caledonia is not an uplifting experience. As Ward has aptly suggested: "It is a beautiful land, where racial divisions have been needlessly strengthened rather than assuaged, where two cultural traditions have been placed in opposition, rather than each valued for the contribution it can make to a new emergent Oceanian society".

the whole land of the territory. "Cronos", Information Bulletin of the French Embassy, No. 5 (1987), 1.

Chapter 1

Introduction

In 1853, New Caledonia was annexed by France.¹ Today, New Caledonia stands out as the last vestige of French colonialism in the world. This paper will examine the impact French colonisation has had on Kanak culture, legal institutions, social organisation and economic livelihood. The historical policies of the French government vis-a-vis the Kanaks will be canvassed with the aim of exploring the manner in which France used the legal process and political institutions it created in New Caledonia to in some instances erode Kanak cultural identity and customary legal traditions and thwart Kanak political influence and in other instances to pacify Kanak demands and accord some deference to Kanak customary law. The alternating pattern of Kanak reaction from acquiescence and accommodation to rejection and militant refusal to accede to the legal regimes established by the French government will also be discussed. Finally, the prospects for reconciling the interests of the settler population with Kanak demands for independence will be assessed.

¹ New Caledonia consists of a main island ("the Grande Terre") and a series of smaller islands which include the Loyalty Islands, Island of the Pines, and the Belep Islands. The Grande Terre is a narrow island 400 kilometres long by 50 kilometres wide with a total surface of 16,890 square miles. The West Coast of the Grande Terre in which the Europeans settled has 83% of the arable land of the territory. "Presence", Information Bulletin of the French Embassy, No.5 (1987), 1.

Chapter 2 Traditional Kanak Society

Native Melanesians ("Kanak") are believed to have been in New Caledonia as long as 4000 years ago.² Kanak means roughly man of the country, signifying the bond between the natives and their land and natural environment.³ The Kanaks were able to make productive agricultural use out of both fertile land located on the foothills and in the coastal areas and less fertile lands in the high terrain areas.⁴ The Kanaks subsisted principally on yams, taro and fishing. The cultivation of yams and taro was viewed as more than just a means of subsistence. This agricultural produce was symbolic culturally and influenced cultural practices and beliefs.⁵

Early Kanak society was based on an intricate system of hierarchy within each family and clan. In each clan, there was a hierarchy based on patrilineal descent. The clan, which reigned supreme in Kanak society, led a communal existence and property and food was

2 It has been estimated that the Kanaks arrived in New Caledonia by sea at least by 1000 BC. Waves of Polynesians are believed to have subsequently settled in the main island of New Caledonia ("le Grande Terre") and in what is known today as the Loyalty Islands ("Iles Loyaute") to the East of the main island. A. Clark "The Politics of Electoral Duality Experience and Election in New Caledonia" (1986), 7-8.

3 M. Lyons "The Totem and the Tricolor : A Short History of New Caledonia Since 1774" (1986), 16. The word Kanak did not actually come into use until the 1960's. In its original form, the word "Canaque" was used as a type of racial insult. D. Robie "Blood on their banner : Nationalist Struggles in the South Pacific"(1989), 82.

4 The Kanaks were able to irrigate dry slopes on the interior of the island by hauling in water from off the coast of the island. J. Guiart "One of the Last Colonies : New Caledonia", J.Int.Aff. (1982) 105, 106.

5 Lyons, Above, n.2, 15-16 explains :

"The yam ... was held sacred, for it grew in the ancestral soil, and its cultivation and harvesting were surrounded by various rituals designed to placate the spirits, and ensure a plentiful crop. The yam was invested with a predominantly male symbolism. It was held to give the male his virility, and to contain the ancestral spirit which enabled the male to continue the line of the tribe or family ... the taro, by contrast, was a female crop, grown not in dry ground but in water ... this series of dichotomies between yam/taro, male/female, dry/wet, was central in Kanak life and culture".

shared on a communal basis.⁶ The clan was comprised of a group of individuals who belonged to different families but recognised their descent from a common ancestor.⁷ The Grands chiefs of the clan, similar perhaps to Ancient Fijian Society, represented the spirit of their respective communities and were generally the eldest brother in the clan.⁸ In some respects, the chief had wide ranging powers :

"He had the power to declare war on another tribe, and he had the power to place taboos on people, food or plots of land. The chief also had judicial powers which might give him the power of life and death over his subjects".⁹

The chief's authority was, however, circumscribed by customary law and by the constraints placed on him by his other kin in the clan, most notably his brothers. As Douglas has stated :

6 Crops were generally presented to the chief by individual families to demonstrate their loyalty to him and the clan as well as to show that the land was cultivated in accordance with the wishes of the clan. The crops were then redistributed to the entire community.

7 Clark, Above, n.2, 8 states :

11 "The clan and its members were indissolubly linked not only to particular terrain, but also to particular features within that area - be they river, rock, animal or tree. The links were at once geographical, familial and metaphysical". As one Kanak has explained :

12 "Each stone bears a name each tree has a history that of our fathers and our father's fathers, lizard, rock, bamboo, caterpillar indicate to everyone their place and it is good to be together".

13 M. Dornoy "Politics in New Caledonia" (1984), 120. Thus, land was a basis for ascertaining and distinguishing social groups, "a central element in the Melanesian personality and world view. Rights to all land and resources were clearly defined and the territory of a clan symbolised its identity, its vitality and its lineal continuity as an organic whole comprising past, present and future generations". B. Douglas "Conflict and Alliance in a Colonial Context : Case Studies in New Caledonia, 1853-1870" Vol.15:1, J.Pac.Hist. (Jan.1980), 29.

8 Lyons, Above, n.3.

9 Above, n.2, 21.

"The sanctity of all New Caledonian chiefs and the deference to which they were entitled rested on their implied genealogical connections with deified ancestors and on their status as elder in relation to their dependents, but they were not autocrats".¹⁰

The chief guided the clan in consultation with a council of advisers made up of "such dignitaries as the chiefs of dependent clans ... masters of the soil, priests, experts and respected elders and group action was normally based on consensus"¹¹. The legal structure of the clan could be described in present terms as a political menage :

"the chief was part monarch, and part representative of an oligarchy of brothers".¹²

The Kanak clans varied in size from 200 members to 5000. There was not much commercial interaction between the clans due in part to the fact that the geographical terrain between many of the clans was hard to traverse.¹³ Over thirty distinct dialects existed on the main island. The chief basis of identification was the localised clan, the membership of which was defined by the ties of common ancestry and attachment to a specific territorial area.¹⁴ Due to the lack of widespread interaction between clans, there was no "consciousness of Kanak unity".¹⁵ Despite the lack of widespread interaction,

10 Douglas, Above, n.7, 27.

11 Ibid.

12 Above, n.2, 22.

13 Clans did however exchange women on occasion in what would be considered a marriage in Kanak society. Though the bride in a marriage lived with the husband's clan, the children of the marriage belonged to the mother's clan. To marry, the consent of the chief and all male relatives had to be secured. These marriages were sealed by the exchange of gifts (or pearl money) between clans. Lyons, Above, n.2, 19.

14 Douglas, Above, n.7, 25-6; Above, n.2, 8.

15 This has led some opposed to Kanak independence to allege that the idea of a single Kanak people is illusory because independence only existed within clans. It is true that prior to colonisation, the various Melanesian linguistic groups had no term to describe their common identity. Though Kanak identity became pronounced in the 1970's, Connell asserts that a Kanak unity emerged long before as a consequence of French colonial rule :

"Throughout the long century of French colonial control, the linguistically divided Melanesian groups of New Caledonia were fully aware of their common fate, namely French rule. They knew what they had in common,

there were some violent conflicts between clans over the central feature of Kanak life - land. It is not surprising that violent conflicts erupted over the issue of land encroachment given the psychological significance of the land to Kanak identity. As former Kanak leader Jean-Marie Tjibaou has stated :

New Caledonia was initially used by the French as a penal colony for political prisoners and other convicts. After cultivating coffee estates proved economically unviable, early settlers focused their

"A clan that has lost its land is a clan that has lost its personality."¹⁶

The nexus between the land and Kanak identity is an inseparable one :

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land in New Caledonia had a claim by at least 1 clan and if not subject to actual cultivation did form a part of their hunting and gathering zone.²² As Lyons points out :

"... Melanesian society remains written on the ground and mountains, streams and rocks bind the ancestors and living together into an inseparable whole. The link with the ancestors ensured that land was also perceived as being thoroughly involved with the blood of the dead. The sacred and secular relationship with the land is a continuous thread through Melanesian history..."¹⁷

The French ... had a very elastic notion of what constituted... vacant land. Unoccupied land might include taro fields, for instance, which were simply lying fallow for a few years. The Kanaks would not have regarded this land as unoccupied or abandoned...¹⁸

Only token attempts were made to compensate the previous Kanak occupants of the land. Yet, even these attempts failed to appreciate Melanesian concepts of land rights. Europeans understood that exchanging goods for property gave them a right to permanent ownership and possession of land. Offering goods in Melanesian society would not serve to alienate the land, the proprietary rights of which ultimately resided in the clan. Rather,

¹⁸ J. Hooper, "Tactics and Politics in French-occupied New Caledonia"

which included custom, tribal ties, consensus, and that these were radically different from the French culture of dominance..."

¹⁹ Ibid., Above, n.3, 85

²⁰ M. Spencer, et.al. "New Caledonia : Essays in Nationalism and Dependency" (1988), 231;

²¹ Above, n.2, 8-9.

¹⁶ Spencer, Above, n.15, 234

¹⁷ Ibid. Above, n.2, 51.

Chapter 3 French Colonisation

New Caledonia was initially used by the French as a penal colony for political prisoners and ordinary criminals.¹⁸ The colony was later populated by French settlers. After cultivating coffee estates proved economically unviable, early settlers focused their energies on cattle ranching. From 1859-1868, the French government encouraged settlers to raise cattle. By 1878, there were 80,000 cattle in New Caledonia.¹⁹ Because the early European settlers allowed their cattle to graze freely, many Kanak taro and yam harvests were destroyed as were sacred burial grounds.²⁰

Two years after French annexation of New Caledonia, the Governor of the colony proclaimed that Kanaks could only occupy land under cultivation. Vacant land was to remain the domaine of the state and be available for settlement.²¹ In reality, it was virtually impossible to differentiate between vacant and occupied land since essentially all land in New Caledonia had a claim by at least 1 clan and if not subject to actual cultivation did form a part of their hunting and gathering zone.²² As Lyons points out :

"The French ... had a very elastic notion of what constituted... vacant land. Unoccupied land might include taro fields, for instance, which were simply lying fallow for a few years. The Kanaks would not have regarded this land as unoccupied or abandoned..."²³

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18 J. Houbert "Settlers and Natives In Decolonisation", Rd.Tble. (1985) 217, 220. New Caledonia was annexed by the French in part to preempt a British takeover. The French government hoped the colony would be a place of commercial wealth while also serving as a penal colony. Robie, Above, n.3.

19 Robie, Above, n.3, 85

20 A. Ward "New Caledonia - The Immediate Prospects" (1983), 7.

21 A. Ward "Land and Politics in New Caledonia" (1982), 2.

22 Ibid.

23 Lyons, Above, n.2, 51.

it would be viewed as an offer for the transfer of short-term use rights as opposed to outright sale.²⁴

"Individuals ... possessed usufructuary rights to particular tracts, which could be transferred with the Chief's approval in return for regular offerings of produce."²⁵

From the outset of colonisation, French officials, missionaries and settlers failed to comprehend or tolerate Kanak customary laws concerning communal land rights, which such legal traditions could not easily be reconciled with French laws recognizing individual private property ownership and freehold land title. This lack of understanding or tolerance manifested itself as early as 1858 when the Catholic Priest, Father Poupinel, expressed frustration with the communism of Oceania which he viewed as a significant impediment to integration into European society :

"...The fundamental problem was that a society based on gift exchange could not easily grasp the notion of buying and selling. A tribal communalism could not be reconciled with modern capitalist concepts of private ownership. This was the origin of one very early misunderstanding. Soon after their arrival, the missionaries believed that they had bought a field of yams. Such a definitive property contract was not comprehensible to the natives who later insisted in taking back the fruits of the harvest. Yams, in any case, were sacred. They were the flesh of the ancestors. How could they therefore be sold in a western sense?

The consequence of these errors was that the French saw these natives as thieves or bandits...

It was therefore the missionaries who first introduced the Kanaks to the notion of individual private ownership. It was a painful introduction. The Kanaks always expected a division of the spoils. When the whites did not cooperate, they became enemies who would not observe the conventions of gift exchange. For the whites, on the other hand, the Kanaks were thieving barbarians, who refused to recognise that certain things did not belong to them : Father Poupinel saw it as his task to eradicate

24 Douglas, Above, n.4, 38.

25 Ibid.

'The Communism of Oceania ... this scourge of society, with its ugly and depressing consequences, [which] oppresses the tribes of these islands. Here one must share everything ... Communism must surely be one of the great obstacles standing in the way of the mission's attempts to improve the physical and moral condition of these tribes'...²⁶

The French failed to appreciate that land was inexorably tied to the very soul of Kanak existence and could not be alienated through sale :

"The complicated religious ties which bound man to earth could not be severed by the exchange of money and signature along the dotted line. There was a network of customary rites and relationships which tied the Melanesian community to the soil and its crops. There would inevitably be resistance, when French law told the Kanaks that their fallow, or their ancestral burial ground, was vacant land which the whites could resume".²⁷

As shown throughout this paper, the differences between the conflicting concepts of ownership has to the present day produced tension both between the Kanaks and the French administration and within the Kanak community. The Kanaks have continuously struggled amongst themselves in deciding whether to accede to the notion of private property ownership and receive the material benefits generated by such a land tenure system or instead to cling to collective sharing of property to preserve Kanak custom and cultural tradition.

In 1867, the French government legally recognized the tribe as the legal owner of occupied land. The tribe was an artificial unit imposed by the French government which bore no resemblance to traditional Kanak political and social structure :²⁸

"Tribe is an analytic rather than an indigenous concept ... and no synonym existed in New Caledonian languages. Moreover, its usage is confused because it has come officially to be applied to one in a hierarchy of modern administrative units. New Caledonians seem to have conceptualised political authority ... in terms of seniority and juniority between groups and their leaders and the resulting territorial patterns of control, influence

26 Lyons, Above, n.2, 32-3.

27 Ibid., 53-4.

28 Ibid., 51.

and deference ... the term maciri (Ajie language) implies among other things the territory inhabited by those recognizing the political authority of a powerful paramount chieftaincy. The concept of chiefdom is therefore central and the most appropriate way of looking at New Caledonian political organization is in terms of localized patterns of allegiance to particular chieftaincies. The groups so formed, which ranged from a large chiefdom incorporating a hierarchy or smaller chieftaincies and clans to a small autonomous chiefdom, were named and were recognized by their members and by outsiders as forming distinct political entities."²⁹

In 1868, France embarked on a publicly stated policy of forcibly confining Kanaks on reserves created by the French Government. Initially, only those villages viewed as having rebelled against colonial authority could have their land confiscated and be relocated. However, as the need for land increased, the French authorities acted at will and without pretext in moving Kanak villages, confiscating Kanak property for resale to settlers and forcing Kanaks to live within reserves.³⁰ From 1895-1903, New Caledonia's Governor Feillet appropriated 250,000 hectares of land to new settlers. This was twice the amount of land allocated for resettlement of Kanaks on reserves. As Saussol states :

"The Feillet colonisation, part of the actual pioneer colonisation of New Caledonia was the high point of colonial pressure on the island, compromising any possibility of integration of the marginalised and traumatised Melanesians and leaving a menacing cloud over the legality of the heritage that had been established in this fashion".³¹

Many tribes were taken away from their ancestral homes and placed on reserves located in dry and inaccessible areas. This had a devastating impact on the spiritual links which Kanaks had with their ancestral past :

"For Melanesian culture, the continuity of tribal and cultural life was endangered, as soon as the essential links with land were severed. In a sense, these land seizures deprived the Kanaks of their history, as well as their livelihood. They amounted to a denial of the colonised peoples experience with their ancestral past. The Kanaks became ... a people without history. They were pushed into the interior, and confined to the

29 Douglas, Above, n.4, 26.

30 Spencer, Above, n.15, 41.

31 Ibid., 46-7.

least fertile areas of the territory, while traditional agriculture suffered extensive damage. At the same time, their past and their spiritual security were destroyed..."³²

The reserves were not held freehold by the Kanaks. The Kanaks possessed merely a right of occupancy.³³ Viewed from another perspective, the Kanaks in reality possessed no rights. Rather, their liberty was curtailed since they were forced to live on the reserves.

