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### The on-going constitutional transition in New Caledonia in 2018

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The Prime Minister of France, Edouard Philippe, has announced the question to be posed at the referendum on independence in New Caledonia on 4 November 2018 “Do you want New Caledonia to accede to full sovereignty and become independent?” The answer will be “Yes” or “No”. “Yes” would begin the constitutional transition towards a new Nation in the South Pacific.

However, the political situation is bad. To clarify, there is a steady, unbalanced, propaganda campaign in favor of voting “No”. All of the local media is campaigning for voting “No”. Public funds are constantly flowing in from both New Caledonian government departments and the French government. Everybody forecast a large defeat of the Yes, often around 70% against 30%<sup>1</sup>. All of this aside, on 18 November 2017 at the University of New Caledonia, Philippe Gomès, New Caledonian Member of the French Parliament, summarized the situation in the country: “*The Kanak independentists say to the French government: You stole our country 163 years ago! Give it back to us! Then, we will give it back to you, by signing an agreement with France to share the sovereign powers and build an associated country! So, the independentists are only fighting for one second of full independence for the country; and it is only that second the non-independentists don’t want*”.

Despite this refusal, the Nouméa Agreement includes guarantees for the pro-independence parties. Thus, the constitutional transition would be blocked for a long time. As you know, the Nouméa Agreement<sup>2</sup> envisages multiple referendums. This strange provision requires three successive referendums, one every two years if necessary, i.e. if the previous one has failed. A quick reading of the Agreement could lead to the conclusion that, if the first consultation takes place in 2018, the second would take place in 2020 and the third in 2022. This is quite a long time.

However, it is not exactly what is written in the Organic Institutional Law, which implements the Nouméa Agreement. A second and a third referendum “*can be asked for by a third of Congress from the sixth month following the vote. The new consultation takes place within 18 months*”<sup>3</sup>. “From the sixth month” could be from

the seventh or eighth month, or from the second or third year after the vote, or even never... It is not urgent or automatic. The Law has removed the time limit. Moreover, if the people's answer is negative for the third time, the Nouméa Agreement stipulates that the political parties must negotiate. However, it does provide an effective standstill provision. Until the process succeeds, the political system will remain unchanged *"in its latest state"*. The French Constitution defines this *"irreversibility rule"* as a constitutional principle<sup>4</sup>.

Why was this provision included in the Nouméa Agreement? It's very important, because it guarantees civil peace, by knowing that nothing can change after the vote.

However, the biggest risk is that nobody, especially the French government, keeps its word. For example, France could propose discussions about a new autonomy inside the French Republic, a kind of "way out" of the Noumea Agreement without independence.

It has often been said that the Nouméa Agreement is a "first" for France: consensual and gradual decolonization. France has never succeeded in decolonization. France has always agreed because it has been under a lot of pressure. The words of the Nouméa Agreement were supposed to be crystal clear: *"decolonization must allow the Kanak people to set up a new relationship with France that meets current reality. France is prepared to work alongside New Caledonia on this"*<sup>5</sup>. We also find this sentence: *"the way to emancipation will be conveyed to the United Nations"*<sup>6</sup>. However, a lot of signs indicate something different. In contrast to New-Zealand, which proposed an acceptable solution of associated States to Cook Islands, Niue or even Tokelau and supported it by campaigning for the Yes, France doesn't support the constitutional transition (1). Despite that, could the referendum be a founding process for the Caledonian people to open the way for a consensual future? (2)

## **1. France doesn't support the constitutional transition of New Caledonia**

In 1988, French Prime Minister Michel Rocard opened Pandora's Box. He introduced France as a mediator between Kanaks and non-Kanak Caledonians, despite France being the administrative colonial power, whose international responsibility is to lead the country towards its emancipation. By systematically hiding behind the lack of consensus with the non-independentist parties, France could easily avoid its obligations. Currently there are a number of signs that France is turning down the decolonization process.

**The abrupt and dividing question for the referendum is the first sign.** The French Prime Minister, Edouard Philippe opted for this wording asking the people to vote for or against independence. However, the question was written in another way in

the Nouméa Agreement: *“Do you agree with New Caledonia fulfilling sovereign functions (foreign affairs, justice, defense, public order, and currency)? Do you agree with the country having international status? Do you agree with a new nationality?”* These were three inseparable questions, which could only be responded to by a “Yes” or “No.”

