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# Self-Determination Through Autonomy or Independence? – On the Current and Future Position of New Caledonia

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**Abstract:** New Caledonia is a colonial territory of France. Since the adoption of the Nouméa Accord in 1998, a period of transition towards the exercise of self-determination has been going on. New Caledonia is currently a strong autonomy, well entrenched in the legal order of France from 1999 on. The legislative powers have been distributed between the Congress of New Caledonia and the Parliament of France on the basis of a double enumeration of legislative powers, an arrangement that has given New Caledonia control over many material fields of self-determination. At the same time as this autonomy has been well embedded in the constitutional fabric of France. The Nouméa Accord was constitutionalized in the provisions of the Constitution of France and also in an Institutional Act. This normative framework created a multi-layered electorate that has presented several challenges to the autonomy arrangement and the procedure of self-determination, but the European Court of Human Rights and the UN Human Rights Committee have resolved the issues regarding the right to vote in manners that take into account the local circumstances and the fact that the aim of the legislation is to facilitate the self-determination of the colonized people, the indigenous Kanak people. The self-determination process consists potentially of a series of referendums, the first of which was held in 2018 and the second one in 2020. In both referendums, those entitled to vote returned a No-vote to the question of ‘Do you want New Caledonia to attain full sovereignty and become independent?’ A third referendum is to be expected before October 2022, and if that one also results in a no to independence, a further process of negotiations starts, with the potential of a fourth referendum that will decide the mode of self-determination New Caledonia will opt for, independence or autonomy.

**Keywords:** self-determination, referendum, legislative power, autonomy, independence

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# 1 Introduction

On 4 November 2018,<sup>1</sup> a referendum in the French autonomous area of New Caledonia (an area which is also a non-self-governing territory under the UN Charter, with France as the administering power) asked voters whether or not they wished New Caledonia to achieve full sovereignty and become independent.<sup>2</sup> A similar referendum with the same question was held on 4 October 2020. The relevant population is less than 300,000 inhabitants,<sup>3</sup> of which around 39% are indigenous Kanaks. The referendums, the first and second in a series of potentially three referendums foreseen by the 1998 Nouméa Accord, which was concluded to bring more peaceful conditions to the unruly area,<sup>4</sup> resulted at least provisionally in the maintenance of the status quo. In the 2018 referendum, 43.6% voted yes to independence and 56.4% voted no to independence, a result which was closer than expected. In 2020, the vote was even closer, with 46.74% of those voting supporting independence and 53.26% voting against independence.<sup>5</sup> A third independence referendum is likely to take place in 2022.

Although this process for the exercise of self-determination has, so far, not resulted in an endorsement of independence, it is arguable that New Caledonia already enjoys partial self-determination through the autonomy arrangement, which places legislative powers with the Congress of New Caledonia. In a similar

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**2** ‘Do you want New Caledonia to attain full sovereignty and become independent?’ The issues to be put to the referendum, agreed in the 1998 Nouméa Accord, contained more dimensions than the question indicates (see below).

**3** According to the 2014 census, the number of inhabitants was 268,767 persons.

**4** A translation into English of the Nouméa Accord can be found in the Annex to ‘New Caledonia – Working paper prepared by the Secretariat’, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, UN GA Doc A/AC.109/2114 (hereinafter: New Caledonia 1998) 9–11 (supplemented by a Policy document outlining the contents of the Accord, 12–19) <<https://undocs.org/A/AC.109/2019/11>> accessed 13 March 2020.

**5** Résultats définitifs, Référendum du 4 octobre 2020 Nouvelle-Calédonie <<http://www.nouvelle-caledonie.gouv.fr/content/download/6849/53341/file/R%C3%A9f%C3%A9rendum%20du%204%20octobre%202020%20-%20R%C3%A9sultat-%20d%C3%A9finitifs.pdf>> accessed 5 October 2020. The turnout in the 2018 vote was high, 80.63%, but hit the even higher figure of 85.69% in the 2020 referendum.

manner, New Caledonia has, through its own legislative powers, a share in the internal sovereignty of France. The distribution of legislative powers between the Congress of New Caledonia and the Parliament of France is based on a double enumeration of legislative powers, which creates one enumeration of legislative powers for the Congress of New Caledonia and another enumeration for the Parliament of France for such national legislation that is applicable in New Caledonia. The two spheres of legislative powers are exclusive in relation to each other. This method of distribution is relatively uncommon amongst autonomies, but is found, *inter alia*, in Finland in relation to the Åland Islands and in Denmark in relation to the Faroe Islands, and also in Canada, where the relationship between the federation and the provinces is fashioned in a similar manner.<sup>6</sup>

The autonomy arrangement also takes into account the indigenous characteristics of the area. In New Caledonia, some 28 different indigenous languages (sometimes referred to as Melanesian dialects) are spoken by up to 39% of the population, but the official language of New Caledonia is French. The non-indigenous part of the population amounts to about 61% and thus constitutes the greater portion of the population. Around 27% of the non-indigenous population is Europeans of mainly French provenance, either settlers from the earlier colonial period or more recent arrivals, while some 34% of the population is from other parts of the Pacific or from Asia. The minority position of ethnic Kanaks appears to be reflected in the result of the two referendums, because it is likely that the Kanak population voted for independence, although some voters from other communities of New Caledonia also support independence.<sup>7</sup>

Given the fact that New Caledonia already possesses law-making powers established in enumerations in the Institutional Act n° 99-209 of 19 March 1999 pertaining to New Caledonia, it could be asked how they are constructed, what their extent is and what does the current set-up imply from the perspective of self-determination and sovereignty? Why might there exist, against the background of the

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<sup>6</sup> See Markku Suksi, *Double Enumeration of Legislative Powers in a Sub-state Context – A Comparison between Canada, Denmark and Finland* (Springer 2018).

<sup>7</sup> One question not dealt with in this article is whether, in the event of independence of New Caledonia, the original indigenous population that was colonized by France is the beneficiary of such self-determination, or if the right of self-determination of the indigenous Kanak population has to be resolved in an additional manner within an independent New Caledonia, for instance, by means of an additional autonomy arrangement. At least from the point of view of current international law of a non-binding nature, self-determination of indigenous populations should not be exercised so as to break up existing states. Instead, internal self-determination should be, in that context, achieved by means of autonomy of some sort. See United Nations Declaration on the Rights of Indigenous Peoples, GA Res 61/295 of 13 September 2007, Articles 4 and 46. What would hence be the form of indigenous self-determination in an independent New Caledonia? Would the current arrangement with the consultative Customary Senate be sufficient?

current arrangement, a wish to break with France and emerge as an independent state? An important driver in this regard is the colonial background of New Caledonia, which implies a categorical right to self-determination, but the ethnic composition of New Caledonia raises additional questions. How does indigeneity play out with respect to aspirations for sovereignty, and what is the position of the original colonized people in case sovereignty is adopted or not adopted? Because of the colonial context and the ensuing relationship to the right to self-determination, there is a question as to what the proper form of exercise of self-determination would be, independence, free association, integration, or some other political status. And how should the referendum procedure be understood in the context of New Caledonia (or Kanaky – New Caledonia, as it might choose to call itself if becoming independent)? Is the referendum procedure mandatory or facultative, and is the referendum decisive or advisory?

This article takes the current autonomy arrangement as its point of departure and progresses through an outline of double enumeration of law-making powers and the decision-making system in the autonomous New Caledonia towards an analysis of the independence referendum procedure, which, in addition to those held in 2018 and 2020, potentially contains two additional referendums in the future, the fourth of which is not explicitly foreseen in the Nouméa Accord. The materials used consist of the Constitution of France, the Institutional Act on the status of New Caledonia (hereinafter also: IA), legislation of New Caledonia and legal interpretations concerning the application of these legislative acts and the human rights obligations of France as well as UN materials and literary sources.

## 2 Historical and Constitutional Background

The colonial history of New Caledonia begins on 24 September 1853, when France annexed the territory.<sup>8</sup> After the Second World War, a gradual development of New Caledonia took place, including improvements brought about by several laws on the governance of the territory. However, by the 1970s, an independence movement had emerged amongst the Kanak population, and between 1984 and 1988 around 80 persons died in violence between those who supported independence from France and those who opposed it. In 1987, a referendum on independence resulted in only 1.7% of those voting supporting independence (the main

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<sup>8</sup> New Caledonia – Working paper prepared by the Secretariat, Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples. UN GA Doc A/AC.109/2019/11 (hereinafter: New Caledonia 2019) 4. The islands were originally discovered by the British explorer, Captain James Cook, who named the territory ‘New Caledonia’.

groupings for independence, mainly Kanak, boycotted the referendum). The situation was calmed by the conclusion of the Matignon Accords in 1988, approved by referendum,<sup>9</sup> which provided for ‘a 10-year period of economic and social development and a self-determination referendum to be held in 1998’.<sup>10</sup> However, the referendum of 1998 was, in the event, not actually on independence, but on the approval of the Nouméa Accord, which created a pathway towards the exercise of self-determination after two decades of developments by promising a series of three referendums towards full independence of New Caledonia. In the referendum of 1998, the Nouméa Accord was approved by almost 72% of those voting.