The reserves were administered by French appointed tribal chiefs who acted ultimately under the supervision of the French police (gendarmes). The Governor of New Caledonia retained the authority to appoint and dismiss chiefs at will and reshape the makeup of tribes.³⁴ The administratively appointed tribal chiefs were empowered to sell occupied land to settlers. Giving tribal chiefs these powers underscored either a lack of understanding of Kanak methods of land allocation or more likely a disinterest in according deference to their customary legal traditions. As previously stated, Kanaks shared property on a collective basis and the chief never had authority to unilaterally dispose of clan land. Such decisions were ordinarily made on a collective basis with the master of the soil playing an instrumental role in this process.³⁵ Moreover, even when land was allocated, it was never completely alienated. Those Kanak chiefs who sought to promote the interests of their people were often removed and replaced with "more pliable leaders chosen by colonial authorities".³⁶

32 Lyons, Above n.2, 134.

33 The reserves were deemed to be concessions of the state, the geographical boundaries of which could be modified by French administrative action. An 1876 decree allowed the reserves to be altered by administrative action. An 1897 decree provided for a right of appropriation of reserved land as well as the right to move Kanaks onto reserved land. The French government justified its right to relocate Kanaks onto reserved land by claiming that the chief, as the proprietor of the reserve, had surrendered this authority to France. Above, n.20.

34 Lyons, Above, n.2, 92.

35 A master of the land or soil was the representative of a clan who asserted the rights of the earliest inhabitants of a particular area. He usually possessed authority through his control of the land and link with the spirits with which it was associated. The inseparable bond between the land and the master of the land was signified by the fact that the defeat of a clan in an interclan war would not dispossess the master of the land of control over his territory because of his links with the ancestral spirits associated with the land. Douglas, Above, n.4, 29.

36 Robie, Above, n.3, 86.

An oppressive code of native regulations (the indigenat) governed affairs in the reserves. To be able to leave the reserves, the Kanaks had to secure the permission of the police and a head tax was levied, a proportion of which was paid to the appointed chiefs.³⁷ This meant that the Kanaks had to work as cheap labour for the settlers to raise the money required to leave the reserves.³⁸ Under the indigenat, Kanaks were forbidden to enter public bars or carry traditional weapons in European areas and were subject to arrest for engaging in charlatanism, witchcraft, showing a lack of respect for the authorities, or walking around naked.³⁹ Though the affairs of Kanaks were regulated by the code of native regulations, France did offer protection to Kanak customary laws regarding marriage and succession to property unless the Kanaks chose to have the matter governed by French law.⁴⁰

The French appointed chiefs enforced customary laws on the reserves and were responsible for settling any disputes within a tribe among Melanesians. However, if a Kanak was dissatisfied with the chief's resolution of a tribal conflict, an appeal could be lodged with a French court. This meant in effect that French law enjoyed primacy over customary law. Moreover, if a Kanak was involved in a dispute with a European, either could choose to have the matter adjudicated by a French Court. Melanesians did not experience equal treatment in practice in the French judicial system during this time period.⁴¹ A 1909 incident involving the unprovoked assault of a Kanak by a white settler has been cited as one notable example of the miscarriage of French justice with respect to the Kanaks :

37 The receipt of a proportion of the head tax encouraged the artificial chiefs to perpetuate the oppression of Kanaks. Above, n.21, 5.

38 Above, n.20.

39 Robie, Above, n.2, 88.

40 The French "statut particulier" exempted Kanaks from military service and upheld aspects of customary law concerning marriage and succession. The non-Kanaks in New Caledonia were governed by the "droit commun" or French common law. To this day, under French law, Melanesians are governed by the statut particulier which is authorised by the French civil code. Kanaks are governed by the statut particulier unless they specifically opt to be governed by the French common law. Ward, Above n.20 cautions that the notion of a French common law is slightly deceiving since French law does not regard as authoritative all of the "medieval precedents and interpretations which English common law does". In addition, the existing French judicial system does not assume the same role concerning interpretation of statutes and regulations as it does in the English common law system.

41 Lyons, Above, n.3, 94.

"The Leconte affair of 1909 ... serves to illustrate the subordinate status of the Kanak in the judicial arena. Leon Leconte was a violent bully in his late twenties ... His violent attacks against Melanesians were protected by the fact that his father, a rich colonist, was a local notable...

On New Year's Eve, Chief Tieou of Paola, near Koné, was bringing in the capitation tax returns he had collected from his tribe. On the way he was hoping to find a popinee, Nina Paega, and entered Leconte's courtyard to see if she was there. She wasn't and he left. Leconte followed him, and attacked him on the road without reason. A little later, Leconte came after him again in his car, beat Tieou so savagely that he lost an eye, and threw him into the nearby river. This appalling brutality was not all, for Leconte also seized the money from the capitation tax, and this loss could have had dire consequences for Tieou and his whole tribe.

Eventually, the Assize Court awarded Tieou 3000 francs damages, but acquitted Leconte. It is clear that the jury and Tieou were under immense pressure to dismiss the charges. Leconte had presented Tieou with a document agreeing to withdraw all charges, offered him 30 francs to sign it, and then threatened him with prison if he refused. Such was white justice. Tieou was perhaps exceptional in resisting this intimidation, for presumably many others did not dare to defy prominent colonists..."⁴²

The establishment of reserves systematically assaulted the traditional complex system of Kanak land rights in which land was held by individual families and clans based on patrilineal descent :

"The clan of a patrilineal descent group ... developed intimate ... cultural ties with the territory of which it was, theoretically, the first cultivator. It occupied a hamlet or small village, the focal point of which was the big house situated on a mound or hillock and surmounted by a sculpture of a deified ancestor and a spire containing totemic emblems. This was the scene of collective group activity and decision-making. Because of the flux of population, migration and war, several clans may have moved in upon the same territory in which case there might be several great houses in a village. Clans, families within clans, and their male heads were ranked, the rank order being devoted by ritual offerings of yams. Ideally,

42 Ibid.

the senior male of the senior line of the founding clan would be the chief with diverse ritual responsibilities and prerogatives of leadership (rather than command). But chiefship in multi-clan settlements could be complex and reflect changing physical or political preponderance. Yet, in this complexity one important principle seems to have been recognised. The authority over land of the clan deemed original was normally respected, because of its relation with the spirits who dwelt on the land. The head of that segment, the master of the land retained important responsibilities as custodian of genealogical and Cadastral knowledge with authority to arbitrate difficult questions in the disposition of the land within the collective clan proprietorship. The political chiefs normally deferred to this and they traditionally did not control larger areas or own larger land rights than other members. Individuals personally held rights to their gardens and garden produce".⁴³

Under the system of reserves, the proprietary rights of individual families and clans and the authority of the master of the land was subordinated to the whims of the artificially created chiefs who were given formal authority to determine how land was to be allocated within the reserves.⁴⁴

Not only did the relocation of Kanaks onto reserves distort the traditional authority structure and system of land rights, but it also led to confusion and friction amongst Kanaks because clans which previously had no relation to each other (or to the land to which they were confined) were forced onto the same reserve. The tribal reserves were in reality no more than a legal fiction created by the French government to justify the process of land encroachment and dispossession. As Lyons states :

"The French administrators grouped different clans together in the same reserve with little discrimination, so that clans who were hereditary enemies might find themselves labelled as members of the same tribe. Such niceties were ignored in the interests of bureaucratic convenience, and speedy white land appropriation ... the tribal reserves gathered together an arbitrary grouping of uprooted people on strange territory. The

43 Above, n.21, 3. Significantly, the French government has recently acknowledged that the traditional social structure of Kanaks based on "spatial reference points all of which delimit the right of the human population over its lands and waters" was disrupted by the process of colonisation involving restriction to reserves and sale of land. Above, n.1, 23.

44 Above, n.21, 3-4.

French might use the reserved land as a kind of reward for clans who supported them, but they had no compunction about making resisters rub shoulders with collaborators in the same newly constituted tribe..."⁴⁵

Confusion and tension on the reserves also resulted because the Kanaks continued to take their orders from the traditional customary chiefs. Limited agricultural land resources on many of the reserves only served to further heighten tension.⁴⁶ By removing Kanaks from their most productive lands and providing them with inadequate space on which to make agriculturally productive use of land, their entire economic structure and survival was undermined.⁴⁷ It is therefore not surprising that from the late 1880's to early 1900's, the Kanak population decreased from 42,500 to 28,000.⁴⁸

As detestable as the French government's action may have been, it did have at least one positive aspect : the remarkable lack of contact between much of the settler population and the Kanaks enabled them to maintain at least some semblance of their cultural heritage.⁴⁹ That is not to say however that other factors did not have a pervasive impact on Kanak cultural traditions. Protestant and Catholic missionary establishments operating in New Caledonia since the 1840's did successfully infiltrate Kanak traditions by converting almost all Kanaks to these two religions. Both churches viewed their mission as one of civilising the cannibals and teaching them the virtues of Western ideas and Christian values, such as private property ownership and monogamous marriage.⁵⁰ Kohler details how the activities of the Catholic and Protestant churches safeguarded Kanaks from colonial abuse while at the same time promoting the process of colonisation :

"Although the Churches gave indisputable priority to their religious objectives and constantly defended certain essential rights of the native people against the abuse of the settlers and the administration (especially in land matters and compulsory work) they furthered the process of colonisation very effectively..."

45 Lyons, Above, n.3, 52.

46 Above, n.21, 3-4.

47 Dornoy, Above, n.7, 127.

48 Robie, Above, n.3, 89.

49 The French policy of segregating Kanaks from the rest of the settler population was a unique one in French colonial history. In other colonies, such as French Polynesia, an effort was made to assimilate the indigenous peoples into the settler community. Above, n.20, 7.

50 Robie, Above, n.3, 83.

More than any other institution, the Churches contributed to the establishment in the indigenous culture of the social and material structures of western civilisation, and to the inculcation in the natives of perceptions and values inherent in colonial domination..."⁵¹

Despite the activities of missionary establishments, the Kanaks did still retain many of their traditional beliefs and customs, including belief in sorcery. Other traditions, such as communal sharing of property, were eroded but not displaced.⁵²

Understandably, the Kanaks resented being dispossessed of their land - the very soul of Kanak history, identity and existence. Resisting encroachment onto their land and territorial expropriation of their land, the Kanaks launched a series of revolts, the most notable one occurring in 1878. Chief Atai led the revolt which constituted the most violent reaction to European colonisation in the Pacific.⁵³ Douglas has sketched the pattern of Kanak response to settler land encroachment and explained why the Kanaks violent response was characteristically followed by efforts to negotiate :

"In virtually every engagement in 1878 ... Melanesian warriors were markedly inferior in number to French troops and their allies. Melanesian tactical preferences in fighting Europeans ... represented not only the prudent pragmatism of the outnumbered, outgunned, part-time warriors, but also an enduring emphasis on restraint, coupled with the belief in the psychological value of short, sharp explosions of extreme violence.

...Though ultimately Melanesians opposed to the French lost every colonial war, they were usually not defeated militarily, but chose or were forced to negotiate when the costs of continued fighting became unacceptable. A subsistence economy could not sustain armed mobilisation indefinitely, especially in the face of an effectively implemented strategy of attrition, furthermore these people scorned political martyrdom and saw no virtue in fighting to the bitter end against daunting odds".⁵⁴

51 Spencer, Above n.15, 145-6.

52 Above, n.20, 7.

53 J. Connell "New Caledonia : A Crisis of De-Colonisation In the South Pacific", 305 Rd.Tble. (1988), 53.

54 B. Douglas, "Almost Constantly at war? An ethnographic perspective on fighting in New Caledonia", 25:1 J.Pac.Hist. (June 1990), 43-5.

The 1878 revolt is today cited by many Kanak nationalists as a significant development in the emergence of Kanak consciousness. Yet, the circumstances of the revolt suggest that resistance to French colonisation was not so widespread as has been previously suggested partly because the French government was successful in dividing Kanaks by exploiting clan rivalries and rewarding with land those clans sympathetic to the French government. Kanak cooperation was critical in the pacification of New Caledonia. In devising methods for their conquest, French authorities drew upon Kanak knowledge of the terrain of the country and local methods of strategy and warfare.⁵⁵ As one scholar has written :

"Not all Kanaks ... were inspired, mobilised or awakened. Many were receptive to French blandishments. Many tribes stayed neutral ... The extent of Melanesian collaboration with the French demands a slightly more nuanced interpretation than that usually advanced by committed nationalists.

That does not mean that the events of 1878 can be brushed off simply as a series of uncoordinated intertribal wars, in which the French occasionally intervened. This was also an anti-French rising ... It was provoked by territorial expropriation of the Kanaks, and the continued harassment they received at the hands of the graziers and their livestock. The roots of the revolt lay in the cold logic of imperial conquest and colonial annexation".⁵⁶

The discovery of nickel in New Caledonia and the emergence of a nickel industry irreversibly affected the Kanaks.⁵⁷ As nickel mines spread throughout the territory in

⁵⁵ Douglas, Above, n.7, 50.

⁵⁶ Lyons, Above, n.3, 64-5. One commentator asserts that the factor distinguishing those tribes which took part in the revolt from those which did not was tribal alliances with chiefs who were arrested at the time. L. Latham "Revolt Re-Examined : the 1878 Insurrection in New Caledonia" 10:3 J.Pac.Hist. (1975), 48.

⁵⁷ The Societe' le Nickel ("SLN") was formed in the 1880's. By the end of the nineteenth century, New Caledonia had become the world's largest nickel supplier. Robie, Above, n.3,89. New Caledonia has 28% of the world's nickel deposits and is now the third largest nickel producer in the world after Canada and the U.S. "Working Paper Presented to the [UN] Special Committee on the Situation With Regard To The Implementation Of The Declaration On The Granting of Independence to Colonial Countries and Peoples" G.A.Doc.A/Ac109/1041 (3 Aug. 1990), 8-9.