What is different? Jean-Marie Tjibaou, the Kanak leader assassinated in 1989, explained the wording in great detail: *“Sovereignty is the right to choose its partners, the right to negotiate interdependency”*<sup>7</sup>. He clarified the difference between sovereignty and independence. He was clearly opting for an Associated State or a partnership like all the independent small island nations in the South Pacific. By stating that full sovereignty is independence and nothing else, the French Prime Minister has minimized the efforts of 30 years of agreements to bring the Caledonians to consensual independence from France, similar to the English-speaking South Pacific. Apart from Tokelau (1337 inhabitants), Pitcairn (50 inhabitants) and American Samoa (55 000 inhabitants), only three South Pacific territories remain dependent and they are all French: New Caledonia, French Polynesia and Wallis and Futuna.

Therefore, France made no proposal towards a partnership or an Associated State. On the one hand, it is still “France or chaos” as expressly demanded by the non-independentist parties. On the other hand, the trap has closed on the pro-independence parties. The “Yes” and “No” are unbalanced. If you answer “No”, things remain unchanged. If you answer “Yes”, you throw yourself into the void without any guidelines, which is much more problematic.

**The second sign that France is turning the decolonization process down is its acceptance of electoral fraud.** The creation of Caledonian citizenship leads to separate electoral rolls for citizens and non-citizens. The electoral roll for citizens comprises all those who have the right to vote in the election of the Congress of New Caledonia. The rule is harsh. Only the French nationals residing in New Caledonia before the Nouméa Agreement (that is before 8 November 1998) AND registered in order to appear on the 1998 roll AND proving that they have been residents continuously for 10 years, will be able to vote. Any French citizens who moved to New Caledonia after 8<sup>th</sup> November 1998 will never be able to become Caledonian citizens, at least, not as long as the Constitution remains unchanged.

The operating process of establishing the special electoral roll failed. Instead of implementing the rules to the letter, the administrative commissions<sup>8</sup>, in which the non-independentist parties are a majority, voted on litigious situations. As a result, people who did not comply with the legal requirements were registered on the special electoral roll.

Legal proceedings also failed. The independentists had to prove, without any help from the Court, that a registered voter did not fulfil all the requirements of the Law. The plaintiffs were asked to provide proof that the Mayor was required to refuse them<sup>9</sup>. The plaintiffs weren't being entitled to a fair trial. It has been proved that 5% of the electoral roll was falsely enrolled, that is to say at least two more seats for the non independentists in the Congress<sup>10</sup>.

Instead of fighting against this electoral fraud, on 4 February 2015 the then French Prime Minister Manuel Valls covered up these irregularities by a political agreement and a large subsidy to the mining industry. The case is thus "*politically closed*" according to the minutes of the Committee of Signatories meeting.

**The third sign is the ongoing French settlement of New Caledonia.** Colonization in Oceania is settlement. There is a modest, but continuous flow of new arrivals from Metropolitan France to New Caledonia. For years, the annual natural increase has been 2 700 people while the annual average net migration is 1 300 people<sup>11</sup>, all settled in Noumea. The Kanaks are now the biggest minority with 39% of the population. It's the same with the electoral roll for the referendum deciding on independence<sup>12</sup>. The Kanaks are still a minority with 46%. This is a little better for them, because the voters had to prove, by the year 2014, they had been residents continuously for 20 years. So, the last eligible voters would have had to have moved to New Caledonia before the end of 1994.

Some might say: what's the real meaning of a decolonization vote in which the indigenous colonized people are a minority? Moreover, France continues to encourage the arrival of French citizens from metropolitan France and French Overseas Territories, in particular by increasing the salaries of civil servants by 73% and by giving them a lot of tax exemptions. Caledonians also benefit from this policy. Owners of land in the South can get rich without working hard, encouraged by tax exemptions and thanks to the housing bubble and purchases by new arrivals. The losers are mostly the Kanaks affected by the double penalty of low wages and high prices.

**The fourth sign is France maintaining an artificial economy by public spending.** By excess public spending, France is reducing the competitiveness of the local economy. Prices have risen, real estate and housing have become unaffordable, health and social welfare have sunk into huge deficits. Public sector employment has further increased its over-dominance. What we wrongly call the "nickel economy" is actually an economy based on public funds, like everywhere in the French Overseas Territories. The currency is significantly overvalued giving artificial purchasing power and, as a result, causing an imbalance in the balance of payments that can only be

offset by the help of France. Public spending and debt are the engines of economic growth. Even the nickel plants, pride of the country, have been heavily subsidized<sup>13</sup>. All of this has cut New Caledonia off from its regional environment and has made it uncompetitive. Even trade has false airs of the old colonial pact. The purchasing departments of the major French distribution companies are all turned towards France. New Caledonian shops are looking more and more like French stores. Australian, New Zealand or Indonesian products are slowly disappearing from the shelves.

