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## The Noumea Accord and the status of New Caledonia

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New Caledonia's history is characterized by the successive legal statuses which have been imposed upon the country. When New Caledonia was annexed by France in 1853, it was declared a French colony. New Caledonia remained under colonial rule until 1946 when it became an "overseas territory".<sup>1</sup> And finally, since 1998, this South Pacific French archipelago located more than seventeen thousand kilometres from mainland France has been a "*sui generis* collectivity".<sup>2</sup> As such, New Caledonia does not fall into any traditional legal category covered by French law.

A decentralized unitary state since the amendment of the Constitution in 2003<sup>3</sup>, France is subdivided into several tiers of "collectivity" (geographically-defined authority or governing body), each granted a greater or lesser degree of autonomy depending on the category to which they belong. The municipalities, departments and regions of mainland France (l'Hexagone)<sup>4</sup> have limited autonomy and constitute the regional or local authorities under common law. Overseas territories<sup>5</sup> are endowed with specific statuses conferring wider powers designed to take their cultural, identity-related and geographical specificities into consideration.<sup>6</sup> All these French territorial, regional or local authorities, diverse as they are, are governed by Heading XII "Des collectivités territoriales" of the French Constitution of 4 October 1958.

All but one, that is: New Caledonia. As a *sui generis* collectivity, New Caledonia has a legal status conferring a degree of autonomy and an institutional framework which are unique within the French Republic. Article 72-3 of the French Constitution, which lists by name

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1 This legal category was created by the French Constitution of 27 October 1946, as was the status of "Overseas Department" which applied to Guadeloupe, Martinique, French Guyana and Reunion Island. In the 1946 Constitution, the regime governing Overseas Departments was based on an assimilation principle, *i.e.* it was modelled on French law, unless a specific exception was laid down by law. The Overseas Territories, which included New Caledonia, were granted a special status which took into account the specific interests of such territories within the French Republic. In their case, the prevailing principle was that of legislative speciality, *i.e.* (French) laws and regulations were not automatically applicable and applied only if expressly specified. See Y. Pimont, 1994, *Les territoires d'outre-mer*, Paris, PUF, coll. Que sais-je ? no. 27-99.

2 Cf. II.

3 Historically, France is the archetypal centralised unitary state. A decentralisation process was introduced as from the 1980s to ensure better provision for local specificities. This was enshrined by the Constitutional Law of 28 March 2003 including, in Article 1 of the Constitution of 4 October 1958, the statement that France is an indivisible State whose "organisational responsibility is decentralised".

4 Name given to mainland France due to its hexagonal shape.

5 These are Guadeloupe, French Guyana, Martinique, Reunion Island, Mayotte, Saint Barthélemy, Saint Martin, Saint Pierre and Miquelon, the Wallis and Futuna Islands and French Polynesia.

6 See J.-F. Auby, 2018, *Droit des outre-mer*, Paris, LGDJ, coll. Systèmes; J.-Y. Faberon and J. Ziller, 2007, *Droit des collectivités d'Outre-mer*, Paris, LGDJ, coll. Manuel; J.-P. Thiellay, 2007, *Droit des outre-mers*, Paris, Dalloz, coll. Connaissance du droit.

all France's Overseas Territories, affirms New Caledonia's exceptional status. After citing all the collectivities (territorial, regional and local authorities) governed by sections 73 and 74, it states: "The status of New Caledonia is governed by Heading XIII". New Caledonia is therefore neither a territorial collectivity under article 72 of the Constitution, nor an overseas department and region under article 73<sup>7</sup>, nor an overseas collectivity under article 74.<sup>8</sup> Moreover, in a 2006 judgement, the Council of State – the supreme court for administrative justice – concluded that New Caledonia could not be described as a territorial collectivity<sup>9</sup>, confirming "the radically different nature of this *sui generis* collectivity".<sup>10</sup>

New Caledonia's status is indeed exceptional. Heading XIII of the French Constitution, which is devoted to New Caledonia, is somewhat laconic and refers back to the Noumea Accord. Signed on 5 May 1998, the Noumea Accord constitutes both the legal framework and the mirror of New Caledonia today. The outcome of a political compromise between the French government and New Caledonia's two main political allegiances – the loyalist Rassemblement pour la Calédonie dans la République (RPCR) and the pro-independence Front de Libération National Kanak Socialiste (FLNKS) – it is a strikingly unusual document which sketches the outlines for an equally unusual status. With a view to ensuring the gradual emancipation of New Caledonia and, in consequence, its decolonization, the Noumea Accord grants the territory a customized status, in marked derogation of common and evolving law. The unorthodox nature of the Accord was such that Prime Minister Michel Rocard told the signatories the very day the Accord was signed to "anticipate pleasurably the perplexity of public law professors faced with the innovative and unusual nature of the constitutional instrument [they had] just invented".<sup>11</sup>

In short, New Caledonia is to the overseas regional and local authorities what these are to the regional and local authorities of France: an exception. This particularity derives firstly from the consensual nature of the Noumea Accord (I). Moreover, given that no pre-existing status offered a solution adapted to New Caledonia, it was given a *sui generis* status corresponding to its marked specificities (II). This new transitional legal framework also has the specific objective of ensuring New Caledonia's gradual decolonization (III).

## I. A CONSENSUAL STATUS

The rationale behind New Caledonia's current status explains why it is unorthodox. For years, the territory's legal framework was imposed by the French government. By excluding

7 These are Martinique, Guadeloupe, French Guyana, Reunion Island and Mayotte.

8 This status applies to French Polynesia, Saint Barthélemy, Saint Martin, Saint Pierre and Miquelon, and Wallis and Futuna.

9 The judge ruled that "New Caledonia is not governed by Heading XII of the Constitution relating to the territorial collectivities of the Republic but by Heading XIII, which it is specifically dedicated to New Caledonia, and that its organisation and powers are determined, in accordance with the Accord signed in Noumea on 5 May 1998, by the Organic Law of 19 March 1999, which does not describe it as a territorial collectivity", Council of State, Disputes Section, 13/12/2006, no. 279-323, *Genelle*.

10 Conclusions du commissaire du gouvernement sur l'arrêt Genelle, J. Ziller, *Droit des collectivités d'outre-mer, op.cit.*, p. 366.