1903, Kanak reserves were diminished.⁵⁸ As the nickel industry grew, New Caledonia transformed from an agriculturally based economy to an urban one.⁵⁹ Individuals from Indonesia, Tahiti, Wallis - Futuna and Vietnam were encouraged to immigrate to provide a labour pool for the growing nickel mining industry.⁶⁰ The policy of segregating Kanaks precluded their involvement in mining activities.⁶¹ The gap between the Kanaks living in remote rural reserve areas (the geographical boundaries and agricultural productivity of which were receding) and the urban settlers increasingly widened. As Guiart has observed : "[The European settlers] ... considered that Melanesians were there to be their servants, and destroyed or neutralized any attempt by Melanesians to be economically proficient and autonomous".⁶² A manifestation of this intent was a system of forced labour which was implemented in 1903 obligating Kanak men to work for the French government on civil projects such as road construction and repair. This served to foreclose the possibility of making full use of the agriculturally productive land which was available simply because obligatory commitments to the French administration were time consuming.⁶³

58 Above, n.21, 5.

59 By 1873, the mining of nickel became the major source of income for the colony. The nickel industry currently accounts for close to ninety percent of New Caledonia's export receipts. H. Fraser, "New Caledonia Anti-Colonialism in Pacific Territory", *Lgsltve.Rch.Srv.* (1987-88), 6.

60 Above, n.18, 220.

61 A. Thompson, "The Uses and Misuses of Capital : New Caledonia's Mining Industry, 1870-1901", 19:1 *J.Pac.Hist.* (1984), 81.

62 Above, n.4.

63 Above, n.21.

Chapter 4

Emancipation or Furtherance of Colonial Abuse and Erosion of Customary Legal Traditions?

World War II marked a turning point in French treatment of Kanaks. During the war, the islands were occupied by allied troops from the U.S., Australia, and New Zealand and was used as a naval and air base for military operations directed against Japan. The American presence in particular undermined the ability of the French to continue depriving Kanaks of their civil liberties. As Cheseneaux discusses :

"American pragmatism, combined with Rooseveltian democratic values, were manifest in U.S. attitudes and behaviour ... Americans paid local labourers, who had hitherto been forced to perform unpaid corvees, in cash. Black and White G.I.'s were seen behaving ostensibly as equals, at ease with each other".⁶⁴

After the war, in 1946, France listed New Caledonia as a non-self-governing territory with the U.N. Decolonisation Committee.⁶⁵ France also abolished the code of native regulations. A 1946 decree abolished the application of customary laws in penal matters involving two Melanesians and extended French penal laws to cover crimes committed by Melanesians.⁶⁶ While the abolition of the indigenat was applaudable, the extension of penal laws to Kanaks on reserves only served to further erode customary legal traditions and adversely affect the efficacy of customary traditions in maintaining order on the reserves. According to Kanak tradition, the petits chefs (small chiefs) were responsible for maintaining order and dealing with the internal problems of the clan. Fote Trolue, a Kanak judge, explains how the application of French penal law has eroded and transformed customary traditions :

"Under customary law, blood is paid for by blood, but there can also be repentance and mediation. If a Kanak commits a robbery, for example, traditionally all of the elders of the clan would punish the offender by hitting him with a stick. They would also discuss why the offence was committed. As a show of solidarity, the offender's friends would also

⁶⁴ Spencer, Above, n.15, 61.

⁶⁵ M. Islam "The Recent Self-Determination Referendum in New Caledonia : Terms Militating Against Its Validity", 15 Melansn.L.J. (1987), 136-7.

⁶⁶ Dornoy, Above, n.7, 102.

suffer punishment with him. Afterwards, the offender's friends would, outside the presence of the clan, also punish the offender. Today, when a robbery is committed, it is reported to the police. The elders of a clan view this as a sign of weakness since the matter is not being resolved by the customary authorities. However, the show of solidarity by the offender's friends is still manifested. Rather than submitting to physical punishment, the friends of the offender will now do something which benefits the community such as cleaning a cemetery or working on a road or communal building".⁶⁷

Kanaks were also granted civil liberties accorded to the settler population as well as the right of free labour after the war. It was not until 1951 however that they were given the right to vote. Ironically, once the Kanaks were no longer forcibly confined to the reserves, there emerged an appreciation among the Kanak population concerning the need to protect the reserves against further encroachment so as to preserve Kanak culture.⁶⁸

Two years after Kanaks were granted the right to vote, they formed their first political party, the Union Caledonie ("U.C."). The U.C. enjoyed the support of all Kanaks and many small (less economically advantaged) settlers who resisted French hegemony in the colony and resented their inability to benefit from the fruits of economic expansion prompted by the growing nickel industry. The multi-racial party campaigned under the slogan "two colours, one people". This slogan implicitly signified the aim of the U.C. to integrate Kanaks into New Caledonian settler society.⁶⁹ The U.C. policy was a reflection in part of international awareness and consensus regarding indigenous peoples at the time.

The U.C. did however recognize that Kanak rights and interests required special attention and protection. The party supported a cessation of territorial infringement on Kanak reserves, greater recognition of customary justice on reservations as well as the granting of minor police powers to tribal chiefs. The U.C. called for a re-allocation of large under-utilised estates to Kanaks and other smallholders.⁷⁰ While the party supported without

67 "De La Coutume Au Droit officiel : Un Enfant De La Coutume M. Fote Trolue" Pourquoi Pas? (Mars. 1990), 19. (Rough Translation).

68 Above, n.21 8.

69 Ibid.

70 Just after War II, Melanesian reserves on the Grande Terre amounted to over 126,000 hectares as contrasted with over 318,000 hectares held by Europeans. Above, n.21, 7.

hesitation continued links with France, it also supported a gradual move toward self-government (not independence) for the colony.⁷¹

U.C. policies reflected the fact that Kanaks were willing to accept assurances of gradual progressive evolution toward economic integration with the settler community.

In 1956, a framework law ("droit cadre") was introduced by the Socialist French Government for all overseas territories. This law was intended to grant internal autonomy to French colonies. Pursuant to the framework law, a Territorial Assembly and Governing Council was established in New Caledonia. The Governing Council was to be selected on the basis of a majority vote of the Assembly. Under the autonomy law, New Caledonia was given control over economic matters. For example, the Territorial Assembly assumed responsibility for primary, secondary and technical education as well as postal and telegraphic communications.⁷² The French Government did however retain responsibility for finance, defence, foreign affairs and tertiary education.⁷³ Given the fact that Kanaks just comprised a numerical majority of the population in 1956, the framework law afforded the Kanaks a prime opportunity to exert political influence and pursue their aims through U.C. control of the Territorial Assembly and Governing Council.⁷⁴

White wealthy conservative settlers ("Caldoches") were worried about the growing influence of the U.C. In particular, they became concerned about the extent of compulsory land distribution which would occur under a U.C. dominated Territorial Assembly. They were also concerned about self-government under Kanak rule. They were to find comfort in 1958 when De Gaulle ascended to power in France. The period 1958-63 witnessed an erosion of U.C. political influence in New Caledonia. During this period, armed settlers with the acquiescence of the French army, caused disturbances in Noumea in an effort to destabilise the U.C.

On 10 June 1958, 10 U.C. representatives were kidnapped from the Territorial Assembly and 1000 settlers demonstrated in Noumea demanding the removal of U.C. leader Lenormand from the Governing Council. In October 1958, De Gaulle dissolved the Territorial Assembly until elections in December of that year. The elections yielded a

71 S. Henningham, "A Dialogue of the Death : Attitudes and Issues in New Caledonian Politics", 61:4 Pac.Aff. (Winter 1988-89), 637-8.

72 Lyons, Above, n.3, 107.

73 Robie, Above, n.3, 92.

74 Above, n.20, 10-12.

U.C. dominated Assembly. In 1962, after the new Governing Council refused to grant the Societe' le Nickel a tax exemption, a bomb exploded shortly thereafter in the Assembly which was yet again dissolved. Another election produced a U.C. dominated Assembly.⁷⁵ The new Governor of New Caledonia, Laurent Pechou, disregarded the provisions of the loi cadre and in 1963, the framework law was revised and the powers of the Governing Council curtailed and centralized in the Governor of New Caledonia.⁷⁶ The Governing Council was relegated to an advisory role.⁷⁷

Thus, the French Government in collusion with the caldoches, stifled the U.C. as an emerging political force by reclaiming powers previously granted to the Territorial government in New Caledonia :

"...1958 and 1963 inaugurated a renewed centralising process based on a coalition of interests of conservatives in New Caledonia and France. A democratic evolution towards self-government, considered normal in British colonies, was frustrated in New Caledonia. Instead, the Paris Government took control of more and more areas of administration as it took over the responsibility of financing them. New Caledonia was ruled as a colony with powers concentrated in the Governor..."⁷⁸

The policies of the De Gaulle government only served to accelerate the process of inevitable conflict between the Melanesian and European community.

75 Robie, Above, n.3, 92.

76 Above, n.20, 10-12.

77 The 1963 loi Jacquinet took away many of the powers of the 1956 law. The Council of Government created in 1956 gave its members executive powers in local affairs. The 1963 law reorganized the Council of Government so that it was presided over and answerable to the Governor who was also head of state services and had control over territorial services. The Governor took control over territorial public services. Dornoy, Above, n.7, 95.

78 Above, n.20, 13.

Chapter 5

Reconciling Kanak Customary Laws with Economic Development and French Laws on Land Tenure

Throughout the 1960's and 1970's, Kanaks became increasingly frustrated with what they perceived to be the slow pace of economic and social reforms and redistribution of land.⁷⁹

The French government faced the difficult dilemma posed by conforming customary rules regulating land ownership to the French system of land tenure. The manner in which land should be redistributed within reserves and the considerations which should affect such land allocations were volatile issues. Some Kanaks with ancestral ties to particular land insisted that it be allocated to them as a matter of customary right. Others who were forced onto particular reserves by the French "cantonement" policy and who had no historical link to the land to be allocated advocated its redistribution on the basis of proposed economic development. Land allocations made as extensions to existing reserves was determined by a group comprising the French administratively appointed chiefs and the Conseil des Anciens made up of appointed Kanak elders.⁸⁰ The French administration usually supported the economic claimant :

"In general, the administration leaned towards support of the economic claim - the actual land needs for subsistence or farming - rather than the psychological claim to ancestral territory. The traditional claimants therefore often felt their claims to land further threatened by the entrenchment of other groups on the extensions to the reserves".⁸¹

Another problematic issue was whether individuals and families should be able to hold title freehold to land within reserves under French common law. No land was actually conveyed to individual Kanak titleholders within the reserves during this period. However, individual Kanak ownership of land was facilitated outside the reserves in an effort to encourage private incentive and integrate Melanesians into the legal infrastructure

79 From 1969-1979, expansion of Kanak reserves proceeded at a sluggish rate. The reserves on the Grande Terre increased from 162,000 hectares to just 162,536 hectares. Above, n.21, 10.

80 Above, n.21, 10.

81 Ibid.

of the French land tenure system.⁸² This was accomplished principally by locations dominales and concessions of domaines. Under the locations dominales, Kanaks were able to lease land for a period of years at a minimal fee with a guaranteed sale provided the land was improved. The concessions of domaine land involved grants of interim title to state land on the periphery of reserves to persons born in New Caledonia for a period of 5 years at which time the title was confirmed if specific improvements were made. Many of the lands conveyed to Kanaks on the periphery of reserves on this basis were not improved mostly because the individual holders felt constrained by the property rights system of the adjacent clans. Thus, even though the land may have been granted pursuant to the *droit commun*, most Melanesians still regarded the bond to customary laws of property rights and succession more compelling. So, unless the traditional customary authorities consented to the reallocation, individual Kanak holders demonstrated little interest in improving the property :

"...there is a tendency for individual holdings on the margins of reserves to be drawn into the property-rights system of the clans. This is partly a function of the customary law of succession, which favours the nearest clan claimant, not necessarily the children or widow of the deceased. Since only a few hundred Melanesians' have opted for the *statut commun* most Melanesians inheritance rights are governed legally by the *statut particulier*. Pressure for a customary devolution of land therefore has been supported in effect by the law, even though the incidents of title may have been those of the *droit commun*".⁸³

Instead of gradual integration into the economic infrastructure of the colony, the Kanaks remained mostly in the rural subsistence sector. As the nickel industry experienced a boom in the late 1960's during the Vietnam War, the economic division between the Kanak and non-Kanak population increasingly widened :

"...the economic history of post-war New Caledonia is essentially that of an increasingly externally oriented economy for markets, finance and even labour, quite unlike that of other parts of Melanesia, where the production of agricultural commodities generally dominates economic life. It is an economy shaped by European interests in which the Melanesian economy

82 Ibid., 11-13.

83 Ibid., 13.

is peripheral and Melanesians largely remain bystanders in the political economy that has shaped their destiny".⁸⁴

The change in demographics in the territory was especially problematic for the ability of Kanaks to shape their destiny through the legal structure set up by the French government. By 1969, Kanaks barely comprised 46% of the population in New Caledonia. The nickel boom witnessed a renewed wave of migration to New Caledonia. This migration was expressly encouraged by the French government owned SLN nickel mine to feed the labour hungry nickel industry. The effect of the SLN recruiting drive was to deny promotional opportunities to the Kanaks and to defer any move towards self-government since most of the immigrants to New Caledonia were supportive of French Government policies.⁸⁵

By the late 1960's, Kanak groups started championing the idea of independence. The most notable such group was the "Red Scarves" (Foulards Rouges). Their stated goal was to establish the supremacy of Kanak people and culture in New Caledonia by ensuring a place for Kanak culture in the educational system and the return of all ancestral lands to the clans which originally had possession of them.⁸⁶ The Red Scarves staged a series of violent demonstrations to convey their message.⁸⁷

A resurgence in Kanak pride in traditional culture took hold in the 1970's and support among the Kanak population for independence continued to grow throughout the

84 Above, n.54, 55.

85 Most of the immigrants supported the French Caldoche Settler population in part because they "tended to hold an ethnocentric contempt" for Kanaks and also because they were drawn to New Caledonia for better economic prospects. They have benefited from the economic opportunities made available by the expansion of the nickel industry. Ibid., 53; A. Ward, "The Independence Movement and the Plan Djoud in New Caledonia", 15:3 J.Pac.Hist (July 1980), 1936; Lyons, Above, n.3, 114.

86 1878 was another radical group formed at the time which insisted on the unconditional return of Kanak land. Robie, Above, n.3, 94.

87 Young Kanaks who had been educated in France during the student revolts in the 1960's formed the Red Scarves. The leader of the Red Scarves, Nidoish Naisseline, was the son of High Chief Naisseline. In 1969, he organised a demonstration against the yearly 24 September celebration of French annexation. Mr Naisseline labelled the day one of "mourning for the indigenous peoples because of the colonial crimes committed by the French". He was jailed for six months for inciting racial hatred. Robie, Above, n.3, 94; Ward, Above, n.85, 193, 195; Above, n.20, 15.

1970's.⁸⁸ As Saussol states, by 1976 demands were made for the return of "former clan mounds and rehabilitation of la coutume : a first step towards the demand for sovereignty which transcended the colonial relationship and took the form of a single transformation from clan space into national space".⁸⁹

The French government's response to growing demands for independence was to continue to encourage new migrants to the Territory. A 1972 letter from the French Prime Minister of Overseas Territories vividly demonstrates the French government's intention to quell the Kanak drive for independence by encouraging new migrants likely to support continued French presence in New Caledonia :

"...it is necessary to seize this last chance to create another French - speaking country. Apart from a World War, the French presence in New Caledonia can only be threatened by nationalist claims made by indigenous people...