All these signs together, give us another explanation. France has no intention of leading the country towards its emancipation. It is just saving time. It is cynically organizing the political failure of the referendum. The visit of French President Emmanuel Macron to New Caledonia in May 2018 was a kind of duplicity model. While saying that he was not choosing in the place of the Caledonians, he continually developed the advantages of remaining in France. Moreover, France has no intention of leaving the Pacific region. *“France is the last European State in the Pacific”* proudly stated the president<sup>14</sup>. *“France would be less beautiful without New Caledonia. France is a great power in the Indo-Pacific region across all its territories, New Caledonia, Wallis-And-Futuna, French Polynesia, but also Mayotte, Reunion Island and the French Southern and Antarctic Territories. More than a million and a half of our fellow citizens are in this vast region; more than 8,000 members of our military forces defend our interests, our strategy. The Indo-Pacific region is more than three quarters of our maritime presence and we are the second largest maritime power in the world”*.

Philippe Gomès, the New Caledonian Representative at the French National Assembly, told the press *“the pro-independence parties will have to mourn independence”*. On the contrary, the Nouméa Agreement was for *“a shared common destiny”*. What constitutional transition can emerge from mourning?

## **2. The 2018 referendum won't be a founding act of the Caledonian people**

The French Prime Minister, Edouard Philippe, addressing Congress of New Caledonia on 5 December 2017, stated: *“What will occur on the Day of referendum? The New Caledonian people, as established by the Noumea Agreement, will directly, and not through elected representatives, decide on the political future of New Caledonia; this will be done completely autonomously, that is to say, totally freely. (...) Ultimately, it will be the New Caledonian people who will decide on sovereignty”*. This view is not unanimous in the country. While some of the non-independentists agree to build a small nation within the greater French Nation, others define themselves as French first. They are expecting the referendum to be a large victory for the French.

Therefore, the conditions of a consensual founding act do not seem to be met. From the vote, the non-independentist parties hope to get a mandate to break the irreversibility rule. On the contrary, the pro-independentist parties hope the country will take a decisive step towards independence. They waited until the last minute of the presidential visit for a strong gesture from the French State, which never came.

Is there at least a consensus on appropriate governance for a multicultural Caledonian society? The pro-independentist parties clearly took on the major part of the institutions established by the Nouméa Agreement in their political project for the consultation process. However, the pending vote toughens the debate. The non-independentists are outdoing everyone!

New Caledonian Member of the French Parliament, Philippe Gomès recently<sup>15</sup> mentioned four major disagreements: they were on collegial policy and the voting system, the allocation keys of income from taxation, and the electorate. Each of them requires an explanation.

**Collegial policy and the voting system are in question.** The constitutional status of New Caledonia was designed to prevent a majority from holding political power. Its aim is to lead to a consensus between the political forces, both Kanak and non-Kanak, without going straight to a deadlock! Power in the Caledonian government is shared according to a system of checks and balances. Consequently, Congress is elected by a proportional representation voting system, which makes it very difficult to get a majority. This situation is classic. 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. This is called “Collegial Policy”. It is very different from the classic political system. The New Caledonian system is based on a simplistic electoral mathematic rule<sup>16</sup>. Proportional representation both in Congress and government gives the New Caledonian political system its exceptional character.

How can this be changed? Philippe Gomès often asks for a majority premium to be granted to the winning party in the Congress so, he could keep a collegial policy in government reduced to an absolute minimum.

Moreover, he endorses the possibility of changing the way the Congress is elected. In fact, at present, Members of Congress must hold dual mandates in New Caledonia: they concurrently hold both provincial and Congress mandates. This situation complicates work in the assemblies, because time is finite, and also, election on a provincial list does not make it easy for national leaders to emerge. An alternative could be the election of members of Congress by a multi-member open list system of proportional representation, using a single national electoral roll

comprising all the registered voters. This electoral system was recently chosen by Fiji. This proposal is very interesting but leads to a loss of seats for the Kanak Northern and Loyalty Islands Provinces and an advantage for the Southern Province. The Southern Province currently has 32 out of the 54 seats in the Congress, that is, 60% of the seats, while it has 75% of the population. However, the Southern Province has only 62 % of the special electoral roll of Caledonian citizens. Tell me why the independentist Kanaks should agree with this proposal...

