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THE STATUS OF NEW CALEDONIA IN THE FRENCH CONSTITUTIONAL CONTEXT

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The current legal status of New Caledonia within the French Republic gives more autonomy to the territory than the previous ones.

A product of negotiations between the two main political parties in the country and the French government, the political agreement contains a number of innovative elements and lays the foundations of the institutional architecture of New Caledonia. It is therefore a compromise between the demands of supporters of independence and the claims of those who want New Caledonia to remain a French territory.

Therefore, the 1998 Noumea Accord, whose aim was to avoid the self-determination referendum, contains provisions contrary to some French constitutional principles. It has then been necessary to revise the French constitution to introduce exceptions for the implementation of the political agreement.

I propose to first study the institutions of New Caledonia and then focus on the main constitutional exemptions granted to New Caledonia.

1. The current institutions of New Caledonia

New Caledonia is a ‘territorial collectivity’ within the Republic of France, with its own local government, Parliament (the Congress) and provincial assemblies. The provincial assemblies are elected by the people, and each assembly has a president elected by its members. The Congress of New Caledonia is made up of a proportion of assembly members from each province. The members of the Congress elect the members of the local Government, who designate their President and Vice-President. The Government is the territory’s executive body, and may propose laws for adoption by the Congress. The *Sénat Coutumier*, an advisory body comprised of sixteen customary Kanak chiefs, must be consulted on issues related to Kanak identity, including customary land tenure.

The Noumea Accord initiated a staged transfer of all administrative powers from the Government of France to New Caledonia, with the exception of certain ‘sovereignty’ powers – justice, public order, defence, finance and currency – which will remain with the French State until after the final referendum on self-determination. The *New Caledonia Act 1999* sets out detailed provisions for the distribution of powers between the State, the territory and the provinces. The internal structure of government in New Caledonia is thus similar to that of a federation.

1.1. The Executive power

The local executive is no longer the representative of the French State, but the Government of New Caledonia, an offshoot of the local assembly.

Executive power is vested in the Government of New Caledonia including the President who represents the territory. Elected by proportional representation in the Congress of New Caledonia, the Government requires the broadest consensus in the executive decision-making process. If this cannot be achieved, decisions have to be taken by a majority of members.

The method of appointment of its members is a specificity of the Government of New Caledonia, which constitutes its uniqueness.

Elected by the Congress of New Caledonia through proportional representation, the local executive thus reflects the political trends of the Parliament. Indeed, parliamentary majorities and minorities coexist within the Government. Imposed by the Noumea Accord and answering to a consociational logic, the heterogeneous composition of the Government reflects the need to build a common destiny for the various components of the Caledonian society. By requiring the majority to discuss with representatives of minority tendencies, the structure of government is truly original even if similar approaches can be found in The Good Friday Agreement in Northern Ireland or in the 1997 Fiji Constitution.

After their election by the Congress, members of the Government appoint their president and vice president and proceed by consensus with the distribution of areas of intervention of each member.

In accordance with the spirit of the Noumea Accord, it is collectively that the Government has the power to initiate legislation in the territory and plays its role of an executive body. This distinguishes local law from national law as it is true that the French state logic is different from the Caledonian dialectic. While the Constitution provides that the Prime Minister as an expression of his paramouncy among fellow ministers, expresses the national government's intentions to establish the rule of executive Government, the New Caledonia Act 1999 favors consensus within the local executive.

However, even though the Caledonian collegiality implies dialogue, mutual work and information, it is not always possible to reach an agreement on all matters and the final decision can be taken by the majority. Indeed, Article 128 of the New Caledonia Act 1999 provides that "*the Government is collectively responsible. Decisions are taken by a majority of its members*".

Government acts are signed by the President and countersigned by the member of the Government responsible for the sector concerned by the act.

The French Conseil d'État, the highest tribunal in administrative matters, has clarified the consequences of the consent that must prevail within the executive. The Court decided that the decision by a member of the Government to refuse to affix his or her countersignature on an act subject to such formality is not detachable from the act for which the countersignature is required. Accordingly, the refusal of a member of the Government to put a

countersignature on an act for which he or she is responsible for supervising the execution taints the act and could cause its cancellation. In other words, each member of the Government in the sectors it is responsible for has a right of veto.

