

## *New Caledonian tall stories*

*"Prédire quoi que soit, c'est difficile, surtout quand cela concerne le futur" (Woody Allen).*

New Caledonia, *Nouvelle-Calédonie*, is an overseas territory of France, made up of a main island (la *Grande Terre*), the Loyalty Islands and several smaller islands. It is located approximately 2000 km east of Australia. New Caledonia, with a land area of 18,575.5 square kilometres, is a little wider than the more well-known Fiji Islands (18274 sq km). The latest census in 2004 estimates the population at 230,789 inhabitants, a third than that of Fiji. Its capital and only "city" is Nouméa. It isn't officially called "territory"; the Nouméa Agreement of 1998, known as "*Accord*", refers to New Caledonia as "*le Pays*", that is, both a country and a nation... New Caledonia today is an "internally self-governing country" of France.

Where does this name come from? The rugged coastline of New Caledonia reminded Captain Cook of Scotland, and he thus named it New Caledonia, which is the old Latin name for Scotland. In French, *Nouvelle-Calédonie* is the official French name but the territory is often colloquially called *Calédonie*. The nickname (*le*) *Caillou* (literally "the stone or the pebble"), is used as an endearing term by the European community of New Caledonia to designate the country. It refers to the main island of New Caledonia which is essentially a nickel-rich long rock formation emerging from the Pacific Ocean.

Another nickname, (*la*) *Kanaky*, is also used in French, especially by independentist movements. The word comes from *kanaka*, meaning "human being". It turned into *Canaque* in French and became derogatory. In the 1970s when the Melanesian native inhabitants started organising themselves into political parties and called for independence, the word was transformed into a symbol of political emancipation and pride. The official name of the territory, *Nouvelle-Calédonie*, could be changed in the near future due to the Nouméa Agreement which stated that "*a name, a flag, an anthem, a motto, and the design of banknotes will have to be sought by all parties together, to express the Kanak identity and the future shared by all parties.*" So far, however, there has been no consensus on a new name for the country, even for "*Kanaky-New-Caledonia*" which would be similar to Papua-New Guinea.

Historically, the island was in French possession in late 1853, as a part of an attempt by Napoleon III to rival the British colonies in Australia and New Zealand. The sole reason for the Island to remain French was due to the British needing a good relationship with France, to stop the growing power of Bismarck's 2<sup>nd</sup> German Empire. Following the example set by the United Kingdom in parts of nearby Australia, between 1864 and 1922, France sent a total of 22,000 convicts to penal colonies along the south-west coast of New Caledonia. This number included regular criminals as well as political prisoners such as Parisian socialists and Kabyle nationalists. Towards the end of the penal colony era, free European settlers (including former convicts) and Asian contract workers by far outnumbered the population of forced workers. The indigenous Kanak population declined drastically in that same period due to introduced diseases and an apartheid-like system called *Code de l'Indigénat* which imposed severe restrictions on their livelihood, freedom of movement and land ownership. Today the Kanak account for less than 45% of the population. Due to the existence of several native languages, French is the "*lingua franca*", the common language, used everywhere on the Island.

The Grande Terre is by far the largest of the islands, and the only mountainous island. A mountain range runs the length of the island, with five peaks over 1,500 meters. It historically divided the island between the dry west coast and the higher rainfall on the east coast. Europeans settled on the dry west coast of Grande Terre, which is more favourable for livestock farming, leaving the east (as well as the Loyalty Islands and the Isle of Pines) to the Kanak, and resulting in an ethno-cultural division, which coincides with the natural one.

New Caledonia today is considered one of the world's most botanically important and critically endangered hotspots. Unlike many of the Pacific Islands, which are of relatively recent volcanic origin, New Caledonia is an ancient fragment of the Gondwana supercontinent. New Caledonia and New Zealand separated from Australia 85 million years ago. This isolated New Caledonia from the rest of the world's landmasses and made it a Noah's Ark of sorts, preserving a snapshot of prehistoric Gondwanan forests. Although the majority of the country's citizens are unaware of the extraordinary nature of their country's biological patrimony, a few of the country's animals and plants have become somewhat emblematic in local culture. Among the best known is a hen-sized, flightless bird, commonly-known as the "*Cagou*", which has a large crest and an odd barking call. Its image is frequently seen as a nationally-recognized icon. Another commonly used cultural emblem is the Columnar or Cook's Pine (*Araucaria columnaris*), an important symbol in Kanak culture, as well as the "*Niaouli*" tree (Eucalyptus, also native to Australia and New Guinea). Before the Europeans arrived, there were no mammals other than the "*Roussette*" (aka flying fox), a large vegetarian bat, considered a local delicacy.