In the short-to medium-term the massive immigration of metropolitan French or citizens from overseas departments should enable this danger to be averted by immediately improving the numerical balance of the races.

In the long-term the indigenous nationalist claims will only be avoided if the communities from outside the Pacific form the majority...

Conditions are ripe for New Caledonia in twenty years to be a small prosperous French territory comparable to Luxembourg, and clearly representing, in the emptiness of the Pacific, a lot more than Luxembourg in Europe..."⁹⁰

With vociferous calls for independence and the emergence of radical Kanak political parties in the 1970's including the U.M. N.C., PALIKA and U.P.M., the U.C. Party moved toward recognition of the need for Kanak independence. In 1978, the U.C. called for total Kanak independence in New Caledonia. The non-Kanak supporters of the U.C.

88 In 1975, a Melanesian 2000 Festival sponsored by U.C. President Tjibaou was attended by 2000 spectators. Ibid.

89 Spencer, Above, n.15, 53.

90 Above, n.59, 7.

flocked to other political parties. In 1979, the U.C. joined under a larger pro-independence banner known as the Front Independentiste ("F.I.").⁹¹

A schism along racial lines emerged in New Caledonia with all Kanak parties advocating full independence and the non-Kanak population resisting any move away from France.⁹² With the end of the Vietnam War in the mid 1970's, the nickel industry experienced a severe downturn which made New Caledonia increasingly dependent financially on France. The downturn reinforced sentiments among the settler population that their future economic livelihood necessitated close ties with France.⁹³

In response to the downturn in the nickel industry, the territorial administration encouraged the development of Noumea into a tourist destination. This investment policy took precedence over Melanesian needs and strengthened Kanak resolve for independence :

"In many ways, the administration of the territory seemed to reflect the interests of Paris, or of a powerful local oligarchy, rather than the interests of the indigenous population, and the interests of white Noumea rather than those of the Kanak bush. While the white-controlled municipalities spent money on installing parking meters and swimming pools in urban centres like Noumea, more remote villages lacked even basic amenities like running water and sealed roads. The needs of tourists became a more pressing investment priority than remedying this material neglect of distant Melanesian communities. Tourism, not Kanak agriculture, was seen as the alternative source of income, when the price of nickel slumped".⁹⁴

The French policy of flooding the colony with new immigrants to squash Kanak moves for independence merely heightened the likelihood of armed conflict :

91 The U.M.N.C. formed in 1970 initially supported internal self-government. However, in 1975, it changed its demands to full independence. PALIKA, an offspring of the GROUP 1878, adopted a Marxist analysis of the plight of Kanaks. This group employed a variety of tactics including physical occupation of settler land and street demonstrations. U.P.M. supported independence by non-violent means. All three parties supported the need to recognise Kanaks as the legitimate people of New Caledonia entitled to independence as a birthright. Above, n.20, 17-20.

92 Above, n.59, 8.

93 Ibid.

94 Lyons, Above, n.3, 123.

"The deliberate changes to the demography of New Caledonia had produced two polarised and apparently irreconcilable communities with little substantial knowledge or contact with each other, each with a vision for the future of New Caledonia, each appealing to a different historical basis for the right to political power".⁹⁵

Tension between the pro-independence Kanaks and the anti-independence settler community reached a fever pitch in the late 1970's, resulting in periodic instances of armed hostility. For example, in 1978, Kanaks fired on gendarmes during a dispute over Kanak claims that waste from a nickel mine was polluting Kanak gardens and a nearby lagoon.⁹⁶

While lack of economic and social progress had a significant impact in fuelling Kanak demands, the greatest factor accelerating conflict was land. A variety of proposals were placed forward concerning the relevant factors to be considered in allocating land and the method by which land should be redistributed. The differences in approach and the opposition each proposal engendered exposed yet again the tension between Kanak land rights and the French land tenure system and the difficulty in reconciling the two.

In 1976, a Commission for Rural Development was established which favoured the subdivision of reserve land into single and family holdings "without questioning the unseizable, and incommutable and inalienable character of the reserve".^{96a} While the European population strongly supported such a plan, most Kanaks were vehemently opposed to the idea of giving governmental officials the power to subdivide land instead

⁹⁵ Above, n.59, 9.

⁹⁶ Above, n.20, 19. Water pollution from nickel mining was also a factor in other incidents involving Kanak resistance. In January 1983, two gendarmes were killed and four others received gunshot wounds in an ambush prompted in part by anger over water pollution. That same month, the Kanak Socialist Liberation Party organised a demonstration in Noumea to protest the pollution of rivers resulting from the mining industry. The mining of nickel particularly had an adverse impact on Melanesians because most of the mining activities take place in the North and Centre of the island, both areas heavily populated by Kanaks. Unequivocal bans on mining were only imposed near Noumea because the French government was concerned that the tourist industry would suffer from the unpleasant residue of mining. Lyons, Above, n.3, 116-17.

^{96a} Dornoy, Above, n.7, 133.

of allocating it through the customary method by the master of the land in consultation with clan elders and chiefs.⁹⁷

Two alternative motions were introduced in the Territorial Assembly by the U.C. and U.P.M. parties in 1977 which reflected a split of opinion even among Melanesians regarding the method to be used and the criteria to be employed in redistributing land. The U.P.M. proposed that private abandoned and uncultivated domaine land should be allocated as an expansion of existing reserves or to individuals for the purpose of facilitating productive agricultural use of the land.⁹⁸ A Commission of Land Redistribution was proposed which would act in consultation with customary authorities from the reserves adjacent to the land to be allocated. While the U.P.M. proposal reflected an accommodation between Kanak rules regulating land allocation and economic development, the U.C. proposal insisted on the allocation of land exclusively on the basis of customary ancestral claim without regard to economic development. Both motions were taken under submission by the Commission for Agriculture and never acted upon.⁹⁹

In 1979, an organisation named Promotion Melanesienne was established by a former member of the Red Scarves. The group noted the problems in the land allocation process and in particular the difficulty in ascertaining the genuine masters of particular land. The group claimed that the policy of forcible removal and relocation onto reserved land merely exacerbated this difficulty.¹⁰⁰ In an attempt to harmonise the desire for expansion of existing reserves and allocation of land through customary mechanisms with French legal principles of individual title, the group proposed legal recognition of the "propriete clanique" which was a cross between "the titles of the droit commun and the tribe and much more traditional".¹⁰¹ The group suggested that Clan Councils made up of ancient and new family heads in a particular area should regulate land allocation matters. If there was a disagreement between clans and the Clan Council could not resolve the matter, then an appeal could be made preliminarily to a Council of Clan Chiefs and ultimately to a Council of Grands Chiefs. The goal of the proposal advanced by Promotion Melanesienne was to provide Kanaks with much more authority to regulate land matters and thereby foster greater respect for the land allocation process.¹⁰²

97 Above, n.21, 26.

98 Ibid., 26-7.

99 Ibid.

100 Ibid., 46.

101 Ibid., 47.

102 Ibid., 47, 59.

Remarkably, Promotion Melanesienne was successful in securing legal recognition of the propieterie clanique when a land reform plan and social and economic development plan introduced in 1979 by French Secretary for the Colonies, Paul Dijoud, was implemented in 1980.¹⁰³ The most noteworthy aspect of the Dijoud plan was its acknowledgement of the inequities in landholdings between Europeans and Kanaks.¹⁰⁴

Whereas the French government previously withdrew powers from the territorial government to thwart Kanak political influence, Dijoud proposed extending greater powers to the local government to more rapidly transfer land to Kanaks in the hope of preventing a further escalation in tension. Under Dijoud's 10 year land reform plan, the territorial administration was granted the powers of pre-emption and expropriation of land. The aim was to transfer 10,000 hectares of land annually over to the Kanaks.¹⁰⁵

A Territorial Ordinance passed in 1980 to implement the Dijoud plan recognised the clan rather than the artificially created tribe as the entity entitled to hold land. However, against the recommendations of Promotion Melanesienne, the Territorial Administration, rather than the Council of Chiefs or Grands Chiefs, was given the authority to resolve conflicting claims for land if the Clan Council proved incapable of doing so.¹⁰⁶ Understandably, since the composition of the clan is fluid and difficult to articulate, the legislation defining a clan was purposefully open-ended :

"The land of the clan is the common property of the family groups of which it is composed. These family groups are represented by the customary chiefs of the family who constitute the Clan Council.

The Clan Council regulates the use and division of land among members of the clan as well as the specification, where applicable, of the proprietary rights of the clan, according to customary law".¹⁰⁷

103 Above, n.20, 19.

104 For example, in 1976, 900 European families owned more land in New Caledonia than the entire Kanak population. 900 Europeans were involved in cultivating 432,000 hectares of land as contrasted with 39,000 Kanaks living on 165,000 hectares (less than 10% of the land surface of the main island). Lyons, Above, n.3, 131; Spencer, Above, n.15, 115-16.

105 Above, n.20, 19.

106 Above, n.21, 47.

107 Ibid., 50.

During the legislative debates on the 1980 ordinance, harsh criticism was levelled against the open-ended definition of the clan and the difficulty such definition would produce in applying the law.¹⁰⁸

The 1980 ordinance was the first comprehensive legislation introduced by the French government which was more consistent with Kanak customary land rights. The Dijoud plan thus represented a commendable step by the French government in providing legal protection for Kanak land rights instead of insisting that land allocations be determined arbitrarily by artificially created administrative agents or that Kanaks be forced to accept French legal concepts of land tenure and individual title.¹⁰⁹ Despite its novel approach in recognising Melanesian customary methods of land allocation and communal ownership, the package failed to win the support of the U.C. in the Assembly when Dijoud insisted that a vote for the plan would constitute a renunciation of the goal of independence for 10 years.¹¹⁰ Though the plan was nevertheless implemented, it failed to enjoy the support

108 Ibid.

109 Ibid., 51.

110 Above, n.20, 19. The U.C. actually helped Dijoud draft the package but refused to support it when he requested that the U.C. renounce its goal of independence for 10 years. As Connell states :

"[Melanesian] social and economic demands were subsumed in the political demands that Dijoud ignored and they were in no mood to be bought off".

J. Connell "New Caledonia or Kanaky? The Political history of a French Colony?" (1987), 276.

The highly publicised television debate which Dijoud insisted would be a public relations extravaganza endorsing his plan turned into a focus on the drawbacks of the plan. Though the majority of the Territorial Assembly voted in favour of the Plan, the U.C. actions during the debate spoiled the carefully scripted scenario Dijoud had envisioned. Ovington has sketched the drama which unfolded:

"...Although the U.C. members are recorded as having abstained, it would be more accurate to say that they did not respond in a roll-call vote. In a procedural wrangle (which served to explain the U.C. gesture) before the vote, the U.C. indicated that it would not respond when irrelevant issues were raised as preconditions. To avoid any misunderstanding of their position, seven of the nine U.C. councillors insisted on an explanation for

of Kanak parties for several reasons. First, since the French government retained responsibility for oversight of land allocations and the resolution of conflicting claims, the Dijoud plan did "not capture the imagination and involvement of many Melanesians".¹¹¹ Some Kanak leaders dismissed the legal recognition of the *propriete clanique* as merely a cynical method of colonial control designed to perpetuate the process of colonisation.¹¹² The Dijoud plan ultimately failed to gain support among all of the Kanak parties because it represented insufficient progress. Indeed, in 1980 Kanaks owned no more land per capita than they did in 1900.¹¹³ If the Dijoud plan had been introduced in the 1950's, it may well have satisfied Kanak demands. But by 1980, the assurance of land and economic and social reforms "had come too late to be a sufficient substitute for self-government".¹¹⁴

Given the refusal of Kanak parties to cooperate with the implementation of the Dijoud plan, the redistribution of land proved very troublesome. In addition, it was difficult to ascertain the traditional tenure to the land due to the conflicting Kanak claims and the "interacting levels of rights [which] did not easily afford a definition of owners even without movement and confusion of peoples since colonisation".¹¹⁵

Angered by the U.C. response to his land reform package, Dijoud warned of retribution. Dijoud successfully initiated an electoral reform bill in the Conservative RPCR dominated Assembly which increased the threshold of votes needed to gain a seat in the Assembly from 3 to 7.5%.¹¹⁶ Dijoud's actions only strengthened the solidarity of the independence forces :

"Instead of fragmenting the independentist parties and keeping the smaller ones out of political office, the threshold provisions in the electoral

their vote. Ironically, because this involved a precise statement of the U.C. attitude towards the plan per se, the explanations focussed more closely on the negative aspects than would probably have been the case if there had been no question of a moratorium on independence and U.C. members had simply been voting in favour ... The bright lights of the television cameras which were supposed to record a Dijoud triumph captured instead his growing discomfiture under this barrage of hostility". Spencer, Above, n.115, 119.

111 Above, n.21, 48.

112 Ibid., 51.

113 Above, n.53, 57-8.

114 Above, n.21, 42.

115 Above, n.20, 27.

116 Spencer, Above, n.15, 20.

reforms had clearly had the reverse effect of encouraging a cohesion ... that they had not previously been inspired to demonstrate...

The Mitterand Years : Greater Autonomy

Dijoud's own political tactics after the Assembly debate were designed to reduce the political influence of the independence parties and to play down the independence question generally. In both respects, however, quite the reverse results were achieved..."¹¹⁷

Pinnin Mitterand which acknowledged a need for independence, four of the five pro-independence Kanak parties joined forces under the F.I. umbrella and supported the Socialist Party in the 1981 election in France. In 1979, Mitterand made some remarks which justifiably gave the F.I. reason for hope that their aim of independence would be realized under a Socialist Government in France :

"We are now approaching a ... situation of desperation which will lead - I assure you - to a confrontation. Now no doubt you [the Giscard d'Estaing Conservative Government] will tell me that the Kanak population is today a minority, ethnically speaking. This may be so, but such an argument is not valid when one remembers how the importation of migrants from Metropolitan France and from neighbouring countries has been encouraged. What we must take into account is that all Pacific peoples, including Australia have after contact with F.I. backed their claim of independence"¹¹⁸

The F.I. was disappointed that the Mitterand government did not propose a timetable for independence after it assumed power in 1981. Nevertheless, the Mitterand government did announce a series of reforms designed to restore economic, social, judicial and cultural equality between the Kanak and other populations. The Mitterand government also attempted to further speed up the pace of land reform.¹¹⁹ In contrast to the d'Estaing government which sought to accelerate the process of land reform by re-allocating power to the territorial governments to promote and expeditious land, the Mitterand government pursued this goal by reinforcing and concentrating power in the metropolitan government in France. A law under Article 38 of the French Constitution was promulgated to override any statutes enacted by the Territorial Assembly in New Caledonia and to introduce reforms in New Caledonia by ordinance, even if these reforms were opposed by the Territorial Assembly.¹²⁰

¹¹⁸ *Ibid.*, p.55, 9-10.

¹¹⁹ *Ibid.*, p.55, 11-12.

¹²⁰ *Ibid.*, p.55, 11-12.

Chapter 6

The Mitterrand Years : Greater Autonomy and Recognition of Kanak Customary Laws and Cultural Traditions But No Independence

Pinning their hopes on statements of Francois Mitterrand which acknowledged a need for independence, four of the five pro-independence Kanak parties joined forces under the F.I. umbrella and supported the Socialist Party in the 1981 election in France. In 1979, Mitterrand made some remarks which justifiably gave the F.I. reason for hope that their aim of independence would be realized under a Socialist Government in France :

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118 Above, n.59, 9-10.

