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► **To cite this version:**

Yann Bevant. CONSTITUTIONAL EXCEPTIONS COMPARED: THE CASES OF NEW CALEDONIA AND NORTHERN IRELAND. Elizabeth Durot Boucé. CURIOS, TIR, 2021, CURIOS, 978-2-917681-55-8. hal-03577182

HAL Id: hal-03577182

<https://hal.science/hal-03577182>

Submitted on 16 Feb 2022

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**CONSTITUTIONAL EXCEPTIONS COMPARED:
THE CASES OF NEW CALEDONIA AND NORTHERN IRELAND**

ABSTRACT: *Though the Caledonian and Irish experiences are widely different, yet there are elements which call for investigation. In both cases, the question of State allegiance remains a major issue, connected as it is with a colonial past, with cultural, linguistic identities and above all with the sense of belonging or not to one or the other nation. And in both cases it is becoming a matter of emergency to find new compromises, in New Caledonia before the third and last referendum on self-determination is held, and in Northern Ireland, where Brexit may lead to the collapse of the whole process which led to peaceful politics.*

Despite major differences, the New Caledonian experience bears some resemblance to that of Northern Ireland. In both cases, fundamental issues are about the legitimacy of a territorial claim, the process of decolonisation, and above all the sense of belonging of the communities. The first part of this paper shall focus on the situation created by the 2018 referendum in New Caledonia, and comparative aspects that can be of relevance with the Northern Irish case shall be examined in the second part. For practical purposes I will refer in this paper to the pro-independence movements as Nationalists and to the anti-independence movements as loyalists.

New Caledonia has a very specific status in the constitutional framework of the French Republic. It is a *sui generis* territory with wide devolved powers comparable to a certain extent to those of the former British Dominions. These powers are enshrined in the provisions of Act n° 99-209 entitled *Loi organique du 19 mars 1999 relative à la Nouvelle-Calédonie*, and it is the only overseas territory enjoying a special status provided not only by the 1999 organic Act, but also by section 13 of the French constitution. This section entitled “Dispositions transitoires relatives à la Nouvelle Calédonie” (provisional arrangements related to New Caledonia), defines in its articles 76 and 77 the conditions under which a referendum on self-determination should be organised in New Caledonia, and it sets out organic law as the means of organising devolution of powers.

This exception to the rule, given the centralised nature of the French State, recalls the previous status of the former British Dominions before the Statute of Westminster freed them from the control of the Imperial Parliament in 1931. Local parliaments had authority over their jurisdictions, so long as their own legislation was not overruled by the Westminster Imperial Parliament. This feature could be compared with the provisions found in article 77:

la loi organique [...] détermine les règles d'organisation et de fonctionnement des institutions de la Nouvelle-Calédonie et notamment les conditions dans lesquelles certaines catégories d'actes de l'assemblée délibérante de la Nouvelle-Calédonie pourront être soumises avant publication au contrôle du Conseil constitutionnel [Constitution].

Organic Law determines the rules for the organisation and running of the New Caledonian institutions, and more particularly the conditions under which certain categories of bills are submitted to the control of the [French] Constitutional Council before they are enacted. In this regard, the ultimate say does not rest with the French Parliament but with the Constitutional Council, which acts as the guardian of the French written constitution and guarantees its integrity on the totality of the jurisdiction of the French Republic including autonomous Overseas Territories.¹ This provision has led to a consistent jurisprudence according to which local legislation cannot contradict the French constitution. However, Section 13 gives much more control and authority to the local Caledonian Parliament called Congress than the British Dominions ever enjoyed before 1931. It gives organic law the power to shape not only the political structure and daily running of New Caledonia as well as electoral and citizenship arrangements, but also the nature and scope of devolution of powers from the French State to the Caledonian authorities. In other words, the State acknowledges the right of New Caledonia's representative institutions to determine how far they want to go in terms of autonomy and self-determination.

Section 13 of the French Constitution and Act 99-209 both owe much to the provisions regarding the general organisation of the French 'Territoires d'Outre-Mer', and to a political process set out in the Matignon-Oudinot and Noumea agreements of 1988 and 1998, and derived from the tensions which led to violent conflict in the 1980s.

The 1988 and 1998 agreements provided for a new organisation of the territory based on power sharing between the Loyalist and Nationalist traditions, and for the possibility of self-determination (under the auspices of the UN).

