

# NEW CALEDONIA: THE ARCHIPELAGO THAT DOESN'T WANT TO BE FREED

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*In 2018, the electorate of New Caledonia voted against independence in the first of what is a probable series of referenda. The result did not surprise many of those who follow New Caledonian politics. A substantial (yet variable) mining income, a level of public services above the regional average in the Pacific, a higher, by way of comparison, level of constitutional autonomy than other French regions, the possibility of accessing European world-class higher education institutions and the benefits of being a member of the European Overseas Countries and Territories Association (OCTA) are a few of the reasons that might have convinced New Caledonians to reject independence. The motivations that move a political community towards independence are multifarious, but this article will focus on the flexibility shown by the French constitutional system in accommodating the demands of the Kanak and the potential implications of renouncing the benefits of European citizenship.*

*The essay is divided into two main parts. The first part discusses the Noumea Accord and its implications for the French constitutional system; the second part discusses the identity-based constitutional aspirations of the Kanak.*

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## **I INTRODUCTION**

According to the United Nations, New Caledonia is a non-self-governing territory<sup>1</sup> administered by the Republic of France as a French autonomous

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1 United Nations General Assembly "General Assembly Resolution 1514 Declaration on the Granting of Independence to Colonial Countries and Peoples"; United Nations "Report of the Secretary-General: Information from Non-Self-Governing Territories Transmitted under Article 73 e of the Charter of the United Nations" 3; Stéphanie Graff "Quand combat et revendication kanak ou politique de l'État français manient indépendance, décolonisation, autodétermination et autochtonie en Nouvelle-Calédonie" (2012) 134 Journal de la Société des Océanistes 61, 69.

collectivity.<sup>2</sup> New Caledonia, by way of comparison to other French regions, benefits from a constitutionally-entrenched legislative and administrative autonomy.<sup>3</sup> The landmass of the archipelago is 18500 km<sup>2</sup> and it is composed of the island of Grand Terre, the archipelago of the Loyalty Islands and several hundred smaller and sporadically inhabited islands and atolls.<sup>4</sup> The island of Gran Terre is the largest and it includes the territorial capital Noumea. The region is relatively isolated. Noumea is 539 km South of Port Vila in Vanuatu, 1472 km North West of Brisbane and 1804 km North of Auckland.

New Caledonia by comparison to metropolitan France, rich in resources. The archipelago includes, for instance, the fourth largest reserve of nickel in the world.<sup>5</sup> The Exclusive Economic Zone (EEZ) is also a current and potential source of revenues since it covers a surface area of over 1.4 million km<sup>2</sup> which is several times the EEZ of metropolitan France.<sup>6</sup> In 2017, the economic support that New Caledonia received from France was estimated to account for 15% of its GDP.<sup>7</sup> The tertiary sector remains the highest contributor to the regional economy, outstripping in terms of GDP both the internal revenues produced by mining (via a sympathetic fiscal

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- 2 French Constitution 1958 (as Revised 23/07/2008) arts 73, 74. Loi Constitutionnelle N° 2008-724 Du 23 Juillet 2008 de Modernisation Des Institutions de La Ve République arts 9, 11, 39, 40, 39, 40. David Chappell "Decolonisation and Nation-Building in New Caledonia: Reflections on the 2014 Elections" (2015) 67(1) Political Science 56, 57; Géraldine Giraudeau "Le Droit International et Les Transitions Constitutionnelles" in Françoise Cayrol (ed) *L'avenir institutionnel de la Nouvelle-Calédonie* (Presses universitaires de la Nouvelle-Calédonie, 2018) 19, 25; Graff, above n 1, 74; Sophie Boyron *The Constitution of France: A Contextual Analysis* (Hart Publishing, 2013) 206, 214.
  - 3 David Marrani "Asia-Pacific: Insights from the Region: Will New Caledonia Be Another Tokelau?" (2006) 31(2) Alternative Law Journal 102, 102; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) art 1.
  - 4 Émilie Dotte "Modes d'exploitation et d'intégration Au Sein Des Territoires Kanak Précoloniaux Des Ressources Végétales Forestières (Ile Millénaire Ap J-C): Approche Ethno-Archéo-Anthracologique En Nouvelle-Calédonie' in Théophile Nicolas and Aurélie Salavert (eds) *Territoires et économies* (Éditions de la Sorbonne, 2016) 155, 155; *Institut de La Statistique et Des Études Économiques- Recensement* <<http://www.isee.nc/population/recensement>>.
  - 5 Séverine Blaise "The "Rebalancing" of New Caledonia's Economy" (2017) 52(2) Journal of Pacific History 194; Colin Filer and Pierre-Yves Le Meur *Large-Scale Mines and Local-Level Politics: Between New Caledonia and Papua New Guinea* (ANU Press, 2017) 4. Emily Schnebele "Nickel, U.S. Geological Survey, Mineral Commodity Summaries 2017".
  - 6 C Le Visage et al "Inventory of the Economic Zones of the French Territories in the Pacific The ZoNéCo and ZEPOLYF Programmes" (1998) 75(1) The International Hydrographic Review 108; Flanders Marine Institute (VLIZ), Belgium "Maritime Boundaries Geodatabase: Maritime Boundaries and Exclusive Economic Zones (200NM)" version 10 Available online at <<http://www.Marineregions.Org/>> <<http://www.vliz.be/en/imis?dasid=5465&doiid=312>>.
  - 7 Filer and Meur, above n 5, 8.

regime subsidised by France) and the public sector.<sup>8</sup> The effective contribution of the mining sector is notoriously difficult to evaluate since it is affected by environmental costs that cannot easily be assessed.<sup>9</sup>

Due to French immigration policies, the majority of the resident population currently has colonial or overseas ancestry; however, in the North, there is an indigenous Kanaka relative regional majority.<sup>10</sup> The Kanak community, as the majority national indigenous Melanesian identity, is fragmented both sociologically, politically and linguistically.<sup>11</sup> The grouping of a multinational society into a single entity is the result of the colonisation process; the sociological and political heterogeneity of the Kanak nation also has constitutional implications for the future of New Caledonia since not all Kanak are in favour of independence.<sup>12</sup> The different perceptions within the Kanak community over the choices that define, and will define, the commonwealth of New Caledonia played out in the 2018 referendum over independence.<sup>13</sup> The referendum result, which went in favour of preserving the union with France, was one of a series set up in the Noumea Accord.<sup>14</sup> The Noumea Accord, among other aspects, defines the level of autonomy of the region and sets the conditions, via the transfer of some of the French public institutions operating in the archipelago, for complete decolonisation.<sup>15</sup>

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8 Blaise, above n 5, 204.

9 Leah S Horowitz "Toward a Viable Independence? The Koniambo Project and the Political Economy of Mining in New Caledonia" (2004) 16(2) *The Contemporary Pacific* 287, 299, 303; Henri Torre *Rapport d'information fait au nom de la Commission des finances, du contrôle budgétaire et des comptes économiques de la Nation sur la mission de contrôle effectuée en Nouvelle-Calédonie relative à la défiscalisation des usines de traitement de nickel* <[www.ladocumentationfrancaise.fr/rapports-publics/054000686/index.shtml](http://www.ladocumentationfrancaise.fr/rapports-publics/054000686/index.shtml)>; Blaise, above n 5, 214.

10 Institut de La Statistique et Des Études Économiques-Recensement, above n 4; Denise Fisher, *France in the South Pacific: Power and Politics* (ANU E Press, 2013) 107; Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2; Raylene Ramsay "Telling the Past as Identity Construction in the Literatures of New Kanaky/New Caledonia" (2008) 2008(110) *Journal of the Australasian Universities Language and Literature Association* 113, 119; Horowitz, above n 9, 289.

11 Fisher, above n 10, 121; Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 58; Blaise, above n 5, 197; Isabelle Leblac "Kanak Identity, New Citizenship Building and Reconciliation" (2007) 125 *Journal de la Société des Océanistes* 271, 274.