119 Ibid., 10-11; Above, n.20, 31-35.

120 Above, n.20, 31-35.

The Mitterand government subsequently passed four ordinances aimed at :

1. transferring land at a much more rapid rate to Kanaks through a newly created Land Distribution office.
2. promoting development of neglected rural areas to benefit Kanak inhabitants;
3. creating a Kanak Cultural and Scientific Institute to support traditional Kanak culture and advancement in the economy, and
4. appointing Kanak assessors in the lower courts where customary law could be applied to Kanaks as parties to a legal action.¹²¹

The land reform process encountered stiff resistance as the pace of acquisition from rural settlers gathered momentum. Right wing conservative settlers resorted to violence to express their opposition to the land reforms. In 1982, after a coalition was forged between the F.I. and a moderate settler party (F.N.S.C.) so that the two groups collectively comprised a majority in the Territorial Assembly, rightists invaded the Assembly and attacked Kanak and Centrist supporters of the land reform package.¹²²

Tension continued in the territory throughout 1982-1983. In the beginning of 1983, 2 French police were shot after riot police attempted to recover from Kanak villagers sawmill equipment of a white settler which was confiscated in protest over the lack of progress on compensation claims made for river pollution by the mill. Later in 1983, a Kanak youth was killed by a settler and a series of pro and anti independence demonstrations ensued.¹²³

Attempting to reconcile the clashing interests of the Kanak and settler populations, the French government in 1984 tried to legislate a solution to the crisis. The French government was insistent that the territory experience a peaceful evolution through legal channels. A statute was enacted in 1984 (the Lemoine statute) which was intended to "integrate Kanak custom authorities within the territory's administrative and development process". Under the Lemoine statute, greater autonomy for the territory was to be followed by a referendum in 1989 on self-determination, of which independence was to

121 Ibid.; Above, n.59, 10-13.

122 Above, n.20, 31-35.

123 Above, n.59, 12-14.

be one option. The Governing Council's powers were to be greatly expanded. Its members were to be chosen from among members of the party achieving a majority in the Territorial Assembly. There was also to be a second chamber (Assemblée des Pays) representing Kanak chiefs drawn from 6 regions of New Caledonia. Each of the 6 regions was to have its own Kanak custom council. The second Chamber was to play a consultative role in the legislative process with the ultimate authority being vested in the Territorial Assembly. Though more administrative responsibility was delegated to the Territory, the French government still retained responsibility for law and order and mining activities. Conspicuously absent from the statute was any mention of electoral reform. Without such reform, the Kanaks would not be able to win a referendum or independence given their minority status.¹²⁴

The F.I. was incensed that a referendum on independence was delayed for so long and that there was no proposal for electoral reform. The conservative party (R.P.C.R.) also rejected the statute as going too far.¹²⁵ The proposed Melanesian dominated consultative chamber was regarded as failing to provide Kanaks with enough real power.¹²⁶

A consensus emerged among most of the Kanak leadership that it was no longer worthwhile to pursue their goal of independence through the existing legal regime in New Caledonia.¹²⁷ In September 1984, a new pro-independence Kanak coalition was formed and found expression in a new party - the FLNKS (Kanak and Socialist Liberation Front). The FLNKS refused to participate in the 1984 elections. The refusal to take part in the electoral process in New Caledonia marked a watershed in the Kanak approach toward achieving independence. Aside from refusing to participate in the elections, the FLNKS also actually obstructed the electoral process by disrupting the voting. Several town halls were burnt down, ballot boxes stolen and contents destroyed. In a symbolic gesture of defiance Kanak leader, Eloi Machoro, axed open a ballot box and burned the voting papers inside. He also declared a provisional Kanak government in Thio.¹²⁸

124 Above, n.20, 38-41.

125 Ibid.

126 Spencer, Above, n.15, 11.

127 Above, n.59, 21-2.

128 Machoro was shot just over a month later by French Security agents. Some have alleged there is evidence suggesting a conspiracy within the French government and intelligence services, to kill Machoro rather than "neutralise" him as French police subsequently insisted. After Machoro's death, the colony was on the brink of civil war. French High Commissioner Pisani declared a state of emergency in New Caledonia with a curfew, reminiscent of the 1961 state of emergency declaration by De Gaulle in Algeria. Yet, the situation in New Caledonia is much more

Participation ranged from zero percent in some areas to less than 50% in others. Not surprisingly, the anti-independence R.P.C.R. won a landslide 34 of 42 seats with a splinter group of the F.I. gaining 6 seats and the Centrists 1 seat. To bestow an air legitimacy on the results, the French High Commissioner altered the electoral results to reflect a participation rate of just over 50%. Shortly thereafter, Mitterand dispatched Mr Pisani, a Socialist Deputy of the European Parliament, to New Caledonia to negotiate self-determination.¹²⁹

Mr Pisani proposed a creative solution to the problem which was referred to as "independence in association with France". A referendum on independence was to be moved forward to July 1985 followed by legislative elections and the transfer of sovereignty. Kanaks would regain sovereignty over the land but leases would be set up to guarantee settler use of the land. Noumea was to be given a special status, with a body set up for management of the economy and administration of the town. French citizens would enjoy a special status in the newly independent New Caledonia. Defence and maintenance of law and order was to be assured by France.¹³⁰ Though there was no provision for electoral reform, the FLNKS embraced the Pisani plan. Both anti and pro independence supporters were killed in a series of incidents following Pisani's announced proposal.¹³¹ The most noteworthy incident was one in which ten unarmed Kanaks were killed in an ambush in Hienghene. The instigators were eventually acquitted in what was viewed by some commentators as a grave miscarriage of justice :

"The sordid judicial aftermath of the massacre of Heinghene is certain to go down as one of the greater stains on French colonial history in the South Pacific. Almost 2 years after the massacre the self-confessed killers were set free by examining magistrate Francois Semur who ruled non-lieu - no case to answer. They had been charged with the murder of 10 Kanaks and the attempted murder of 7 others.

Citing a rarely used highway robbery law dating back to Napoleonic times, Magistrate Semur said the accused had acted in self-defense. He referred to the exceptional circumstances at the end of 1984 - the three

precarious than it ever was in Algeria where the white settlers formed merely a small minority of the population. In New Caledonia, the caloche population represents a sizeable and well armed minority group. Robie, Above, n.3, 116, 125; Spencer, Above, n.15, 182.

129 Above, n.59, 21-2.

130 Above, n.53, 56-59.

131 Ibid., 59; Above, n.18, 224.

90,000 week period which gripped New Caledonia after the Kanak boycott of the elections of November 18...

The Magistrate neglected to mention the fact that at the time of the ambush the Kanaks who died had been unarmed and were returning from the meeting at which it had been decided to resort to peaceful negotiations with the French authorities. Semur also did not explain why he shunned the testimony of more than 20 witnesses which showed the attack was an unprovoked slaughter of unarmed Kanaks".¹³²

The Pisani proposal had two fatal deficiencies :

"...it was introduced in a period of tension ... Having been caught off guard by the Kanak boycott, it appeared that the French government was too eager to come up with a solution to an issue over which it was coming under daily attack in Paris ... Secondly, the Pisani plan calculated on securing a significant percentage of the non-Kanak vote in the referendum on independence - and not enough time was given for this to be secured..."¹³³

Due to a breakdown in law and order in New Caledonia, President Mitterand scrapped Pisani's proposal. French Prime Minister Fabius proposed an alternative scheme which was intended to accelerate the transfer of power to regional bodies as a prelude to self-government and independence. A referendum on self-determination was to be held before the end of 1987. In the interim, New Caledonia was to be divided into 4 regions, each with its own council responsible for administering in the areas of economic development, primary education, local language, culture, sports, health, social services, land reform and agricultural development, transport and housing. The councils were to be chosen in a 1985 election by universal suffrage based on proportional representation. Notwithstanding widespread scepticism with the plan, the FLNKS and R.P.C.R. agreed to take part in the regional council elections after Mitterand visited New Caledonia in an attempt to appease the pro and anti independence parties. Over 80% of the electorate of

132 The furore created over the Magistrate's ruling resulted in the eventual trial by jury of the accused in November 1987. After just two hours of deliberation, the jury returned a verdict of legitimate self-defence. Many, including the Vice-President of the French League of Human Rights, felt an unbiased jury could not be chosen given the animosity toward the Kanaks among the settler population. Robie, Above, n.3, 11.

133 Above, n.59, 24.

90,000 voters participated in the ballot. Though on a territory-wide basis the pro-independence parties only garnered just over 35% of the vote, they were able to gain control over 3 of 4 regions - Northern, Central and Loyalty Islands.¹³⁴ FLNKS leader Jean-Marie Tjibaou was ecstatic over the results. The FLNKS viewed their victory as a golden opportunity to demonstrate their ability to peacefully lead New Caledonia after independence by providing an "image to non-Kanak of the FLNKS as a government (at a regional level) intent on the development of the territory and to encourage non-Kanak to share in this".¹³⁵ Accordingly, the FLNKS devoted their energies to economic development and sought to avoid a direct confrontation with anti-independence supporters. The FLNKS proposed promoting small-scale tourism and the production and marketing of agricultural produce. Attempts were made to set up joint enterprise projects involving Kanak communities and regional administrations and local settlers and investors.¹³⁶ In 1985, the FLNKS also opened up alternative elementary schools teaching vernacular languages and emphasising Kanak culture. These "écoles populaires kanakes" reported an enrolment of 1500 in 1986. As Chesneaux has stated :

"the brief period between the Kanak victory in the New Caledonia regional elections (September 1985) and the return of the right to power in Paris (March 1986), saw a new political awakening in Kanak society, one which stressed grass-root initiatives, creative imagination and enthusiasm for tackling the problems of economic management. Small-scale economic projects (cattle, subsistence farming, fishing, etc.) and long term planning in such such key sections as mining, forestry and imports were flourishing at the tribal, municipal and regional levels. The ... ordinances detailed and minute in the extreme, as in the French administrative tradition, had deliberately established new forms of collective management, which permitted the Kanak tribes to borrow and to invest something hitherto impossible. Other ordinances had introduced the vernacular languages in the primary schools through the appointment of native [teachers] ... For the first time, Kanaks were taking direct responsibility for their own economic development, although the new regional institutions demonstrated how difficult it was for traditional Kanak culture to adjust itself to the modern economic system..."¹³⁷

134 Above, n.53, 59.

135 Above, n.59, 26-7.

136 Ibid.

137 Spencer, Above, n.15, 67.

The anti-independence forces sought to spoil the goodwill created by the Kanak election victory in 3 regional councils by engaging in a spate of violence following the election which included destruction of buildings occupied by pro-independence supporters.¹³⁸

Underpinning the anti-independence strategy of the colonial government in 1975 was an attempt to undermine the support for the Kanak Independence Movement (KIM) party. This was achieved by the French government through a series of measures. While the regional councils were established in 1975, their powers were substantially diluted and restricted to local issues. The regional councils were also subject to the French High Commissioner's veto. The appointment of the 3 regional council members and the regional council members themselves were also subject to the French High Commissioner's veto. The appointment of the 3 regional council members and the regional council members themselves were also subject to the French High Commissioner's veto.

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138 Above, n.59, 26-7.

Chapter 7 A Return to the Past

Unfortunately, the significant strides made by the Mitterand government in 1985 were to be severely undermined less than 1 year later when Chirac's Conservative neo-Gaullist party won a majority in the French national legislative elections in 1986. While the regional councils were allowed to remain, their powers were substantially diluted and transferred to the R.P.C.R. controlled Territorial Assembly and the French High Commissioner.¹³⁹ The boundaries of the 4 regions were also redrawn and gerrymandered to ensure that the anti-independence parties would control the two most economically prosperous regions.¹⁴⁰

The Chirac Government changed the name of the Office of Kanak Culture and altered its mission to include the promotion of all cultures in New Caledonia. Adding insult to injury, a new Director sympathetic to continued ties with France was appointed.

The Land Distribution Board set up in 1982 by the Mitterand government to buy Caldoche land and redistribute it to Kanak traditional owners was replaced with ADRAF (Land and Rural Development Agency) whose role was altered to include the equitable redistribution of land to all ethnic groups in New Caledonia and the development of the rural economy.¹⁴¹ A scathing report has recently been issued by France's auditor general, Francois Assilineau, on the activities of ADRAF under the Chirac government. His report alleges that a group of RPCR members took control of ADRAF and demonstrated favouritism and partiality by distributing land to individuals with ties to the RPCR and anti-independence cause. ADRAF allegedly failed to follow its own guidelines of using economic development plans as a criteria for allocating land. Generally, the agency allocated land without a verified economic development plan. The land was also not redistributed to all ethnic groups in proportion to their populations. A total of 420 allocations were made from 1986-88. Of 717 Kanak applications for land, only 136 were approved. Kanaks who were given land often received land with steep terrain which lacked water and was distant from any roads and the sea. In contrast, 23 Europeans who received land already owned an average of 195 hectares each and were awarded an

139 Ibid., 28-9; Above, n.53, 60.

140 Robie, Above, n.3, 262.

141 ADRAF was created pursuant to a July 1986 Territorial Bill with the explicit aim of promoting rural and land development among all ethnic groups in New Caledonia. *Pacific Islands Monthly* December 1989, p.17.

additional average of 171 hectares each. 34 other recipients were not even born in New Caledonia and at least 77 recipients had secure jobs as public servants or employees of the SLN nickel company.¹⁴²

Assilineau claims that ADRAF adhered to a deliberate plan designed to fuel tension between Kanak clans and European owners and also between Kanaks. ADRAF apparently breached promises made to Kanaks by its predecessor, the Land Distribution Board. For example, a tribe at Oundjo had a verbal contract from the former Land Board for redistribution of riverside grazing land. The former owner had agreed to sell the land in exchange for the tribe leasing it back to him to raise his cattle. ADRAF refused to recognize the claim and evicted the tenant. Subsequently, ADRAF sold the land to a European. Oundjo threatened a mass land occupation unless the land was returned.¹⁴³

ADRAF perverted its own legal functions by repeatedly ignoring Kanak customary claims to ancestral land and purposefully allocating land to Kanaks with no customary right to the land. The Board was usually not informed of conflicting Kanak customary claims on allocated land. In one case, ADRAF allocated land to a Kanak at La Foa which encompassed sacred burial sites of the Chone clan to which the recipient did not belong. Even when the Board of ADRAF was notified of a conflicting claim, allocations to those with no ancestral tie to the land were made anyway. For example, 47 hectares were allocated to a Kanak man despite the objections of a Kanak member of ADRAF's Board who revealed that the land had already been claimed by the Nechero clan. When ADRAF's Director, Dennis Millard, visited the property with two of his colleagues to mediate the resulting dispute between the clan and the landholder, the roof of his car was attacked with an axe and he and his companions had to seek police protection after physical threats.¹⁴⁴

ADRAF usually insisted on transferring land into private ownership rather than in accordance with traditional Kanak notions of communal ownership.¹⁴⁵ As Assilineau

142 Ibid.

143 Ibid., 18.

144 Ibid.

145 Ibid. Interestingly, in an interview conducted by the writer with the current Director of ADRAF, Mr Vladislav, no mention was made of the corrupt practices of the organisation from 1986-1988. Mr Vladislav simply stated that the land redistribution process was not successful in the past for "political reasons". He did add however that from 1986-1988 the Kanaks were asked to accept the European notion of individual property ownership. This, he said, created problems because the notion of individual freehold land title was inconsistent with traditional Kanak concepts of

stated in his report: "In the overwhelming majority of cases, ADRAF's aim was to give private property to individuals in order to bring Kanaks round to the Western view of ownership and the increased profit it was supposed to generate".¹⁴⁶ Only 2 out of 420 total allocations were made to Kanak clans collectively.