Nevertheless, in practice, a member of the Government who refuses to countersign an act will see his sectors of intervention modified, so that a more cooperative member will be able to take decisions.

In this context, the representative of the French state plays a more limited role than in the previous status, which shows the evolution towards autonomy desired by the negotiators of the Noumea Accord . He is the representative of state and, more importantly, ensures regular exercise of their powers by the institutions of New Caledonia, including through the review of legality. He may refer to the Constitutional Council for review of the constitutionality of local statutes.

1.2. The legislative body

New Caledonia has a partial bicameral Parliament. Indeed, the Congress intervenes in all areas. The Customary Senate, for its part, is involved in the legislative process only as it concerns matters of Kanak identity and custom.

1.2.1. The Congress

The scope of intervention of the Congress is quite large, in part because of the transfer of powers to New Caledonia. Its status tends to approach that of a parliamentary assembly. In particular - and this constitutes a major innovation of the New Caledonia Act 1999 - Congress has, in some subjects, a legislative power: the power to enact "statutes of the country", that is, local statutes.

1.2.1.1. Composition of the Congress

The members of the Congress of New Caledonia are elected for five years.

The Congress of New Caledonia is actually an offshoot of the provincial assemblies. Indeed, the local assembly is composed of 7 of the 14 members of the Loyalty Islands Province, 15 of the 22 councilors of the Northern Province and 32 of the 40 elected members of the Southern Province. Each province thus forms a constituency for the designation of members of the Congress of New Caledonia. The provincial division was decided in 1988 to allow equitable sharing of power between the separatists and loyalists, and thus allows a faithful representation of the population.

The election takes place with a party-list proportional representation system. The seating is in the order of presentation of each list. However, there is a hurdle and the lists which do not obtain 5% of registered voters do not participate in the distribution of seats.

1.2.1.2. Functions of the Congress

Congress has two main roles: the first of these functions is to adopt, within its areas of competence, various regulations that are binding on Caledonians. These take the form of regulatory power and – a major innovation of the New Caledonia Act 1999 – a legislative power. The second of these functions is to elect the government of New Caledonia, and possibly to question its responsibility by voting a no-confidence motion.

Congress also has other functions, including the issue of advisory opinions, resolutions or wishes. It can also decide to delegate the management of a public service of New Caledonia to the private sector and to create, where appropriate, commissions of inquiry.

It should nevertheless be noted that the appointment of members of government by proportional representation has led to a different mode of conflict resolution. In case of disagreement between the political parties, it is not the Congress which operates through a no-confidence vote. In practice, one of the political parties that is represented within the Government resigns from the Government. This has the effect of causing the resignation of the whole of the Government. Likewise, the method of appointment does not promote the use of tools such as inquiry commissions. Question times, in which the government is interrogated, have been introduced but only timidly: members of the Government are previously informed of the questions that will be asked, and no surprises are sprung on it.

The Congress of New Caledonia has a general jurisdiction regarding to the powers granted to New Caledonia. Thus, the Government of New Caledonia and its President have a limited jurisdiction.

It should be added that the initiative of legislative and regulatory acts belong concurrently to the government and members of Congress.

Section 99 of the 1999 New Caledonia Act lists exhaustively the subjects in which the legislative power of the Congress intervenes. The acts adopted in these matters have the force of law.

Among these subjects, some are very specific and timely (signs of identity, the name of New Caledonia, power transfer and timing of these transfers from French State to New Caledonia). Others, however, are more general and give rise to a frequent legislative action. Among these, we can mention taxation, labour law, customary civil law, mining law... and since their transfer from French State to New Caledonia, in 1st July 2013, civil law and commercial law.

Within fifteen days after the adoption of a law of the country by the Congress of New Caledonia, the various authorities (High Commissioner of the Republic, the Government of New Caledonia and Congress president or a provincial assembly president) or eleven members of Congress have the opportunity to request a new reading of the legislative text.

If no such request has been made, the process of enactment is engaged.

After a second reading of the text has occurred, and before enactment, the local statute may be referred to the Constitutional Council within ten days by the same authorities as above or eighteen Congress members. If it does not contain any provision contrary to the Constitution, it can be enacted. In the opposite case, part or the whole text won't be enacted.