12 Fisher, above n 10, 58; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 188.

13 Horowitz, above n 9, 299.

14 Fisher, above n 10, French and English versions available in Appendix 1, 311.

15 Graff, above n 1, 66–73; Kanak Agency for Development "United Nations: New Caledonia: Current Realities and Prospects for Decolonization under the Noumea Accord" <[www.un.org/en/decolonization/pdf/dp\\_2012\\_new\\_caledonia.pdf](http://www.un.org/en/decolonization/pdf/dp_2012_new_caledonia.pdf)>; "Accord de Noumea"

The Noumea Accord and the Matignon-Oudinot Accord (the Matignon Accord) have multiple implications for the administration of the archipelago.<sup>16</sup> This essay will focus on two aspects that might have a substantial impact on the development of the constitutional status of New Caledonia.<sup>17</sup> In particular, one section will discuss the constitutional implications of the Noumea Accord and secondly, the paper will evaluate the effects of the process for the recognition of the Kanak identity.

We call these elements 'drivers of change'. The term 'driver of change' refers to a research methodology pioneered in constitutional studies by the Constitution Unit at University College London (UCL) by Robert Hazell and a select group of researchers.<sup>18</sup> Hazell and his team worked for over a decade on a project aimed at forecasting the future development of the UK constitutional system.<sup>19</sup> The interdisciplinary methodology, which was first adopted in business studies, mapped the effects of interdependent variables such as economic trends,<sup>20</sup> sociological transformations such as a nationalist revival in Scotland, external pressures by international organisations such as the Council of Europe<sup>21</sup> and political parties' electoral campaign strategies.<sup>22</sup> These are the 'drivers of change' since they might change a constitutional system.<sup>23</sup> The results of the process of evaluating the interdependent effects of the drivers of change were a series of analyses of plausible scenarios that might develop in the next ten years within the British constitutional

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<[www.mncparis.fr/uploads/accord-noumea.pdf](http://www.mncparis.fr/uploads/accord-noumea.pdf)>; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019); General Assembly United Nations "Resolution 35/118 Plan of Action for the Full Implementation of the Declaration on Granting of Independence to Colonial Countries and Peoples" <[www.un.org/documents/ga/res/35/a35r118e.pdf](http://www.un.org/documents/ga/res/35/a35r118e.pdf)>; General Assembly United Nations "Resolution 41/41A Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples".

16 For a detailed analysis of the economic implications of the Noumea Accord see: Blaise, above n 5; Horowitz, above n 9.

17 Fisher, above n 10, French and English versions available in Appendix 1 (p 311).

18 Robert Hazell *Constitutional Futures Revisited: Britain's Constitution to 2020* (Palgrave Macmillan, 2008) 23.

19 Ibid 4–5, 20–25. Vito Breda "Constitutional Futures Revisited: Britain's Constitution to 2020 (Publication Review)" [2011] Public Law 446.

20 Alan Trench "Scotland and Wales: The Evolution of Devolution" in Robert Hazell (ed) *Constitutional futures revisited: Britain's constitution to 2020* (Palgrave Macmillan, 2008) 29.

21 O'Coinneide Colm "The New Human Rights Culture" in Robert Hazell (ed) *Constitutional futures revisited: Britain's constitution to 2020* (Palgrave Macmillan, 2008) 159.

22 Justin Fischer "Whither the Parties?" in Robert Hazell (ed) *Constitutional futures revisited: Britain's constitution to 2020* (Palgrave Macmillan, 2008) 43.

23 Hazell, above n 18, 23.

system.<sup>24</sup> The objective of this essay is, however, less ambitious. The paper's aim is to describe a reasoned selection of the potential drivers of change that might affect the constitutional status (in the near future) of New Caledonia. So, the aspiration of the paper is, by way of comparison to Hazell's endeavour, to describe the chosen drivers of change and their causal relationships rather than forecasting future constitutional scenarios.<sup>25</sup>

The selection of the drivers of change is also tilted towards the general implications that these elements have in a comparative analysis of the Pacific region. For instance, the accommodation of the Noumea Accord in the French Constitution might inspire a process of reevaluation of identity-based constitutional demands in the US-controlled territories in the Pacific region such as American Samoa, Guam and the Commonwealth of the Northern Mariana Islands.<sup>26</sup> It is worth mentioning that historically, and in relation to the process of the evaluation of identity-based constitutional demands, both the French and US constitutional systems had a tendency to accept narratives which favoured the principle of equality (and indirectly, cultural homogeneity) over the idea of multinationalism.<sup>27</sup>

Before these narratives are explored in more detail, a series of issues needs to be dealt with as part of the preliminary discussion. The group of islands and atolls that are New Caledonia were inhabited by the Kanak for over a thousand years before their land was annexed by the French Empire in 1853.<sup>28</sup> It is safe to suggest that

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24 Ibid.

25 For a speculative analysis of the constitutional future of New Caledonia see Françoise Cayrol (ed) *L'avenir Institutionnel de La Nouvelle-Calédonie* (Presses universitaires de la Nouvelle-Calédonie, 2018) <<https://unc.nc/wp-content/uploads/2018/10/UNIV-Avenir-Institutionnel-web.pdf>>; Fisher, above n 10; Sémir Al Wardi "Changer la politique: le concept de 'pays associé' comme solution ?" (2015) 140 *Journal de la société des océanistes* 309; Giraudeau, above n 2; Françoise Cayrol and Steven Ratuva (eds) "L'Eléphant et Le Maharadjah: L'ingénierie Constitutionnelle" in *L'avenir institutionnel de la Nouvelle-Calédonie* (Presses universitaires de la Nouvelle-Calédonie, 2018) 29.

26 Vito Breda *Constitutional Law and Regionalism: A Comparative Analysis of Regionalist Negotiations* (Edward Elgar Publishing, 2018) 168–174.

27 Kimberly A Costello "Rice v Cayetano: Trouble in Paradise for Native Hawaiians Claiming Special Relationship Status Notes" (2000) 79 *North Carolina Law Review* 812; S James Anaya "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs Symposium: Native American Law" (1993) 28 *Georgia Law Review* 309; Rex Tauati Ahdar "The Scope of the Right of Religious Freedom in Samoa" (2013) 55(3) *Journal of Church and State* 432; Vito Breda *Constitutional Law and Regionalism: A Comparative Analysis of Regionalist Negotiations* (Edward Elgar Publishing, 2018) 6.

28 Isabelle Leblic "Chronologie de la Nouvelle-Calédonie" [2003] (117) *Journal de la Société des Océanistes* 299; John Connell *New Caledonia of Kanaky: The Political History of a French Colony* (Development Studies Centre, The Australian National University, 2017) 6 <<https://openresearch-repository.anu.edu.au/handle/1885/132702>>; Isabelle Leblic "Présentation : Nouvelle-Calédonie,

colonisation had a negative impact on the Kanak and their culture.<sup>29</sup> The discovery of rich mining resources was directly coupled with government-promoted Asian and Pacific immigration that was perceived as providing a workforce which was viewed as 'better' than employing the local Kanak.<sup>30</sup> In addition, the effect of several decades of officially abetted immigration from France developed a divided society in which poor Kanak lived in rural areas and rich immigrants inhabited urban areas.<sup>31</sup> From the 1950s onwards, the oscillating economic cycles of the archipelago's mining sector exacerbated an already fragile relationship between the Kanak and the new residents, which is now recognised as the starting-point of the 1984 uprising known as the Kanak revolt.<sup>32</sup>

Regarding the sociological phenomena at play, there are multiple explanations for politically motivated violence. Doumenge suggests, for instance, that regionalism was inspired by Anglo-Saxon ideology.<sup>33</sup> Most studies, however, have associated the increased awareness of the political leaders of the Kanak, some of whom graduated from French universities, with the fact that the colonies were tired of the ailing French imperial power.<sup>34</sup> There was also an increasing awareness that moral pressure would not be sufficient for change.<sup>35</sup> It was, for instance, one of De Gaulle's impromptu policies that suppressed regional autonomy in Polynesia and New Caledonia.<sup>36</sup> The French attempts to claw back its Pacific territories was, it is

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150 ans après la prise de possession" [2003] (117) *Journal de la Société des Océanistes* 135; Dotte, above n 4, 155.

29 Horowitz, above n 9, 301.

30 Connell, above n 28, 6; Yann Bencivengo "Naissance de l'industrie du nickel en Nouvelle-Calédonie et au-delà, à l'interface des trajectoires industrielles, impériales et coloniales (1875-1914)" [2014] (138–139) *Journal de la Société des Océanistes* 137, 145.