New Caledonia is one of the relatively few places on Earth still under colonial rule and referred to as the only remaining colony of France. The area was first entered on the United Nations list of Non-Self-Governing Territories from 1946 to 1947 and re-entered in 1986. At that point, the UN General Assembly pointed out that ‘New Caledonia is a Non-Self-Governing Territory within the meaning of the Charter’ of the UN. The UN General Assembly also affirmed the ‘inalienable right of the people of New Caledonia to self-determination and independence in accordance with resolution 1514 (XV)’.<sup>11</sup> Nevertheless, the administering power, France, held in 1998 the position that New Caledonia was not a non-self-governing territory but more a matter within its domestic jurisdiction,<sup>12</sup> although the State has continued to cooperate well with the UN on the referendum process as established by the Nouméa Accord. In fact, France has taken many domestic measures with regard to the regulation of the particular position of New Caledonia as a part of

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**9** At the national level, 80% of the French electorate approved the Matignon Accords, but the turnout was unusually low, only 37.4%. In New Caledonia, 57% of those voting supported the Matignon Accords, while 43% opposed the agreement.

**10** New Caledonia 1998 (n 4) para 6.

**11** UN GA Res 41/41 of 2 December 1986: Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples – A. The term colonialism is understood in this article as a phenomenon referred to in para 1 of the UN resolution 1514 (XV) as the ‘subjection of peoples to alien subjugation, domination and exploitation’. For comprehensive UN information about New Caledonia, see New Caledonia 1998 (n 4). See also Léon Wamytan, *Peuple kanak et droit français – Du droit de la colonisation au droit de la décolonisation, l’égalité en question* (Centre de Documentation Pédagogique de la Nouvelle-Calédonie 2013).

**12** In the opinion of the delegation of France to the fourth Committee, the question of New Caledonia was also a question of domestic jurisdiction as set out in Art 2, para 7, of the UN Charter. See New Caledonia (n 4) para 19. In relation to the European Union, New Caledonia is an overseas country and territory referred to in Art 198 of the Treaty on the Functioning of the European Union and Annex II to the TFEU with Overseas Countries and Territories to which the Provisions of Part Four of the Treaty on the Functioning of the European Union Apply. See also Council Decision 2013/755/EU of 25 November 2013 on the association of the overseas countries and territories with the European Union (‘Overseas Association Decision’) [2013] OJ L344/1.

France, such as an amendment to the 1958 Constitution of France and the adoption of an Institutional Act implementing the provisions of the Nouméa Accord and the associated Policy Document in domestic law. In part because of these and other measures undertaken by the State of France, the GDP, human development and quality of life in New Caledonia is close to that of Metropolitan France.<sup>13</sup> Both the Nouméa Accord and the Policy Document are undersigned by the two political groupings of New Caledonia as represented originally in the Matignon Accords, and by representatives of the French Government.

The evolution of the legal position of New Caledonia thus contains both an international and a national legal dimension, and it is possible that France has tried to have an impact on the international dimension by means of domestic law.

The 1958 Constitution of France is based on, *inter alia*, the principle of indivisibility of the Republic, established in s 1, and on a principle of the unity of the people, including language.<sup>14</sup> These principles are probably more of a political than a legal nature, because the Constitution of France contains several provisions, such as ss 72 through 75-1 about overseas territorial collectivities (eg departments and regions) that actually allow the introduction of provisions of law in the various territories with their own populations that differ from provisions in metropolitan France (see s 72-3, first sentence).<sup>15</sup> However, it is no easier to arrange the manner in which internal self-determination is practiced than it is to provide for external self-determination.<sup>16</sup> The Preamble of the Constitution of France departs from the principle of the free determination of peoples. On the basis of this principle, the Republic offers to the overseas territories, which have expressed the will to adhere to

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**13** According to data presented in New Caledonia 2019 (n 8) paras 25–61. From that point of view, it is possible to say that France has conducted itself in conformity with Art 1 (3) of the CCPR according to which the States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations. State spending in New Caledonia is currently more than 1.3 billion euros, which adds up to around 15% of the New Caledonian GDP. See Rapport d'activité 2018 des services de l'État en Nouvelle-Calédonie, 3 <<http://www.nouvelle-caledonie.gouv.fr/content/download/5943/45767/file/Rapport%20d%E2%80%99activit%C3%A9%202018%20des%20services%20de%20l'Etat%20en%20Nouvelle-cal%C3%A9donie.pdf>> accessed 6 October 2020.

**14** See also Jean-Paul Pastorel, 'Le principe d'égalité en outre-mer' (2012) 35 Les Nouveaux Cahiers du Conseil constitutionnel, 11–19, where equality is presented as an important element of the principle of indivisibility of the republic.

**15** Félicien Lemaire, 'L'outre-mer, l'unité et l'indivisibilité de la République' (2012) 35 Les Nouveaux Cahiers du Conseil constitutionnel 95.

**16** Lemaire (n 15) 100–101. See also Markku Suksi, 'The referendum as an instrument for decision-making in autonomy-related situations' in Peter Hilpold (ed), *Autonomy and Self-determination – Between Legal Assertions and Utopian Aspirations* (Edward Elgar 2018) 97–137.

the foundational elements of France, new institutions founded on the common ideal of liberty, equality, and fraternity and conceived for the purpose of their democratic development. In addition, according to s 53 (3) of the Constitution of France, no ceding, exchanging or acquiring of territory shall be valid without the consent of the population concerned, reinforced by s 72-4 of the Constitution, which creates a referendum requirement for change of status for communities. This means that gaining independence as an expression of the right to self-determination has to be by means of a referendum, not only for reasons of public international law, but also for domestic constitutional reasons. This is apparent as concerns New Caledonia, where both internal and external self-determination issues are present in the regulatory fabric and where several referendums connected to self-determination have already been held (see above), with more referendums in the pipeline. Expressions such as ‘the Kanak people’ and ‘divided sovereignty’, found in the Nouméa Accord, are very particular and set New Caledonia apart even in the largely heterogenic company of the overseas collectivities of France.<sup>17</sup>

As concerns the domestic constitutional dimension, the 1958 Constitution of France was amended on 6 July 1998 by adding two provisions in Title XIII, entitled Transitional provisions pertaining to New Caledonia. The Constitution is thus based on the idea that New Caledonia is in a state of transition in a manner that may lead to the separation of New Caledonia from France. By implication, if New Caledonia does not emerge as an independent state at the end of the self-determination process, the constitutional status of the area may have to be regularized at a later point of time by deleting the term ‘transitional’ and amending the two provisions so as to reflect the internal status of the area that the pathway towards self-determination has reached. That status would probably take the form of far-reaching territorial autonomy.

Yet, at the same time, the transitional provisions concerning New Caledonia constitutionalized the Nouméa Accord and the autonomy of New Caledonia in the French constitutional system. It should be noted that the Nouméa Accord is not a treaty or agreement under public international law, but a domestic settlement aiming at a peaceful solution of a matter that has a connection to public international law through the right to self-determination of colonized peoples.

Section 76 of the Constitution recognizes the signature and official publication in France of the Nouméa Accord. The Article also recognizes that the population of New Caledonia will vote on the approval of the Nouméa Accord under particular voting requirements, established in an Act of 1988, whereby the right to vote was

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<sup>17</sup> Lemaire (n 15) 108. As pointed out by Pastorel (n 14) 8, New Caledonia is not a territorial collectivity in the meaning of s 72 of the Constitution of France.

restricted so as to exclude persons who had settled in New Caledonia relatively late. In effect, this had a restrictive effect on the political rights of citizens from metropolitan France (see below).

Section 77 anticipated the approval of the Nouméa Accord in the referendum of 1998 and provides for the establishment of a new governmental system for New Caledonia in accordance with the provisions in the Nouméa Accord. The Article created a legal basis for an Institutional Act that would implement the Accord. Several general points of departure for the Institutional Act can be found in s 77, such as the determination of those of the State's powers which are to be definitively transferred to the institutions of New Caledonia under the principle of irrevocability of powers from New Caledonia to France. The provision foresees a timetable for the transfer of powers as well as principles for the apportionment of expenditure related to the transfer of powers. As a consequence, the French Parliament enacted the Institutional Act n° 99-209 of 19 March 1999 pertaining to New Caledonia,<sup>18</sup> which is a so-called organic act implementing the constitutional provisions.