11 Cited by F. Lemaire, "Propos sur la notion de 'souveraineté partagée' ou sur l'apparence de remise en cause du paradigme de la souveraineté", *RFDC*, no. 92, 2012, p. 821-850, spec. p. 822.

any consultation with the local authorities, this unilateralist position contributed to acute institutional uncertainty, leading to a situation of heightened tension plunging New Caledonia into violence (1). Peace could only be restored by a radical change in policy. The hoped-for turning point was reached with the negotiations leading to the Matignon-Oudinot and Noumea Accords. Because New Caledonia's status is based on consensus, it has paved the way for reconciliation and emancipation (2).

### A. Imposed statuses: the time of tension

Prior to 1988, the French government position vis-à-vis New Caledonia was unilateralist. The successive statuses to which the territory was subject were imposed by France, giving rise to increasing tension and hostility with dramatic consequences.

Starting as a French colony and therefore entirely at the mercy of colonial France, New Caledonia became an overseas territory in 1946. This major step forward put an end to the application of colonial law, including the Indigenous Regime.<sup>12</sup> New Caledonia then became a French territorial collectivity like any other. Or almost. France's position remained ambivalent, given that it inscribed New Caledonia on the UN list of Non-Self-Governing Territories in 1946.<sup>13</sup> In so doing, the French government recognized that New Caledonia had not really been decolonized despite its change in legal status.

Furthermore, France maintained an authoritarian attitude over the following years. Between 1946 and 1988, a dozen different statuses were imposed on New Caledonia, a veritable "waltz of statuses"<sup>14</sup> granting the country greater or lesser degrees of autonomy, orchestrated

12 From 1887 onwards, the Kanak people were subjected to the Indigenous Regime, thus becoming French subjects, *i.e.* non-citizens under French colonial administration. Serving as a *de facto* means of "legalising violence", the Indigenous Regime meant that France could control, repress and relegate local communities to reserves, irreversibly undermining and disrupting both their social structures and cultural traditions. See I. Merle, "De la 'légalisation' de la violence en contexte colonial. Le régime de l'indigénat en question", *Politix*, 2004, vol. 17, no. 66, p. 137-162; I. Merle and A. Muckle, 2019, *L'Indigénat. Genèses dans l'Empire français*, CNRS Éditions, Paris.

13 United Nations General Assembly, Resolution 66 (I) of 14 December 1946, "Transmission of Information under Article 73e of the Charter". The UN List of Non-Self-Governing Territories is a list of territories considered by the United Nations as not having been decolonized. The list was drawn up in 1946. When a territory is included on the list, the member state is required to transmit annually to the United Nations Special Committee on Decolonization information relating to conditions in the said territory. See United Nations General Assembly Resolution 1541 (XV) of 15 December 1960, "Principles which should guide members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter". France then rapidly ceased sending the information it was required to transmit about New Caledonia to the United Nations, effectively removing it from the list of Non-Self-Governing Territories. France eventually reinscribed New Caledonia on the list in 1986. For a detailed review of the steps leading to the reinscription of New Caledonia on the list of Non-Self-Governing Territories, see J.-M. Regnault, 2013, *L'ONU, la France et les décolonisations tardives : l'exemple des terres françaises d'Océanie*, PUAM, coll. Droit d'Outre-mer, Aix-en-Provence, p. 83-157. See also S. Mohamed-Gaillard, "Parcours de l'indépendance kanak de la Nouvelle-Calédonie aux Nations Unies", in E. Wadrawane & F. Angleviel (eds.), 2008, *La Nouvelle-Calédonie : les Kanaks et l'histoire*, Les Indes savantes, coll. Annales d'histoire calédonienne, vol. 2, Paris, p. 349-364.

14 S. Jacqemart, "Inventer la Nouvelle-Calédonie", *Annuaire des collectivités locales*, vol. 9, 1989, p. 61-79, spec. p. 64. See also G. Agniel, "L'expérience statutaire de la Nouvelle-Calédonie ou de l'étude du mouvement du yo-yo au service de l'évolution institutionnelle d'un territoire d'outre-mer", in J.-Y. Faberon (ed.), 1997, *L'avenir statutaire de la Nouvelle-Calédonie. L'avenir des liens de la France avec ses collectivités périphériques*, La Documentation française, coll. Les Études, Paris, p. 41-57.

by successive political changes in France.<sup>15</sup> France decided, New Caledonia endured the consequences and the situation gradually deteriorated. None of the legal regimes imposed on New Caledonia succeeded in creating a framework adapted to the territory's specific needs and character. In short, the instability and powerlessness of the country's institutions became glaringly clear.<sup>16</sup>

The lack of any attempt to take local aspirations into consideration helped boost the demands for independence which surfaced in the 1970s. In response, the supporters of keeping New Caledonia within France also got organized. And so New Caledonian society gradually split into two camps: the supporters of an independent New Caledonia – mainly headed by the FLNKS (Front de Libération Nationale Kanak et Socialiste) – and the advocates of keeping New Caledonia within the French Republic, basically under the umbrella of the RPCR party (Rassemblement Pour la Calédonie dans la République). The division gradually reached a point of no return, leading to a state of near-civil war during the 1980s. Discreetly named “the Events”, this period reached its climax on 5 May 1988 with the tragedy at the Ouvéa cave which resulted in the death of twenty-one people.<sup>17</sup>

This brutal and bloody tragedy finally acted as a wake-up call to the French government and New Caledonia's politicians that a change in policy was urgently required. In France, a decisive alternative had until then almost always been used to resolve decolonization issues: assimilation as part of France or accession to independence, pure and simple<sup>18</sup>. Given that assimilation had got nowhere in New Caledonia, implementation of “an innovative policy of decolonization through differentiation strikingly divergent from the traditional French ‘model’ of decolonization” was needed.<sup>19</sup> This change in approach involved replacing the statuses imposed by France with a status negotiated with the New Caledonians, designed by them and for them, with a view to opening the path towards reconciliation.

15 The most symbolic statuses include the “Defferre law” (outline law of 23 June 1956), the “Billotte laws” (2 January 1969), the “Stirn status” (28 December 1976), the “Lemoine status” (6 September 1984), the “Fabius-Pisani status” (23 August 1985), the first “Pons status” (17 July 1986) and the second “Pons status” (22 January 1988).