31 Chappell "Decolonisation and Nation-Building in New Caledonia" above n 2, 60; Blaise, above n 5, 207; *Institut de La Statistique et Des Études Économiques- Recensement*, above n 4.

32 François Doumenge "La dynamique géopolitique du Pacifique Sud (1965-1990)" (1990) 43(170) *Les Cahiers d'Outre-Mer* 113, 148; Connell, above n 28; Horowitz, above n 9, 291; 301.

33 Doumenge, above n 32, 161; Filer and Meur, above n 5, 8.

34 Graff, above n 1, 66.

35 Ibid; Howard Zinn *A People's History of the United States* (Harper, Reissue edition, 2017) eKindle location:3317.

36 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 59. Fisher, above n 10, 57.

reasonable to assume, one of the triggers for the Kanak revolt between 1984 and 1988.<sup>37</sup>

The Matignon and Noumea Accords ended most of the hostilities.<sup>38</sup> It is important to note that the Noumea Accord was a proxy for a reform of the French Constitution.<sup>39</sup> The reform allocated a series of constitutionally-protected competences to New Caledonia, rebalanced public expenditure in a way that supported Kanak communities<sup>40</sup> and set the conditions under which residents could vote in referenda over the next ten years on the issue of full sovereignty.<sup>41</sup>

Setting up the electoral role for the referendum over independence has been particularly controversial. There are currently three electoral roles in New Caledonia.<sup>42</sup> One electoral role designates who can vote in municipal elections (and that coincides with the list for the European Parliament elections). Another electoral role decides who can vote in national elections (for the French Parliament and French President) and the third electoral role sets the limit of the franchise for the referenda over independence (arts 76 and 77 of the 1958 Constitution).<sup>43</sup>

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37 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 59; Horowitz, above n 9, 292; Graff, above n 1, 66. Article 188 of the Loi 99-209 as restricting the electoral franchise to those who were resident in New Caledonia before 1998.

38 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 59.

39 Accord Sur La Nouvelle-Calédonie Signé à Nouméa Le 5 Mai 1998; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) art 99; Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 arts 77, 78. Loi Constitutionnelle No 98-610 Du 20 Juillet 1998 Relative à La Nouvelle-Calédonie. Fisher, above n 10, 69; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 99. Fisher, above n 10 French and English versions available in Appendix 1. *Les Autres Textes Relatifs Aux Listes Électorales / Le Cadre Juridique / Référendum 2018 / Elections 2018 / Politiques Publiques / Accueil - Les Services de l'État En Nouvelle-Calédonie* <[www.nouvelle-caledonie.gouv.fr/Politiques-publiques/Elections-2018/Referendum-2018/Le-cadre-juridique/Les-autres-textes-relatifs-aux-listes-electorales](http://www.nouvelle-caledonie.gouv.fr/Politiques-publiques/Elections-2018/Referendum-2018/Le-cadre-juridique/Les-autres-textes-relatifs-aux-listes-electorales)>.

40 Blaise, above n 5, 197.

41 Accord Sur La Nouvelle-Calédonie Signé à Nouméa Le 5 Mai 1998; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) art 99; Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 arts 77, 78. Loi Constitutionnelle No 98-610 Du 20 Juillet 1998 Relative à La Nouvelle-Calédonie. Fisher, above n 10, 69; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 99. Fisher, above n 10 French and English versions available in Appendix 1 (p 311). *Les Autres Textes Relatifs Aux Listes Électorales / Le Cadre Juridique / Référendum 2018 / Elections 2018 / Politiques Publiques / Accueil - Les Services de l'État En Nouvelle-Calédonie*, above n 38.

42 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 59.

43 Ibid.

A series of regional commissions were set up to evaluate the requests to be listed in the electoral role for the 2018 referendum and the voting day was a relatively subdued affair.<sup>44</sup> A majority of the listed voters favoured the status quo (60199 voted for full sovereignty and 78734 against), yet there were substantial regional variations.<sup>45</sup> The majority of voters in the Northern provinces of La Gran Terre and the islands opted to support independence, whereas the Southern provinces and Noumea voted for the status quo.<sup>46</sup> The 2018 referendum might be the first of three in which New Caledonia might be asked to vote again on the same or a similar question.<sup>47</sup> The possibility of voting again, given the current relative stability of the archipelago's demography, might appear illogical.<sup>48</sup> The Kanak (the majority of whom support independence) might not become, short of a mass emigration of French, European and Asian settlers from the Southern provinces, a demographic majority.<sup>49</sup> Even if that were the case, electoral behaviours might change when independence (or the setting of a free association) is a more likely outcome of the decolonisation process. This has been the case, for instance, for the United Nations-sponsored referenda in Tokelau.<sup>50</sup> It is also unlikely that a referendum and secession

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44 Ibid 60; French Constitution 1958 (as Revised 23/07/2008) art 77; Loi Organique N° 2018-280 Du 19 Avril 2018 Relative à l'organisation de La Consultation Sur l'accession à La Pleine Souveraineté de La Nouvelle-Calédonie - art 2. Accord Sur La Nouvelle-Calédonie Signé à Nouméa Le 5 Mai 1998; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) Article 99. Fisher, above n 10, 69; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 99. Fisher, above n 10 French and English versions available in Appendix 1. *Les Autres Textes Relatifs Aux Listes Électorales / Le Cadre Juridique / Référendum 2018 / Elections 2018 / Politiques Publiques / Accueil - Les Services de l'État En Nouvelle-Calédonie*, above n 38.

45 La commission de contrôle de l'organisation et du déroulement de la consultation sur l'accession à la pleine souveraineté de la Nouvelle-Calédonie, Journal officiel de la République Française n.257 (7.11.2018).

46 Ibid.

47 Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 art 77.

48 *Institut de La Statistique et Des Études Économiques- Recensement*, above n 4.

49 Fisher, above n 10, 97.

50 Breda *Constitutional Law and Regionalism*, above n 26, 192–204; Michael Keating and Zoe Bray "Renegotiating Sovereignty: Basque Nationalism and the Rise and Fall of the Ibarretxe Plan" (2006) 5(4) *Ethnopolitics* 347; Marrani, above n 3; Fiji Minister of Foreign Affairs (as per Mr Luke Daunivalu) "Special Committee on Decolonization Concludes Session with Approval of Draft Resolution on Tokelau, Another Containing Report on Organizational Matters | Meetings Coverage and Press Releases" <[www.un.org/press/en/2011/gacol3227.doc.htm](http://www.un.org/press/en/2011/gacol3227.doc.htm)>; Richard Wyn Jones and Roger Scully *Wales Says Yes: Devolution and the 2011 Welsh Referendum* (University of Wales Press, 2012); "Debate: Sionaidh Douglas-Scott: Why the EU Should Welcome an Independent Scotland" on *UK Constitutional Law Association* <<http://ukconstitutionallaw.org/2014/09/10/debate-sionaidh-douglas-scott-why-the-eu-should-welcome-an-independent-scotland/>>. Kelihiano Kalolo "Tokelau" (2007) 19(1) *The Contemporary Pacific* 256; Marrani, above n 3.

would be the death knell of French influence in the internal affairs of New Caledonia.<sup>51</sup> The distinctive possibility of having multiple referenda (on the basis of the Noumea Accord) over the sovereignty of New Caledonia is, instead, an indication that both the French and Kanak have accepted the cyclic nature of identity-based constitutional aspirations.