The exercise of public powers requires rules governing the organization and operation of the institutions of New Caledonia and about how the exercise of legislative powers in New Caledonia is integrated in the constitutional fabric of France, such as possibilities to test the constitutionality of New Caledonian legislative enactments by the Constitutional Council (*Conseil Constitutionnel*). The fundamental legislation to be enacted on the basis of s 77 would also contain rules concerning citizenship, the electoral system, employment, and personal status as laid down by customary law, which means that a number of the legal arrangements in force in New Caledonia would be adapted to the particular circumstances of the area. Measures that are not exceptions to established constitutional principles of

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**18** Loi n° 99-209 organique du 19 mars 1999 relative à la Nouvelle-Calédonie. On the constitutionality of the Institutional Act, see Decision 99-410 DC of 15 March 1999 by the Constitutional Council on the Institutional Act concerning New Caledonia <[https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank\\_mm/anglais/a99410dc.pdf](https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/a99410dc.pdf)> accessed 15 September 2020. In its decision, the Constitutional Council declared unconstitutional only s 195(I) (5) and the fourth paragraph of s 217 of the Institutional Act concerning New Caledonia. The first finding of unconstitutionality dealt with a certain form of ineligibility to the Congress and provincial assemblies and was found to violate the principle that penalties must be necessary (paras 35–43). The second one dealt with a facet of the consultation of the population of New Caledonia, by providing for a meeting of the signatories to review the situation engendered by successive negative responses, not to a third consultation but to the second. Therefore, the fourth paragraph of s 217 violates the obligation incumbent on the institutional legislature by virtue of s 77 of the Constitution to respect the guidelines defined by the Nouméa Agreement and determine the rules needed to give effect to it (paras 47–53).

France but that are needed to give effect to the Nouméa Accord can, under s 77, be determined by statute.

The entire arrangement is thus based on the premise that it contains exceptions to the constitutional principles of France, including the institution of a particular citizenship of New Caledonia that is additional to French citizenship and that creates certain special rights for those French citizens who are also in possession of the citizenship of New Caledonia. Those special rights contain the right to vote in New Caledonian elections and independence referendums (see below) and the reservation in s 24 of the IA of public service positions and liberal professions to holders of New Caledonian citizenship. Such institutionalized difference between French citizens would normally run counter to the principle of equality in the French Constitution, but in this case, the Constitutional Council found that the mention in s 77 of the Constitution and in the Institutional Act of the New Caledonian citizenship did not result in unconstitutionality of provisions in the Institutional Act that deal with the special rights.<sup>19</sup>

At the same time, s 77 does not lose sight of the main object of the normative construction, the fulfillment of the self-determination of New Caledonia. The Institutional Act is required to lay down ‘the conditions and the time limits within which the population concerned in New Caledonia is to vote on the attainment of full sovereignty’. For that purpose, the definition of the group of persons entitled to vote in the elections to the Congress of New Caledonia and to the provincial councils of New Caledonia follows the stipulations of the Nouméa Accord and ss 188 and 189 of the Institutional Act. The definition of eligible voters in the elections to the Congress and the provinces is referred to as the ‘list drawn up for the ballot provided for in Article 76 hereinabove which includes those persons not eligible to vote’.

Section 77 of the Constitution, as amended in 2007, thus also contains the unusual requirement to identify persons who do not have the right to vote in elections to the Congress and the provinces. This means there is a constitutional requirement to produce a negative list of voters for elections to the Congress and the provincial assemblies, a requirement that may also impact on the independence

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**19** Decision 99-410 DC of 15 March 1999 by the Constitutional Council on the Institutional Act concerning New Caledonia, para 2 14–18. According to the Constitutional Council, laws of the land should establish ‘objective and rational criteria in direct relation with the promotion of local employment, without imposing restrictions beyond those which are strictly necessary for the implementation of the Nouméa Agreement; in any event, that duration may not exceed that which is determined by the combined provisions of sections 4 and 188 of the same Act for the purpose of acquiring New Caledonia citizenship’.

referendums foreseen in the Nouméa Accord.<sup>20</sup> It appears, however, that such a negative list is not required by the Accord nor the Policy document. The implementation of the right to vote in elections and referendums has created a number of administrative and legal issues that will be touched upon below, leading to a segmentation of the population of New Caledonia as concerns the exercise of political rights and to a series of conflicts over interpreting the provisions on the right to vote.

### 3 Self-Determination as Law-Making

#### 3.1 Double Enumeration of Legislative Powers in Certain Material Areas

Public international law bases itself on the premise that independent states reflecting the opinions of their peoples constitute the format of international cooperation, and it may therefore seem self-evident that self-determination of colonized peoples is an overriding concern. Colonized peoples are not properly part of the international legal order because they do not have the capacity to determine their political status for themselves, freely pursue their economic, social, and cultural development and dispose freely of their natural wealth and resources, as established in common Art 1 of the International Covenant on Civil and Political Rights.<sup>21</sup> Free determination of political status is apparently what New Caledonia is in the process of carrying out. However, it can be asked what it is that a people does when freely pursuing its economic, social, and cultural development or disposing freely of its natural wealth and resources?

Economy, social matters, and culture, as well as the use of natural resources, imply the need to make decisions about these matters, most of which are of

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**20** The negative list of voters is regulated on the basis of s 189 of the IA and is primarily a feature of the elections to the Congress and the provincial assemblies. Because of the requirement of the right to vote in these elections as a basis for the right to vote in the 1998 independence referendum, the negative list of voters may also impact on those who can be entered on the list of voters in the independence referendums. This is so because according to s 218 of the IA, voters registered on the electoral list on the date of the referendum and who meet one of the other conditions of the Section, listed in paras a) through h), are admitted to participate in the referendum. The negative list of voters emerges in an administrative process at each polling station, apparently as a consequence of denied applications for the right to vote in elections (and the referendums, as the case may be). For the confusing process with regard to the negative list and the opinion that the rule of law was called into question, see Mathias Chauchat, 'La fraude à la sincérité électorale en Nouvelle Calédonie' (2014) 13 *Jus Politicum*, 9–17.

**21** 999 UNTS 171. On Article 1 of the CCPR, see Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary* (2nd revised edn, N P Engel 2005) 5–26.

a legislative nature. Exercise of self-determination over economy, social matters, culture and the use of natural resources translates to the exercise of law-making powers in a state structure that is representative of the opinions and expectations of the people.<sup>22</sup> Legislative decisions in such matters are completely in the hands of the people when the territory is an independent state. The full sovereignty that is the aim of de-colonization would, in the case of New Caledonia, lead to the emergence of a sovereign and independent state where the law-maker would be able to exercise full law-making powers over all matters, including economy, social matters, culture and the use of natural resources, and also to enter into relationships with other subjects of international law.

However, as indicated by the UN Friendly Relations Declaration of 1970,<sup>23</sup> independence is not the only possible organizational alternative for the exercise of self-determination. In addition to independence, some other modes of implementing the right of self-determination also exist, such as free association or integration with an independent state and emergence into any other political status freely determined by a people. Although the aim concerning New Caledonia is to implement the right of a colonized area to exercise its right to self-determination, the range of options appears to contain other modes of self-determination than independence with full sovereignty. The current temporary arrangement implies the possibility of territorial autonomy, and the discussion in New Caledonia has also mentioned free association with France once full sovereignty has first been achieved.<sup>24</sup>

In fact, the current temporary arrangement already contains important elements of what a people exercising self-determination might expect to determine by using law-making powers in the areas of economy, social matters, culture, and the use of natural resources. According to the Nouméa Accord, the aim of the constitutional development towards self-determination is to share sovereignty with France so that some of the decisions of the Congress of New Caledonia shall have the force of law. The extent of the law-making powers of the Congress reflect the dynamic nature of the self-determination process so that some powers would be transferred as soon as the

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**22** Representation of New Caledonia in the Parliament of France consists of two representatives in the National Assembly and two senators.

**23** Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations of 24 October 1970, UN GA Resolution A/RES/25/2625.

**24** Free association would, however, seem to require that New Caledonia first emerges as an independent state, after which it decides to associate itself with France. Such association would probably take place under s 88 of the Constitution of France, where it is provided that '[t]he Republic may enter into agreements with States which wish to associate with it in order to develop their civilizations'. For further reference on the issue, see Mathias Chauchat, 'La citoyenneté calédonienne' (2008) 23 *Cahiers du Conseil constitutionnel* 6.

new organization takes effect, while other law-making powers are transferred according to a specific schedule.<sup>25</sup> In addition, the powers that have been transferred may not revert to the State and the new organization shall be irreversible. The right of self-determination would in itself appear to grant some entrenchment to the material and the organizational irreversibility principle, while the effect of s 77 of the Constitution of France is the creation of general constitutional entrenchment.<sup>26</sup> In addition, it might be possible to view the Institutional Act n° 99-209 of 15 March 1999 pertaining to New Caledonia as a special entrenchment, because the Institutional Act, which implements provisions of the Constitution, was adopted on the basis of s 46 of the Constitution as an organic act and is of a constitutional rank,<sup>27</sup> not on the basis of the regular legal basis for legislation, which is s 45 of the

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**25** In 2009, three transfers of competence took place: public and private secondary education, private primary education and school health; internal air traffic police and security and operators established in New Caledonia whose main activity is not international air transport; and police and maritime traffic safety taking place between all points of New Caledonia, and safeguarding human life at sea in territorial waters. In 2012, two transfers of competence took place: civil law, civil status, and commercial law; and civil security. Therefore, although some temporary exceptions to the list of New Caledonian powers may remain according to sub-section III of s 21, because the State also exercises, until their transfer to New Caledonia and under the conditions provided for in s 26, the certain powers, most or perhaps all of the following have, by 2020, been transferred from the State to New Caledonia: police and security of internal air traffic and operators established in New Caledonia whose main activity is not international air transport; police and maritime traffic safety taking place between all points of New Caledonia; safeguarding of life at sea in territorial waters; public and private secondary education, except the creation and maintenance of junior secondary schools; school health; private primary education; civil law, subject to the provinces' jurisdiction in matters of hunting and the environment, rules concerning civil status and commercial law; civil security.