The local statutes are promulgated by the High Commissioner of the Republic with the countersignature of the President of the Government of New Caledonia. Promulgation is the act that certifies the existence of the law of the country and gives it the full force of law. Once they are enacted, the provisions of a local statute can still be challenged by any person who is involved in legal proceedings before a court ; that person can argue that a statutory provision infringes rights and freedoms guaranteed by the Constitution.

All normative acts adopted by Congress, which are not local statutes are regulatory acts, are called “deliberations”.

These deliberations can be challenged by a referral to the Administrative Court of New Caledonia.

The deliberations of the Congress are fully enforceable as soon as they are published in the Official Journal of New Caledonia by the President of the Government of New Caledonia and they are transmitted to the representative of the French State. Indeed, the representative of the State is responsible for the control of legality, that is to say, he may refer to the tribunal deliberations of the Congress which he considers contrary to the law.

As part of this general power of rulemaking, Congress has a specific power in budgetary matters by adopting the budget and approving the accounts of New Caledonia.

1.2.2. The Customary Senate

In support of specific institutions, the Noumea Accord recognizes the pre-existence of the Kanak people because of their presence in 1853 before annexation by France. It decided as well to grant traditional organs the rank of republican institutions in order to offer Kanak people some rehabilitation of their social and cultural identity, which they use as a bulwark against Westernization at the same time as they regain their dignity and their freedom. This explains the creation and role of the customary Senate in the procedure of adoption of the local statutes.

In this context, while Congress is in principle the only assembly to approve bills, an intervention of the Customary Senate is expected through the legislative procedure, for matters relating to custom.

The Customary Senate is composed of sixteen members appointed through the traditional practices of each customary area, with two representatives from each customary area of New Caledonia.

This feature is explained by the social structure of New Caledonia, composed of two main ethnic groups of equal importance: the indigenous population of the island, the Melanesian, and population who immigrated from the mid-nineteenth century. Significant cultural

differences between the two communities have required the creation of a specific entity, able to preserve the Kanak culture and custom.

Section 145 of the New Caledonia Act 1999 allows the Customary Senate to seize on its own initiative or on the request of a customary council, "the Government, the Congress or the provincial assemblies on any matter concerning the Kanak identity."

Indeed, this procedure operates for all matters related to Melanesian custom. The bills on Kanak identity matters are transmitted by the President of the Congress to the customary Senate, which has two months to decide on the submitted text. If it does not, the text is deemed to be approved in its original form.

If the customary Senate modifies the bill, the text is then submitted to the Congress of New Caledonia. If the bill is modified by the Congress, the Customary Senate examines the text in the new version. If it does not adopt the text in identical terms within a month, then Congress can decide definitively.

Only one local statute on customary acts was passed, in 2007. It was sent to the Senate by the President of Congress. Within 2 months, the traditional institution had completely rewritten the bill. As no time limit is set to compel Congress to deliberate, it took the Congress almost 2 years to examine the bill. In this regard, we can regret the lack of regulation on legislative procedure. The Customary Senate itself was then allowed to decide on the new version of the text, giving its opinion within one month. Finally, it took another 4 months for the Congress to finally adopt the statutory provisions. The local statute was finally promulgated on 15 January 2007, after 2 years and a half of procedure.

It seems however regrettable that the French Parliament has not given an initiative power to the Senate when it comes to the adoption of the local statutes for Melanesian custom. Concordance between the areas of intervention and initiative would have brought a little more consistency to the proceedings.

For the time being, the role given to the Senate in the customary local legislative procedure is more of an advisory one than that of a second house of a parliament.

1.3. The Provinces

New Caledonia is divided into three provinces with jurisdiction in all matters that are not reserved by statutes to the State, to New Caledonia or municipalities. They are freely administered by assemblies elected through direct universal suffrage for five years.

Each province consists of several municipalities. There are 33 municipalities in New Caledonia.

Article 20 of the New Caledonia Act 1999 states that: "*Each province has jurisdiction in all matters that are not devolved to the state or to New Caledonia by this Act or by the statutory provisions applicable in New Caledonia.*"

Provinces were a key concept in the institutional design of the Matignon Accords in 1988 as they allow a distribution of powers in relation to the reality of the different political tendencies. Provincial jurisdiction includes for example economic development and agriculture, primary education, culture, youth, sport and leisure, some aspects of healthcare and social work, and protection of environment.

The three provinces are the Loyalty Islands Province, the North Province and the South Province.