It is also worth mentioning as part of the preliminary debate that New Caledonia is part of the OCTA.<sup>52</sup> As a part of such an association, New Caledonians are European Union (EU) citizens who vote in EU elections, and have the possibility of demanding restricted protection from the European Court of Human Rights.<sup>53</sup> It is outside the limits of this essay to discuss the implications that an eventual secession of New Caledonia from France might have for the relations between the EU and New Caledonian institutions but New Caledonian institutions might need to grapple with a series of dilemmas. The first is related to a shortfall in economic support from the EU. New Caledonia is currently the second highest beneficiary of EU funding in the OCTA group.<sup>54</sup> A large part of the funding has allowed tertiary education students and staff to travel to and study in world-class European universities.<sup>55</sup> In addition, New Caledonia's currency is 'pegged' to the Euro, which, in the long term, reduces the fluctuation that affects all small Pacific nations.<sup>56</sup> A stable currency, by way of

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- 51 Abdurrahim Sıradag "Understanding French Foreign and Security Policy towards Africa: Pragmatism or Altruism" 23.
- 52 "Treaty Establishing the European Community (Consolidated Version 2002) OJ C 325, 24.12.2002, p 33–184" Title 4 , Annex II. For an extensive analysis of the status of New Caledonia see: RC Plachecki "EU and World Trade Law: Economic Partnership Agreements and Considerations for New Caledonia" (2008) 14 *Revue Juridique Polynésienne* 71.
- 53 Cour de Cassation, Assemblée plénière, du 2 juin 2000, 99-60274, Publié au bulletin (Unreported, 6 February 2000); *PY v France* [2005] European Court of Human Rights 66289/99 (1 November 2005).
- 54 *EEAS - European External Action Service - European Commission* EEAS - European External Action Service <[https://eeas.europa.eu/diplomatic-network/new-caledonia\\_en](https://eeas.europa.eu/diplomatic-network/new-caledonia_en)>; *Pacific Regional Indicative Programme 2014–2020 - EEAS - European External Action Service - European Commission* EEAS - European External Action Service <[https://eeas.europa.eu/headquarters/headquarters-homepage\\_en/4742/Pacific Regional Indicative Programme 2014-2020](https://eeas.europa.eu/headquarters/headquarters-homepage_en/4742/Pacific%20Regional%20Indicative%20Programme%202014-2020)>; Blaise, above n 5, 210.
- 55 *EEAS - European External Action Service - European Commission*, above n 54; *Pacific Regional Indicative Programme 2014–2020 - EEAS - European External Action Service - European Commission*, above n 54; Blaise, above n 5, 210.
- 56 Fiona Murray *The European Union and Member State Territories: A New Legal Framework Under the EU Treaties* (Springer Science & Business Media, 2012) 77.

comparison to other small island states, contributes to a greater inflow of foreign direct investments and, consequently, to the creation of more jobs.<sup>57</sup>

## **II A NEGATIVE DRIVER OF CHANGE: THE PARADIGM OF UNITY BETWEEN THE FRENCH REPUBLIC AND THE CONSTITUTIONAL RECOGNITION OF NEW CALEDONIA**

The result of the 2018 referendum gives an indication of the current understanding of what is perceived by the majority as the most beneficial constitutional status of New Caledonia and it is a matter of speculation as to whether such a perception will continue to persist in the future. Constitutional negotiations over the destiny of New Caledonia will, however, continue to refer to the current constitutional asset of the archipelago which is directly linked to the French Constitution. In Part III we will discuss the effects that the 1958 constitutional principles such as the unity of the Republic and decentralisation reforms might have in the debate over an autonomous or an independent New Caledonia.<sup>58</sup> In this part it will be argued instead that current French constitutional arrangements foster a level of democratic engagement over identity-based constitutional claims, yet these demands have to be accommodated within a distinctively French idea of equality that is inserted in the Republic's paradigm of unity.<sup>59</sup>

The constitutional status of New Caledonia is explicitly recognised in the text of the 1958 Constitution in *Titre XIII Dispositions transitoires relatives a la Nouvelle-Caledonie*.<sup>60</sup> Article 99 of the Loi 99-209 lists the legislative competences of the New Caledonia Congress. The Congress has, for instance, a legislative competence in relation to symbols (art 99(1)), customs (art 99(5)) and land resources such as those of oil and nickel (art 99(6)).<sup>61</sup> In 2010 the Kanak flag was adopted as

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57 RC Plachecki "EU and World Trade Law: Economic Partnership Agreements and Considerations for New Caledonia" (2008) 14 *Revue Juridique Polynésienne* 71, 91–95.

58 Boyron, above n 2, 23.

59 David Marrani *Dynamics in the French Constitution: Decoding French Republican Ideas* (Routledge, 2013) 112; Constitution Du 4 Octobre 1958 (Version Consolidée) 1958; Noumea Accord 1998 (2002) 7(1) *Australian Indigenous Law Reporter* 88; Loi N°56-619 Du 23 1956 *Mesures Propres a Assurer l'évolution Des Territoires Relevant Du Ministère de La France d'outre-Mer* 1956 (56-619); Loi N° 88-1028 Du 9 Novembre 1988 *Portant Dispositions Statutaires et Préparatoires à l'autodétermination de La Nouvelle-Calédonie En 1998*; Loi N° 99-209 *Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019)*; Loi Organique N° 2015-987 Du 5 Août 2015 *Relative à La Consultation Sur l'accession de La Nouvelle-Calédonie à La Pleine Souveraineté*.

60 Loi Constitutionnelle No 98-610 Du 20 Juillet 1998 *Relative à La Nouvelle-Calédonie; Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 Titre XIII*.

61 Marrani, above n 3, 102; Loi N° 99-209 *Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019)* art 99; Gustaaf van Nifterik "French Constitutional

representing the archipelago, alongside the French flag.<sup>62</sup> The introduction of customary law has been a proxy for a flourishing of pluralistic jurisprudence across a range of New Caledonian legal institutions.<sup>63</sup> Family law and land management have seen the most interesting comparative developments.<sup>64</sup> The recognition of a community distinctiveness is mediated by the principle of legislative identity between the law approved in France and that approved in New Caledonia,<sup>65</sup> the principle of adaptivity in which laws are adapted to a cultural context<sup>66</sup> and the paradigm of unity of the French Republic.<sup>67</sup> The 'paradigm of unity' is the term that Marrani uses to describe the combined effects of a constitutional text that only recognises French as the official language of the Republic and that associated the use of French as one of the necessary elements for the application of the principle of equality.<sup>68</sup>

The status of New Caledonia is, within the French gamut of *meso-governance* institutions, distinctive.<sup>69</sup> The archipelago has the possibility of preparing (pursuant to art 76 of the 1958 Constitution and the *Loi n° 99-209 organique du 19 mars 1999 relative à la Nouvelle-Calédonie*) the conditions for a series of referenda, like the one that took place in 2018, that might grant full sovereignty to the French collectivity.<sup>70</sup> *Loi organique* (Organic Law) has a special status and approval procedures within the hierarchy of French legal systems because it is intended to implement an aspect of the 1958 Constitution.<sup>71</sup> Political debates over the

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History, Garden or Graveyard?: Some Thoughts on Occasion of Les Grands Discours Parlementaires" (2007) 3(3) European Constitutional Law Review 476, 480.

62 Blaise, above n 5, 199.

63 Pascale Deumier "Introduction: Présentation de la Base de Données" in Etienne Cornut, Pascale Deumier and Françoise Cayrol-Baudrillart (eds) *La coutume kanak dans le pluralisme juridique calédonien* (Presses universitaires de Nouvelle-Calédonie, 2018) 17, 26.

64 Ibid.

65 Boyron, above n 2, 213.

66 Ibid.

67 Marrani, above n 59, 106, 120–122. Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 art 75-1; Loi Constitutionnelle N° 2008-724 Du 23 Juillet 2008 de Modernisation Des Institutions de La Ve République art 40.

68 Marrani, above n 59, 106.

69 Jeremie Gilbert and David Keane "Equality versus Fraternity? Rethinking France and its Minorities" (2016) 14(4) International Journal of Constitutional Law 883, 296; Marrani, above n 3; Boyron, above n 2, 214.

70 Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 Titre XIII; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 99.