On November 4th 2018, a first referendum on self-determination was held in NC, as the agreements provided for the possibility of holding three referenda.² This event came as the culmination of a 30-year old political process that had started in the 1980s, and it was at the

¹ And with the State Council in charge of verifying the conformity of proceedings. Several elections were declared void in the 2000s by the council because of irregularities in the proceedings and new elections had to be organised as a result, as was the case in 2009 (May and December) in the Provincial elections held in the Loyalty islands, or in 2011 in Congress.

² Under the terms of the Nouméa Agreement, eligible voters have the opportunity to cast their ballot again in 2020 and (if that vote fails as well) in 2022 if one third of the Congress of New Caledonia – the local legislature – agree to allow those votes to be held.

same time long awaited and feared by many given the potential consequences of the vote, whatever the outcome could be. When the agreements providing for the referendum in 2008 and then 2018 at the latest were signed, such an outcome as the culmination of the process of reconciliation was in fact a way of satisfying both Nationalists and Loyalists as they would have an opportunity of achieving a final settlement in conformity with their ultimate wish. Yet, the agreement between Nationalists and Loyalists was more about the nature of their disagreement than about a political compromise on the future of New Caledonia. Giving time to time, to use Mitterrand's famous sentence, was a way of bringing back stability, to heal the wounds of the present and of the past in order to facilitate reconciliation and to try and build a common future for all the communities living in the archipelago. This left the main bone of contention unaffected. If the 1988 and 1998 agreements can be seen as the will expressed by nationalists, Loyalists and the French State to achieve a peaceful settlement, and if legislation passed was consistent with the agreements and left the future open, they did not address the fundamental question of the future constitutional status of New Caledonia. Through the peace process nationalists hoped that they would rally a majority of the Caledonian people to their cause and hence be in a position to build a sovereign nation based on the decolonisation of the Kanak people and on the integration of the other communities living mainly in the southern part of the mainland. The process of devolution on the other hand, satisfied Loyalists who considered that the large autonomy granted to New Caledonia would at the same time lead to the decolonisation of the territory, which had been by and large suspended during the Gaullist era, without jeopardising the French status of the archipelago. "Aller aux confins de l'autonomie" ("to go to the outer reaches of autonomy") to quote Pierre Frogier, one of the Loyalist signatories of the 1998 agreement, was the ultimate acceptable limit to Loyalists. One can see here a major contradiction that surfaced during the debates on the referendum in 2018: Nationalists talk about the decolonisation of a people whose right to self-determination is inalienable and imprescriptible, Loyalists talk about the decolonisation of a territory shared by several communities whose equal rights and interests are guaranteed by their inclusion in the French Republic. Under this light decolonisation without independence is not contradictory. This is where the position of the French State as an 'honest broker' becomes quite difficult to maintain, as many official speeches delivered by French Statesmen, from Michel Rocard who was the architect of the 1988 agreement to President Macron in 2018, have espoused this analysis.

Under such auspices, it should not come as a surprise that the response of Nationalists had radical undertones. Louis Kotra Uregei and the Labour Party campaigned in favour of abstention in the referendum, claiming it was a trick to deprive the Kanak people of their

natural right to self-determination. Daniel Goa, the president of the *Union Calédonienne* (the main component of the FLNKS, the pro-independence umbrella organisation) made it clear that an outcome unfavourable to independence in the referenda would not extinguish the nationalist claim, and independence would then be negotiated directly with the French State under the aegis of the United Nations.³

Hence, the referendum was long-awaited and feared, as it was clear that it would clarify the debate by putting forward the central question, and at the same time it is for that very reason that it was feared as memories of past violence and division between the communities were revived. Obviously, the referendum on self-determination was bound to polarise positions, and liable to unleash the most vociferous claims. Indeed the debate was polarised, but though the yes versus no vote comforted the notion that two blocks were confronting each other mainly on an ethnic basis and that nothing had really changed in 30 years, a more detailed analysis of the situation is required.