**26** On different types of entrenchment, see Markku Suksi, 'On the Entrenchment of Autonomy' in Markku Suksi (ed), *Autonomy – Applications and Implications* (Kluwer Law International 1998) 151–171.

**27** Decision 99-410 DC of 15 March 1999 by the Constitutional Council on the Institutional Act concerning New Caledonia, para 5. See also the case of *Py v France* (n 33) para 16, where the European Court of Human Rights establishes the facts of the case, inter alia, by stating that '[o]n 13 July 2000 the Court of Cassation dismissed his appeal on the ground that the conditions for taking part in elections to Congress and the provincial assemblies followed from an institutional Act which ranked as constitutional law in that it reproduced the wording of the Nouméa Accord, which itself had constitutional status by virtue of Article 77 of the Constitution'. The Institutional Act appears therefore to be shielded from a direct impact of ratified conventions such as the ECHR and the CCPR, because of s 55 of the Constitution on international law and the legal status of treaties: Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party. However, the State can be in violation of its international obligations in spite of s 55.

Constitution. Nevertheless, an institutional act such as the one pertaining to New Caledonia must undergo constitutional review by the Constitutional Council.<sup>28</sup>

For the sharing of sovereignty, the Policy Document operates with three categories of powers: enumerated powers of New Caledonia, enumerated powers of the State, and shared powers.

As concerns shared powers, in most cases where legislative competence is with the State (international and regional relations, aliens, broadcasting, maintenance of law and order, international air services, and higher education and scientific research), the executive body of New Caledonia shall be allowed to participate in, be consulted on, be informed of, or be involved in the exercise of the powers of the State. This means that the legislative powers actually belong to the State, not to the Congress of New Caledonia. Also, as concerns mining, legislative powers over fuel oils, potassium salts, nickel, chromium, and cobalt are reserved to the State in the Policy Document, but some regulatory powers are to be transferred to New Caledonia. The area of shared powers is, therefore, in fact, mainly enumerated powers of the State.

The State also holds the sovereign powers, that is, legislative powers over justice, law and order, defense, currency (including credit and exchange), and foreign affairs. This enumeration of the powers of the State cannot, according to Nouméa Accord, be transferred to New Caledonia, but will shift over to New Caledonia only in the event of independence and full sovereignty. By implication, those legislative powers identified as shared powers (although they are legislative powers of the State) could be transferred to New Caledonia.

Finally, New Caledonia shall hold, under the Policy Document, a range of powers immediately upon the entering into force of the Institutional Act and other powers that shall be transferred at a later stage.

### 3.2 Legislative Powers of New Caledonia

According to s 22 of the IA, powers over a broad range of matters belong to New Caledonia albeit not necessarily in the form of legislative powers as defined in

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<sup>28</sup> For the Institutional Act concerning New Caledonia, see Decision 99-410 DC of 15 March 1999 by the Constitutional Council on the Institutional Act concerning New Caledonia. For an exacting analysis of the distribution of legislative powers, see Carine Gindre David, *Essai sur la loi du pays calédonienne – La dualité de la source législative dans l'état unitaire français* (L'Harmattan 2008).

s 99 of the IA, but as administrative and regulatory powers held also by the provinces.

The powers of New Caledonia and its provinces are, on the basis of the Institutional Act, considerable and most of them fit into the four categories of matters indicated by Art 1 of the CCPR, namely economy, social matters, culture, and natural resources. However, it appears that not all of the powers over natural resources are powers of New Caledonia, because issues that concern regulations relating to the matters mentioned in 1° of s 19 of the decree n° 54-1110 of 13 November 1954, reforming the regime of mineral substances in the overseas territories, as well as the installations which make use of them, belong to the State.

Beyond these matters directly indicated within the categories in Art 1 of the CCPR, New Caledonia also has powers over other matters: the public service of New Caledonia and the municipalities; regulation of the liberal and commercial professions and of public or ministerial officers; civil procedure, legal aid and administration of the services responsible for the judicial protection of children; guiding principles of town planning law (subject to provincial jurisdictions in environmental matters); building standards; cadastre; animal and phytosanitary regulations, slaughterhouses; organization of services and public establishments in New Caledonia; statistics of New Caledonia; meteorology; state law of New Caledonia and the provinces; the New Caledonian road network.

As indicated above, these competence areas are not necessarily all of a law-making character, but may be so according to s 99 of the IA. According to s 99, the instruments which the Congress adopts relating to the matters defined in the provision are called 'laws of the land'.<sup>29</sup> These laws of the land may emerge in the following matters, largely corresponding to the powers mentioned above and categorized by and large in the manner indicated by common Art 1 of the CCPR (see Table 1 below):

The laws of the land cover, on the basis of the above account, a broad range of the entire legal order, both public law and private law. For internal purposes, the legal order of New Caledonia divides the laws of the land into the following categories of law: transfers of jurisdiction, identity signs, customary law, mining law, social protection law, fiscal law, public service, mutuality, customs law, labor law, state law, economic law, town planning, agriculture and fishing, insurance,

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<sup>29</sup> For the internal distribution of the laws of the land on different categories of legislation, see Journal Officiel de la Nouvelle Calédonie <<https://juridoc.gouv.nc/juridoc/jdwebe.nsf/Juristart?openpage>> accessed 17 June 2020.

**Table 1:** Legislative powers of New Caledonia.

| Category          | Powers                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Economy           | Rules relating to the basis and collection of taxes, and duties and taxes of all kinds; fundamental principles of labor law and trade union law; rules relating to access to work for foreigners; rules relating to access to employment, in application of s 24; rules concerning the status and capacity of persons; matrimonial property regimes, successions, and gifts; fundamental principles concerning the regime of property, real rights ( <i>jus in rem</i> ) and civil and commercial obligations; distribution among the provinces of the operating allocation and the equipment allocation mentioned in I and II of s 181 |
| Social matters    | Fundamental principles of social security law                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Culture           | Identity signs and names mentioned in s 5 of the IA; customary civil status, regime of customary lands, and customary palavers; boundaries of customary areas                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| Natural resources | Rules concerning hydrocarbons, nickel, chromium, cobalt, and rare earth elements                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| Other             | Fundamental guarantees granted to officials of New Caledonia and the municipalities; terms of appointment to the customary senate and to customary councils, subject to the provisions of ss 137, 138, and 138-1; rules concerning hydrocarbons, nickel, chromium, cobalt, and rare earth elements; competences transferred and the timetable for these transfers, under the conditions provided for in s 1 of chapter I of title II; creation of independent administrative authorities, in application of s 27-1, in the areas falling within its competence                                                                          |

health, energy, environment, and construction law.<sup>30</sup> These classes of law indicate the breadth of the New Caledonian legal order.

By implication, those powers of New Caledonia which are not of a legislative nature under s 99 of the IA are of a more administrative nature. As mentioned in s 20 of the IA, the three provinces of New Caledonia and the municipalities of New Caledonia have administrative competences both on the basis of New Caledonian legislation and on the basis of legislation of the State.

<sup>30</sup> See the Official Journal of New Caledonia <<https://juridoc.gouv.nc/JuriDoc/JdWebE.nsf/Juristart?openpage>> accessed 5 January 2021. For a review of various categories of laws of the land during the first 15 years of legislative activity of the Congress, see Carine David (ed), *15 ans de lois du pays en Nouvelle-Calédonie – Sur les Chemins de la maturité* (Presses Universitaires d'Aix-Marseille 2016).

### 3.3 Legislative Powers of the State for the Territory of New Caledonia

Without doubt, the State is competent in a relatively large number of matters, as laid down in s 21 of the IA, either without or with interaction with the authorities of New Caledonia.