The Loyalty Islands Province is largely dominated by those favouring independence with a traditional opposition between the Caledonian Union, usually the majority, and UNI-Palika. Since 2009 the political parties that are in favour of a French New Caledonia have had no provincial councillor in Loyalty Islands Province.

The Northern Province is predominantly pro-independence, with opposition here within the FLNKS, between UNI (which includes Palika, the RDO and UPM) and the Caledonian Union. The presence of anti-independence representatives, which ranged between 1989 and 2014 from 3 to 5 members in the Assembly, has now been reduced. Loyalists continue to represent about a quarter of the electorate of the province and are mainly located on the west coast where are located the only two municipalities governed by an anti-independence mayor.

The Southern Province is predominantly anti-independence. Supporters of separation from France did not have any representative in the provincial assembly between 2004 and 2009, and they got 4 seats out of 40 in 2009 and 7 seats since 2014.

The assembly was dominated from 1989 to 2004 by a united party lead by Jacques Lafleur, the *Rassemblement pour une Calédonie dans la République* (RPCR). Since 2004, the provincial elections are marked by the disintegration and division of the loyalist camp, with, for example, six lists representing the trend in 2009. None of the lists has a majority.

2. The New Caledonian citizenship

The French government demonstrated few reservations and little hesitation in challenging major French constitutional principles when it produced the revision of the French Constitution of 20 July 1998. MPs felt that civil peace deserved an adaptation of law and the priority was to maintain order in New Caledonia. In order to achieve this aim, it was accepted in Paris that the consensus reached by the representatives of the two main components of the Caledonian society in the Nouméa Accord should prevail.

Among the points that necessitated a revision of the French constitution, the establishment of a local citizenship induced legal difficulties. Indeed, this local citizenship introduces some strong limits to the right of vote and work for French citizens on the territory of New Caledonia.

For most of the politicians who participated to the negotiation of the Noumea Accord, " *New Caledonian citizenship was the key to the Noumea Accord.*" Postponing the question of

independence for twenty years, the new status proposed to build a common destiny between the different parts of the Caledonian population.

2.1. Restriction in the composition of the electorate

The restriction in the composition of the electorate for the election of the Congress of New Caledonia and the provincial assemblies is one of the points that justified a constitutional revision, because Article 3 of the Constitution provides that in France, suffrage "*is always universal, equal and secret. Electors, under the conditions determined by statutes, are all French citizens of either sex, enjoying their civil and political rights.*"

Articles 188 and following of the New Caledonia Act 1999 govern the composition of restricted electorate. Voters participating in the appointment of members of provincial assemblies and the Congress of New Caledonia must meet one of the conditions imposed by the text: to resume, to be part of the electorate, any person should have had his or her residency for 10 years in New Caledonia.

The Constitutional Council stated in 1999 that persons who, at the date of the election, are resident for more than ten years in New Caledonia, whatever the date of their establishment in New Caledonia, even after 8 November 1998, contribute notably to the election to provincial assemblies and Congress. These provisions were considered as defining a changing electoral body as time passed.

However, this interpretation of the restriction by the Constitutional Council caused discontent among pro-independence supporters. Indeed, negotiations continued between the signatories of the Noumea Accord after its signing and the signatories agreed on the establishment of a "frozen" electoral body. The decision of the Constitutional Council was therefore unwelcome and talks were initiated to return to this point by a new constitutional amendment.

The reason put forward to justify a restriction of the electorate is the mistrust of pro-independence politicians regarding the migratory flow of metropolitans, which they believe could impact on provincial elections. After years in which the issue of 'changing' or 'frozen' was contested, the constitutional revision of 23 February 2007 finally ruled in favour of a frozen electoral body with the adoption of a constitutional law amending Article 77 of the Constitution. Thus, people not registered on electoral lists on November 8, 1998 are deprived of the right to vote in elections for provincial assemblies and the Congress of New Caledonia and, consequently, they do not enjoy all the rights of Caledonian citizenship.

If the constitutionality of these provisions restricting the electorate for the election of provincial legislatures and the Congress of New Caledonia is not in doubt - the constituent power, demonstrating its sovereignty, has authorized the eviction of French citizens from the electorate - the degree to which they conformed with convention appeared questionable to some.