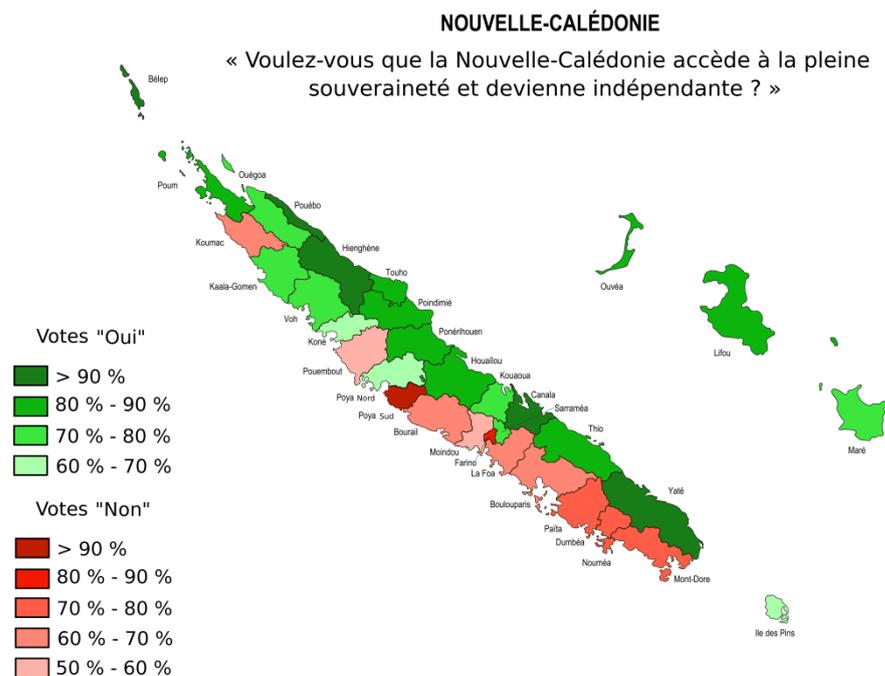
Announced in the evening of polling day, the result was 56.4% for maintaining the status quo and 43.6% in favour of independence. The turnout was 81% of the 174, 995 voters eligible to vote in this referendum.

The question for the referendum was: *Voulez-vous que la Nouvelle-Calédonie accède à la pleine souveraineté et devienne indépendante ?* “Do you want New Caledonia to attain full sovereignty and become independent?”

Choice	Votes	%
For	60, 573	43.6
Against	78, 361	56.4
Invalid/blank votes	2, 165	–
Total	141, 099	100
Registered voters/turnout	174, 995	80.6

Source: Government of New Caledonia

³ « Goa called the referendum a “question of dignity”, saying: “As long as a single Kanak person is standing, he will fight for his freedom. That should tell you the importance of this day, and the symbolism of this referendum” » [Lyons].



A first comment is that a number of expectations proved unjustified. Polls had predicted a large victory of the no vote, which prompted right-wing Loyalist leaders such as Sonia Backès and Pierre Frogier to demand that no further referendum be held as it would be unnecessary and detrimental to economic stability. Given the much tighter result than expected, their demand was irrelevant and turned down by the French government, all the more since it would have breached the Agreement and the prerogatives of the Caledonian Congress. The triumphant attitudes displayed by some prominent right wing Loyalists before the referendum contributed to transform what was technically a victory into a psychological defeat once the results were published. On the Loyalist side Philippe Gomes, the leader of the then main Loyalist party *Calédonie Ensemble* had warned that a 70% no vote would not be representative of the real strength of the Nationalist movement, despite the heavy criticism of right wing Loyalist parties accusing him and *Calédonie Ensemble* of frolicking with the Nationalists. He was proved correct.

The situation in 2018 was a clear departure from the previous and first referendum on independence held on 13 September 1987. Independence was rejected by a large majority, with 842 people (1.7%) voting for independence and 48, 611 people (98.3%) voting for New Caledonia to remain a part of France. But the turnout was very low compared to 2018, as only 59.10% of enrolled voters participated: the Kanak and Socialist National Liberation Front (FLNKS) boycotted the vote. On the contrary, in 2018 the FLNKS campaigned very effectively in favour of the yes vote, and the result showed at the same time its decisive influence and the lack of support for Uregei's abstentionist policy. The result, given the

negative polls before the referendum, has galvanised FLNKS supporters and activists with the feeling that victory was near, in a psychological effect exactly opposite to Loyalists.