71 French Constitution 1958 (as Revised 23/07/2008) Article 46; Boyron, above n 2, 47.

constitutional accommodation of identity-based claims do not happen in a vacuum.<sup>72</sup> The Constitution normally sets the boundaries of both the 'reasonable' in relation, for instance, to the partaking of the sharing of public resources, and the 'possible' vis à vis the derogation to fundamental principles such as equality. It is perhaps more so in a codified constitutional system such as the one adopted in France.<sup>73</sup> The original text of the 1958 Constitution did not leave much room for debate over the recognition of sub-state national identities and, until the 1998 reforms that recognised the possibility of a special status for New Caledonia, the French constitutional model was considered the archetype of the unitary state.<sup>74</sup> Overseas territories and communities were recognised, yet the acknowledgement only linked indirectly to the recognition of sub-state identities.<sup>75</sup> The 2008 constitutional reform recognised the existence of regional languages as part of the process of the modernisation of the state's institutions, but the French language remains the only official language of the Republic.<sup>76</sup>

There are strict prescriptive implications associated with an officially monolingual legal system. French public institutions, for instance, have to produce official documents in French.<sup>77</sup> Institutions might produce translated documents, but they cannot be considered official documents.<sup>78</sup> David Marrani argues that a constitutional endorsement of the language is a manifestation of the Republic's endorsement of the 'paradigm of unity'.<sup>79</sup> He explains: 'Only the French language is

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72 Vito Breda "An Odd Partnership: Identity-Based Constitutional Claims" in Fiona Jenkins, Mark Nolan and Kim Rubenstein (eds) *Allegiance and identity in a globalised world* (Cambridge University Press, 2014) 52.

73 Marrani, above n 3, 102; Marrani, above n 59, 15; Boyron, above n 2, 43; Mark Tushnet "Constitution" in Michele Rosenfeld, Andras Sajó and Susanne Baer (eds) *The Oxford handbook of comparative constitutional law* (Oxford University Press, USA, 2012) 217, 221.

74 David Avrom Bell *The Cult of the Nation in France: Inventing Nationalism, 1680–1800* (Harvard University Press, 2001) 198; X Philippe "France: The Amendment of the French Constitution 'on the Decentralized Organization of the Republic'" (2004) 2(4) *International Journal of Constitutional Law* 691, 691; Michel Rosenfeld and Andras Sajó "Constitutional Identity" in Michele Rosenfeld and Andras Sajó (eds) *The Oxford handbook of comparative constitutional law* (Oxford University Press, USA, 2012) 756, 763.

75 Loi Constitutionnelle N° 2008-724 Du 23 Juillet 2008 de Modernisation Des Institutions de La Ve République.

76 Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 art 2 (1); Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) 140; Loi Organique N° 2013-1027 Du 15 Novembre 2013 Portant Actualisation de La Loi Organique N° 99-209 Du 19 Mars 1999 Relative à La Nouvelle-Calédonie - art 6.

77 Marrani, above n 59, 122.

78 Ibid. For a contextual analysis see: Boyron, above n 2, 32–53; Nifterik, above n 61.

79 For an historical analysis see: Philippe, above n 74, 291.

the language of the French Republic. A few populations with different languages are recognised, as particular cultural identities but also as subordinated ethnicities.<sup>80</sup> From an internal perspective, the subordination of alien languages to the French idiom is a manifestation, according to Marrani's analysis of the jurisprudence of the *Conceil constitutionnel*, of the principle of equality before the law of all citizens.<sup>81</sup> The image of a linguistically homogeneous community spills over into the normative debate on the protection of minorities because French institutions, as a supernumerary elaboration, refuse to recognise the existence of minority groups within their population.<sup>82</sup> Again, Marrani describes the manifestation of the paradigm of unity with a distinctive insight: 'Language is employed as the means to organise the world through an ideological order, it is a theatrical representation of a society; it is a theatrical representation of a society that believes it is what is represented: a society formed by language into a country (France), then into a Republic.'<sup>83</sup> In other words, and from an external and sociological perspective, the idea of overlapping a normative idea (eg the principle of equality) with a pragmatic choice (eg choosing a language, national symbols and excluding other national groups that make concurring claims) is a manifestation of French ethnocentric nationalism.<sup>84</sup>

The refusal to recognise a language as official was a deliberate historical choice by the drafter of the 1958 Constitution, which has not been changed by subsequent constitutional reforms.<sup>85</sup> France shares a series of historical linguistic minorities (eg the Catalan and the Basque) that are recognised in Spain.<sup>86</sup> The 1948 Italian Constitution, which was inspired by the 1946 French Constitution and that was approved just ten years before the 1958 French Constitution, explicitly recognises

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80 Marrani, above n 59, 121.

81 Ibid.

82 Gilbert and Keane, above n 69, 884.

83 Marrani, above n 59, 113.

84 Bell, above n 74, 198; J Habermas "The European Nation State. Its Achievements and its Limitations. On the Past and Future of Sovereignty and Citizenship" (1996) 9(2) *Ratio Juris* 125; Boyron, above n 2, 27; Félicien Lemaire *Le Principe d'indivisibilité de La République: Mythe et Réalité* (Presses universitaires de Rennes, 2010) 186.

85 Constitution Du 4 Octobre 1958 (Version Consolidée) 1958 Article 2 (1); Loi Constitutionnelle N° 2008-724 Du 23 Juillet 2008 de Modernisation Des Institutions de La Ve République art 40 .

86 Ley Orgánica 3/1979, de 18 de Diciembre, de Estatuto de Autonomía Para El País Vasco. 1979; Ley Orgánica 4/1979, de 18 de Diciembre, de Estatuto de Autonomía de Cataluña. 1979; Marrani, above n 59, 119.

regional ethnic communities and their languages as official languages.<sup>87</sup> It is safe to suggest that the 1958 parliament's decision to ignore the existence of minorities in metropolitan France and its confirmation in 2008 is based on a legal fiction.<sup>88</sup> Secondly, and perhaps as a corollary to the first point, given the counterfactual nature of the paradigm of unity (ie France is a multinational and pluri-linguistic community), it is reasonable to assume that the decision to ignore social features and to protect others is a manifestation of a nation-building strategy.<sup>89</sup> Bell describes this process:<sup>90</sup>

Faced with this monumental task, the revolutionaries adopted the methods of the Reformation-era priesthood, proposing to send their own well-drilled republican versions of the Jesuits out into the countryside to teach, persuade, and indoctrinate by every possible means, and to provide the diverse population with a common education, a common set of allegiances, and a common language.

The chosen common language is, in a nutshell, a constitutional distortion that should be considered as more than technical in nature. It is an ideological assumption that was (and still is) imposed into a political system of contending interests.<sup>91</sup>

For instance, Anderson refers to the concept of *Imagined Community* in which strangers are gathered around a shared language as a sociological project that favours some ideological elements and omits others.<sup>92</sup> For instance, the *Loi constitutionnelle* n°2003-276 inserted the principle of administrative decentralisation into the 1958 Constitution, yet the reallocation of political power from the central to the regional

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87 Mario Einaudi "The Constitution of the Italian Republic" (1948) 42(4) *The American Political Science Review* 661, 668–670.

88 Constitution of the Italian Republic 1948 arts 116–117. These officially recognized languages are Friulian (526 000 speakers), German (295 000 speakers), Ladin (a Rhaeto-Romanic language that includes 28 000 speakers), Sardinian (175 000 speakers), French (120 000 speakers), Occitan (50 000 speakers), Franco-Provençal (70 000 speakers), Arberesh (a variant of contemporary Albanian that includes 100 000 speakers), Slovene (85 000 speakers), Croatian (1700 speakers), Catalan (18 000 speakers) and Greek (3900 speakers); Aline Sierp "Minority Language Protection in Italy: Linguistic Minorities and the Media" (2008) 4(4) *Journal of Contemporary European Research* 303.

89 Bell, above n 74, 199; Michele Rosenfeld, Andras Sajo and Susanne Baer (eds) "Equality" in *The Oxford handbook of comparative constitutional law* (Oxford University Press, USA, 2012) 983, 984, 993; Ernest Gellner *Nationalism* (Phoenix, 1998) 33; Benedict Anderson *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1983).

90 Bell, above n 74, 201.

91 Gellner, above n 89.

92 Anderson, above n 89; Anthony D Smith *Theories of Nationalism* (Duckworth, 1971) 171; Breda *Constitutional Law and Regionalism*, above n 26, 1.

institutions is based on the assumption<sup>93</sup> that the decentralisation of a selected number of administrative functions might increase the overall efficiency of the French public sector:<sup>94</sup>

The only exception to this approach relates to the specific status of the French Polynesian territories and New Caledonia, which have been allowed to adopt special measures to benefit the local populations based on the fact that these relate to very specific autonomous territories. As a consequence special measures can occur only under limited administrative sleights-of-hand, seen in the above 2001 decision which approved the identification of economically deprived areas for special educational assistance that do not distinguish between candidates within those areas on the basis of minority or other grounds. The fact that, invariably, the majority of residents in these areas are also racial, ethnic or religious minorities is not germane to the model.