16 J.-Y. Faberon, 2012, *Des institutions pour un pays : la Nouvelle-Calédonie en devenir*, PUAM, coll. Droit d’outre-mer, Aix-en-Provence, p. 34.

17 On 22 April 1988, against a background of rivalry between pro-independence Kanak and anti-independence Caldoches (New Caledonian communities of European heritage), a group of Kanak planned a protest occupation of a gendarmerie. This protest, intended to be peaceful, actually served as the trigger of the tragedy. Four gendarmes were killed and 27 others were kept hostage in the Ouvéa cave for several days. On 3 May, the French government launched a military assault in which 19 Kanak and two soldiers were killed. The details surrounding the deaths of the Kanak hostage-takers remain unclear to this day. See (C.) Michalski, 2004, *L’assaut de la grotte d’Ouvéa : analyse juridique*, L’Harmattan, Paris.

18 The former colonies which are now Overseas Departments and Regions are illustrations of the assimilation policy. These are Reunion Island, Martinique, Guadeloupe, French Guyana and Mayotte. However, all other French colonies in Africa have gained full independence as, for example, in the case of Senegal, the Ivory Coast and Togo.

19 F. Melin-Soucramanien, 2013, “La République française et la Nouvelle-Calédonie : réussir (enfin) une décolonisation?”, in, *Espaces du service public. Mélanges en l’honneur de Jean du Bois de Gaudusson*, Presses Universitaires de Bordeaux, coll. Droit, Pessac, Bordeaux, p. 1239-1249, spec. p. 12-44. See also F. Melin-Soucramanien, “Les politiques françaises de décolonisation. L’émergence d’une politique de décolonisation par différenciation en Nouvelle-Calédonie”, in *Mélanges offerts au Doyen Charles Cadoux*, PUAM, Aix-en-Provence, 1999, p. 205-212.

## B. Negotiated statuses: the time of reconciliation

Aware of the urgent and pressing need for a radical change in policy regarding New Caledonia, then French Prime Minister Michel Rocard set up a peace mission in May 1988. Comprising representatives holding differing political, religious and philosophical views, this peace mission was designed to broker a deal between New Caledonia's key political players. Talks among New Caledonian representatives, and between them and French government figures were held in Paris. They led to the signing of the Matignon Accord on 26 June 1988<sup>20</sup>. This was finalized by the signing of the Oudinot Accord on 20 August of the same year<sup>21</sup>. The handshake marking the occasion, between Jean-Marie Tjibaou, the pro-independence leader, and Jacques Lafleur, the loyalist movement leader, became the symbol of reconciliation. The page had been turned on violence and a new chapter in New Caledonia's history could be written.

The Matignon-Oudinot Accords were political agreements and therefore still had to be given legal effect. The new status of New Caledonia was established by the Referendum Act of 9 November 1988 *setting out statutory and preparatory provisions for the self-determination of New Caledonia in 1998*. Negotiated and approved by both the FLNKS and the RPCR, the Act was based on a key concept: while political players could work together on issues of economic, social, and cultural development, reconciling their opposing views as to New Caledonia's future status was currently impossible. In other words, New Caledonia's political parties and the French government decided to work together on all issues on which they agreed and to kick into the long grass the thorny question of New Caledonia's future in relation to France.<sup>22</sup>

In view of those considerations, New Caledonia's new status was based on a two-fold strategy. First and foremost, New Caledonia's institutions were reorganized and accompanying economic, social and cultural measures were put in place to ensure a process of "rebalancing" benefiting the Melanesian community. The innovative measures included the division of New Caledonia into three regional authorities known as "provinces" (South Province, North Province and Loyalty Islands Province), a move designed to ensure that pro-independence supporters, a minority of New Caledonia's population, would hold power in two of the three provinces (North Province and Loyalty Islands Province), thus rebalancing the distribution of regional and national authority. Moreover, the Referendum Act of 9 November 1988 provided for the holding of a self-determination referendum between 1st March and 31 December 1998. However, this never took place.

The approach envisaged in the 1988 Matignon-Oudinot Accords proved fruitful since it brought a rapid easing of tension in New Caledonia. Nevertheless, as early as 1991, New Caledonia's key political players, anxious to avoid any risk of fresh outbreaks of civil turmoil, concurred in their unwillingness to grasp the nettle and ask for a yes or no to independence, as

20 In reference to the Hôtel de Matignon, the name of the official residence of the head of the French government, *i.e.* the Prime Minister, where the negotiations took place.

21 In reference to rue Oudinot, the Paris headquarters of the French Ministry for Overseas Departments and Territories.

22 J.-Y. Faberon, *Des institutions pour un pays : la Nouvelle-Calédonie en devenir, op. cit.*, p. 43 and ff.

originally provided for in the Referendum Act of 9 November 1988. With a view to avoiding the “sunset referendum”<sup>23</sup>, RPCR party founder Jacques Lafleur was the first to appeal to New Caledonia’s political class and the French government to reflect on a consensual solution which would mean the independence issue could be further deferred, thus contributing to the firm establishment of peace in New Caledonia.

In the spirit of the Matignon-Oudinot Accords, the political partners worked on a new agreement for the future of their territory. Their negotiations resulted in the Noumea Accord, adopted on 21 April 1998 by the FLNKS and the RPCR and signed on 5 May 1998 by Prime Minister Lionel Jospin. The Noumea Accord was the reflection of a shared willingness to continue working together on the task, begun ten years previously, of building and decolonizing New Caledonia. The Accord was submitted to a territorial referendum on 8 November 1998 and was approved by 72% of New Caledonians with a turnout of 74%. Through their unambiguous adoption of the Noumea Accord, the New Caledonian people chose a completely new status setting customized institutions in place.

## II. A *SUI GENERIS* STATUS

The status of New Caledonia provides striking proof that law is primarily an instrument subservient to politics. To address the very specific case and context of New Caledonia, the Noumea Accord sets up a *sui generis* status. This unprecedented status is unique in possessing constitutional value, thereby constituting a mini Constitution within the main (French) Constitution (1). It sets up entirely unprecedented customized institutions (2).