The question of the conventionality of the electorate was put to the European Court of Human Rights. It had to determine whether Congress was part of the legislative body and, if so, whether a restricted electorate, as conceived in New Caledonia, was an obstacle to the effective participation in the legislative body of persons residing in the territory.

Unsurprisingly, the European Court of Human Rights states in its judgment of 11 January 2005 that "Congress is sufficiently involved in the legislative process to be considered part of the" legislative body "of New Caledonia ". The European judges decided that, given the history of New Caledonia, a condition of ten years of residence in order to obtain the right to vote in local elections is not disproportionate.

But in 2005, the European Court of Justice was considering the electoral body as "slippery" and not frozen. The question of the frozen electoral body was referred to the Court in 2010. The European judges found the application inadmissible, considering that it had already ruled on the issue. The Court has thus avoided this delicate question.

It is sometimes instructive in this regard to consider the point of view of the Melanesian population. These were excluded from the electorate for all elections until 1946, and for most of them until 1957. Excluding a number of French citizens of the electorate only for local elections is, from their point of view, neither shocking nor anti-democratic.

It should also be noted that, as the title XIII of the Constitution indicates, the provisions of New Caledonia are transient and therefore temporary. Negotiations will occur before or after the self-determination referendum.

2.2. Local employment

A special right is granted to citizens by the New Caledonia Act 1999: protection of local employment.

To reflect the tightness of the labour market, the Nouméa Accord provides that "provisions shall be defined to promote access to employment for local people permanently established."

Thus, Article 24 of the New Caledonia Act 1999 states that in order to support and promote local employment, New Caledonia can adopt statutory provisions to promote the exercise of an employment to the benefit of the citizens of New Caledonia and to persons who have a sufficient residence time provided it does not violate the individual and collective benefits enjoyed at the date of their publication by other employees.

Such measures are applied in the same manner to the public sector of New Caledonia.

The only local statutes on this matter were adopted in 2010, partly because of a disagreement between opponents and supporters of independence on the degree of protection afforded. Negotiations with the social partners on the issue only began in 2006.

The statutory provisions stipulate that only Caledonian citizens or persons resident for ten years, have completely free access to private sector jobs. Those who do not fulfil those conditions have differential access.

It must justify a residence time of at least three years to get to know important business recruitment difficulties, at least five years for businesses experiencing average difficulties recruiting.

No minimum period of residence is required for trades experiencing "extreme" difficulty in local recruiting. To recruit outside of New Caledonia, an employer must obtain a certificate from deficiency of the Joint Committee of the local employment that was created at the beginning of this year.

2.3. A local legislative power in a unitary state

Giving a legislative power to New Caledonia is another breach of French constitutional tradition.

The local statute of New Caledonia is a legislative act, placed in the hierarchy of norms at the same level as ordinary law passed by the French Parliament. It is not the only similarity with the national standard. The local statute intervenes in matters specifically listed by the New Caledonia Act 1999. Most of these areas are considered to lay the foundation for a harmonious evolution of the Caledonian society as a whole.

It should indeed be noted that France is a unitary state which, in principle, does not accept the duality of legislative source. In a unitary state, only the state has normally legislative power. Therefore, it was necessary to revise the French Constitution to enable it to meet the Noumea Accord and grant legislative power in the Congress of New Caledonia.

Conclusion: what's next ?

The Noumea Accord provides for the organisation of a referendum on self-determination between 2014 and 2018. If the result of the consultation is in favour of independence, New Caledonia will accede to the status of a sovereign state in the conditions and a timetable to be defined. If the answer is negative, a second and, if necessary, a third referendum can take place at the request of a minority of elected officials.

The electorate for the referendum includes persons residing in New Caledonia since December 31, 1994, a length of residence requirement of at least 20 years from the date of consultation.

Even if it is still possible, it is unlikely that, as has been the case for the Noumea Accord, negotiations between representatives of different political tendencies of the territory will make possible a new status that would avoid the self-determination referendum. It is more likely that the referendum occurs at the latest date stated in the Nouméa Accord, ie in November 2018.

Nevertheless, the question of eligibility to vote in the consultation due to take place in 2018 remains a contentious issue, with between 10.000 and 25.000 kanak citizens not being registered for the vote, despite awareness campaign organized by the French State. If no agreement is reach on this issue, this could led some political parties to call to boycott the self-determination consultation.