In other words, the relocation of administrative powers is not related to a recognition of sub-state national identities nor can it be constructed as an exception to the paradigm of unity of the French nation.<sup>95</sup>

There is, however, an element of flexibility in the formulation of the paradigm of unity that allows for the accommodation of specific regional needs.<sup>96</sup> The 1998 Noumea Accord is, according to Marrani and Fisher, one of the manifestations of that flexibility.<sup>97</sup> As mentioned earlier in this paper, the Accords emerged after a period of political instability and ethnic violence.<sup>98</sup> This last stage of the development of Kanak identity is associated with a troublesome period in the relation between independence supporters and French institutions. 'Les événements', as the period of instability was called, was also a phase of negotiations, but the watershed moment, in terms of forming the current development of New Caledonia, happened

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93 Boyron, above n 2, 215; Loi Constitutionnelle N°2003-276 Du 28 Mars 2003 Relative à l'organisation Décentralisée de La République - art 1. Also relevant: Loi N° 82-213 Du 2 Mars 1982 Relative Aux Droits et Libertés Des Communes, Des Départements et Des Régions 82-213. For a general summary: Boyron, above n 2, 32-37.

94 Gilbert and Keane, above n 69, 896.

95 Philippe, above n 74, 700.

96 A Stone Sweet "The Politics of Constitutional Review in France and Europe" (2007) 5(1) *International Journal of Constitutional Law* 69.

97 Fisher, above n 10, French and English versions available in Appendix 1; Marrani, above n 59, 119.

98 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 59.

during the aftermath of the 1988 Gossanah cave crisis.<sup>99</sup> The Matignon Accord indicated the end of the violence and set out the areas of customary law.<sup>100</sup>

The Noumea Accord eventually established the Customary Senate representing the different regional customary councils.<sup>101</sup> In addition, the French government accepted that the electoral franchise should be amended in such a way as to reduce the effects of immigration and, in exchange, the Kanak accepted postponing an eventual referendum over independence.<sup>102</sup> It was, however, clear that a demographic majority of non-Kanak would continue to have a limited say in the administration of the archipelago and that having the opportunity to have scheduled referenda might be a profitless and transient prize for the Kanak.<sup>103</sup> The French parliament had to approve the Accord (it did so with Organic Law 99-209 1999),<sup>104</sup> amend the 1958 Constitution<sup>105</sup> and continue to pass statutory acts and regulations that maintained the Republic's commitment to the Noumea Accord throughout multiple political cycles in the French government. One of the latest statutory activities linked to the Accord was the approval of the Loi 2018-280, which fine-tuned some of the issues related to the limits of the referendum voting franchise.<sup>106</sup>

There is limited space to discuss in more detail the administrative ramifications for public institutions and private individuals (such as the management of customary land) in the period that followed the Noumea Accord, yet it is important to note that both agreements prepared the road map for collaboration between the central and regional administrations.<sup>107</sup> Distinctive of the Noumea Accord, within the constitutional endorsement of the paradigm of unity, is the indirect recognition of the Kanak as a sub-state national identity. For instance, the recognition of national symbols in Article 5 of the Loi 99-209, and the traditional law and its jurisdictional implications in Title I of the same statute are manifestations of the existence of

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99 Blaise, above n 5, 195.

100 Ibid.

101 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) 137.

102 *Institut de La Statistique et Des Études Économiques- Recensement*, above n 4; Fisher, above n 10, 68; Blaise, above n 5, 210.

103 Fisher, above n 10, 69.

104 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie.

105 Loi Constitutionnelle No 98-610 Du 20 Juillet 1998 Relative à La Nouvelle-Calédonie.

106 Loi Organique N° 2018-280 Du 19 Avril 2018 Relative à l'organisation de La Consultation Sur l'accession à La Pleine Souveraineté de La Nouvelle-Calédonie.

107 For instance: Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) Title II.

concurring national identities.<sup>108</sup> The administrative relocation of institutions, such as the Kanak Development Agency,<sup>109</sup> which actively promote the decolonisation process from France in the archipelago and within international organisations such as the United Nations are also indications of the recognition of a sub-state identity,<sup>110</sup> which has the prerogative to act in a way that is concurrent with French national interests and that might derogate from the paradigm of unity of the Republic.<sup>111</sup> It might be the case of reality (and necessity) being not only the mother of constitutional transformation, but also the first cousin to prescience. Perhaps the most obvious sign of a change of roles in the paradigm of unity within the French constitutional system is the recognition of the Traditional Customs Senate. "The Traditional Customs Senate has to be consulted, depending on the procedural requirements, by the president of the government, by the president of the congress or by the president of the provinces, on projects or bills that affect the Kanak identity."<sup>112</sup> The consultative power is limited but the interesting aspect of the article is the explicit recognition of the Kanak identity.

Again, the recognition of an identity rather than a Kanak national identity might appear to be a relatively small step. However, it is the combination of accepting a sociological fact (eg the existence of a concurring identity next to the French nation) and the recognition that a social group has an administrative (albeit limited) power that gives one indication among many that France's paradigm of unity might allow for a degree of flexibility.<sup>113</sup> Recall that until recently the recognition of a minority language was associated with an insistent denial of the possibility of a multinational French Republic<sup>114</sup> and that the French jurisprudence underpinning the paradigm of unity might continue to describe France as a single nation in which localised ethnic communities do speak a local vernacular.<sup>115</sup> However, the reference in the Loi 99-

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108 Ibid arts 23(4), 140, 143.

109 Ibid art 23(4).

110 United Nations, above n 1; United Nations General Assembly, above n 1.

111 Kanak Agency for Development, above n 15, 7.

112 Original: Le sénat coutumier est consulté, selon les cas, par le président du gouvernement, par le président du congrès ou par le président d'une assemblée de province sur les projets ou propositions de délibération intéressant l'identité [K]anak. Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) art 143(1).

113 Yves Tanguy "La Motion de Défiance Dans Le Statut de La Corse: Vers Une Mise En Jeu de La Responsabilité Des Exécutifs Devant Les Assemblées Locales ?" (1992) 45(266) La Revue administrative 121, 121; Marrani, above n 59, 92, 99, 105, 119.

114 Marrani, above n 59, 121.

115 Ibid 122.

209 to a Kanak identity indicates, an increased awareness of the limit of the paradigm of unity.<sup>116</sup>

Additionally, the recognition of the Kanak culture might appear as a minute step. Most of France's adjacent European states do recognise official languages. The Spanish Constitution recognises its nationalities (eg the Basque), and the Swiss,<sup>117</sup> Italian<sup>118</sup> and Belgian<sup>119</sup> constitutions acknowledge their linguistic communities. However, the historical and institutional conditions upon which the Republic is founded are different. For instance, Marrani noted that imposing (by violence if necessary) a local vernacular as a substitute for Latin has been a crucial part in the formation of the Republic.<sup>120</sup> Similarly, but perhaps less violent, was the selection of English by the US constitutional system. Note that the US Supreme Court's interpretation of the principle of equality has similar levelling effects on identity-based constitutional claims in Hawaii, American Samoa, Guam and the Commonwealth of the Northern Mariana Islands.<sup>121</sup> Analogous to the US jurisprudence, the current qualification of equality principles by the French jurisprudence remains strongly associated with the paradigm of (national) unity and it will continue to add an element of inertia; that is to say, it is a negative driver of change in the process of the constitutional recognition of the Kanak identity.

### ***III DRIVER OF CHANGE: THE DYNAMIC OF THE KANAK IDENTITY***

In Part I we discussed the explicit and implicit constitutional limits of the process of recognition of the Kanak identity. This Part focuses on the Kanak communities and on their political aspirations. Secession is high on the agenda of most but not all those political parties that represent Kanak identity.<sup>122</sup> The Kanak and Socialist National Liberation Front, for instance, supports independence, however, the Caledonia Union, which has a multiethnic franchise, is in favour of a free association with France.<sup>123</sup>

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116 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) 143(1).