In addition to the remarkable terrestrial environment of New Caledonia, the country is also home to important aquatic ecosystems. The New Caledonian Barrier Reef, which surrounds Grande Terre and the Isle of Pines (Île des Pins), is the second-largest coral reef in the world after Australia's Great Barrier Reef, with a length of 1,500 kilometres. Like its terrestrial counterpart, the Caledonian reef system has a great species diversity: it is home to the endangered "*dugong*" (*Dugong dugong*), and it is an important nesting site for the Green Sea Turtle (*Chelonia mydas*). The Nautilus is a living-fossil species, once common during the age of the dinosaurs, and survives today in the waters surrounding New Caledonia. UNESCO listed the New Caledonian Barrier Reef on the World Heritage List on 7 July 2008<sup>1</sup>.

This is a vast oversimplification to describe New Caledonia's extremely important, complex and diverse country.

Politically, New Caledonia has been on the United Nations list of non-self-governing territories since 1986. Agitation by the Front de Libération Nationale Kanak Socialiste (FLNKS) began advocating for independence in 1985. The FLNKS (led by the late Jean-Marie Tjibaou, assassinated in 1989), asked for the creation of an independent state of "*Kanaky*". The troubles culminated in 1988 with a bloody hostage taking in Ouvéa. This unrest led to agreement on increased autonomy under the Matignon Accord of 1988 and the Nouméa Accord of 1998. The latter describes the process of transfer of powers as "*irreversible*" and also provides for a local Caledonian citizenship, local official symbols of Caledonian identity, as well as the duty of mandating a referendum sometime after 2014 on the contentious issue of independence from the French Republic.

The Noumea Agreement emerged through a political negotiation between the two main political forces of New Caledonia. As a result, it has been a well-balanced and odd compromise between two incompatible logics. After this compromise became enshrined in the Agreement of 1998, France modified its Constitution to include it as the thirteenth title of the French Constitution, called "*transitional enactments concerning New Caledonia*".

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<sup>1</sup> Source Wikipedia

The status of New Caledonia is unique and has its own odd characteristics. Among the most important and odd features of New Caledonia, we can pick out three of them, which have put the new “country” into a more distant orbit of France.

These three main features are:

1. *The Caledonian collegial policy*
2. *The Caledonian citizenship*
3. *The right of self determination of New-Caledonia*

### **I – The Caledonian collegial policy**

The constitutional status of New Caledonia was crafted to prevent a political takeover by a majority only. Its aim is to lead to a consensus between the political forces, Kanak and non-Kanak.

Thus, the political powers are shared:

First, the establishment of three “Provinces” as regional councils shares the powers on a territorial basis. The Noumea Agreement follows the US and Australian federal models; It enumerates Caledonian powers (like the Commonwealth powers) and leaves all unlisted powers to the “Provinces” (like the States in Australia).

Secondly, the powers inside the government itself are shared according to a system of checks and balances. Let me give an account of this specific point. The voting system used to elect the Congress is proportional representation, which makes it very difficult to build a majority. This situation is classical, even in the Australian Senate. Furthermore, the Noumea Agreement provides that the members of government themselves may be elected by the Congress under a system of proportional representation! So, all the main political parties may join the government. It is called “*collégialité*”, in English “collegial policy”.

This deeply differs from the classical political system. The new one is based on a simplistic electoral mathematic rule, slightly limited by the possibility to choose the number of members of government. The proportional representation gives the New Caledonian political system its exceptional characteristic.

It is an exceptional characteristic, however, not a unique one: proportional representation at government’s level exists in Switzerland. But it is unlikely that the wise Swiss democratic system would work in New Caledonia. It has been tried in Fiji, but it has never worked and has resulted in a coup. Thus, the Fijian political model does not induce optimism.

Would such a collegial policy work in New Caledonia? Although we would expect instability as a result, the system has given a paradoxical answer: the government is secure, but weak.

#### *A – A secure government*

The way of electing the government appears to be simplistic: firstly, the parties, which are represented in Congress, present a list of names of members or non-members of the

Congress. Secondly, each Representative votes for his favourite list. The number of members is proportionate to the votes cast. What is strange is that there isn't any political debate about the governmental framework prior to the election, nor is there a policy choice. Each party delivers its own opinion separately.