### A. A mini Constitution within the main Constitution

The Noumea Accord of 5 May 1998 is an historic political agreement, akin to a mini Constitution within the French Constitution of 4 October 1958. Not only has it acquired constitutional value through the various texts with which it is now indissociably linked, but it also provides the foundation for an authentic New Caledonian social pact.

The Noumea Accord acquired constitutional value in an entirely unprecedented way. Initially, it was merely a political agreement adopted by two political parties and given the French government’s official stamp by the Prime Minister’s signature. As such, it had no binding legal value. And yet, by means of a referral mechanism, this simple political agreement was raised to the highest levels of the French legislative hierarchy. A few weeks after the Noumea Accord was signed, the Constitutional Law of 20 July 1998 enshrined Heading XIII “Transitional provisions relating to New Caledonia” in the French Constitution. This Heading, specific to New Caledonia, comprises two articles, Articles 76 and 77, each referring to the Noumea Accord. Pursuant to Article 76, “the population of New Caledonia is called

23 The concept of a “sunset referendum” is often used in New Caledonia to reflect the fact that any vote on accession to full sovereignty can lead only to a divisive binary and thus simplistic result, given that it involves answering yes or no to the question of independence. Working on building a consensual, negotiated institutional solution – possibly thereafter approved by referendum – might have been a more appropriate approach given New Caledonia’s Oceanian cultural heritage and complex history. See J.-Y. Faberon, “Débats”, in F. Faberon (ed.), 2016, *Diversité de la démocratie. Théorie et comparatisme : les pays de la Mélanésie*, LGDJ, Clermont-Ferrand, p. 301-316, spec. p. 480.

upon to vote by 31 December 1998 on the provisions of the Accord signed in Noumea on 5 May 1998". Article 77 provides that "After approval of the Accord by the vote provided for in Article 76" an organic law shall implement the Accord.

Two points should be added. Firstly, the New Caledonians approved the Noumea Accord in the referendum held on 8 November 1998. As a result, Article 77 entered into application. Secondly, in accordance with the decision of the Constitutional Council in Resolution no. 99-410 DC of 15 March 1999<sup>24</sup>, the organic law required to implement the Noumea Accord should "comply with the spirit and guidelines of that Accord".<sup>25</sup> It therefore follows that the Noumea Accord is more highly placed in the legal hierarchy than the organic law. Furthermore, insofar as the Noumea Accord can diverge from rules or principles of constitutional value, the Noumea Accord itself has constitutional value.<sup>26</sup> And so, bypassing all the usual parliamentary debates, this political agreement was enshrined in the French Constitution and set at the very summit of the French legal hierarchy. New Caledonia thus became the only French collectivity to possess a legal status having constitutional value.<sup>27</sup>

Not only does the Noumea Accord possess constitutional value but the content of the Accord is also akin to that intrinsic to constitutions. The Noumea Accord is not a homogeneous text and actually comprises two parts, a preamble and a guidance document. The guidance document defines the main principles relating to the status of New Caledonia. It is organized in six main sections dealing with Kanak identity, institutions, powers, economic and social development, the evolution of the political structure in New Caledonia and the implementation of the Accord. The guidance document, central to the Noumea Accord, establishes a specific institutional system – which we will return to – as does the constitution of a country.

The preamble of the Accord, like the preambles of constitutions invested with marked symbolic significance, lays the basis for a remodelled society, serving in a way as a "social contract".<sup>28</sup> Fully aware that a knowledge of the past is key to understanding the present and planning for the future, the authors of the document devote much thought to New Caledonia's turbulent history. The text first recognizes that "the shadows of the colonial period, even if it was not devoid of light, [...] [brought lasting trauma for the original population". It is therefore necessary to "acknowledge the memory of these difficult times, to

24 CC, Resolution no. 99-410 DC of 15 March 1999, Loi organique relative à la Nouvelle-Calédonie.

25 It was Organic Law no. 99-209 of 19 March 1999 relating to New Caledonia which amplified the guidelines set out in the Noumea Accord.

26 See Court of Cassation, Plenary Session, 2 June 2000, Melle Fraisse, Bull. civ., AP, no. 4 p. 7; CC, Ruling no. 2004-500 DC of 29 July 2004 Loi organique relative à l'autonomie financière des collectivités territoriales.

27 The vast majority of other collectivities within the French Republic possess a status of legislative value (for example, regions and departments). At most, they can be accorded a status of organic value, *i.e.* above the law but below the Constitution, as in the case of French Polynesia (cf. Organic Law no. 2004-192 of 27 February 2004 relating to the autonomous status of French Polynesia). However, New Caledonia remains the only collectivity to be accorded a status of constitutional value.

28 H. Mokaddem, "Qui est peuple en Nouvelle-Calédonie aujourd'hui ?", in J.-Y. Faberon, V. Fayaud & J.-M. Regnault (eds), 2011, *Destins des Collectivités politiques d'Océanie : Peuples, populations, nations, États, territoires, pays, patries, communautés, frontières*, vol. 2, PUAM, coll. Droit d'Outre-mer, Aix-en-Provence, p. 615-623, spec. p. 617. See also F. Garde, "Le préambule de l'Accord de Nouméa, prologue d'une histoire officielle ?", in E. Wadrawane & F. Angleviel (eds), *La Nouvelle-Calédonie : les Kanaks et l'histoire*, *op. cit.*, p. 79-86.

recognize the wrongs, to return their stolen identity to the Kanak people - this will amount for them to a recognition of their sovereignty". But it is also, and above all, a question of transcending these divisions by "allowing the original people to form a human community together with the men and women who live there, affirming their common destiny"; this aspiration having since become the "motto"<sup>29</sup> of the Noumea Accord. The precondition for making this social vision a reality is "re-establishing a social contract between all the communities living in New Caledonia, and sharing sovereignty with France, on the path towards full sovereignty". In short, as aptly summed up by the Noumea Accord itself: "The past was the time of colonization. The present is the time of sharing, through rebalancing. The future will be the time of identity, in a common destiny".<sup>30</sup>

So, in terms of both form and substance, the Noumea Accord is akin to a mini constitution within the main Constitution. As French constitutional expert G. Carcassonne pointed out, "what is concerned here are not so much specific constitutional provisions as another Constitution, that of New Caledonia, enshrined in our beneficent 1958 French Constitution under Heading XIII".<sup>31</sup> Furthermore, the singular nature of New Caledonia's status is manifest in the unique institutions it sets in place.