117 Federal Constitution of 18 April 1999 of the Swiss Confederation 2000 art 4.

118 Constitutional Law n 4 26.02.1948.

119 Belgian Parliament "Belgian Constitution as Updated Following the Constitutional Revision of 24 October 2017" art 2.

120 Marrani, above n 59, 118.

121 "Developments in the Law: The U.S. Territories" (2016) 130 Harvard Law Review 1616.

122 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 12, 63.

123 Fisher, above n 10, 56.

The Kanak peoples are generally recognised as a Melanesia population.<sup>124</sup> However, Kanak society is highly diversified and fractured along political, tribal and clan lines.<sup>125</sup> Its current identity has been affected by the European colonisation process in a way that had, on a general level, a negative impact on the size of the population and on Kanak culture.<sup>126</sup> In relation to political claims that have constitutional significance, the majority of the political parties support decentralisation and a minority support independence. It is interesting to note that in the 1950s and after the process of decentralisation had started,<sup>127</sup> the Caledonian Union represented the interests of both Kanak and European resident, and in the 1959 referendum, 98% of the voters supported the union with France.<sup>128</sup> However, in 1963, with a series of statutory measures, New Caledonia's autonomy was substantially reduced<sup>129</sup> and a new regulation was inserted to administer the archipelago's recently discovered mining resources.<sup>130</sup> The transfer of administrative power over local mining resources, coincided with a revival of the Kanak identity.<sup>131</sup>

It is plausible to suggest that after World War II an increased awareness of the Kanak peoples' cultural distinctiveness was coupled with the coordination of political demands by political parties such as the Kanak and Socialist National Liberation Front.<sup>132</sup> In the 1970s, multiple parties claimed to represent the Kanak identity: LKS (Libération Kanak Socialiste, Socialist Kanak Liberation), FULK (Front Uni de la Libération Kanak, United Kanak Liberation Front), the UPM (Union Progressiste Mélanésienne, Popular Melanesian Union), and the PSC (Parti Socialiste Calédonie, [New] Caledonian Socialist Party).<sup>133</sup> The whirlpool of New

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124 David A Chappell *The Kanak Awakening: The Rise of Nationalism in New Caledonia* (University of Hawaii Press, 2013) 16.

125 David Chappell "Decolonisation and Nation-Building in New Caledonia: Reflections on the 2014 Elections" (2015) 67(1) *Political Science* 56, 62; Barbara A West *Encyclopedia of the Peoples of Asia and Oceania* (Infobase Publishing, 2010) 360.

126 United Nations, above n 1; United Nations General Assembly, above n 1; Chappell *The Kanak Awakening*, above n 122, 21.

127 Loi N°56-619 Du 23 1956 Juin Mesures Propres a Assurer l'evolution Des Territoires Relevant Du Ministère de La France d'outre-Mer 1956 (56-619).

128 Fisher, above n 10, 56.

129 Ibid 58.

130 Loi N°69-4 Du 3 Janvier 1969 Modifiant La Reglementation Miniere En Nouvelle-Caledonie 1969 (69-4).

131 Chappell *The Kanak Awakening*, above n 124, 212.

132 Fisher, above n 10, 58.

133 Ibid.

Caledonian politics will not be discussed in detail however it is notable that the frustration with a lack of decentration might have been a proxy for the degeneration of the political debate into violence.<sup>134</sup> Chappell, for instance, suggests an untrammelled relation of causation between the centralist stance held by the French government in relation to New Caledonia's period of political violence.<sup>135</sup>

It is also important to note that immigration and the formation of the electoral role was, and to some extent still is, perceived as one of the hot debates for the political parties representing Kanak identity and European/Asian/Pacific islanders who settled in New Caledonia.<sup>136</sup> The policy was effective and, by the middle of the 1960s, it had a significant impact on reducing the role that the Kanak could have, as part of a minority group, within New Caledonia's political arena and within French national politics.<sup>137</sup>

A substantial step towards a normalisation of relations between the Kanak and France was the international recognition of the status of the Kanak. In 1986, the General Assembly of the United Nations reintroduced New Caledonia to the list of territories that might benefit from a process of decolonisation. It is also apparent that, after the 1960s, French immigration policies had the effect of transforming the role of the Kanak from a demographic majority to a heavily monitored minority.<sup>138</sup> In 1988, Fisher reports, over 6000 military personnel were stationed for a platitudinous 'development reason' in the proximity of Kanak villages.<sup>139</sup> The imperial orthopraxy might have been subsumed, yet the current demography of the archipelago continues to be a source of attrition between the Kanak and the residents who arrived in New

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134 Ibid 61; Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 60; Chappell *The Kanak Awakening*, above n 124, 212; T Hadden and K Boyle "Northern Ireland: Conflict and Conflict Resolution" in K Rupesinghe (ed) *Ethic conflict and human right* (United Nations University Press) 53; Garth Stevenson *Parallel Paths: The Development of Nationalism in Ireland and Quebec* (McGill-Queen's University Press, 2006); Georg Grote *The South Tyrol Question, 1866–2010: From National Rage to Regional State* (Peter Lang, 2012); Professor Michael Keating *Nations against the State: The New Politics of Nationalism in Quebec, Catalonia and Scotland* (Palgrave Macmillan, 1996).

135 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 2, 60.

136 Fisher, above n 10, 59; Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) art 4.

137 Fisher, above n 10, 57.

138 *Institut de La Statistique et Des Études Économiques-Recensement*, above n 4; Fisher, above n 10, 97.

139 Fisher, above n 10, 65.

Caledonia; however, the Gossanah cave crisis is considered a turning point in French and Kanak relations.<sup>140</sup>

The Gossanah cave crisis resulted in twenty-one deaths and attracted widespread international condemnation.<sup>141</sup> In the aftermath of the crisis, French central institutions, at least in practice, accepted that institutional violence might not stop the process of recognition of the Kanak and the Kanak accepted continuing their struggle without using violence. This new stage of the process of negotiation was marked by two agreements. The first was the Matignon Accord. The second agreement, which arrived seven years after the Matignon Accord, was the Noumea Accord.<sup>142</sup> The Noumea Accord, by way of comparison to Matignon Accord, had higher constitutional implications since it changed the status of New Caledonia from a region to an autonomous territory with constitutionally-entrenched legislative competences.<sup>143</sup> However, it was the Matignon Accord that signalled that French central institutions were willing to negotiate the recognition of local customs.<sup>144</sup>

The Matignon Accord should be considered, for instance, as one of the processes that fostered a considerable reduction in ethnic violence between the majority of the population that has European ancestry and the original inhabitants of New Caledonia.<sup>145</sup> It also prepared a plan for the redistribution of land and mining resources, like the one managed by the Société d'Economie Mixte de Développement Contrôlée par la Province Nord, to the Northern provinces that have a larger Kanak population.<sup>146</sup> So, the Matignon Accord and Noumea Accord, with their respective referenda, might have given an indication that political parties representing French national interests and political parties supporting New Caledonian identities were

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140 Ibid 66.

141 Ibid.

142 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019); Loi Organique N° 2015-987 Du 5 Août 2015 Relative à La Consultation Sur l'accession de La Nouvelle-Calédonie à La Pleine Souveraineté; Loi Organique N° 2018-280 Du 19 Avril 2018 Relative à l'organisation de La Consultation Sur l'accession à La Pleine Souveraineté de La Nouvelle-Calédonie; Fisher, above n 10, 69.

143 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 07 Janvier 2019) 99.

144 Fisher, above n 10, 63.

145 Fisher, above n 10, 63.

146 Blaise, above n 5, 200; Fisher, above n 10, 67–70; Horowitz, above n 9, 294.

accepting the dynamic nature of identity-based political claims.<sup>147</sup> Fisher describes the effects of the Accord:<sup>148</sup>

The Noumea Accord is an innovative and ground-breaking agreement by all three partners, the French State, the mainly Kanak independentists, and the mainly European pro-France group [...] Its key features include an acknowledgement of the 'shock' of colonisation both to the identity of the Kanak people and those who had come either for religious reasons or against their will; a future for all groups within a common destiny; and a continued commitment to economic rebalancing. In a new concept of 'shared sovereignty', the French State would transfer all but the central, or regalien, sovereign competencies (defence, foreign affairs, justice, law and order, and the currency), progressively to local institutions in a defined schedule.