What is becoming harder is the choice of the Head of government! The President of the government has to be elected by his colleagues during their first meeting. You need at least a majority within the members of the government. At this time, a "tacking practice" takes place. As you know, "tacking" was the habit of the House of Commons to attach (to tack) substantive provisions to money bills to make it difficult for the Lords to reject them. That practise is still going on in the USA. And it has appeared in New Caledonia. Every subject can be linked to another and it's a hard bargain.

Furthermore, after a president has been elected, the portfolios still have to be allocated. It's a hard work, because the organic Law (which implements the Noumea Agreement) requires each minister to countersign the collaborative decision. Thus, any one of them can stop the process.

That's the main reason why a government is secure. Nobody has a real interest in overturning the government! And the creation of another government would lead to the same structure! Avoiding a crisis could not be achieved through the dismissal of a minister, the resignation of the government itself or even through the use of the parliamentary couple of censure and dissolution.

There is no way to force a minister to resign and the resignation of the government needs a majority vote too! Only the resignation of the president can drag the government down!

To pass a vote of no confidence in the Caledonian government makes no sense, because all the parties are represented. Its only use would be to change the president of the government. But there is an easier way to challenge the president. If all the members of the same party in the government resign at the same time, proportional representation can't be achieved and the organic Law forces the government to resign!

Dissolution of the Congress could be a solution, but it is not in the hands of the president of the Caledonian government; it is in the hands of the French government. The French government does not use a discretionary power: indeed, it is under hard constitutional pressure. Dissolution can only be pronounced if "*the running of the government is proved to be impossible*".

Therefore, the government is secure but weak.

#### *B – A weak government*

For any decision, the government has to find a majority; and it isn't a relative one. You need to collect the consent of a majority of the members of government. No party has a majority alone. So, each decision takes a long time to reach.

The president of the government still has a casting (predominant) voice but only when the government is divided into two, next to the majority of voters. For example, in a government

of 10 or 11 members, which is an average size, the majority needed is 6. If the deadlock concerns 5 members against another 5, the president can use his predominant vote. Not if it is 4 against 4, with abstaining members.

And the parties have quickly found a very easy way to fight the predominant voice scheme. They only need not attend the government's meeting and then it becomes impossible to gather 5 votes in favour of an executive decision!

Furthermore, the collaborative decision, if adopted, must be countersigned by "*the minister in charge of enforcing the regulations*". Thus, each minister "in charge" can easily refuse to add his signature on a decision, even if it has been adopted by a majority of the government's members.

All these rules, which force people to work together, are understandable. But they make the decision-making process rough. Therefore, what happened was inevitable. Because a tough decision is difficult to make, even in a strong and homogeneous government, such a decision in any matter has never been adopted! So, all you have to do is to give some electoral gifts to the voters, and never increase taxes. This way of governing favours one of the worst French flaws, the government's irresponsibility.

The current government can easily fool the voters, because the Treasury coffers are still full with the booming mining industry taxes and the contributions of France. But if the economic situation takes a bad turn (goes pear-shaped!), it would be hard for any government to keep up with such high level of public expenses!

These are the features of the collegial policy in New Caledonia, with its strengths and weaknesses. It appears more like a political compromise than an efficient system of checks and balances.

Nevertheless, it could work, if the political parties found compromises and created some constitutional customs (conventions)! The New Caledonian system might lead to the acknowledgement of a "right of implicit veto". This veto could be used by the big parties in case of disagreement on any decision made by the executive power. On the other hand, the executive power has to be prevented from passing a project without consensus. The constraints placed upon the majority and the vetoes of the minority on what is essential, undoubtedly make up the formula of a "democracy of concordance".

It is up to the elected representatives of the Congress to create a constitutional custom.

The second strange feature of the Caledonian political system is the emergence of a Caledonian citizenship.

## II – The Caledonian citizenship

Citizenship usually means membership of a political community. It carries with it rights to political participation. It is largely coterminous with nationality, although it is possible to have a nationality without being a citizen (as an example, a convicted prisoner may be disenfranchised). In the political history of New Caledonia, we must never forget that the Kanak received the electoral capacity only on the 7<sup>th</sup> May 1946. The French Republic distinguished carefully between Man and Citizen.

Through a complete reversal of the situation, the Noumea Agreement recognised the existence of a Caledonian citizenship. This citizenship is distinct from the French one, although the French and the Caledonian (Kanak included) have French citizenship in common and carry French passports.

This Caledonian citizenship gives particular rights to the locals to political participation. It might be changed into a nationality, if New Caledonia chooses to become independent. The introduction of this right has been criticised because it may create a second-class status for French nationals living in New Caledonia. The French constitute a special electorate indeed.