The zero sum game created by the referendum must also be considered in the light of the balance of strength between the various parties inside each block. What the result also reveals is the weakness of the more uncompromising attitudes on both sides. Now the result also opened up competition within each block for the provincial elections in May 2019, in fact minds remained focused on the balance of strength in the perspective of the next referendum. There was no need to have a crystal ball to understand that Nationalists would gain enough seats to trigger a second referendum within the next two years, so the question that comes to mind is: what are the perspectives if the same question is put to the voters of the special electoral roll?

Another interesting feature is that division among Loyalists gave Nationalists a golden opportunity to show that nothing could be done without them when Philippe Germain's bid for the presidency of the government was blocked for several weeks by a loyalist minority vote. The result of the referendum goes in the same direction, but one can ponder over the possible reactions of Loyalist voters in case a second or third referendum gives a narrow margin in favour of independence. The obvious difficulty with the polarisation created by the question is to bring together people who have opposite views of what their constitutional future should be.

Beyond the constitutional question lies the perception of one's own national identity. If Caledonians from all walks of life and from all shades of the political spectrum have no problem with their Caledonian citizenship, attitudes diverge when it comes to the passport. It may be argued that practical considerations are at stake, because the protection and opportunities offered by French nationality are likely to outweigh those of a nation of less than 400, 000 inhabitants living on an archipelago of 11, 000 square miles. Whether such considerations are relevant or not must not hide the fact that the sense of belonging plays a crucial part not only in the process of reconciliation, but also in the possibility of a shared national identity. Caledonians agree on Caledonian citizenship because it defines and protects their specificity. They disagree on national identity because of conflicting views as to what France means to them in terms of past history, and therefore in terms of the future of their country. For some the dual identity is their natural and legitimate heritage, for others French nationality is a colonial burden. This is evidenced by attitudes displayed on the status of Kanak Common Law. To put it bluntly, Loyalists agree on citizenship because it gives them a special place in the French Republic, Nationalists see citizenship as the final stage before full-fledge nationality.

A 51/49 vote can be divisive in France, the best example is probably the 1974 presidential election won by Valéry Giscard D'Estaing with the narrowest of margins. Yet it did not challenge the existence of France as a nation and the perception the French had of their own national identity. This is not the case in societies such as New Caledonia where the population is divided on the nature of its own national identity, and therefore divided on the notion of State allegiance. This is where the comparison with the old Irish question and its contemporary avatar in Northern Ireland, comes into play.

If we take the long perspective, it so happens that the seeds of modern Irish nationalism were sown by members of the Anglo-Irish and Scottish-Irish Protestant minority who ran the country in the late 17th century and in the 18th century. What they initially sought was a much greater degree of autonomy from London, more particularly in terms of trade regulations, as William Molyneux's 1698 pamphlet "The Case of Ireland being bound by Acts of Parliament in England, stated" illustrates [Molyneux]. To prove that Ireland was a nation in its own right equal to England and Scotland, Irish Protestant intellectuals developed a whole corpus of writings on the glorious Irish past. Their aim was to make the Irish colony the fourth British nation alongside Scotland, Wales and England. Persisting religious discrimination and considerable social inequalities coupled with the influence of the French Revolution led to the emergence of a Republican Nationalist movement at the end of the 18th century and to the rise of Irish Catholic Nationalism in the first part of the 19th century under the influence of Daniel O'Connell. The divide created by the Act of Union and the industrial revolution between a largely agrarian south dominated by Catholics and an industrial north east dominated by Protestants froze the national debate along sectarian lines. Pitt – the British Prime Minister – had hoped that the Act of Union would settle the Irish question through the integration of the colony into a larger multinational State. Direct rule from London on the contrary reinforced the colonial nature of the relationships. Catholic emancipation in 1829 and the Home Rule campaigns in the 19th century frightened the Protestant minority who feared to be overwhelmed by a Catholic majority if autonomy was granted to Ireland. Unionism/Loyalism in Ireland was born in the 19th century, out of conflicting economic interests and a diverging sense of national identity which crystallised on religious denominations. Present day Northern Ireland is the heritage of those irreconcilable perceptions, which led to violent conflict and to partition of the island between an autonomous and later full-fledge independent state in the South, and a British North with devolved institutions. Yet partition did not solve the national question as the South maintained a territorial claim on the North in its 1937 Constitution, and the Catholic minority in the North was discriminated against by what Lord Craigavon called "a Protestant Parliament and a