In the first category of matters, where the State is competent without interaction with the authorities of New Caledonia, the following issues are found, categorized in the same way as above (see Table 2 below):

In the second category of State matters, where interaction between the State and institutions of New Caledonia does take place, the following matters are

**Table 2:** Legislative powers of the State.

| Category          | Powers                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |
|-------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Economy           | Currency, credit, foreign exchange, financial relations with foreign countries, and the Treasury; budgetary control of the provinces, the communes and their public establishments                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| Social matters    | –                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Culture           | –                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                          |
| Natural resources | Regulations relating to the matters mentioned in 1° of s 19 of the decree n° 54-1110 of November 13, 1954 reforming the regime of mineral substances in the overseas territories, as well as the installations which make use of them                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Other             | Nationality; guarantees of public liberties; civil rights; electoral system; justice, judicial organization, organization of the profession of lawyer, costs of criminal and administrative justice; criminal procedure and contentious administrative procedure; public commissions and prison public service; national defense; war materials, weapons and ammunition, powders and explosive substances; maritime and air service between New Caledonia and the other points of the territory of the Republic; government, defense, and security communications and links in the field of post and telecommunications; radio frequency regulation; vessel status; aircraft registration; State civil service; public contracts of the State and its public establishments; rules relating to the administration of the provinces, the communes and their public establishments; control of legality of the provinces, the communes and their public establishments and accounting and financial regime of the public communities and their public establishments, subject to s 27; exercise, outside territorial waters, of competences resulting from international conventions, subject to the provisions of 10° of s 22 relating to the resources of the exclusive economic zone; general census of the population; police and security of external air traffic and maritime traffic, subject to III of the article; fight against illicit circulation and money laundering, fight against the financing of terrorism |

found, again arranged according to the categorization indicated by Art 1 of the CCPR (see Table 3 below):

As can be seen, on the basis of the listing of powers of New Caledonia and of the State, a double enumeration of legislative powers is created. However, the listing of two spheres of legislative powers is not entirely faithful to the Nouméa Accord as concerns the powers of the State; the powers listed for the State in the Institutional Act appear broader than the ones listed for the State in the Nouméa Accord. It seems, however, that the enumeration for the State does not contain much material content that would fall into the categories of common Art 1, except some in the categories of economy and natural resources. In the area of social affairs, the State is given no competences at all, and in the area of culture, the role of the State is relatively restricted, while the State has some limited competence in the areas of natural resources and economy. Most of the competences of the State are powers that cannot be placed in the categories indicated by Art 1 of the CCPR. This could be interpreted as a situation where New Caledonia already holds most powers relevant for self-determination, but with some exceptions.

3.4 Transfer of Powers from the State to New Caledonia

In spite of a listing of powers of the State, the Institutional Act also creates a system for transfer of legislative powers from the French law-maker to the law-maker of New Caledonia, which means that the double enumeration system is of a dynamic nature and allows for changes in the lists of powers. However, any change is unidirectional and unilateral, because the Congress of New Caledonia can decide, on the basis of ss 26–27 of the IA, to transfer competences according to timetables established in the provisions, and does not require any further permission from the

Table 3: State matters with interaction with New Caledonia.

| Category          | Powers                                                                                                                                                                                              |
|-------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Economy           | –                                                                                                                                                                                                   |
| Social matters    | –                                                                                                                                                                                                   |
| Culture           | Audiovisual communication; higher education and research; collation and delivery of titles and diplomas, subject to the provisions of 2° of s 22                                                    |
| Natural resources | –                                                                                                                                                                                                   |
| Other             | External relations; conditions of entry and stay of foreigners; maintenance of order; aviation security; criminal law, subject to the provisions of ss 86, 87, 88 and the second paragraph of s 157 |

State or any legislative decision by the national law-maker. There is an exception to this main principle, because the Government of France can decide on the basis of s 23, upon proposal of the Congress, that certain public establishments are transferred to New Caledonia. The Institutional Act contains a great number of provisions that deal with the details of exercise and transfer of legislative powers in New Caledonia and how they are funded.

It appears that a good portion of the transfers of power possible under the Institutional Act (and under the Nouméa Accord) have already been completed by legislative decisions of the Congress of New Caledonia, because several material areas have been transferred by means of laws of the land. The following matters mentioned in s 21, sub-sections 2 and 3, of the IA have been transferred: civil security (2012); civil law, rules concerning civil status and commercial law (2012); police and safety of maritime traffic between all places in New Caledonia and safeguarding of human life at sea in territorial waters (2009); police and safety of internal air traffic and operators established in New Caledonia whose main activity is not international air transport (2009); public and private secondary education, private primary education and school health (2009).<sup>31</sup>

Some material powers that could be transferred have not yet been (the rules relating to the administration of territorial entities such as municipalities and provinces, higher education and research, audiovisual communication), which means that legislation of the State is in effect within these material areas.

The double enumeration of competences in the Institutional Act results in the creation of two exclusive spheres of legislation within the territory of New Caledonia, one established by the Congress of New Caledonia and another established by the State, that is, the Parliament of France.<sup>32</sup> It is evident on the basis of the above account that, as of 2020, New Caledonia is in control of the most significant elements of law-making power relevant for the material content of self-determination, namely economy, social affairs, culture, and natural resources. In addition, the law-maker of New Caledonia has broad control over legislative matters that are not implied by the material contents of self-determination. All in all, New Caledonia possesses a significant degree of (internal) self-determination and, at the same time, a significant portion of internal sovereignty, strengthened by the right to transfer legislative powers from the State. The powers between the State and

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<sup>31</sup> For a list of legislative decisions by the Congress on transfer of competence, see Official Journal of New Caledonia <<https://juridoc.gouv.nc/juridoc/jdwebe.nsf/Juristart?openpage>> accessed 25 June 2020.

<sup>32</sup> As pointed out in the case of *Py v France* (n 33) para 37, '[g]eneral power is vested in the provinces, while the State and New Caledonia are assigned powers in specified areas'.

New Caledonia are indeed shared, but not exercised jointly. The picture that emerges is that the State is left with some important legislative powers, while New Caledonia has broad powers in material areas that impact greatly the everyday lives of individuals and business enterprises.

## **4 The Legislative Procedure of New Caledonia**

### **4.1 The Composition of the Legislature**

The self-determination already accorded to New Caledonia by means of the Institutional Act is broad and requires independent norm-setting activity by a law-maker other than the Parliament of France. The population of New Caledonia is represented in law-making for the area by the Congress of New Caledonia, which is elected in a particular fashion that involves the provinces and provincial representatives. According to s 185, 40 representatives are elected to the Provincial Assembly of the South and, of those, 32 representatives also sit in the 54-member Congress; the Provincial Assembly of the North has 22 representatives of whom 15 also sit in the Congress. The Provincial Assembly of the Loyalty Islands consists of 14 representatives of whom seven are included as members of the Congress. This means, according to s 190 of the IA, that each province is an electoral district for the purposes of electing both the members of the provincial assemblies and the member of the Congress. A good portion of these members, elected in a single election, thus sit on two different seats, one of an administrative nature at the provincial level and another of a legislative nature at the central level.

The term of mandate of both the Congress and the provincial assemblies is five years. The election is proportional and carried out, according to ss 191 and 192 of the IA, on the basis of closed lists, where gender is taken into account in a manner that results in equal numbers of female and male candidates. A 5% threshold of votes is implemented. The elected members of the Congress from each province are those at the top of the list, because according to s 192, subsection 3, after the allocation of the seats of members of the Congress according to the order of presentation on each list, the seats of members of the assembly of the province are distributed under the same conditions between the lists. For each of them, the seats are allocated in the same order of presentation, starting with the first of the candidates not proclaimed elected member of the Congress. The

method of voting is thus direct both for the Congress and for the assemblies of the three provinces, but the special feature of the arrangement is that each member of the Congress is also a member of one of the three provincial assemblies. It is, however, evident on the basis of the provisions in the Institutional Act that the legislature and government of New Caledonia is representative in nature.

According to s 188, prior to voting in elections to the Congress and the provincial assemblies, 10 years' residence is required, that is, two electoral cycles. This can be understood as a problem from the point of view of human rights, such as Art 25 of the CCPR, as the requirement amounts to a restriction of the right to vote. The question is whether the restriction is reasonable, but that question has not been tried by the UN Human Rights Committee under Art 25 of the CCPR. The HRC has, however, adjudicated on the reasonableness of exclusion from participating in the independence referendum of New Caledonia (see below, the case of *Gillot v France*) and found no violation of the CCPR. On the basis of similar arguments as in the *Gillot* case, it might be possible to argue that a residence requirement of 10 years for participating in elections to the Congress is not an unreasonable requirement under Art 25 of the CCPR during the transitional period.

In the context of the European Convention on Human Rights, a direct challenge of the 10 year residence requirement was found not to be a violation of Art 3 of the First Protocol to the European Convention (Art 3 does not apply to referendums and therefore, the limitation of the right to vote in referendums cannot arise in relation to the European Convention). In the case of *Py v France*,<sup>33</sup> the European Court of Human Rights found that because of the powers conferred on the Congress, 'it is no longer a purely consultative body but has become an institution with a decisive role to play, depending on the issues being dealt with, in the legislative process in New Caledonia' and that the 'Congress is sufficiently involved in this specific legislative process to be regarded as part of the "legislature" of New Caledonia for the purposes of Article 3 of Protocol No 1' of the European Convention. Mr Py, who was originally from metropolitan France and who thus had the right to vote in national elections and in elections to the European Parliament and who had been entered on the list of voters for municipal elections, was employed as a university lecturer in New Caledonia. In this capacity, he was a State employee and under the requirement of mandatory stay in the territory while holding this position. While in New Caledonia, he was denied registration as a voter in the 1999 elections to the

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<sup>33</sup> App no 66289/01 (ECtHR, 11 January 2005).