**The parties continue to disagree on the allocation keys of the income from taxation.** The relationship between the New Caledonian government and its provinces is determined by the allocation keys for two reasons: to avoid perpetual bickering and ensure the rebalancing between Kanaks and non-Kanaks. As a result, the Southern Province receives 50% of the taxes, 32% for the Northern Province and 18% for the Loyalty Islands Province. Basically, whereas an inhabitant of the Southern Province receives only one franc, an inhabitant of the Northern Province receives two francs, and an inhabitant of the Loyalty Province three francs. This really creates difficulties for the Southern Province. However, tax exemptions from the French government and from New Caledonia mostly benefit the South, where the wealth is. Obviously, the standard of living remains much higher in the South. What really bothers the independentists is that the dispute reveals the intention to question the rebalancing. Furthermore, they are angry that continued immigration from France to Nouméa will result in giving more means to the Southern Province. This conflict could probably be overcome.

Last but not least, **the sliding electorate is coming back.** The non-independentist parties really want to widen Caledonian citizenship and the special electorate.

Significant compromises have been made in the Signatories' Committee meetings since the signature of the Nouméa Agreement. If New Caledonian citizenship one day exists, it would include predominately natives of the country (Caledonians and Kanaks), and non-natives who have a parent who is native. Non-natives who arrived before the Nouméa Agreement, and their descendants would also be included, but not newcomers, only their native-born descendants.<sup>17</sup> This is the fragile result logic of successive political agreements. It corresponds to a simple and understandable vision of citizenship for all (natives, non-natives having a native parent and people who arrived before the Nouméa Agreement). This citizenship would be consolidated by the willingness to live together in a common destiny.

The non-independentist parties want more. They're asking for a "sliding" electorate which means if you have been a resident continuously for 10 years, you become a Caledonian citizen. This is requested for democratic reasons: one man, one vote. The reopening of the sliding electorate would trigger unrest. For the

independentists this means the reopening of the French settlement. It also means the Kanaks, who would be the biggest minority in an independent Kanaky, would have to resign themselves to being a minority, and not even a strong one, of indigenous people within the French Republic. This is understood in a disparaging sense to be “the aboriginal way”.

Thus, failing to win, the independentists may focus on only the ethnic result of the referendum. If the Kanaks vote overwhelmingly for independence, even against all “others”, then the political situation will remain blocked. Nothing would ever be able to change without long negotiations between Kanaks and non Kanaks. The alleged broad victory of the No is likely to be misinterpreted. There are Kanaks who fear independence and Kanaks who conversely do not want to “share” the country, are not pleased by the “common destiny”, and do not accept to have become a minority. For them, the referendum will be the coronation of the French settlement. Moreover, in Kanak culture, silence in a political discussion often means disagreement.

The French Prime Minister, Edouard Philippe, addressing Congress of New Caledonia on 5 December 2017, suggested convening a working group, to establish a set of common values and write a declaration of shared values and rights. This working group has not yet progressed but could perhaps turn out well. However, some non-independentists refuse to sit down to discuss.

The “repatriation” of the Organic Law could be another sign of good will. What does this mean? The Organic Law would no longer be able to be unilaterally modified by the French Parliament but only by the representatives of New Caledonia, most likely with a reinforced majority, for example three/fifths of the Congress. In fact, the Organic Law contains a provision which means it can't be modified without consulting Congress. This consultation of Congress was interpreted by the French government as not applicable to the amendments adopted during the parliamentary shuttle, by the National Assembly and the Senate. On the eve of the referendum, the political message is very clear. Despite repeated speeches on the autonomy of New Caledonia, France does what it wants at home... The “repatriation” of the Organic Law would lead to increased self-government in New Caledonia. This step is highly unlikely.

As Yash Ghai regularly says: *“The process of making the Constitution is as important as the outcome; in fact, the process determines the outcome”*<sup>18</sup>. The risk of a non-consensual constitutional transition in New Caledonia would be a step back, with on one side the colonized Kanak people and on the other side the colonizing French State. The “others” (non Kanak Caledonians) will then be denied their Caledonian legitimacy since they only define themselves as French. The common destiny

between the people of New Caledonia (Kanak and non-Kanak Caledonians) is at stake.

In conclusion, France is the colonizing power. It is its international duty to decolonize. So, France has to propose an acceptable solution in accordance with international Law and campaign for the Yes.