ADRAF's deliberate policy under the Chirac government of aggravating tensions between Kanaks as well as between Kanaks and Europeans was certainly not in the French governments' interest. As the Kanak response to these actions demonstrated "unrelieved Melanesian frustrations and tensions find expression in hostility to the authorities".¹⁴⁷

The Chirac government also announced a 1987 referendum which would guarantee a no independence vote given that those who lived in the territory for 3 years or more would be allowed to vote.¹⁴⁸ The Chirac government insisted that the participants in the electoral referendum were entitled to vote under democratic principles. Restricting the vote on independence to Melanesians would deny equal rights to other Caledonians of European, Polynesian, Indonesian or Vietnamien origin.¹⁴⁹ Yet, as Father Denis Jacquin of the Bonde mission in the northeastern hills of the Grande Terre stated: "Its a sham to try and maintain a colonial situation in the name of democratic values".¹⁵⁰

ownership in which an individual could use and occupy a particular parcel of land subject always to the communal rights and interests of the clan. The only clue given by Mr Vladislav that corruption was rife in ADRAF previously came in remarks he made concerning the new objectives of the organisation and changes in the decisionmaking process which are aimed at preventing corrupt practices and the appearance of impropriety. Private Discussions with Mr Vladislav.

146 Above, n.141, 18.

147 Ibid.

148 Above, n.59, 28-9; Above, n.53, 60.

149 Pacific Islands Monthly September 1987, p.20.

150 Pacific Islands Monthly August 1987, p.35. One commentator accurately points out that adherence to the majority principle is appealing at first blush. However, more careful scrutiny reveals that this democratic principle does not apply in the context of a referendum on self-determination in New Caledonia:

"The French government deliberately fostered a mass-scale immigration with the manifest aim to swamp any future movement for independence in the territory. It overtly abused and misused the democratic principle of the majority opinion in an attempt to mislead the world community that the majority of New Caledonians are opposed to independence. New Caledonia is, unlike an independent state, a non self-governing territory with a population comprising both the native

Any hope of a peaceful evolution in New Caledonia's political future was substantially undercut by the actions of the Chirac government which allied itself closely with the R.P.C.R., exhibited contempt for Kanak aspirations and made no effort to encourage negotiations between the two polarised communities.¹⁵¹

Equally troubling, the Chirac government adopted a military policy toward New Caledonia remarkably similar to the French government's strategy in Algeria in 1959. As in Algeria, the French military dispatched mobile units of elite French troops (gardes mobile) to villages known to have strong FLNKS support. The FLNKS viewed the strategy as "a cover for intimidating Kanak villagers and gathering intelligence on local independence leaders and any fresh Kanak campaign tactics ..."¹⁵²

The Chirac government's retreat from advances made by its predecessor strengthened international recognition of Kanak demands. In an August 1986 South Pacific Forum meeting, it was unanimously agreed to seek the relisting of New Caledonia with the U.N. Decolonisation Committee.¹⁵³ In December 1986, the United Nations General Assembly voted (89 to 24) with 34 abstentions in support of a resolution referring New Caledonia to the U.N. Committee on Decolonisation.¹⁵⁴ The Chirac government rejected the resolution and persisted in its intent to hold the 1987 referendum absent U.N. supervision.¹⁵⁵

colonial peoples and the nationals of independent states including the colonising power ... The principle of democracy does not accord self-determination to the settlers and their descendants simply because the right does not lawfully belong to them ..." Above, n.65, 150-151.

- 151 Above, n.53, 60-61,
- 152 Robie, Above, n.3, 258.
- 153 Prior to 1986, the South Pacific Forum consistently refused to seek the reinscription of New Caledonia on the United Nation Decolonisation Committee due to the collective view that France should be afforded an opportunity to implement reforms and move gradually towards independence. Above, n.59, 30-1.
- 154 Ibid.
- 155 Prior to the U.N. vote, France circulated a document at the United Nations which attacked Australia's treatment of Aborigines and New Zealand's treatment of Maoris. During the United Nations debate on the issue, France's U.N. Ambassador also stated that Australia and New Zealand should not give lessons to France when they had poor records in promoting harmonious multi-racial societies.

The South Pacific Forum denounced the planned referendum, advising France to abide by U.N. principles on self-determination and to limit the vote to those who can establish "long-term residence and commitment to New Caledonia".¹⁵⁶

Predictably, the FLNKS refused to participate in the referendum despite persistent attempts by the French government to encourage their participation.¹⁵⁷ An FLNKS spokesman described the referendum as a sham poll and called for :

¹⁵⁶ France also exerted economic pressure on small United Nations countries likely to support the relisting. For example, Antigua was reportedly threatened with the deferral of a French loan for airport extensions, and Zimbabwe was informed that planned development of a Peugeot plant could be in jeopardy. France also allegedly warned Nigeria that it would not accede to its debt rescheduling requests.

After the General Assembly approved the resolution, France expelled the Australian Consul-General Mr. John Douth from New Caledonia on the grounds that he assisted radical pro-independence groups. This allegation was vehemently disputed by the Australian government. Ministerial exchanges between the two countries were also banned. Metropolitan French government officials have freely expressed their strong antipathy towards Australia, which such sentiments have always enjoyed support among the Caldoche population in New Caledonia. The Caldoche paper *Les Nouvelles Caledoniennes* frequently articulates the view that Kanak demands are expressly encouraged by other countries. Pacific Islands Monthly February 1987, p.13-14; Above, n.59, 30-1.

¹⁵⁶ Above, n.59, 31-2.

¹⁵⁷ French Minister of Overseas Territories, Bernard Pons, visited Kanak villages in an effort to encourage their participation. He made a patronising and impassioned plea for their participation:

"Because you are children of France, because you are unqualified citizens of the country of human rights, you can benefit from an exceptional privilege, a privilege that is sadly rare in today's world - of expressing your opinion and deciding your destiny with a ballot paper. Remember well that the precious thing which is guaranteed for you by the grand democratic state that is France, is a fragile thing..."

Above, n.149, 19.

"...a true referendum, i.e. a self-determination poll where only the colonised people are consulted on their future, independently of the mass of immigrants who were encouraged to come here to make us a minority..."¹⁵⁸

The FLNKS insisted that the persons eligible to vote be restricted to those born in the territory and those with one parent born in New Caledonia. The French government rejected this proposal as racially biased.¹⁵⁹

158 Above, n.59, 31-2.

159 The RPCR maintained that U.N. Resolution 1514 of 1960 on decolonisation provided that all populations must be consulted without distinction of race, religion or colour. But this provision is contained in the preliminary reference regarding "the subjection of people to alien subjugation, domination and exploitation". The FLNKS has maintained that other citizens of New Caledonia already possess independence as French citizens and are not subjected to colonial exploitation. Above, n.59, 34.

The 1960 United Nations Decolonisation Declaration provides that the peoples of territories which have not yet attained independence "have the right to determine freely their own political future". The Declaration acknowledges the "yearning for freedom in all dependent peoples and the decisive role of such peoples in the attainments of their independence". The ascertainment of "dependent peoples" is a factual determination: "It is the identifying of the existence of dependent peoples quite different from that of the power administering them ... historical tradition, racial or ethnic identity, cultural homogeneity ..." A cogent argument can be developed that the Kanaks are the colonial peoples of the territory and the only ones entitled to vote on a self-determination referendum. As Islam reasons: "The non-Kanak population ... have come to ... New Caledonia after the colonisation of the territory as beneficiaries of a mass immigration policy of the coloniser. Any modes of exercising self-determination must include the colonial peoples concerned, quite independently of citizens of the coloniser and other independent states ... the numerical strength of a settler group and their long term residence does not confer upon them selfhood for the purpose of exercising the right to self-determination on that territory...". Above, n.65, 137-146.

There is precedent in French constitutional legal history for limiting the vote as the FLNKS has proposed :

160 Ibid.

161 Ibid. "... in 1947, a referendum was held in the valleys of Roya Tinee and Vesubie

162 Ibid. to decide their future after they were regained from Italy after the Second

163 Ibid.

In August 1987, one month prior to the referendum, the U.N. Decolonisation Committee passed a resolution reaffirming the right of the people of New Caledonia to a free and genuine act of self-determination consistent with U.N. principles and practices of self-determination and independence.¹⁶⁰

Due to the lack of Kanak participation in the 1987 referendum, the vote in favour of remaining a French territory was 99%.¹⁶¹ The referendum results were dismissed by the South Pacific Forum. Australia's Foreign Minister Bill Hayden articulated the sentiments of Forum members :

"The referendum was altogether too stark in the alternatives it offered : either remain with France or be cast adrift. The referendum was also inconsistent with the requirements of the U.N. for the processes for decolonisation ... for three reasons ... co-operation with the U.N. was refused; there was no political education regarding the options; there was no dialogue among various parties; the choice was restricted ... to two stark options; punitive consequences were implicitly, and occasionally explicitly attached to the independence option; and the French government campaigned hard for its preferred option, continued attachment to France..."¹⁶²

After the elections, Chirac announced that the Regional Councils would be abolished and another autonomy statute enacted.¹⁶³

Fortunately, Mitterand was returned to office in France in May 1988 and the implementation of an autonomy statute never materialised. The new French Prime Minister Rocard was able to forge an accord between the pro and anti-independence forces in New Caledonia in what became known as the "Matignon Accords".

World War. Anybody with a parent in the region or who had lived there for 25 years was eligible to vote".

Robie, Above, n.3, 262.

160 Above, n.59, 31-2.

161 Ibid.

162 Ibid., 37.

163 Ibid.

Chapter 8

The Matignon Accords: A Blueprint For The Future of New Caledonia or A Postponement of Reality?

The legacy of discord which ensued during the Chirac years convinced both the FLNKS and RPCR of the need to reach a resolution which would restore calm to the territory. The Matignon Accords of 16 June 1988 are the product of intensive negotiations between the two rival factions and the French government.¹⁶⁴ Under the accords, administrative authority of the territory was assumed by metropolitan France for 1 year. The powers of the Territory's Executive Council were transferred to the High Commissioner who acted in consultation with an 8 member advisory committee representative of New Caledonia's major political parties.¹⁶⁵ The rationale for direct French rule of the territory until July 1989 was to hasten the distribution of public money and jobs allowing for the development of New Caledonia's underprivileged regions and to redress the gross imbalance reflected in the involvement of Kanaks in the public service.¹⁶⁶

After the 1 year period, the territorial administration was decentralized to 3 provinces (the North, South and Loyalty Islands). Each province administers itself through an assembly elected for six years by proportional representation and has its own Executive. The affairs of the 3 provinces are run by a Territorial Congress composed of the 3 Provincial Assemblies meeting together.¹⁶⁷

The agreement provides for substantial financial grants to the provinces. Development contracts have been consummated to improve the training of Kanaks and the disparity in health protection between Noumea and the outlying Kanak areas.¹⁶⁸

164 The Matignon Accords were endorsed by a national referendum in France, and a territorial referendum in New Caledonia. In France, 63% of all eligible voters did not cast a ballot. Of the remaining 37% who did vote, 80% endorsed the accord. In New Caledonia, over 74% of the eligible voters cast a ballot of which 57% voted in favour of the accord. However, the largely white population of Noumea rejected the accord. *Pacific Islands Monthly*, June 1989, p.2.

165 "Agreement on the Future of New Caledonia" (16 June 1988). (Source: French Embassy, Wellington).

166 Ibid. *Pacific Islands Monthly*, July 1989, p.23.

167 Ibid. *Pacific Islands Monthly*, August 1989, p.19.

168 In December 1989, the Presidents of the Regional Councils of the 3 provinces signed a development contract with the High Commissioner under which France invested 1.9 billion

A Kanak Cultural Development Agency was set up under the agreement "to provide for the expression and fulfilment of the Melanesian personality in all its forms [and] ... to ensure that everyone has access to information and culture".¹⁶⁹

Perhaps the most significant obstacle in reaching agreement was the issue of voter eligibility and the timing of another referendum of self-determination. The FLNKS wanted a vote for self-determination in 1993. In accordance with United Nations principles, the FLNKS also wanted the vote limited to Kanaks and first generation settlers. The RPCR wanted the referendum postponed until 1998 and the vote opened "to all residents with French nationality".¹⁷⁰ A compromise was reached. The referendum was deferred until 1998. All New Caledonians who were eligible to vote in the 1987 referendum and their descendants who are of voting age by 1998 are entitled to vote on the self-determination referendum.

FLNKS negotiator Jean-Marie Tjibaou agreed to the 10 year deferral for several reasons. First, he believed that the 10 year period would instil confidence among all Caledonians in the Kanak ability to effectively manage an independent Kanaky. By proving their ability to govern their own affairs, the Kanaks would be able to gain the confidence of other ethnic groups currently opposed to independence.¹⁷¹ Tjibaou also wanted to prepare his people for independence by preliminarily fostering economic self-sufficiency :

"I don't want immediate independence for my country if that means being listed among the 20 poorest of the United Nations ... There is no point in waving your flag at the front of the door if you have to crawl through the back door and beg for money".¹⁷²

Also, it has been suggested that Tjibaou acceded to the composition of the 1998 electoral roll due to the possibility that Kanaks (given current demographic statistics) may constitute a slim electoral majority by 1998.¹⁷³

francs in the territorial economy over three years of which 75% has been spent on the Kanak controlled provinces. Above, n.57.

169 Above, n.165.

170 Robie, Above, n.3, 278.

171 Pacific Islands Monthly, July 1989, p.25.

172 Pacific Islands Monthly, August 1989, p.19.

173 According to the 1989 Census, the total population of New Caledonia was 164, 173 inhabitants, of whom 44.8% were indigenous Melanesians, 33.6% of European origin and 21.6% of other

Acceptance of the 10 year deferral on the self-determination referendum came as a surprise to many Kanaks. However, as Fraser points out, Tjibaou was highly motivated to reach an agreement since he viewed the "choice as being between civil war - for which Kanaks did not have the means - and a process which allows (us) to construct peace. Tjibaou wanted independence to be viewed not as a means of throwing Caldoches into the sea but as a positive stable option for the future".¹⁷⁴

Since the signing of the Matignon Accords, the French government has changed the goals of ADRAF and restructured the decision making process of the organisation to change its reputation for corruption and in an "effort to create a new equilibrium between all of the ethnic groups in New Caledonia".¹⁷⁵ The current Director of ADRAF, Mr. Vladislav, has enumerated several objectives for the organisation. First, to redistribute 85,000 hectares of land to all ethnic groups in New Caledonia through the extension of Melanesian reserves and the facilitation of private ownership where appropriate. Presumably, private ownership is most appropriate for the settler community. The redistribution of the land is to take place at the rapid rate originally envisaged in the Dijoud plan but never fulfilled. As Mr Vladislav has stated, "the Kanaks have been waiting 10 years for the French government to fulfil its pledge of returning their land".¹⁷⁶ Of the 85,000 hectares to be redistributed, 42,000 has already been allocated of which 32,000 has been allocated to

ethnic groups, including Tahitians, Indonesians and Vietnamese. Europeans have 1.5 children per woman of fertile age as compared with 5.5 for Kanaks. Above, n.165; Robie, Above, n.3, 278.