Congress for failing to meet the criteria of s 188 of the IA, in particular the 10 year residence requirement. The Court found that in the instant case, where the circumstances of the self-determination process were taken into account, ‘the residence requirement pursues a legitimate aim’. In principle, the Court felt that a 10 year residence requirement, covering two periods of mandate of the legislature, could potentially be disproportionate to the aim pursued, but went on to ‘determine whether there are local requirements in New Caledonia, within the meaning of Article 56, such that the restriction in question on the right to vote may be deemed not to breach Article 3 of Protocol No 1’.

Citing previous cases<sup>34</sup> and taking into account of the views of the UN Human Rights Committee,<sup>35</sup> the Court noted that ‘New Caledonia’s current status reflects a transitional phase prior to the acquisition of full sovereignty and is part of a process of self-determination. The system in place is “incomplete and provisional”, like that examined by the Court in the *Mathieu-Mohin and Clerfayt* case’. Then the Court went on to opine that ‘[a]fter a turbulent political and institutional history, the 10 year residence requirement laid down in the Institutional Act of 19 March 1999 has been instrumental in alleviating the bloody conflict. This local factor, resulting from problems that are more deep-seated and have more far-reaching consequences than the linguistic disputes at the origin of the *Polacco and Garofalo* and *Mathieu-Mohin and Clerfayt* cases [...], has brought about a more peaceful political climate in New Caledonia and has enabled the territory to continue its political, economic, and social development.’ The Court considered that ‘the history and status of New Caledonia are such that they may be said to constitute ‘local requirements’ warranting the restrictions imposed on the applicant’s right to vote’ and made reference to the fact that France had deposited its instrument of ratification concerning the Convention with a note that, where the

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<sup>34</sup> See *Mathieu-Mohin and Clerfayt v Belgium* (1987) Series A no 113 (concerning transitional systems); *Polacco and Garofalo v Italy* App no 23450/94 (Commission Decision, 15 September 1997) (concerning mandatory residence requirement of four years in South Tyrol before the right to vote was granted), and *Tyrer v UK* (1978) Series A no 26 (concerning local requirements).

<sup>35</sup> *Py v France* (n 33) para 63: ‘As the United Nations Human Rights Committee noted on 15 July 2002 (...): ... the cut-off points set for the referendum of 1998 and referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided. This being the case, these cut-off points do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory’.

overseas territories are concerned, due regard should be had to local requirements. The Court found that there had been no violation of Art 3 of the First Protocol to the European Convention. Hence the broader picture of the struggle for and development towards self-determination provided arguments in support of local requirements that could justify an interference with the right to vote which otherwise would have constituted a violation of the Convention. The overall method for the production of the laws of the land is thus in order under the requirements of the local situation, where the unicameral Congress is supplemented by a consultative Customary Senate and where the arrangement is of a provisional nature.<sup>36</sup>

The electorate in New Caledonia can therefore be multi-layered, in particular when taking into account that those entitled to vote in the independence referendums are defined on the basis of a third set of criteria (see below). There is a general level of persons entitled to vote in New Caledonia which follows the French definition of the right to vote and covers presidential and legislative elections, EU Parliament elections and local government elections. This group comprised 209,832 voters in the European Parliament elections of 2019.<sup>37</sup> The most restricted group of voters in New Caledonia is constituted by those who are referred to in s 188 of the IA and who also constitute the foundation of the citizenship of New Caledonia on the basis of s 4 of the IA. These are the voters in elections to the Congress and the provincial assemblies placed on a special list of voters for provincial elections. This group comprised of 169,552 voters in the 2019 elections to the Congress and the provincial assemblies.<sup>38</sup> This is problematic in the sense that the difference in the number of voters, around 40,000 persons, means that a relatively large number of persons, the 'French residents' with a general right to vote are not able to influence the composition of the legislative body that exercises normative powers concerning all inhabitants of New Caledonia.<sup>39</sup> However, as stated in the case of *Py v France*, the European Court of Human Rights felt that there were local circumstances that could justify such a difference.

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<sup>36</sup> Pastorel (n 14) 9.

<sup>37</sup> Elections Européennes 1er tour, 26 Mai 2019 <<http://www.nouvelle-caledonie.gouv.fr/content/download/5997/46160/file/20190527%2001-R%C3%A9sultats%20europ%C3%A9ennes%20class%C3%A9s.pdf>> accessed 2 October 2020.

<sup>38</sup> Resultats définitifs de l'élection des membres du congrès et des assemblées de province du 12 mai 2019 <<http://www.nouvelle-caledonie.gouv.fr/Politiques-publiques/Elections/Elections-2019/Provinciales-2019/RESULTATS>> accessed 2 October 2020.

<sup>39</sup> Chauchat (n 24) 1–3.

## 4.2 Some Notes on the Legislative Process

All draft legislation submitted to the Congress as proposals of the Government<sup>40</sup> of New Caledonia or as legislative proposals of members of the Congress must,<sup>41</sup> according to s 100 of the IA, undergo prior competence control by the Conseil d'Etat.<sup>42</sup> This means that the competence line between New Caledonia and the State is systematically checked, in respect of the New Caledonian enumeration, by the administrative jurisdiction of the French legal order. The prior competence control appears to be asymmetric, because the New Caledonian legislative competence is systematically controlled for transgression of the competence line, while the legislative competence of the State does not necessarily undergo the same exacting scrutiny in relation to the enumerated competences of New Caledonia, although the Conseil d'Etat does in practice give advisory opinions on most draft laws.

When the Congress of New Caledonia has adopted a piece of law within the category of laws of the land, as identified in s 99 of the IA,<sup>43</sup> under the s 101 requirement of absolute majority, it becomes possible under ss 104 and 105 of the IA to challenge the law before its promulgation by means of a review of constitutionality at the Constitutional Council (Conseil Constitutionnel). The relevant procedure is established in s 61, sub-section 2, of the Constitution of France. This possibility of constitutional review is the same as for legislative enactments of the Parliament of France, except that the number of instances empowered to activate the review is larger, which makes this form of constitutionality review symmetrical in relation to the constitutional review of the legislation of the State. This means that the law-maker of New Caledonia is on a par with the law-maker of the State. It

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**40** The Government of New Caledonia is politically accountable to the Congress. On the basis of s 95 of the IA, one-fifth of the representatives may initiate a motion of censure of the Government, and an absolute majority is required for dismissing the Government. The government itself, however, does not follow the majoritarian principle, but is proportionally composed of the party groupings in the Congress in a manner that leads to a collegial composition (potentially similar to that of Northern Ireland). See *Le fonctionnement du gouvernement* <<https://gouv.nc/gouvernement-et-institutions-le-gouvernement/le-fonctionnement-du-gouvernement>> accessed 7 October 2020.

**41** For a more detailed description of the legislative procedure in the Congress, see *Focus sur la Loi du Pays* <<https://www.congres.nc/lassemblee/attributions/focus-sur-la-loi-du-pays/>> accessed 6 October 2020.

**42** Statutes of the country of New Caledonia; Services of the Constitutional Council, Edition of 12 October 2011. See also s 107, which deals with statutes of the land that are not given within the categories of norms identified as laws, in which case they are only regulations. This means that they can be referred to Conseil d'Etat after promulgation.

**43** According to s 84 of the IA, the Congress also decides on the budget of New Caledonia.

appears that 11 reviews of constitutionality have taken place during the past two decades.<sup>44</sup> This form of constitutional review is not available for the decisions of other territorial assemblies in the overseas collectivities of France, because the decree powers exercised by their respective deliberative assemblies are subject to judicial review by the Conseil d'Etat.

According to s 106 of the IA, the High Commissioner, that is, the representative of the State of France, promulgates the laws of the land, with the countersignature of the Prime Minister of the Government of New Caledonia. The promulgation takes place in the Official Journal of New Caledonia (JONC), which is a forum corresponding to the Official Journal of the Republic of France (JORF).

In addition, the mechanism of constitutional priority questions (QPC) under s 61-1, sub-section 2, of the Constitution of France, concerning the application of legislation, is available when cases involving laws of the land are dealt with by the highest courts of law. According to the provision, if it is claimed, during legal proceedings at the Conseil d'Etat or the Cour de Cassation, that a statutory provision infringes the rights and freedoms guaranteed by the Constitution, the matter may be referred by the relevant court to the Constitutional Council. The QPC is thus a mechanism of preliminary rulings, which has been in place since 2010. By 2020, eight QPCs have been submitted to the Constitutional Council, two by the Conseil d'Etat and six by the Cour de Cassation.<sup>45</sup> The latter court has declared provisions of the laws of the land unconstitutional in one case (labor law) and constitutional in two cases (mining law, law on meat and offal).