### **B. A unique institutional structure**

The Noumea Accord establishes a truly customized status granting New Caledonia an unparalleled degree of autonomy within the French Republic.<sup>32</sup> A number of mechanisms encompassed by this status derogate directly from the French Constitution. Such derogations are made possible because the Organic Law of 19 March 1999, in which they feature, is itself provided for by the Constitution and by the Noumea Accord which, let us not forget, has itself constitutional value.

New Caledonia is characterized by a territorial structure based on four distinct levels: the French government, the Collectivity of New Caledonia, the provinces and the municipalities. Since the territory is still part of France, the French government has a presence in New Caledonia: it is represented by a High Commissioner of the French Republic. In the same way as the Prefects appointed throughout France's entire national territory, the High Commissioner is the guarantor of public order, defence and justice in New Caledonia.<sup>33</sup>

29 H. Mokaddem, "La reformulation permanente de la souveraineté de la Kanaky/Nouvelle-Calédonie", in N. Gagne & M. Salaün (eds), 2010, *Visages de la souveraineté en Océanie*, L'Harmattan., coll. Cahiers du Pacifique Sud contemporain, Paris, no. 6, p. 185-209, spec. p. 187.

30 Noumea Accord, 5 May 1998, preamble.

31 G. Carcassonne, *La Constitution*, 2009, Paris, Éditions du Seuil, coll. Points Essais, p. 377.

32 For an overview of New Caledonia's institutions, see F. Garde, 2001, *Les institutions de la Nouvelle-Calédonie*, L'Harmattan, coll. Mondes Océaniens, Paris; M. Chauchat, 2011, *Les institutions en Nouvelle-Calédonie. Institutions politiques et administratives*, Noumea, Scérén, CDP de Nouvelle-Calédonie, coll. Université; J.-Y. Faberon, *Des institutions pour un pays : la Nouvelle Calédonie en devenir*, op. cit.

33 Article 1 of Decree no. 2007-423 of 23 March 2007 relating to the powers of the High Commissioner of the Republic, to the organisation and action of French government agencies in New Caledonia provides that: "The High Commissioner of the Republic in New Caledonia is vested with the authority of the French government. He shall have responsibility for national interests and compliance with the laws. He shall represent the Prime Minister and each of the ministers. He shall ensure the enforcement of government regulations and decisions. The High Commissioner shall, subject to the authority of the ministers and in accordance with the conditions laid down by the same decree, direct the decentralised agencies of French government administrative authorities in New Caledonia."

Conversely, compared to his/her counterparts, the High Commissioner of New Caledonia has far fewer powers, and in this particular case, fewer and fewer. We will return to this point, but the Noumea Accord and the Organic Law of 19 March 1999, supplementing the former, provide for a process of gradual transfer of powers from the French government to New Caledonia and its provinces. Thus, over time, the French government's sphere of jurisdiction has diminished to a point where it finally covers only the sovereign powers.<sup>34</sup>

Conversely, on the principle of communicating vessels, the collectivity of New Caledonia has been granted ever greater powers. The country possesses specific institutions for the exercise of these powers.<sup>35</sup> Granted, it has a deliberative assembly and an executive body like France's other territorial collectivities. However, setting an entirely innovative precedent, the former – the Congress – possesses legislative power, while the second – the government – operates on a collegiate basis.

Comprising 54 members representing the Provincial Assemblies<sup>36</sup>, the Congress of New Caledonia is the territory's deliberative assembly. A major innovation introduced by the Noumea Accord lies in the Congress having the power to adopt not only administrative acts but also, importantly, legislative acts.<sup>37</sup> In certain areas listed exhaustively in Article 99 of the Organic Law of 19 March 1999, such as identity symbols, taxation, labour law and social security, New Caledonia's Congress may adopt acts known as "Country Laws". Such acts have legal force. As such, they are subject to oversight by the constitutional judge, i.e. the Constitutional Council, whereas acts adopted by all other French territorial collectivities are subject, due to their regulatory nature, to oversight by the Administrative Judge. Accordingly, the Congress of New Caledonia is the only institution which exercises a truly autonomous legislative power competing directly with that of the French Parliament. In the space of 20 years, from 1999 to 2019, the Congress has passed more than 200 Country Laws (over a third relating to New Caledonia's tax regime), proof that New Caledonia has taken full control of this unique power.

The Government of New Caledonia, the territory's executive body, is equally unusual. It represents almost the only instance in the world of a government elected not on a majority vote basis but by proportional representation based on the parties represented by the members of the Congress. In line with the spirit of the Noumea Accord, the members of

34 Article 3.3. of the Noumea Accord, entitled "Sovereign powers", provides that: "Justice, public order, defence and currency (together with credit and exchange rates), and foreign affairs (subject to the provisions of 3.2.1) shall remain within the competence of the French Republic until the new political structure resulting from the votes put to the populations concerned, provided for in 5."

35 Article 2 of the Organic Law of 19 March 1999: "The institutions of New Caledonia include the Congress, the Government, the Customary Senate, the Economic, Social and Environmental Council and the Customary Councils".

36 The Congress is formed by the coming together of a portion of the members of each Provincial Assembly: 7 members representing the Assembly of the Loyalty Islands Province out of the 14 elected members of this Assembly; 15 members representing the North Province Assembly out of the 22 elected members of this Assembly; 32 members representing the South Province Assembly out of the 40 elected members of this Assembly.