In an interview with Francois Sodter, a specialist in demographic history at ORSTOM (Office of Scientific and Technical Research), the writer was told that as a governmental employee, he was precluded ("c'est interdit") from even engaging in conjecture off the record as to the likelihood that the Kanaks may constitute a slight electoral majority in 1998. His response shows the sensitivity of the issue in New Caledonia.

174 H. Fraser "Your Flag's Blocking Our Sun" (1990), 210. The personal experiences of Tjibaou and RPCR leader La Fleur were instrumental in convincing the two leaders of the need to reach a peaceful solution: "As President of the FLNKS, Tjibaou felt some personal responsibility for the bloody Ouvea killings. And with the memory of the deaths of his two brothers in the 1984 Hienghene massacre he was strongly influenced into opting for a peaceful plan to independence. For his part, La Fleur, who had suffered a heart attack 2 years earlier, was apparently determined to find a peaceful solution after the Ouvea tragedy. He certainly did not want to go down in history as the man who pushed New Caledonia into civil war ..." Robie, Above, n.3, 278.

175 Above, n.145.

176 Ibid.

Kanaks. This already surpasses the 1990 goal of transferring 30,000 hectares by the end of the year. ADRAF hopes to redistribute the remainder of the land by the end of 1990.¹⁷⁷

The second goal of ADRAF is to regulate land disputes and render decisions regarding allocation which are perceived as fair to the entire population of New Caledonia. ADRAF has now established Land Commissions in each commune (or village) which consists of the Mayor of the Commune and representatives from the tribes and clans. These Land Commissions are designed to open up the decision making process (which is now more consensual) and prevent allegations of corruption and favouritism. The Kanaks need only establish an ancestral tie to the land sought. Other ethnic groups must present a plan for economic development of the land. To prevent the allocation of land to Kanaks who have no customary right to it (as occurred from 1986-1988), a written request must be made for a particular parcel of land which is registered with the City Council. The clan must make a persuasive case demonstrating prior occupancy and customary right to the land. A meeting is called with the tribe or clan requesting the land. This meeting is known as the "palabre". The palabre is attended by elders of the clan, members of the clan, the heads of each family, the chief of the clan, an agent from ADRAF and a gendarme. The elders attendance is necessary in establishing a customary ancestral tie to the land since this information is maintained in Kanak society through oral tradition. The gendarme reduces the minutes of the meeting to writing after a translation. Ideally, a consensus is reached as to the proper recipient of the land. However, in instances where a consensus cannot be reached, the Land Commission is empowered to investigate any matters relating to the land under consideration. The Commune Land Commission makes a recommendation on land allocation to a Provincial Land Commission which in turn issues a recommendation to central headquarters at ADRAF which renders the final decision.¹⁷⁸

Providing ADRAF with responsibility for oversight of land allocations and resolution of conflicting claims opens it up to the same criticism levelled against the Dijoud plan. Kanak customary legal resolution mechanisms are ultimately rendered subordinate to the French legal process. By taking sides in land disputes, the French government in a way reinforces interclan divisions. Also, though an improvement over the past, the current allocation process reinforces the lack of Kanak control over their cultural identity, the very existence of which is inextricably tied to the land. The current approach reflects the continuing scepticism among French authorities as to the Kanak ability to distribute property where there are conflicting claims. The writer submits that it may be wise to

177 Ibid.

178 Ibid.

provide the Kanaks with the opportunity to sort out land claims exclusively amongst themselves. They may even prove more adept than the French bureaucracy has been historically. At the least, such an approach would provide Kanaks with a greater sense of control over their cultural destiny. The appeal procedure recommended by Promotion Melanesienne in which authority to resolve these matters rests ultimately with customary authorities may be a sensible alternative to the present plan. Perhaps the French government is concerned that returning land to Kanaks *carte blanche* would be viewed as tantamount to ceding sovereignty to the Kanaks.¹⁷⁹

Despite the shortcomings of the existing land allocation procedure, the Director of ADRAF feels strongly that most Kanaks are now satisfied with the land allocation process because of its open and consensual nature. Also, he believes Kanaks have been persuaded of ADRAF's good intentions to redistribute the land equitably. Mr Vladislav does admit that there is still a sense of unfairness among some clans which will be left without land because of existing occupancy by other clans. There still remain conflicts within the Kanak community between those who wish to economically develop land to which they have no ancestral tie and those who insist they are entitled to the land under customary law. In this regard, the French government has apparently finally been persuaded of the need to allocate land to Kanaks on the basis of ancestral tie. Nevertheless, ADRAF has encouraged the economic development of the land redistributed on the basis of customary law. ADRAF has been careful not to impose on the Kanaks European notions of economic development. The Kanaks have been encouraged to maintain communal economic subsistence through traditional methods of cultivating the land rather than embarking on European style agriculture. In particular, the Kanaks have been encouraged to cultivate fruits, vegetables and coffee which "allows for individual benefit while maintaining communal attachments".¹⁸⁰ Some Kanaks have formed agricultural cooperatives which Mr Vladislav views as an encouraging sign that Kanaks are taking responsibility for economic self-sufficiency. That is not to say that difficult issues do not remain concerning economic development within reserve areas. These issues demonstrate once again the difficulties the Kanaks face in balancing tradition with modern progress. Some Kanaks would like to promote tourism. In Lifou, for example, a group of Kanaks have indicated an interest in opening a hotel. As one can easily imagine, since traditional Kanak society is consensual, problems will arise in achieving a consensus on all matters which must be resolved in building and operating a hotel. What is to be the method of payment to workers? How much are they to be paid? Who is the owner of the land? Is the land on which the hotel is situated individually

179 See Above, n.162; Above, n.21, 55-7.

180 Above, n. 145.

owned or owned by the clan? Is the group leasing the land from the clan? Who is to be paid on the lease? These issues do not present a problem with agricultural cultivation which is transitory and is not dependent on land ownership. Conversely, with a hotel, there is no security for the proprietors of the hotel if they do not own the land on which it is situated and if the conduct of their business is perpetually subject to the whims of the clan.¹⁸¹ Thus, the Kanaks face a dilemma in finding a solution which allows for and encourages profit and economic development yet also respects Kanak custom and tradition.

The French government has also instituted a customary law jurisdiction in New Caledonia and decentralised the judicial structure since the signing of the Matignon Accords.¹⁸² As with ADRAF, the French government's approach renders Kanak customary law inevitably subservient to the French legal process.

There are seven customary law jurisdictions and each jurisdiction is comprised of a French magistrate and two customary assessors. The establishment of customary courts represents an attempt to integrate customary law into French legal practice. The jurisdiction of the court can be invoked by either party to a dispute where both parties are Kanaks governed by the statut particulier. If one of the parties is not subject to the statut particulier, the matter is not within the jurisdiction of the customary court. The court is

181 Ibid.

182 La Lettre Du Delege, February 1990, p.14-15; Private Discussions with the Procureur General (the public prosecutor responsible for the judicial institutions in New Caledonia). A June 1989 law decentralised the judicial system in New Caledonia to a certain extent. There are now 2 tribunals in Noumea, 1 in the Northern province and 1 in the Loyalty Islands. These courts judge penal, civil and commercial matters. In its full capacity, the tribunal consists of 3 magistrates accompanied by citizen jurors in penal matters. The citizens are chosen from among the entire population. The system is not entirely decentralised because preliminary hearings still take place in Noumea. These hearings are powerful screening agencies because the judge d' instruction can determine the court in which the case is to be heard as well as the evidence to be presented. Nevertheless, the Procureur General believes the semi-decentralised judicial structure has enhanced Kanak perceptions of French judicial administration. Significantly, the Procureur General failed to engage in conjecture on the type of legal system which would be instituted in a post-independence New Caledonia. Mr Lucazeau said simply that "French law is well perceived and received". He virtually deliberately avoided the question possibly because by engaging in a dialogue concerning a post-independence legal system which is different from the French system, an invitation would be initiated for entertaining Kanak demands of expanding the application and administration of customary law in the current system.

designed to resolve a matter definitively where customary legal authorities were unable to do so, particularly concerning questions of divorce. Mr Lucazeau, the Procureur General (Attorney General) of New Caledonia, stated in an interview with the writer that recourse to these courts is appropriate in dealing with contemporary problems facing Kanaks to which customary resolution procedures are not well adapted. He mentioned that as more Kanaks have moved to Noumea, they have acquired "European mores and lifestyles" producing an increase in divorce.¹⁸³ Not everyone would agree with Mr Lucazeau's assessment. Kanak judge, Fote Trolue, has harshly criticised the way in which customary law has effectively been subordinated to French law and how customary traditions have been steadily eroded with the assimilation of Kanaks into European culture. Traditionally, both clans had to agree consensually to a divorce between two Kanaks. Under the current customary court jurisdiction, customary law regarding divorce is applied by French authorities if either of the marital parties is dissatisfied with the resolution by customary authorities.¹⁸⁴ While extolling the virtues of the customary court jurisdiction, the Procureur General conceded that this court system is not working well in practice because the divorce process has become a drawn out process of negotiation. Also, the jurisdiction of the court has not been invoked very often.¹⁸⁵ Neither of these statements are particularly surprising. Divorce, as previously stated, traditionally required the consensus of both clans and thus invariably entailed long series of negotiations. Implicit in the aims of the customary court system are ethnocentric assumptions that French chosen authorities are more equipped to resolve matters governed by customary law than local customary authorities and that Kanaks will lend greater credence to French application of customary law. Both such assumptions are highly dubious.

Aside from usurping the jurisdiction of customary legal authorities, the application of customary law in the areas of divorce and succession have also been eroded by French legal concepts of equity and fairness. This is illustrated very clearly in demands now made by some Kanak women for compensation upon divorce. Previously, a divorced Kanak women would never even consider asking for compensation upon divorce for her contribution to the land. Currently, although it is still uncommon, some women do request compensation.¹⁸⁶ Another area in which French legal concepts of equity and fairness have filtered into, and irreversibly impacted on, customary law is in the manner in which property is disposed upon death. Under the customary law of succession, the land rights of the brothers and members of a kin group take precedence over the claims of

183 Private, Above, n.182.

184 Ibid.

185 Ibid.

186 Above, n.67.

the immediate family. In accordance with French notions of equity, the state has given greater legal protection to the rights of the immediate family of the deceased, particularly the widow and surviving children. Even those Melanesians governed by the statut particulier can now choose in writing with regard to property held under the droit commun to have such property distributed upon death under customary law or according to French law. If no choice is made, a rebuttable presumption is made that the deceased opted for his property to be distributed according to Kanak custom.¹⁸⁷ Imposing French concepts of equity on Melanesian traditions has potentially damaging consequences as Ward explains:

"The principle of succession by all children in equal proportions is a recipe for fractionation of the estate over 2 or 3 generations into uneconomic interests and into an almost unmanageable number of owners ... It sets aside, with potentially unhappy consequences, the customary principles which operated to eliminate certain parties - particularly non-residents with property elsewhere - from the succession."¹⁸⁸

Therefore, custom and tradition have been slowly eroded with the assimilation of Kanaks into modern life. This certainly cannot be avoided. As Fote Trolue has stated :

"...our custom is changing. We must recognize that our custom is an oral tradition and must adapt to the evolution of the Kanaks. We can't expect that the life our grandfather lived is applicable today..."¹⁸⁹

However, the right of appeal to a French court in the event of dissatisfaction over resolution of a matter by customary authorities, coupled with the option of having property distribution upon death governed by French laws of succession in some instances, not only relegates Kanak customary law to a subordinate position vis a vis French law but also necessarily weakens the authority and effectiveness of customary authorities in regulating these matters.

The United Nations Special Committee on Decolonisation has endorsed the Matignon Accords and the spirit of dialogue which continues to exist. The General Assembly recently approved a resolution submitted by Fiji which noted that French authorities were taking positive measures to promote political, economic and social development in the

187 Above, n. 21,55.

188 Ibid.

189 Above, n.67.

territory to provide a framework for the peaceful progress of the Territory to self determination. The resolution urged all parties to maintain their dialogue and continue promoting a framework for the peaceful progress of the Territory towards an act of self-determination in which all options are open and which safeguard the rights of all New Caledonians.¹⁹⁰

Despite the endorsement of the United Nations and the support of many Caledonians, the Matignon Accords have sparked dissension within the FLNKS ranks. FLNKS leader Tjibaou and his deputy Yeiwene were assassinated on 4 May 1989 by Djubelly Wea, a former Protestant pastor recently released from prison, who was incensed that he was not a part of the FLNKS negotiating team and bitter over the agreement reached.¹⁹¹ Splinter groups of the FLNKS continue to denounce the accords. In a presentation to the United Nations Special Committee on Decolonisation, Yann Uregei, Secretary General and Foreign Affairs Minister of FULK, acknowledged that the FLNKS was a party to the Matignon Accords. However, he asserted that the FLNKS was steamrolled and caught in the trap of French Prime Minister Rocard :

"French colonialism has succeeded in neutralising the Kanak people in its liberation struggle by locking it into the 10 year plan and making use of a few leaders who are starstruck by money and comfort ... The salary of simple provincial representatives is approximately (\$5,000 U.S.) a month which is twice the monthly salary of the Prime Minister of Vanuatu. After 1 year of reading the balance sheet of the Matignon Accords, there is demobilisation of the Kanak people in its struggle for liberation. The signatories of the Matignon Accords have imprisoned for 10 years the Kanak people. Now some of the FLNKS have recognised there is demobilisation of the Kanak people. How can the signatories of the Accords dare say that the hut is burning when it is they themselves who set fire to the hut. The French only trapped the inexperienced leaders of the

190 G.A. Doc.No.A/AC 109/1041 (3 Aug. 1990).

191 Mr Wea was imprisoned in France after four gendarmes had been killed on Ouvea during the storming of the gendarme station. His release from prison coincided with the beginning of the Matignon negotiations. His bitterness had been fuelled in part by a campaign of disinformation by FULK leader Yann Uregei who had unsuccessfully sought on four occasions to force the independence movement to accord him positions of power. Above, n.174, 210-11.

FLNKS and corruption is continuing this exploitation ... They did not trap the entire FLNKS..."¹⁹²

Mr Uregei also asserted that the current electoral body proposed would provide the anti-independence forces with a 64% majority in the 1998 referendum. He claimed only Melanesians and the "victims of history" should be able to vote. Acceptance of any other notion of the electoral body would constitute an acceptance of the "waves of immigrants who have arrived in the territory through the deliberate policy designed to drown out calls for independence of the Kanak people".¹⁹³

Uregei's statements reflect continued internal divisions within the FLNKS over the Matignon Accords. His remarks imply an acknowledgement that the FLNKS is technically a party to the agreement. At the same time, the remarks also appear aimed at paving the way in the future for pulling out of the accords in the event it later becomes clear that the 1998 referendum will definitely produce a no vote on independence.