Altogether, it seems that New Caledonia is, in the exercise of its legislative powers, well incorporated in the overall constitutional fabric of France.<sup>46</sup> Indeed, New Caledonia appears to have a share in the exercise of the internal sovereignty and the internal self-determination of France in a manner that makes it a strong autonomy in charge of its own matters. This is in part due to the fact that New Caledonia has been able to increase its own competences by means of its own decisions. In spite of this partial sovereignty now enjoyed by New Caledonia, the prospect under both international law and national law is that New Caledonia will evolve from autonomy to full sovereignty, on the basis of which it would exercise its self-determination under its own constitution, without any constraints from the French Constitution.

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<sup>44</sup> See the Official Journal of New Caledonia (JONC) <<https://juridoc.gouv.nc/JuriDoc/JdWebE.nsf/Juristart?openpage>> accessed 25 June 2020.

<sup>45</sup> See the Official Journal of New Caledonia (JONC) <<https://juridoc.gouv.nc/juridoc/jdwebe.nsf/Juristart?openpage>> accessed 25 June 2020.

<sup>46</sup> The representative of the State in New Caledonia, the High Commissioner, interacts with the Congress and the Government of New Caledonia in various ways established in the Institutional Act.

However, in addition to being embedded in the constitutional fabric of France, the Institutional Act also takes into consideration the fact that a large portion of the population belongs to an indigenous people. The IA creates a Customary Senate that has a role in law-making as a consultative body in matters that are of particular relevance for the indigenous population. According to s 137, the Customary Senate is made up of 16 members appointed by each customary council in the manner recognized by custom so that two representatives are drawn from each customary area of New Caledonia. Section 142 of the IA determines that any draft or proposed law of the land shall be transmitted to the customary senate by the President of the Congress if it relates to: identity signs as defined in s 5; customary civil status; the customary land regime and, in particular, the definition of leases intended to govern relations between customary owners and operators on these lands, under the regime of customary palaver, at the limits of customary areas; and the modalities of election to the customary senate and customary councils.<sup>47</sup> The Customary Senate has a period of deliberation of two months concerning a project or a proposed law of the land, and refraining from answer is deemed an adoption of the text, which is then submitted to the Congress for deliberation. If the Congress does not adopt a text identical to that adopted by the Customary Senate, the text voted on by the Congress is returned to the Customary Senate. If the Customary Senate does not adopt this latter text in identical terms within one month, the Congress makes the final decision on the matter. Because the Congress is politically dominated by non-Kanak representatives, there is room for improvement in the participatory mechanisms of the indigenous population.

## 5 Full Independence as Self-Determination of the People?

Self-determination is a right of the people and as such a collective right, not an individual right. Self-determination is thus a group right, but the exact personal extent of this group right and the personal extent of self-determination remains unclear. According to the last sentence of para 3 of the Nouméa Accord, the intention of the arrangement is to ‘restore to the Kanak people their confiscated

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<sup>47</sup> See Christine Demmer and Benoit Trépied (eds), *La coutume kanak dans l'État – Perspectives coloniales et postcoloniales sur la Nouvelle-Calédonie* (L'Harmattan 2017) and also *L'intégration de la coutume dans le corpus normatif contemporain en Nouvelle-Calédonie. Rapport de reserche* (2016) <<https://halshs.archives-ouvertes.fr/halshs-01592950/document>> accessed 6 October 2020.

identity, which in their view means to recognize their sovereignty prior to the founding of a new sovereignty shared in a common destiny'.<sup>48</sup> The colonized people thus achieves a recognition of its sovereignty, but that sovereignty is included in a new sovereignty where also other communities and inhabitants of New Caledonia coexist and share a common destiny. This is so because individuals belonging to the other communities have, according to the Nouméa Accord, acquired a legitimate right to live in the Territory and to continue to contribute to its development. The identity of the Kanak people and its prior sovereignty is thus recognized, but for the future, an inclusive concept of a common destiny is developed with reference to a social contract that also covers other communities and their members. This development means that foundations for citizenship of New Caledonia are established 'in a way that will allow the indigenous people together with all the other men and women living there, to constitute a human community affirming its common destiny'.<sup>49</sup>

During a transitional period, indications of progressive recognition of citizenship of New Caledonia shall be given in a manner that reflects the common destiny that the inhabitants of the Territory have chosen 'and which may become, at the end of the period, a nationality, should it be so decided'. There is thus a regional citizenship, that is, citizenship of New Caledonia, established on the basis of s 4 of the IA with the requirement of a right to vote under s 188 of the IA in elections to the Congress and the provincial assemblies (for other categories of voters existing in New Caledonia, see below). This is a status that is additional to an underlying French citizenship and conditional upon the possession of French citizenship while New Caledonia is a part of France. At the same time, regular citizenship attached to full sovereignty of New Caledonia is projected as an option if New Caledonia becomes an independent state. That regular citizenship or nationality would be inclusive and include the Kanak people and the other communities of New Caledonia.<sup>50</sup>

The General Assembly of the United Nations refers, in its resolution of 7 December 2018, to five different descriptions of the group:<sup>51</sup> population, people of the territory, Kanak people, indigenous Kanak people, and the people of New Caledonia.

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**48** The policy document lists several matters as components of the Kanak identity: customary status of Kanak individuals (with implications on eg conveyance of property), customary law and structures, cultural heritage (place names, cultural items, languages, cultural development), land and symbols.

**49** See Jean-Yves Faberon (ed), *Citoyenneté et destin commune en Nouvelle-Calédonie* (Presses Universitaires d'Aix-Marseille 2013).

**50** See also Chauchat (n 24) 3–6.

**51** (A/Res/73/115). For the latest UN document available, see UN GA Res 75/115 on the Question of New Caledonia of 10 December 2020 (A/Res/75/115).

The term ‘population’ appears in the GA resolution with two meanings – as a reference to indigenous populations in general and as a reference to all sectors of the population of New Caledonia. The term ‘people of the Territory’ is used twice as a link to the context of self-determination, once in a reference to the (procedural) options of self-determination and once in a reference to a material dimension of self-determination concerning the right to own, access, use, and manage natural resources, including proprietary rights for future development. The resulting impression is that the term ‘people of the Territory’ might cover all inhabitants of New Caledonia. The term ‘Kanak people’ appears as a reference to a sub-group of the population or of the people of the Territory, in the context that the Kanak people is understood as a minority that is less advantaged than the rest of the population or people of the Territory. The term ‘indigenous Kanak people’ (and the term ‘indigenous Kanak people of New Caledonia’ and ‘indigenous people of New Caledonia’) communicates a similar impression. Finally, the term ‘the people of New Caledonia’, used many times in the resolution, appears to be a general description of all inhabitants of New Caledonia in their political capacity as those entitled to exercise the right to self-determination, to be beneficiaries of self-determination and to vote in the self-determination referendums. The population, the people of the Territory and the people of New Caledonia appear to be largely overlapping terms, while the Kanak people and the various references to the indigenous group come across as references to a sub-group of the population, the people of the Territory and the people of New Caledonia.

From the point of view of the three overlapping terms (the population, the people of the Territory, and the people of New Caledonia) used in the GA resolution, there is little chance that the indigenous Kanak people alone would be the entity entitled to exercise self-determination in New Caledonia, although it is this indigenous group that was originally colonized by France. The same conclusion can be reached on the basis of the Nouméa Accord. It is thus not the colonized people that is in the process of exercising its self-determination in the manner indicated in the 1960 UN Declaration on the Granting of Independence to Colonial Countries and Peoples,<sup>52</sup> but instead an entity that has a different composition due to a long historical evolution and migration to the territory. This has consequences for the exercise of self-determination in the manner intended in the 1970 UN Friendly Relations Declaration,<sup>53</sup> because one of the stated aims of the declaration is to bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned. According to the Friendly Relations Declaration, all peoples have the right freely to determine, without external interference, their

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52 A/Res/1514(XV), or the so-called Resolution 1514 (XV) of 14 December 1960.

53 A/Res/25/2625.

political status and to pursue their economic, social, and cultural development, but the forms under which this shall take place may vary. The reference to free determination may involve decision-making procedures such as a referendum, but may also involve elections to a decision-making assembly as well as a decision by a competent UN body (see below).<sup>54</sup>

What is more interesting is that full independence is not necessarily the only institutional alternative available in colonial situations, because in addition to the establishment of a sovereign and independent State, the declaration proposes that free association or integration with an independent State or emergence into any other political status may constitute a mode of implementing the right of self-determination by a people. It appears that French policy, based on the Nouméa Accord, is very much in harmony with this organizational palette,<sup>55</sup> because under the 1970 Friendly Relations Declaration, some other institutional solution than independence would also be acceptable from the point of view of decolonization, as long as the political status of the territory is freely determined. The only institutional alternative that the current set-up excludes on the basis of internal French law is integration of New Caledonia with France, because the transfer of powers from the State to New Caledonia is stated to be irreversible. This means that New Caledonia cannot be expected to follow the path chosen by Mayotte in 2009, when the population decided in a referendum to become a more integrated part of France as an overseas department instead of continuing as an overseas collectivity of a more autonomous kind.<sup>56</sup>

Therefore, in the event that the exercise of self-determination in New Caledonia does not lead to independence, a more permanent status within the French Constitution is the likely outcome. This would imply that the transitional provisions in ss 76 and 77 of the Constitution would have to be reformulated in a manner that that reflects and embodies the current autonomy arrangement or creates another status, such as associated statehood. In such a scenario, the

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<sup>54</sup> *Western Sahara* – Advisory Opinion of 16 October 1975, International Court of Justice, Reports of Judgments, Advisory Opinions and Orders, para 71: ‘The right of self-determination leaves the General Assembly a measure of discretion with respect to the forms and procedures by which that right is to be realized’.