37 Noumea Accord, point 2.1.3: "Some resolutions of the Congress shall take the form of Country Laws"; Article 107 of Organic Law no. 99-209 of 19 March 1999, relating to New Caledonia: "Country Laws have legal force". About this, see C. Gindre-David, 2009, *Essai sur la loi du pays calédonienne : la dualité de la source législative dans l'État unitaire français*, Paris, L'Harmattan, coll. Gralle; N. Clinchamps, "Les lois du pays dans le droit français", in P.-Y. Chicot, R. Etien and P. Teisserenc (eds.), 2013, *L'influence des régimes juridiques des collectivités territoriales d'outre-mer sur l'évolution de l'État français*, Paris, Cujas, coll. Actes et études.

the Government, from five to eleven, are elected by the deliberative assembly based on a list system of proportional representation. The Government therefore represents the same political parties as those making up the Congress. This allocation system means that minority and majority political parties jointly form the executive, with decisions made based on a majority of members (who do not have individual powers). In addition, the President of the Government plays a role restricted to the coordination and representation of New Caledonia. All these features ensure that power is shared, and give priority to seeking a consensus, a central tenet of Oceanic cultural tradition.<sup>38</sup>

In addition to these two central institutions, New Caledonia is also endowed with three other institutions. The Customary Senate represents the Kanak customary community, a key component of New Caledonia's culture and identity. It is made up of 16 customary senators, two from each of the eight existing customary areas.<sup>39</sup> Any draft bill or proposal for a Country Law relating to identity symbols and customary status can be brought before the Customary Senate. It therefore acts as a second legislative chamber representing Kanak custom, although the powers of the Customary Senate are far from being on a par with Congress. And finally, New Caledonia's institutions also include the Economic, Social and Environmental Council, called on to advise on legislation within its remit, and the Customary Councils, representing each customary area and having jurisdiction on customary issues.

New Caledonia is further divided into three regional authorities known as "provinces": the South Province, the North Province and the Loyalty Islands Province. Once again, the provinces constitute regional authorities of a type found nowhere else in the French Republic. The provinces were set up in 1988 by the Matignon Accord and each has an elected Provincial Assembly. The members of each assembly are elected by direct universal suffrage for a term of five years: 40 members for the South Province, 22 members for the North Province and 14 members for the Loyalty Islands. The provinces have a very broad scope for action since they have general jurisdiction.<sup>40</sup> In other words, they have authority over all areas not specifically subject to the jurisdiction of the French government, New Caledonia or the municipal authorities. Centrally placed within New Caledonia's institutional system, the provinces play a vital political role in ensuring continuous dialogue and the future development of New Caledonia. Provincialization has decentralized political and administrative powers throughout the country: the South Province, in which Noumea lies, is home to a majority of anti-independence voters, while pro-independence voters form the majority in the North Province and the Loyalty Islands Province, thereby ensuring a balance of power promoting peace in New Caledonia.

Lastly, as in France, New Caledonia's municipalities represent the most localized level of administrative responsibility. The 33 municipalities "are freely self-governing through

38 J.-Y. Faberon, *Des institutions pour un pays : la Nouvelle-Calédonie en devenir*, *op. cit.*, p. 75.

39 The eight customary areas are special subdivisions existing alongside the administrative subdivisions. They include individuals having Kanak customary civil status, therefore not subject to common law, and have jurisdiction in matters of private law matters relating to customary civil status, customary lands and issues involving Kanak languages and culture.

40 The provinces have responsibility for public primary education, rural and maritime development, economic and tourism development, youth and sports initiatives and environmental protection.

assemblies elected by universal suffrage<sup>41</sup>. Seen in this way, New Caledonia's municipalities are assuredly the local authorities most closely modelled on their counterparts in France. Although there are some specific features<sup>42</sup>, the rules and regulations governing the composition, election and operation of municipal councils are based on the provisions of the General Local Authorities Code applying to French municipalities. Traditionally, New Caledonia's municipalities are vested with jurisdiction under a general clause which means that they can act in any area of municipal community interest.<sup>43</sup> In practice, this amounts to recognizing that municipalities have residual jurisdiction.

The unique features of New Caledonia's status are the reason for New Caledonia being known as a *sui generis* collectivity. The goal pursued by the Noumea Accord underlines this uniqueness: ensuring the decolonization of New Caledonia.

### III. A STATUS FOR DECOLONIZATION

New Caledonia has a unique administrative framework because its status is designed to ensure the country's gradual emancipation (1). *In fine*, the aim is to pave the way to self-determination (2). As such, the Noumea Accord establishes an "unprecedented process of decolonization"<sup>44</sup> supported by the French government.

#### A. The aim: ensure New Caledonia's emancipation

The Noumea Accord aims to pave the way towards New Caledonia's emancipation by furthering development and building a common destiny shared by the various communities of people living there. To achieve this, New Caledonia needed to be given the means to deal with the issues involved. A number of measures based on the concepts of sharing and rebalancing were set in place to enable New Caledonia, pending the referendum on self-determination, to achieve a significant degree of autonomy without actually parting from France. Shared sovereignty and New Caledonian citizenship represent the two defining measures underpinning New Caledonia's status.

In accordance with the Noumea Accord:

*The sharing of powers between the French government and New Caledonia shall signify shared sovereignty. It shall be gradual. Powers shall be transferred on implementation of the new framework. Others shall be transferred according to a set timetable, which can be adjusted by the Congress, in accordance with the principle of self-organization. The transferred powers cannot be reclaimed by the French government, and this shall reflect the principle of irreversibility governing these arrangements.*<sup>45</sup>

41 Article 3 of the Organic Law of 19 March 1999.

42 M. Chauchat, *Les institutions en Nouvelle-Calédonie. Institutions politiques et administratives*, *op. cit.*, p. 143.

43 According to Article L 121-25 of the Code of New Caledonia Municipalities, "the municipal council shall debate and rule on all issues concerning the municipality".

44 V. Goesel-Le Bihan, 1998, "La Nouvelle-Calédonie et l'accord de Nouméa, un processus inédit de décolonisation", *AFDI*, vol. 44, p. 24-75.

45 Noumea Accord, Preamble, point 5.

Shared sovereignty therefore means, first and foremost, the sharing of powers between the French government and New Caledonia.<sup>46</sup> Even though there exists, as part of a decentralization process, a like sharing of powers in regard to other French territorial collectivities, there can be no quantitative or qualitative comparison with the aforementioned arrangements. New Caledonia is also unique insofar as the Noumea Accord and the Organic Law of 19 March 1999 provide for the gradual transfer to New Caledonia of the powers held by the French government, to the point where the latter retains only the so-called sovereign powers, such as justice, defence or the conditions for attribution of nationality. Powers held by the French government are to be transferred to New Caledonia in four stages, corresponding to the four successive terms in office of the Congress preceding the referendum on self-determination (1999–2004; 2004–2009; 2009–2014; 2014–2019). This innovative arrangement ensures New Caledonia's gradual progress towards independence.