### *A – The New Caledonia's electorates*

The creation of a Caledonian citizenship leads to separate electorates for the citizens and those who aren't. Furthermore, the Kanak want to know who will be entitled to vote in the issue of independence, to prevent an immigration trend. This creates another electorate. So, there are 3 main electoral bodies in New Caledonia.

The 1<sup>st</sup> one aggregates all those who will have the right to express their say in the final referendum deciding upon independence. According to international Law, the country, which is engaged in a decolonisation process, has to discourage immigration from the metropolitan territory. The Kanak are still extremely concerned about a new French settlement in New Caledonia. In 1988 the political compromise sealed up into the Matignon Agreement and confirmed with the Noumea Agreement in 1998, is tough: those taking up residence after 1988 will not be able to vote in the future constitutional referendum except if, by the year 2014, they prove they have been resident continuously for 20 years. So, the last voters would have had to have moved to New Caledonia before the end of year 1994. The rules are now clearly known by everyone.

The second electorate is made up of the Caledonian citizens. It comprises all those who have the right to vote in the election of the congress of New Caledonia. The rule is also harsh, but they only have to prove that they have been resident continuously for 10 years before the election.

This rule didn't satisfy the independence movements, because it allowed what they called a "*democratic drowning*". This situation, known as "*the sliding electorate*", has led to demonstrations and violence. French President Jacques Chirac himself recognised the rule

was not in compliance with the Noumea Agreement, although its terms were ambiguous. Hence in 2007, he proposed to change the Constitution and “freeze” the electorate. Only those residing in New Caledonia before the Noumea Agreement (that is before the 8<sup>th</sup> of November 1998) will have the right to prove that they have been resident continuously for 10 years. Any French national, who moved to New Caledonia after the 8<sup>th</sup> November 1998, will never be able to become a Caledonian citizen, at least as long as the Constitution remains unchanged.

The third electorate is composed of all the French nationals, living in New Caledonia, and includes the Caledonian citizens as well. This widest electorate is simply called “*additional board*”, because of the addition of the French nationals to the Caledonian citizens. Together, they take part in the legislative and presidential French elections by sending 2 Representatives to the National Assembly, as well as in the national referendum, the election of the European Parliament and the local town councils.

These limitations upon the right to vote have created severe political and judicial quarrels.

### *B – Disputes about the Caledonian citizenship*

Does this law, which deprived the French nationals in New Caledonia of a right to vote, violate a fundamental right? Or, on the other hand, do these people, who are French without being Caledonian citizens, only vote for the elections that they may be affected by?

Because the French Constitution was expressly changed, no constitutional appeal before the Constitutional Council (which is the French Constitutional High Court) could be launched. But the issue has been referred to the European Court of Human Rights and the Human Rights Committee by political “loyalist” opponents.

Firstly, the Human Rights Committee gave its observation. The Human Rights Committee is a treaty-based mechanism where a group of experts examines reports on individual communications pertaining only to the “*International Covenant on Civil and Political Rights*”. In principle, it remains disputed whether the Human Rights Committee’s non-binding final views qualify as decisions of a quasi-judicial body or simply constitute authoritative interpretations on the merits of the case.

Despite this, the Committee submitted its report on the 15 July 2002. It submitted that the Caledonian citizenship requirements were reasonable because they applied to a historical decolonisation process.

A complaint regarding violation of human rights by France was also filed in the European Court of Human Rights established under the “*European Convention on Human Rights*” of 1950 to monitor compliance by 47 European member States. Any decision of the Court is binding on the member States and must be complied with. However, on the 11<sup>th</sup> January 2005, the Court ruled that these limitations regarding the right to vote were also acceptable in a process of self-determination.

No decision has since been made about the constitutional change in 2005 which has “frozen” the electorate. This new issue is still pending before the European Court of Human Rights...



After the resolution of the first issue, a second one presented itself: should the Caledonian citizenship be the basis of an affirmative action, as it was established by former President Kennedy in the USA to enhance racial equality of applicants? A provision of the Noumea Agreement authorises organisation of a safeguard for local workers. This safeguard addresses protection from overseas workers, namely French nationals. This issue strikes deeply into the Kanak independence movements and the European community of New Caledonia.

In spite of the provision of the Noumea Agreement, nothing has been made to establish such a safeguard. The French can freely continue to come to, and find a job in, New Caledonia, even though they are not entitled to New Caledonian citizenship.

The Caledonian citizenship issue will remain a major bone of contention in the forthcoming years because it foreshadows a prospective nationality in the eyes of the Kanak.

Let me continue with a third oddity of the Caledonian political system, the right of self-determination.