The economic and constitutional implications, Fisher notes, of the Noumea Accord are significant, yet the agreement shows signs of a shared commitment to negotiate rational decisions, rather than imposing nationalist and exclusionary assumptions on others.

In addition, the long-term (perhaps too long-term) schedule for the administrative transfer of powers and for the referenda over independence (eg Title IX of the Loi 99-209 which implemented the Noumea Accord) shows a distinctive awareness of the dynamic nature of the identity-making process.<sup>149</sup> On a general level, the identity-making process tends to foster cycles in which support for decentralisation fluctuates.<sup>150</sup> In the past 50 years, for instance, the support for independence has

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147 Fisher, above n 10, 70.

148 Ibid.

149 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) 99.

150 Breda *Constitutional Law and Regionalism*, above n 26, 19–22.

fluctuated, but a similar large variation has been reported in Hawaii,<sup>151</sup> Guam and American Samoa,<sup>152</sup> Quebec,<sup>153</sup> Catalonia,<sup>154</sup> Sicily<sup>155</sup> and Scotland.<sup>156</sup>

Furthermore, the two Accords separated out the political issue of managing the archipelago's resources, and instead focussed on a debate over the protection of the Kanak identity, Kanak languages and traditional customs.<sup>157</sup> In 1988, for instance, the Agency for the Development of the Kanak Culture established by the Matignon Accord was one of the institutions that signalled a change of interaction between French central institutions and Kanak peoples.<sup>158</sup> The Agency for the Development of the Kanak Culture has a significant role in promoting tourism, yet, politically, it also increases the profile of the Kanak culture and ultimately provides a reference point for developing a national identity.<sup>159</sup> The Customary Senate of New Caledonia is, for instance, actively promoting the cultural implications of having a multilingual Kanak identity.<sup>160</sup>

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151 Jennifer ML Chock "One Hundred Years of Illegitimacy: International Legal Analysis of the Illegal Overthrow of the Hawaiian Monarchy, Hawai'i's Annexation, and Possible Reparations" (1995) 17 *University of Hawai'i Law Review* 463.

152 Frank Quimby "Fortress Guåhån: Chamorro Nationalism, Regional Economic Integration and US Defence Interests Shape Guam's Recent History" (2011) 46(3) *The Journal of Pacific History* 357; United Nations General Assembly "American Samoa (A/AC.109/2017/i). The Special Committee on the Situation with Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples".

153 Stevenson, above n 134.

154 Germa Bel *Disdain, Distrust and Dissolution: The Surge of Support for Independence in Catalonia* (Sussex Academic Press, 2015).

155 Luca Antonini *Federalismo all'italiana* (Marsilio, 2013).

156 Gavin W Anderson et al "Gavin Anderson et al: The Independence Referendum, Legality and the Contested Constitution: Widening the Debate" on *UK Constitutional Law Group* <<http://ukconstitutionallaw.org/2012/01/31/gavin-anderson-et-al-the-independence-referendum-legality-and-the-contested-constitution-widening-the-debate/>>.

157 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 122, 61; Leblic "Kanak Identity, New Citizenship Building and Reconciliation", above n 11, 275.

158 Loi N° 88-1028 Du 9 Novembre 1988 Portant Dispositions Statutaires et Préparatoires à l'autodétermination de La Nouvelle-Calédonie En 1998 - art 2 art 93; Agence de développement de la culture kanak data.bnf.fr <[https://data.bnf.fr/fr/12341667/agence\\_de\\_developpement\\_de\\_la\\_culture\\_kanak/](https://data.bnf.fr/fr/12341667/agence_de_developpement_de_la_culture_kanak/)>; The Tjibaou Cultural centre and adck <<http://www.adck.nc/presentation/english-presentation/the-tjibaou-cultural-centre-and-adck>>.

159 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 122, 61. For a general analysis of the identity building see: Z Bauman "Identity in the Globalising World" (2001) 9(2) *Social Anthropology* 121; Z Bauman "Right or Wrong: My Country?" (1997) 39 *Argument* 327; Zygmunt Bauman *Community: Seeking Safety in an Insecure World* (Polity Press, 2001).

160 Chappell "Decolonisation and Nation-Building in New Caledonia", above n 122, 61.

The public support for the development of a local culture has been an example of collaboration between the Kanak, New Caledonian immigrants and French institutions however, diverging political and legal interpretations of previous agreements are to be expected in such a dynamic social environment. One of the most debated issues is related to the boundaries of the electoral franchise for the planned set of referenda over independence.<sup>161</sup> The political parties that have taken on the role of representing the Kanak identity considered art 188 of the Loi 99-209 as restricting the electoral franchise to those who were resident in New Caledonia before 1998. The political parties that had a tendency to support union with France interpreted art 188 of the Loi 99-209 as having a less narrow ten-year residency restriction.<sup>162</sup> The unionists (eg Rassemblement, Nouvelles Calédoniennes) were concerned with the progressive undemocratic effect of reducing the electoral franchise to a list that is over twenty years old.<sup>163</sup> After a long gestation, a period which included the litigation related to art 188 by French jurisdictions<sup>164</sup> and, at the European Court of Human Rights,<sup>165</sup> the Loi was amended in order to recognise the restriction of the franchise.<sup>166</sup> This might appear as a long and convoluted process, but deciding over 'who can be part of a community' is normally perceived as fundamental for a political entity. Again, the saga over who can vote is a manifestation of the dynamic nature of the identity-formation process for the Kanak and for the other identity groups that reside in New Caledonia. This process of interaction (which might be based on disagreements) will continue, it is reasonable to suggest, to drive the change in Caledonia's constitutional status within the French Republic.

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161 Cour de Cassation, Assemblée plénière, du 2 juin 2000, 99-60274, Publié au bulletin (Unreported, 6 February 2000); *PY v France* [2005] European Court of Human Rights 66289/99 (1 November 2005).

162 Loi N° 99-209 Organique Du 19 Mars 1999 Relative à La Nouvelle-Calédonie (Consolidée Au 7 Janvier 2019) 99; Fisher, above n 10, 103, 107.

163 Fisher, above n 10, 101.

164 Cour de cassation, civile, Chambre civile 2, 8 mars 2018, 17-60275, Publié au bulletin [2018] Publié au bulletin; Cour de Cassation, Assemblée plénière, du 2 juin 2000, 99-60274, Publié au bulletin (Unreported, 6 February 2000).

165 *PY v France* [2005] European Court of Human Rights 66289/99 (1 November 2005).

166 Fisher, above n 10, 103; Loi Organique N° 2015-987 Du 5 Août 2015 Relative à La Consultation Sur l'accession de La Nouvelle-Calédonie à La Pleine Souveraineté; Loi Organique N° 2018-280 Du 19 Avril 2018 Relative à l'organisation de La Consultation Sur l'accession à La Pleine Souveraineté de La Nouvelle-Calédonie - art 2.

#### *IV CONCLUSION*

In this paper we have discussed a selection of constitutional and political factors that are likely to influence the future of New Caledonia. We discussed, for instance, the effect of the paradigm of unity of the French constitutional system, the constitutional requirement of having French as the only official language and what the implications are for the status of Kanak peoples. While the Matignon Accord and Noumea Accord have constitutionally entrenched New Caledonia autonomy, the paradigm of unity will continue to add an element of inertia to the process of recognition of New Caledonian identities.

A second driver of change considered in this paper was the role of Kanak identity and the Kanak peoples in reshaping the constitutional status of the archipelago. The most evident aspect of the Noumea Accord is the set of referenda over independence, like the one which took place in 2018. However, Kanak identity-based constitutional demands are far more articulated than secession is. Referenda that seek to change the status of a political unity such as the one over Catalonia independence or over Puerto Rico's US statehood are not apotropaic devices. We argued, instead, that New Caledonia's identity-based constitutional demands such as control over the free movement of French and New Caledonian citizens (currently a competence of French central institutions), the managing of the electoral franchises and the recognition of Kanak languages as official languages might change the French constitutional system.