Protestant State for a Protestant people” which contributed to foster a siege mentality inherited from the 17th century. The uncompromising attitudes and the brutality which came as a response to the rise of the Civil Rights movement in the 1960s led to civil unrest and to the emergence of paramilitary groups on both sides, the most important being the Provisional IRA. Violence led to the demise of the Northern Irish devolved institutions and to the restoration of direct rule from London. As a result Northern Ireland experienced 30 years of conflict which totalled over 3, 000 casualties and more than 43, 000 wounded and maimed people, out an overall population of about 1.5 million living on a territory of 9, 300 square miles. The failed tentative to establish a power sharing administration with the Sunningdale Agreement in 1973-1974 and the failed referendum of 1973⁴ revealed that no lasting settlement was possible without taking into account all the layers of the conflict. This implied 3 strands: a North-South Irish dimension, a British-Irish dimension, and of course a Nationalist-Loyalist Northern Irish dimension. This in turn, implied that there should be no exclusion from the negotiation table. This pre-condition was met in the 1990s under the favourable conditions created by the end of the cold war. The end of apartheid in South Africa provided a peaceful example of conflict resolution. Then US commitment, the conversion of the Republican movement to representative and parliamentary politics through its party Sinn Fein, the more conciliatory attitudes of the British government, Tony Blair’s large parliamentary majority which gave him a free hand, were vital ingredients in the Peace Process. Last but not least, the influence of European Community and European Union policies in terms of economic integration, largely made the border irrelevant.

The Good Friday Agreement was signed in 1998. The agreement opened the way for the creation of consociational power-sharing institutions in the North. The constitution of the Irish Republic was altered in order to drop the territorial claim on the North. In return the British State acknowledged that sovereignty over the North was based on the consent of the Northern Irish population and that if a referendum produced a majority in favour of reunification, the British Parliament would legislate accordingly (provided the Irish State also approved the change...). Intergovernmental conferences were also created to address the British-Irish and Irish-Northern Irish dimensions. The Agreement was approved by referendum on both sides of the border with solid majorities of 94% in the South and 71% in the North.

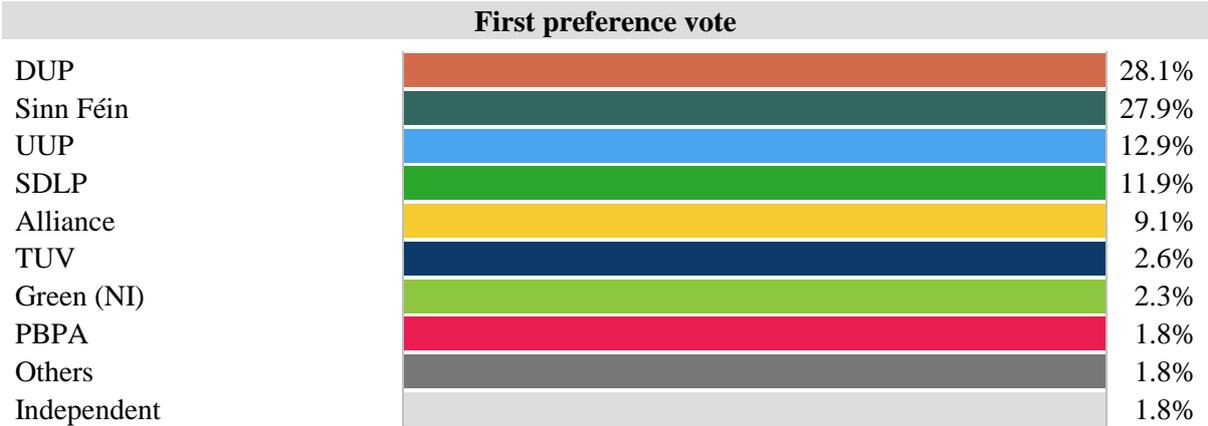
⁴ The referendum was held in March 1973 to determine whether people in Northern Ireland favoured reunification or the status quo. The so-called “Border Poll” was boycotted by Nationalists and resulted in an inconclusive victory for remaining in the UK. 98.9 percent voted to remain in the UK but the voter turnout was 58.7 percent.