### **III – The right of self-determination of New Caledonia**

The constitutional law in France is still in line with the decolonisation process since the approval of the referendum in the Matignon Agreement in 1988. New Caledonia was re-listed as a non-self-governing territory by the United Nations in 1986.

#### *A – The decolonisation process*

This United Nations' list of Non-Self-Governing Territories is a group of countries which, according to the United Nations, are not decolonised yet. The list was initially prepared in 1946 pursuant to Chapter XI of the United Nations Charter and has since been updated by the General Assembly. Only permanently inhabited territories are considered for inclusion in this list, excluding many remote atolls (e.g., the French Island of Clipperton) and Southern Ocean territories (e.g., the French Southern and Antarctic Territories).

In 1960, the General Assembly adopted Resolution 1514, called the "*Declaration on the Granting of Independence to Colonial Countries and Peoples*". This Resolution declared that all remaining non-self-governing territories and trust territories were entitled to self-determination. The following year, the General Assembly established the Special Committee on the Situation with Regard to the Implementation of the Declaration. It is sometimes referred to as the Special Committee on Decolonisation or the "Committee of 24" (because for much of its history the Committee was composed of 24 members), which generally reviews the situation in each non-self-governing territory and reports to the General Assembly.

The Nouméa Agreement provides two main guarantees to the United Nations: the first is to ensure a mechanism for the determination of the ultimate status of New Caledonia. Pursuant to the Agreement, the Territorial Congress will have the right to call for a referendum on independence, at any time of its choosing after 2014. The second one is that France plainly



accepts “*the way to emancipation (independence) shall be brought to the attention of the United Nations*”.

Pursuant to the Noumea Agreement, both Congress and government are increasingly empowered via the gradual implementation of a transfer of powers from France to New Caledonia. Key areas (e.g. taxation, labour law, health, foreign trade, and many others) are already in the hands of the Territorial Congress and government. Further authority will be given to the Congress in the near future (e.g. civil law, corporate law, High School Education, etc.). Ultimately, before New Caledonia decides on its future, the French Republic should only remain in charge of *foreign affairs, justice, defence, public order, and currency*, one would say, the “sovereign functions”.

So, at the end of the line, and if no major crisis happens, what will be the future of New Caledonia?

### *B – What is at stake in the Referendum*

The Noumea Agreement surprisingly plans multiple referendums only for the Caledonian citizens during the 4<sup>th</sup> mandate of the Congress (e.g. 2014 to 2019). This strange provision requires three repeated questions, each year if necessary, after the previous has failed.

If the people’s answer is negative for the third time, the Noumea Agreement requires that the political parties negotiate the matter but provides an effective standstill provision. Until the concertation succeeds, the political system will remain unchanged “*à son dernier stade d’évolution*”, in English “at its latest stage”. The French Constitution defines this “irreversibility rule” as a constitutional principle.

Although decolonisation can be achieved by attaining independence, establishing a "free association" status, or integrating with the administering power (or even another State), the Noumea Agreement has ruled out the possibility of integration.

The Congress of New Caledonia is involved both in choosing the date of referendum and in formulating the question. This hard task is achieved by a majority of three fifths of the members of Congress.

There are many issues at stake:

- Will New Caledonia be able to afford independence? If not, how can it retain financial aid from France?
- How to fulfil sovereign functions, if New Caledonia ever has to?
- Could New Caledonia afford a local currency or should it keep the fixed exchange rate between the Pacific Franc and the Euro?
- How to control the influx of migrant workers from metropolitan France to New Caledonia?

All these issues are very controversial and potentially conflicting. That’s why the development of an elaborate and complicated question for the referendum might be an avenue worth investigating for the Congress.

This question might include such a compromise, giving a mix of contradictory signs to the people of New Caledonia: New Caledonia might accept the sovereign functions, and as a result might develop into a State but at the same time, it might sign an agreement with France to allow it exercise these sovereign powers for 20 years more...

To sum up, nothing has changed but everything is different!

Such a compromise would require a lot of prudence and shrewd negotiators to work out a deal. Hopefully, the worst will never happen. The Noumea Agreement is often compared to a “bet on intelligence”; we shall find out in due time!

Mathias CHAUCHAT  
Professor of Law, University of New Caledonia,  
Visiting Professor,  
Centre for Public, Comparative and Inter National Law,  
T C Beirne School; of Law,  
University of Queensland.

<http://larje.univ-nc.nc> - [mathias.chauchat@univ-nc.nc](mailto:mathias.chauchat@univ-nc.nc)