In negotiating the Matignon Accords, the French government has assumed an arbitral role between two polarised communities within New Caledonia. As the newly elected President of the FLNKS, Paul Neaoutyne, recently stated :

"France under the Socialists now maintains a role of referee in New Caledonia between the anti-independence parties such as the RPCR and the pro-independence Kanaks."¹⁹⁴

The Matignon Accords are clearly designed to develop and maintain an atmosphere of cooperation between the various ethnic groups in New Caledonia. However deplorable French intentions may have been in encouraging migration to New Caledonia, the reality today is that this territory is a multi-ethnic community. Regardless of the legality of Kanak claims that the 1998 referendum be restricted to only Kanak citizens and those born in New Caledonia, the fact remains that the FLNKS reached a political compromise to a legal dispute in accepting the composition of the electorate provided for under the accords. The Matignon Accords and the statements by French government officials with

192 (Rough Translation) "Petition Presentee Devant Le Comite Special De 24 Par Mr Uregei Secretaire General Du Front Uni. De Liberation Kanak Charges Des Relations Exterieures" reprinted Above, n.57.

193 Ibid.

194 Pacific Islands Monthly, October 1990, p.52.

whom the writer spoke envisage a New Caledonia modelled on the original theme of the UC "two colours, one people".

Despite the laudable intent of the French government and the strides made through the Matignon Accords in restoring temporary calm to the territory, it is unlikely these agreements will achieve over the longer term a stable multi-racial state in which each ethnic group has a claim to legitimacy as opposed to a claim to primacy. One can certainly appreciate the thicket in which the French government finds itself in attempting to reconcile the interests of the settler population with the demands of the Kanaks. There is simply no magical formula which will satisfy every section of the Caledonian population. Ironically, the only unifying theme of the Caldoche and Kanak communities is their mutual blame of the French administration for the problems which have emerged in New Caledonia.¹⁹⁵

In some respects, the more heavily involved the French government becomes in trying to achieve a multi-racial state, the more elusive the goal becomes :

"...the French state, remote as it is and represented by officials on tours of duty - is an unsubtle instrument for handling inter-cultural problems to the utmost intricacy like the land question ... Schemes developed from outside, by the most talented and well-intended officials, are inherently unlikely to apprehend the intricacies of a society as distant from the European as is the Melanesian. But the more fundamental weakness of state paternalism is the inevitable fact that, because the state takes the responsibility, and withholds it from ... the New Caledonians, extreme demands are encouraged rather than discouraged, and community weakens rather than grows".¹⁹⁶

It is unlikely that cooperation between the pro and anti-independence forces can survive the 1998 referendum. One commentator accurately warns that :

"the legacy of violence and the gap between nationalist and loyalist interests, perceptions and attitudes remain as major obstacles to an enduring consensus and ... [it will be] ... hard to maintain discipline within the respective blocks".¹⁹⁷

195 Above, n.21, 57.

196 Ibid., 69-70.

197 Above, n.71, 652.

A no vote on independence will likely yield the same reaction the 1985 referendum produced. As previously stated, factions of the FLNKS have already laid the groundwork for rejecting the 1998 referendum. If it appears the Kanaks will be unsuccessful in the 1998 referendum, the FLNKS may well abandon the French legal process to secure their objectives. This would bring a renewed spate of violence.

A yes vote on independence presents its own set of problems. The FLNKS has insisted that the Kanak people must achieve an independence which recognises the primacy of Melanesians as the legitimate people of New Caledonia.¹⁹⁸ Such a position is likely to spark fierce resistance from other ethnic groups in New Caledonia, particularly the heavily armed Caldoche population. The Kanaks have failed to specify the system of land tenure in an independent state of Kanaky. As Adrien Hnangan, former Director of the Melanesian Cultural Institute, has stated :

"It's for the Kanaks to decide their own land tenure system and after that we can start talking about who has what land. We never asked the whites to come and colonise New Caledonia. And if people won't recognise that fact, then it's their problem and it's a stalemate. Let the Kanaks sort out land problems, and if the others trust the Kanaks, they'll be given land..."¹⁹⁹

Certainly, given the legacy of land deprivation and its link with Kanak cultural identity, these sentiments are understandable. However, such statements offer no comfort to the settler community particularly in view of precedents set elsewhere in the Pacific, most notably Vanuatu.²⁰⁰ Kanak leaders have been equally ungenerous on the subject of citizenship in an independent Kanaky. The FLNKS has indicated that "victims of history" would be offered automatic citizenship in a state of Kanaky if one parent is born in the territory. This is not very reassuring to the Indonesians and Vietnamese who were repatriated after 1945 and who would be granted citizenship only if they demonstrate a prior commitment to Kanak independence.²⁰¹

198 Above, n.21, 20, 69. An independent Kanaky in which the Kanaks are the dominant group to the detriment of other ethnic groups is unlikely to foster a stable multi-racial society.

199 Spencer, Above, n.15, 226.

200 Ibid., 4-5.

201 Ibid., 100-102

Furthermore, Kanak unity, which is currently the product of resistance to colonial rule, is likely to become highly fragmented in a post-independence state. As one scholar has commented :

"There are village and clan loyalties, which can produce divisions within particular language groups ... There are divisions between language groups ... Underlying the rhetoric of unity is a reality of distinctiveness and separation, bridged by alliances, trading ties and contemporary friendships, but separated by mutual suspicion and linguistic diversity..."²⁰²

Aside from Kanak disunity due to disparity in tribal history and diversity of language groups, there will also likely be divisions within the Kanak society over how much custom should be compromised for the sake of economic development. Connell forecasts that many Melanesians would resist rejection of the capitalist system to which they have become accustomed :

"Almost a quarter of all Melanesians live in Noumea [and] ... the economic and social future of these Melanesians lies outside the reserve. In a territory dominated by capitalist enterprises, in a region dominated by capitalism ... where French institutions dominate a part of social life, it would be surprising if some Melanesians had not found a substantial and apparently permanent stake in the capitalist system, either in commerce or the bureaucracy. [Many Kanaks would be] ... unwilling to reject the colonial system through which their advancement has been secured".²⁰³

Kanak leaders have emphasised that an independent Kanaky would balance western capitalist values and traditional exchange values in an effort to accommodate modernity and technology with Kanak custom and culture.²⁰⁴ Such pronouncements indicate a recognition that independence is not a panacea for solving the issues thrust upon Kanaks by French colonialism, which such issues have no easy solution. The recent emergence of agricultural cooperatives have been cited as a successful example of combining rural economic development with tradition and custom. Yet, the long term success of these types of ventures in other parts of Melanesia does not bode well for their success in New Caledonia :

202 Ibid., 247.

203 Ibid., 240.

204 Ibid.

"Throughout Melanesia cooperatives have gone through phases of growth and decline and many have been replaced by a more individual form of production and entrepreneurial activity, just as land tenure, under pressure from long-term cash cropping and population increase, has increasingly moved from a more corporate to a more individual form ... in an independent Kanaky their role may quickly disappear. The practice of development will turn idealism into irrelevance".²⁰⁵

As the foregoing amply demonstrates, each of the alternatives in 1998 presents potentially explosive problems. The only reasonable certainty after 1998 is the continued French presence in the territory. The current dependence on French subsidies continue to provide France with the ability to exert control over New Caledonia. France would likely continue to provide substantial monetary assistance to ensure its presence in the region.²⁰⁶ Yet, in the final analysis, the solution to the dilemma in New Caledonia must come not from France which must toss aside its ethnocentric view that it has "a duty, by means of her culture and her institutions, to subsume narrow sectional interests and to instil order".²⁰⁷ As Robie insightfully points out,

"ultimately an accommodation between the races and cultures in New Caledonia must come from some acceptance by the peoples themselves of the distribution of powers and responsibilities between them".²⁰⁸

205 Ibid.

206 The most significant factor contributing to France's continued desire to maintain a presence in New Caledonia is strategic. The French nuclear testing program and presence in the South Pacific helps project France as an independent world maritime and nuclear power. Even though France heavily subsidises New Caledonia and currently reaps no net economic gains, the South Pacific is also viewed by France as a region of growing importance and opportunity in the world economy. Ibid., 67; Robie, Above, n.3, 13; Above, n.21, 63.

207 Above, n.21, 63.

208 Robie, Above, n.3, 18.

Chapter 9 Conclusion

The legal structure and complex system of land rights which existed in traditional Kanak society has been substantially undermined by French colonisation. Removing clans from their ancestral homes onto reserves severed the spiritual link which Kanaks had with their ancestral past. The very existence of Kanak cultural identity which is inexorably intertwined with land was systematically assaulted. The actual establishment of reserves contravened the system of Kanak land rights in which land was occupied by individual families and clans on the basis of patrilineal descent. Recognising the tribe as the legal owner of land and controlling land allocation on reserves through artificially created tribal chiefs reflected a lack of understanding or disinterest in according deference to Kanak social, political and legal traditions which were based on localised patterns of allegiance to particular chieftaincies and involved the consensual allocation of land. Moreover, granting Melanesians a right of appeal to French courts to resolve tribal disputes among Kanaks not only undercut the authority and efficacy of customary authorities in regulating affairs on the reserves but also relegated Kanak customary laws and resolution mechanisms to a subordinate position.

The encroachment onto Kanak reserves prompted by cattle ranching and the discovery of nickel and the growth of the nickel industry, coupled with the French policy of forced labour, further impacted deleteriously on the Kanak way of life and reliance upon agricultural subsistence.

It is not surprising that the Kanaks launched a series of revolts in protest over the deprivation of their legal traditions, history and identity.

The abolition of the indigenat and the granting of civil liberties and voting rights to Kanaks after World War II represented a giant leap forward in the French treatment of Kanaks. However, the extension of French penal laws to all Melanesians in 1946 only served to further erode and transform customary legal traditions and undermine the ability to maintain order on the reserves through customary legal methods. The record of the French government in addressing Kanak concerns and interests and preserving Kanak custom in the post war period is a sloppy and undistinguished one at best. French government policy in the post war period has changed like the direction of the wind and has been subject to the whims of the particular governing body in metropolitan France. There has been a vacillating pattern of granting greater powers to the territorial

government followed by restrictions on territorial governmental authority to thwart Kanak political influence in some instances or to give greater expression to Kanak interests and demands. This pattern initially manifested itself in 1956 when the French government introduced the framework law under which New Caledonia would be the recipient of greater internal autonomy. Two years later, the powers granted to the territorial government in New Caledonia were severely curtailed to hinder growing Kanak political power in the territory.

The 1970's and 1980's witnessed a variety of proposals designed to reconcile two polarised groups - the Kanaks and non-Kanak settler population. Land, the hallmark of Kanak personality and existence, continued to be a source of great tension. The French government provoked controversy as it attempted to conform customary laws regulating land ownership to the French system of land tenure. The manner in which land should be redistributed and the considerations affecting such land allocations had become volatile issues as a result of the previous French containment policy which forced Kanaks onto particular reserves to which they had no ancestral tie. Thus, having concocted a recipe for disaster, the French government was faced with demands from some Kanaks who favoured land allocation on the basis of economic development and others who insisted that it be allocated on the basis of ancestral tie as a matter of customary right. The variety of proposals introduced to deal with the land issue exposed the difficulty in reconciling the French land tenure system and Kanak land rights. The resistance each proposal encountered reflected the internal struggle among Kanaks in balancing custom and tradition with economic development.

The schizophrenic pattern of alternately granting and reclaiming powers of the territorial government emerged again in the late 1970's. In 1979, the French government granted greater powers to the territorial government to accelerate the process of land reform in an attempt to pacify Kanaks. The government finally recognised the clan rather than the artificially created tribe as the legal owner of land. The Dijoud plan, which met with limited success, represented too little and too late. By the time the plan was implemented, Kanak demands for control over land had expanded to encompass demands for independence.

In 1983, after a change in government in France, many of the powers of the territorial government were withdrawn and concentrated in metropolitan France to more rapidly restore equality between the Kanak and non-Kanaks in part by an accelerated land transfer. Merely one year later, the same French government granted greater internal autonomy to the territory and established a second chamber representing Kanak chiefs to

integrate Kanak custom authorities into the existing legal regime established by the French government. In 1984, for the first time in the Colony's history, the French government set a date (1989) for a referendum on self-determination.

In 1985, under the Fabius plan, a greater measure of autonomy was granted to regional councils in New Caledonia and the referendum date was moved forward to 1987. Again, one year later, Chirac stripped the regional councils of many of their powers and insisted on holding a referendum on self-determination which failed to comply with U.N. principles and was guaranteed to achieve his desired result - a no independence vote. The Chirac government widened the gap between the already polarised Kanak and European Communities and attempted to fuel tension between Kanaks by allocating more land to the settler community than the Kanak community and purposefully redistributing land to Kanaks on the basis of individual title as opposed to customary ancestral tie.

With the return of Mitterand in 1988, both patterns of reclaiming and granting powers to provincial authorities were reflected in the Matignon Accords. Under this agreement, the French government first reclaimed powers of the territorial government for one year to hasten the integration of Kanaks into the public sector and the distribution of public money to Kanak regions and then granted a greater measure of autonomy to the provincial administrations in the 3 provinces. Though the Matignon Accords are commendable for restoring calm to the territory, the retention by the French government of oversight of land allocations and resolution of conflicting claims reinforces the subordinate position of Kanak customary legal resolution mechanisms and the lack of Kanak control over their cultural identity, the makeup of which is firmly bound to the land.

The Kanak response to French policy in the territory has varied from acquiescence and accommodation with French authorities and political institutions established in the territory to rejection and refusal to participate in the political process. Shortly after French annexation, Kanaks periodically resisted settler encroachment onto their lands as reflected in the series of revolts launched from 1878-1917. These revolts were followed by periods of attempted reconciliation and grudging acquiescence to forcible relocation onto reserves. In the post-war period, the Kanaks exhibited a tremendous amount of patience in working within the legal regimes established by the French government to initially integrate themselves economically into the settler community while preserving their cultural heritage.

Just when the Kanaks experienced a political awakening in the late 1960's they were already relegated to a numerical minority due initially to the policy of encouraging

immigration to feed the growing nickel industry and subsequently to the deliberate French government policy of flooding the electoral roles in an effort to stifle Kanak hopes of achieving independence electorally.

Nevertheless, Kanaks still exercised a tremendous amount of restraint until it became clear that progress toward achieving independence was becoming ever so more elusive. In 1984, the Kanaks, for the first time in the post war period, abandoned the pursuit of their goal of independence through the legal process, disrupted the electoral process and resorted to periodic armed clashes. Just one year later, after the Fabius plan was introduced, the Kanaks were once again acquiescing in the electoral process by participating in the regional council elections in 1985. In 1986, the Kanaks refused to accede to the regressive policies of the Chirac government and to take part in the sham referendum on self-determination. Again, in 1988, the Kanaks have participated in the political process and exercised patience in foregoing a referendum vote until 1998.

The alternating pattern of Kanak response to French colonisation attests to the Kanak character. Douglas explains :

"Kanak where possible avoid open confrontation with opponents who possess an overwhelming monopoly of force; they emphasise negotiation and withdrawal, while ambush and surprise are their chosen offensive modes in the event that direct action is seen to be unavoidable. Culturally, they prefer compromise to martyrdom and emphasise selective, controlled, intensely psychological violence, often verbal rather than physical ... Melanesians in New Caledonia are generally slow to anger, passionate and sometimes extremely violent in its expression, but quick to seek negotiation and restoration of equivalences in its aftermath".²⁰⁹

If success on the 1998 referendum appears highly in doubt or if it results in a no vote on independence, the Kanaks may well abandon the French legal process again to achieve their objective. Only time will provide the answer to this question. In the interim, the Kanaks will continue struggling to achieve a comfortable balance between custom and tradition and economic development.

209 Above, n.54, 46.

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