To make a long story short, compromise was made possible by the favourable conditions of the 1990s, by economic integration, by the acknowledgement of the legitimacy of all identities. The large success in the 1998 referenda is explained not only by the fact that the Irish, North and South, had grown weary of the conflict. It is also explained by major ideological and economic changes. The border issue which had been one of the causes of the civil war in the 1920s and which had remained a key issue in British –Irish and Nationalist-Loyalist relations, was becoming irrelevant because of the process of European economic integration.

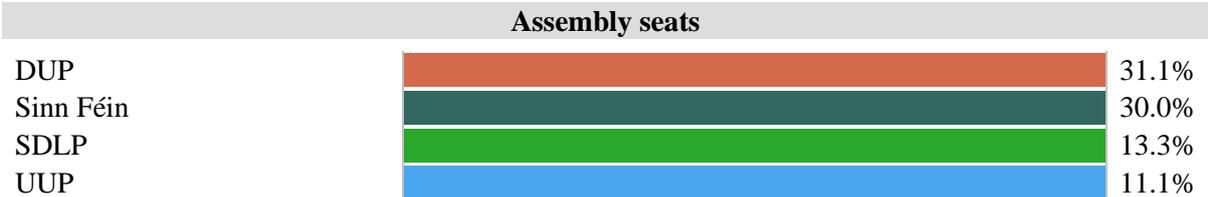
Now the twenty years of peace enjoyed by Northern Ireland do not mean that all problems are solved. There have been several crises that led to temporary suspension of the power-sharing executive, but the most serious of them all is today the Brexit crisis, which has brought back to the fore the border issue. Tensions between Nationalists and Loyalists led to the suspension of the power-sharing administration and assembly with no prospect of a negotiated settlement in sight. Northern Ireland gave a 56% turnout in favour of Remain in the Brexit vote. This contradicts the line of the main Loyalist party, the DUP, which campaigned in favour of Brexit. Today the DUP is staunchly opposed to the Protocol on Northern Ireland negotiated between the UK and the EU so as to reach a compromise which opened the way to the EU-UK Trade and Cooperation Agreement settled on December 24, 2020 and signed on December 30.

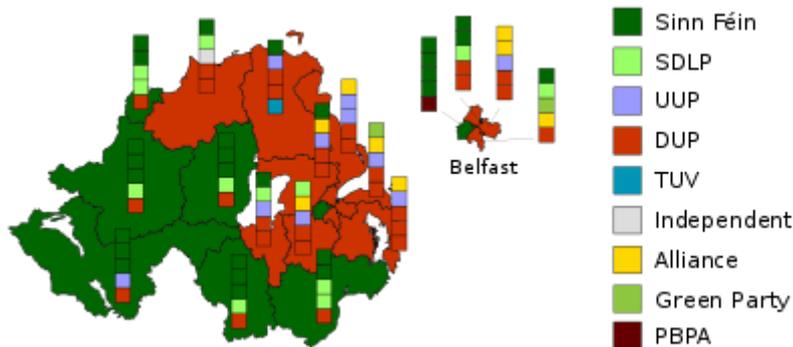
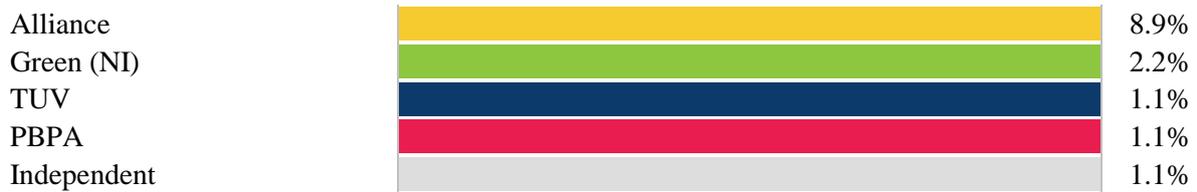
Today Loyalists no longer have an overall majority in the Northern Irish Assembly, and the fear that they could lose a referendum on reunification is real.