At the present time, apart from the powers specified in Article 27 of the Organic Law of 19 March 1999 (legality audit, higher education, audiovisual communication)<sup>47</sup>, the transfer thereof being optional and such transfer not having been requested by the Congress of New Caledonia<sup>48</sup>, all transfers of powers provided for in the Noumea Accord have been accomplished. To take an example, New Caledonia now passes its own civil, commercial and environmental regulations, whereas traditionally these are areas under French government control elsewhere throughout France's national territory.

New Caledonia enjoys an exceptionally wide range of powers, together with unprecedented authority to implement such powers. As discussed above, the Congress has legislative powers which it can employ in a number of fields listed exhaustively in Article 99 of the Organic Law of 19 March 1999. Furthermore, in line with the aim of emancipating New Caledonia "the transferred powers cannot be reclaimed by the French government, and this shall reflect the principle of irreversibility governing these arrangements".<sup>49</sup> In other words, all powers are transferred once and for all; the French government cannot take back such powers. This principle of irreversibility serves as an authentic guarantee of New Caledonia's advance towards ever greater autonomy.

46 See J. Page, 2001, *Du partage des compétences au partage de la souveraineté : des territoires d'outre-mer aux pays d'outre-mer*, Aix-en-Provence, PUAM, coll. Collectivités locales, , p. 333-351; J.-Y. Faberon & J. Ziller, *Droit des collectivités d'Outre-mer*, op. cit., p. 377-413; M. Chauchat, "Transferts de compétences et avenir de la Nouvelle-Calédonie", *AJDA*, 2007, p. 2243-2247; O. Gohin "Comment dépanner l'accord de Nouméa ? Réflexions sur les nouveaux transferts de compétences", *AJDA*, 2008, p. 291-296; M. Chauchat, *Les institutions en Nouvelle-Calédonie. Institutions politiques et administratives*, op. cit., p. 100-124.

47 Article 27 of the Organic Law of 19 March 1999: "The Congress may, from the start of the term beginning in 2009, adopt a resolution providing for the transfer, under a subsequent organic law, of the following powers: - regulations relating to administration of the provinces, municipalities and their public institutions, legality auditing of the provinces, municipalities and their public institutions, the accounting and financial system applying to the public authorities and their public institutions; - higher education -; audiovisual communication".

48 Nevertheless, on 17 September, the UC-FLNKS political alliance tabled a draft text requesting the transfer of the powers specified in Article 27. This draft text will need to be passed by a majority in Congress before such transfer of powers can proceed.

49 Noumea Accord, Preamble, point 5.

The innovative character of the Noumea Accord lies not only in its provision for the gradual and irreversible transfer of exceptionally broad powers to New Caledonia, but also in its creation of New Caledonian citizenship.<sup>50</sup> Acknowledging that New Caledonian society is essentially heterogeneous, a society in which a variety of communities with past histories of conflict currently co-exist, the Noumea Accord promotes the project of “common destiny”. This core concept embodies not only the basis for New Caledonia’s overall status but also a goal to be accomplished. The common destiny epitomizes the aspiration to ensure New Caledonia’s emancipation by bringing its communities together. New Caledonian citizenship is the legal instrument serving this political agenda and takes on the character of an essential component in the move towards decolonization.

In the preamble, the signatories to the Accord state: “It is now necessary to lay the foundations for a New Caledonian citizenship, enabling the original people to form a human community together with the men and women who live there, affirming their common destiny”.<sup>51</sup> This citizenship, which could be transformed “after the end of the period of application of the Accord, into a nationality”<sup>52</sup>, has two dimensions.

Firstly, fairly unusually, New Caledonian citizenship takes the form of setting in place a policy to oversee and manage access to local job opportunities. The key concept is to give job recruitment priority to “*people long resident in New Caledonia*”.<sup>53</sup> The link between local employment and citizenship was unequivocally established by the Organic Law of 19 March 1999 which states that the issue is “to support or promote local employment [...] to the advantage of the citizens of New Caledonia”<sup>54</sup>, although this link is not exclusive in nature (people who prove they have been resident for long enough may also be concerned). This scheme for protecting local employment forms an intrinsic part of the rebalancing policy, which is itself a key component in the decolonization process.<sup>55</sup>

Secondly, and much more conventionally, New Caledonian citizenship has civil rights implications because it “forms the basis for limitation of the electoral body for elections to the country’s institutions and for the final referendum”.<sup>56</sup> New Caledonian citizens alone have the right to vote in these specific elections, from which French citizens who do not

50 See O. Gassiot, “La consécration constitutionnelle du droit du sang comme fondement principal de la citoyenneté calédonienne”, *Politeia*, no. 12, 2007, p. 13-40; N. Clinchamps, “Distorsions et corps électoraux en Nouvelle-Calédonie”, *Pouvoirs*, no. 127, 2008, p. 151-165; M. Chauchat, “La citoyenneté calédonienne”, no. 23, 2008, p. 56-60; F. Garde, “Naissance et avatars de la citoyenneté calédonienne”, in J.-Y. Faberon, V. Fayaud, J.-M. Regnault (eds.), *Destins des Collectivités politiques d’Océanie : Peuples, populations, nations, États, territoires, pays, patries, communautés, frontières*, op. cit., p. 583-590; J.-Y. Faberon (ed.), 2013, *Citoyenneté et destin commun en Nouvelle-Calédonie*, Aix-en-Provence, PUAM, coll. Droit d’outre-mer.

51 Noumea Accord, 5 May 1998, preamble.

52 Noumea Accord, 5 May 1998, point 2.

53 Noumea Accord, 5 May 1998, point 5: “To take labour market limitations into account, provisions shall be set out to promote local employment opportunities for people long resident in New Caledonia”.