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<sup>1</sup> <https://m.facebook.com/quidnovi.nc>

<sup>2</sup> Point 5 of the Noumea Agreement.

<sup>3</sup> Article 217, Organic Law n° 99-209 of 19 March 1999, modified in 2015.

<sup>4</sup> The institutions, including collegial government, provincialization, transfers of powers from France, the frozen electorate of citizens, but also provisions about local employment, customary status or accession to full sovereignty are constitutionally irreversible.

<sup>5</sup> Point 4 of the preamble of the Noumea Agreement.

<sup>6</sup> Point 3.2.1. of the Noumea Agreement.

<sup>7</sup> Les temps modernes, n° 464, mars 1985.

<sup>8</sup> The commission is made up of 5 people and chaired by a magistrate from metropolitan France: a representative of the High Commissioner, a representative of the Mayor and two representatives of the political parties, one from the independentist parties and the other from the non independentist parties. The Chairman and the representative from the FLNKS are often in the minority.

<sup>9</sup> Avis de la CADA n° 20164280 du 3 novembre 2016, Sylvain Pabouty.

<sup>10</sup> Mathias Chauchat, Jus politicum n° 13/2015 La fraude à la sincérité du corps électoral en Nouvelle-Calédonie.

<http://juspoliticum.com/article/La-fraude-a-la-sincerite-du-corps-electoral-en-Nouvelle-Caledonie-964.html>

<sup>11</sup> <http://www.isee.nc/population/demographie/migrations> ; New Caledonia has a population of 278.500 inhabitants (2017). On average, the net migration is the half of the yearly natural surplus.

<sup>12</sup> Mathias Chauchat, Jus politicum 27 février 2018, Les modifications récentes de la loi organique sur le corps électoral en Nouvelle-Calédonie.

<https://larje.unc.nc/wp-content/uploads/sites/2/2018/04/Jus-politicum-révision-LO-2018.pdf>

<sup>13</sup> During his 2016 trip to New Caledonia, French Prime Minister Manuel Valls announced a €200 million loan (€1 million = us\$1.2 million) for the *Société Territoriale Calédonienne de Participations Industrielles* (STCPI), the holding company run by the three provinces of New Caledonia, which holds a 34 percent minority share of the SLN. In November 2016, Prime Minister Valls announced strong financial support for the Vale Plant, as he had done for the SLN in April 2016. To prevent its possible closure, Valls pledged a €200 million loan and an additional financial guarantee for €220 million. The situation of the Northern plant was still to be resolved. In November 2016, the French government announced that Glencore would not have to reimburse a €200 million tax exemption, the same amount the other two plants had received. In total, €600 million was lent to the three plants, the repayment of which is assessed as unlikely. Offering job subsidies is a classic strategy in French politics.

<sup>14</sup> Nic Maclellan, France and the blue Pacific, Asia & the Pacific Policy Studies, vol. 5, no. 2-2018: "In the Pacific, French policy is driven by strategic interests as a mid-sized global power, but also long-term access to strategic resources (Fisher, 2015). France has a key interest in maintaining its global standing through its 'overseas collectivities' (the term now used for the former DOM-TOM network of over-seas departments and territories)".

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<sup>15</sup> Philippe Gomès, Pour que continue à vivre le rêve calédonien, Revue juridique, politique et économique de Nouvelle-Calédonie, L'autodétermination, n° 31, mai 2018.

<sup>16</sup> Slightly limited by the possibility to choose the number of members of government.

<sup>17</sup> November 8, 1998, regardless of whether or not they are listed in the special roll of 1998, which was a conceded point in the Signatories' Committee of February 4, 2015. These "*young people, born on the territory and being registered at 16 in New Caledonia*", according to the expression of the Court of Cassation, are registered at their majority by presumption on the provincial special list because of a jurisprudence of the Court of Cassation, yet contrary to Article LO. 188 which requires a citizen parent; Court of Cassation, n ° D 11-60.376 of November 3, 2011, Hnawia.

<sup>18</sup> Yash Ghai, for an example, see April 9, 2008, The 2008 Myanmar Constitution: Analysis and Assessment, p.1.

[http://www.burmalibrary.org/docs6/2008\\_Myanmar\\_constitution--analysis\\_and\\_assessment-Yash\\_Ghai.pdf](http://www.burmalibrary.org/docs6/2008_Myanmar_constitution--analysis_and_assessment-Yash_Ghai.pdf)