Voting summary



Seats summary





Consequently, they placed all their hopes in the pressure they exerted on Teresa May who desperately needed their support in Parliament after the disastrous result of her 2017 snap general election. It is quite striking to see that Boris Johnson can ignore their claims today thanks to his huge parliamentary majority, but the most recent decisions made by the British government indicate a clear will to act unilaterally with little consideration for the international treaty they signed with the European Union. The EU has now launched legal action against the UK, and even US president Biden has warned the British that nothing should threaten the arrangements born from the Peace process. These developments set the scene for what will be months of politically sensitive arguments about how the Protocol can be made to work, without upsetting the delicate constitutional balance. In four years the British government is supposed to organise a consultation in Northern Ireland about the Protocol. It remains to be seen if the present arrangements will last that long. If they do, there is little doubt that such a consultation will trigger a robust political campaign, as Loyalists will push for the Protocol to be scrapped, while Nationalists will push for the reunification of Ireland in the EU.

Conclusion

The Caledonian and Irish experiences are by no means the same. Yet there are elements which call for investigation. The question of State allegiance remains a major issue in both cases, and this issue is connected with a colonial past, with cultural, linguistic identities and above all with the sense of belonging or not to one or the other nation. In turn, the nation cannot be separated from the territory on which it exercises its jurisdiction, and in both cases

territorial claims have been a source of conflict. In both cases again the possibility of a referendum on self-determination in a near future was a way of settling the dispute. To Nationalists the referendum would give the people the power to recover full fledged sovereignty over the territory in the New Caledonian case, to put an end to partition of the national territory in the Irish case. Seen from a Loyalist perspective, the referendum was a means to hammer the last nail in the coffin of nationalist expectations, hence the overconfident reactions in New Caledonia in November 2018, and on the contrary the fears in Northern Ireland in the aftermath of the Brexit and Northern Irish assembly votes in 2016 and 2017.

Besides, in Northern Ireland the issue of the legitimate territory of the nation became less of an issue in the years accompanying the peace process as the border grew invisible. The Caledonian contradiction between decolonisation of a territory versus decolonisation of a people did not operate in the Irish case, until Brexit reopened the case.

In both cases political parties have no option but to find a way forward through negotiation. One can hardly see how the same question could not generate another tight result and end up in crisis – as the second referendum revealed in New Caledonia – with Nationalists rejecting the legitimacy of a final no vote, or Loyalists staging a desperate opt out option in New Caledonia at least in the Southern Province in case of a tight yes majority, as was the case in Ireland a century ago.⁵

In Northern Ireland Brexit and the border issue made it impossible for Sinn Fein and the DUP to work together for a while, even though other reasons were advocated when the late Martin McGuinness resigned, thus bringing down the executive. The restoration of the devolved institutions did bring back a consociational executive, though viewpoints seem totally irreconcilable. The conflicting relation between Sinn Fein and the DUP has been underlined by the abortion crisis of February-March 2021, which led the British Secretary of State to bypass the local assembly and government.

Obviously, this is walking on the thin edge, and much rests on the balance of strength that has come out of the Assembly election in Northern Ireland, and out of the last provincial and Congressional elections in New Caledonia. Contrary to the Northern Irish case, the assembly and the executive did not collapse in New Caledonia, and they have continued work on a consociational basis however uneasy it may be at times. In New Caledonia power sharing survived to/stood the crash test of the referendum on self-determination. In both cases they were times when the executive was suspended or could not work, though not for the same

⁵ The idea was floated by Pierre Frogier after the second referendum and a 3% surge of the pro-independence vote.

reasons: in Northern Ireland the crises were linked to the opposition between Sinn Fein and the DUP while in New Caledonia paralysis was created by internal struggles between Loyalists and more recently between Nationalists.

The infighting between Nationalists in New Caledonia has paralysed the new Nationalist majority at a critical time with the eruption of the Covid crisis, thus giving Loyalists a golden opportunity to expose Nationalist contradictions. After months of tension generated by the future of the southern nickel plant, the message conveyed by the political crisis is quite clear : the devolved institutions created by the agreements of 1988 and 1998 are strong enough to weather the conflicts between Loyalists and Nationalists, but it is becoming a matter of emergency to find new compromises before the third and last referendum on self-determination is held, as the fragile constitutional edifice rests chiefly on the promise of this ultimate settlement, and nothing is settled yet. This analysis also applies to Northern Ireland, where Brexit has revived the possibility of a hard border between the two parts of Ireland and may lead to the collapse of the whole process which led to peaceful politics.

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