54 Article 24 of the Organic Law of 19 March 1999 relating to New Caledonia.

55 See A. Chirez, “Droit au travail et préférence locale : les exemples de la Polynésie française et de la Nouvelle-Calédonie”, in J.-Y. Faberon, V. Fayaud, J.-M. Regnault (eds.), *Destins des Collectivités politiques d’Océanie : Peuples, populations, nations, États, territoires, pays, patries, communautés, frontières*, op. cit., p. 715-724; F. Garde, “Qu’est-ce que l’accord de Nouméa dit du rééquilibrage ?”, in J.-Y. Faberon & T. Mennesson, 2012, *Peuple premier et cohésion sociale en Nouvelle-Calédonie. Identités et rééquilibrages*, Aix-en-Provence, PUAM, coll. Droit d’Outre-mer, p. 177-186.

56 Noumea Accord, 5 May 1998, point 2.

have New Caledonian citizenship are *a fortiori* excluded. Two distinct special electoral bodies were determined, one for the election of members of provincial assemblies and the other for the vote on self-determination.

To be included, individuals need to meet criteria<sup>57</sup> – the complexity of which has engendered endless legal debates – designed to identify the “communities concerned”.<sup>58</sup> Specifically, only New Caledonians with strong ties to New Caledonia because they are of Kanak heritage, because they were born in the territory or because they can prove they have been resident there for long enough, are entitled to have a say in local political life and in determining the future of the territory.<sup>59</sup> The infringement of the right to vote and the principle of equality enshrined in the French Constitution which New Caledonian citizenship represents is considered legitimate and legal, in terms of both international law<sup>60</sup> and national law<sup>61</sup>, because it is intrinsic to the process of decolonization of the territory.<sup>62</sup> New Caledonia’s gradual emancipation must give it the means required for self-determination.

### **B. The ultimate goal: ensuring the self-determination of New Caledonia**

Viewing the Noumea Accord as representing a fixed status would be a simplification insofar as it makes provision for a genuine decolonization process which is, as such, transitional in nature – it should be noted again that Heading XIII of the Constitution is entitled “Transitional provisions relating to New Caledonia”.

The Noumea Accord is not intended to constitute a permanent institutional framework. It provides for its own abeyance, specifying that it constitutes a “solution [which] defines for a period of twenty years the political framework of New Caledonia and the terms and conditions of its emancipation”. Consequently, as noted by the European Court of Human Rights in the *Py v. France* ruling of 11 January 2005, New Caledonia’s status is an “incomplete and provisional system”.<sup>63</sup> It does not simply set out a structure for New Caledonia today; it also provides the framework for an evolving process of self-determination with the ultimate goal of organizing a referendum on New Caledonia’s accession to full sovereignty.

Since 1988, New Caledonia has had its sights set on the prospect of holding a referendum on self-determination. Originally scheduled for 1998 by the Matignon Accords and later postponed by 20 years under the Noumea Accord, the crucial vote was finally held on 4 November 2018.

57 See Article 188 of the Organic Law of 19 March 1999 for the conditions for inclusion in the electoral roll for provincial elections, and section 218 of the same Law for the conditions for inclusion in the special electoral roll for the referendum on accession to full sovereignty.

58 Constitution of 4 October 1958, article 77.

59 10 years to vote in the provincial elections, 20 years (must have arrived in the territory in 1998 at the latest) to vote in the referendum on New Caledonia’s accession to full sovereignty.

60 See the United Nations Human Rights Committee, Views under article 5, paragraph 4 of the Optional Protocol to the International Covenant on Civil and Political Rights, Communication no. 932/2000 of 26 July 2002; ECHR, 11 January 2005, *Mr. Py v. France*, Ref. no. 66289/01.

61 Constitution of 4 October 1958, Heading XII “Dispositions transitoires relatives à la Nouvelle-Calédonie”.

62 N. Clinchamps, “Distorsions et corps électoraux en Nouvelle-Calédonie”, art. cit., p. 151-165.

63 ECHR, *Case of Py v. France*, 11 January 2005, no. 66289/01.

To the question “do you want New Caledonia to accede to full sovereignty and become independent?”<sup>64</sup>, 56.7% of New Caledonians voted “No”, with a record turnout of 80.6%.

However, this result did not constitute a definitive “No”. The referendum of 4 November 2018 was in fact only the first stage of a complex and step-by-step process. Point 5 of the Noumea Accord provides for the potential scheduling of not one, but three successive referendums on New Caledonia’s accession to full sovereignty. Should the result of the first referendum be negative, a second ballot could be held at the request of one-third of the members of New Caledonia’s Congress. It must be held at least six months but not more than two years after the first referendum and pose the same question. Called for by the majority of New Caledonia’s political community<sup>65</sup>, a second referendum on self-determination was scheduled for 4 October 2020.<sup>66</sup> In the event of another result in the negative, a third referendum could be held within two years of the second ballot – i.e. by the end of 2022 – on the same issue, unless New Caledonia’s political representatives decide against another ballot and negotiate the future status of New Caledonia in collaboration with the French government.

In the event that the result of a third referendum should once again be “No”, the Noumea Accord provides that “the political partners will come together to review the situation”. They would therefore ultimately be required to define New Caledonia’s new status within France. Conversely, if the second or third referendum results in a “Yes” vote, New Caledonia will accede to full sovereignty. Pursuant to Article 5 of the Noumea Accord, this will involve “the transfer to New Caledonia of sovereign powers, access to an international status entailing full responsibility and organization of citizenship into nationality”. As a sovereign country, New Caledonia will have full right and power in the exercise of its own powers, i.e. it will acquire total freedom to determine how it exercises its powers.

Whatever the choice made by the New Caledonian people, the Noumea Accord is a success, *a minima* because it paves the way to self-determination for New Caledonia. Seen in broader terms, New Caledonia’s status is proof that there are customized solutions to be found where rigid preconception and prejudice have no role to play. With the support of the French government, New Caledonia has proved its ability to build a legal framework tailored to the country’s own identity. The task ahead for New Caledonia will be building its “post-Noumea Accord” future by consolidating the gains of the last three decades.

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64 Decree no. 2018-457 of 6 June 2018 calling on voters and scheduling the referendum on the accession of New Caledonia to full sovereignty.

65 Following the negative result of the referendum held on 4 November 2018, the elected representatives of the Avenir en Confiance alliance (anti-independence) and the elected representatives of the UNI and UC-FLNKS and Nationalist alliances (pro-independence) each asked for the second referendum provided for in the Noumea Accord to be held.

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