<sup>55</sup> In a statement by the State explaining the implications of the referendum on 4 October 2020 the State concludes that in accordance with both constitutional and international law obligations, the state must describe the implications of the vote, although a large number of options depend on the dialog and negotiations that will be conducted in the weeks and months following the consultation. See Les implications de la consultation du 4 octobre 2020 <[https://www.elections-nc.fr/images/referendum/Les\\_implications\\_du\\_re%CC%81fe%CC%81rendum\\_2020.pdf](https://www.elections-nc.fr/images/referendum/Les_implications_du_re%CC%81fe%CC%81rendum_2020.pdf)> accessed 29 October 2020.

<sup>56</sup> Suksi (n 6).

inhabitants of New Caledonia would probably continue to have two citizenships, a regular French citizenship and a regional citizenship of New Caledonia, to which at least some customary rights of the Kanak population might be connected, but perhaps also some particular rights of all inhabitants of New Caledonia, such as a right to vote in provincial elections. That is likely to be a difficult path, in part because of the equality principle of the French Constitution, and in part because of a similar expectation of equality and non-discrimination in international human rights.<sup>57</sup>

## 6 Independence referendum(s) as Mechanism of Self-Determination

As stated above, the French Constitution envisages territorial changes by involving the population of the territory as a decision-maker. This is also, at least in part, the expectation of public international law concerning the exercise of self-determination. However, the International Court of Justice explained in its 1975 advisory opinion on Western Sahara that exercise of self-determination can also be effected by means of mechanisms of decision-making other than referendum. Elections can also be used in the context of self-determination, leading to representative decision-making of the population concerned. Indeed, there are many examples of de-colonization in which referendum has not been used. In the case of Namibia, for instance, elections to a constituent assembly, which also performed the functions of a legislature, were held under UN supervision.<sup>58</sup> Where a referendum or elections are not possible, there remains, as a fallback position, the possibility that an appropriate body of the United Nations makes a statement as to whether a territory should emerge as an independent state or not.<sup>59</sup> As can be seen, a referendum is not the only way to exercise self-determination.

The expectations of a referendum in both international and domestic law are implemented through the Nouméa Accord in the Institutional Act n° 99-209 of 19 March 1999 pertaining to New Caledonia. Sections 216 through 222 of the IA contain provisions concerning a referendum, referred to as a ‘consultation’. Whilst

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<sup>57</sup> Chauchat (n 24) 2.

<sup>58</sup> *Western Sahara* (n 54) para 71. See also Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections* (Martinus Nijhoff Publishers 1994) 151–163 in particular for Namibia.

<sup>59</sup> See A Rigo Sureda, *The Evolution of the Right of Self-Determination. A Study of United Nations Practice* (A W Sijthoff 1973) 191, 303.

acknowledging that the term referendum is reserved for those popular votes that are regulated in the Constitution of France, such as s 89, the term consultation may nonetheless indicate something about the nature of the referendums in New Caledonia, namely whether they are decisive or consultative.

In the context of the right to self-determination, the expectation is that a referendum, if such is organized, will decide the self-determination matter. Evidently, the 2018 and 2020 referendums would have done so, if the votes had supported independence.<sup>60</sup> In such a case, however, independence would probably not have followed right away. Instead, a shorter or longer period of transition towards full independence would have started during which the enumerated powers of the State would have been handed over to New Caledonia. At the end of the period of transition, the parliament of an independent New Caledonia would have issued a declaration of independence, expected recognition as a State and subject of international law, entered into treaty relationships with other subjects of international law and sought membership of inter-governmental organizations such as the United Nations. In such a scenario, it is possible to say that a Yes-vote would have been decisive.

As reported at the beginning of this article, both in 2018 and 2020, the decision of the voters was against independence, and in principle, this should have implied that the population of New Caledonia decided to adopt some other mode of self-determination than independence, such as continued autonomy as a part of France. However, the internal solution established on the basis of the Nouméa Accord and s 217 of the IA treats a No-vote as consultative, not decisive, by making possible a second referendum, the one in 2020, and even a third one, depending on whether a minority of one-third in the Congress decides to request such additional referendums. The referendums subsequent to the 2018 referendum should pose the same question to the voters. Again, a Yes-vote in the two subsequent referendums would be decisive, while a No-vote in the subsequent referendums is only consultative and form a basis for further decision-making.

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**60** This is confirmed by a statement by the State explaining the implications of the referendum on 4 October 2020, where the State concludes that the referendum result constitutes a decision with which the State complies and which produces legal effects, at least if the result is an approval of independence, for all New Caledonia. See *Les implications de la consultation du 4 octobre 2020* <[https://www.elections-nc.fr/images/referendum/Les\\_implications\\_du\\_re%CC%81fe%CC%81rendum\\_2020.pdf](https://www.elections-nc.fr/images/referendum/Les_implications_du_re%CC%81fe%CC%81rendum_2020.pdf)> accessed 29 October 2020. For a summary of the political situation prior to the 2020 referendum in a journalistic article, see *Référendum en Nouvelle-Calédonie: tout comprendre des conséquences politiques et économiques du scrutin* <[https://www.francetvinfo.fr/politique/referendum-en-nouvelle-caledonie/referendum-en-nouvelle-caledonie-tout-comprendre-des-consequences-politiques-et-economiques-du-scrutin\\_4105823.html](https://www.francetvinfo.fr/politique/referendum-en-nouvelle-caledonie/referendum-en-nouvelle-caledonie-tout-comprendre-des-consequences-politiques-et-economiques-du-scrutin_4105823.html)> accessed 2 October 2020.

Hence the nature of the independence referendum(s) in New Caledonia is binary: a Yes-vote is always decisive, while a No-vote is consultative and opens up a new path. However, if that new path had not been used after the first referendum of 2018 or is not used after the second referendum of 2020 by calling a third referendum within the established time-frame, the result of the latest referendum may become binding.

In case that a third referendum held at some future point of time results in a No-vote, s 5 of the Policy Document attached to the Nouméa Accord envisions a meeting of the political partners to consider the situation. It is also underlined in the Policy Document that '[u]ntil the proposed new political organization has been approved in a referendum, the political organization established by the 1998 Accords shall remain in force in its last stage of evolution, without any possibility of regression, "irreversibility" being constitutionally guaranteed'. A status quo with the current arrangement could therefore be a long-term solution, if even the third referendum produces a No-vote and the subsequent discussions and negotiations take time. The projected agreement at the end of such negotiations, whichever institutional mode of self-determination the settlement might propose, would be submitted to yet another referendum for final decision. However, neither the further negotiations after a third No-vote nor the fourth referendum are regulated in the Institutional Act. A situation of the kind envisaged in the Policy Document would require new legislation to supplement the Institutional Act, including rules about the right to vote in a possible fourth referendum and a determination that the vote is decisive whichever alternative wins. The process has to be brought to a conclusion at some point, and the fourth referendum projected in the Policy Document should be the final stop. This final referendum should present two material alternatives, one of which should be independence and the other an alternative involving another political status, such as the confirmation of the current autonomy arrangement.

There is yet another issue related to the nature of the referendum(s), namely if the referendums are mandatory or facultative. Under principles of international law, a colonized people has the right to exercise self-determination, and on that basis, it could be possible to say that a referendum on self-determination is mandatory, except that self-determination can also be exercised by way of other procedures,<sup>61</sup> such as elections and by decision of a competent UN body, depending on the situation. Therefore, under public international law, a referendum is not mandatory in a situation of self-determination, but it is so under the provisions of the French Constitution. In New Caledonia, referendum is the mechanism of decision-making prescribed by national law, and s 217 of the IA

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61 *Western Sahara* (n 54) para 71.

makes the first referendum, that of 2018, mandatory by stating the deadline for holding it. The second and the third referendums, however, are facultative, because their organization is dependent on a minority protection mechanism: if one-third of the members of the Congress require that the second and the third referendum are held, then they will take place, but otherwise not. Because the political groupings representing Kanak and Melanesian interests have a sufficient number of seats in the Congress, they were able in 2020 and will in future be able to muster the one-third minority threshold for requesting a referendum. The second and the third referendums are, thus, facultative, not mandatory, and the third referendum may be held during the two-year period following the second referendum of 2020, provided that the one-third minority requests one. This is likely to happen, and therefore, a third referendum is likely to take place before October 2022.

Because the potential fourth referendum is not yet legislated upon, it is not at this point possible to characterize that referendum as a mandatory one from a legal point of view, but the indication in the Policy Document is that the fourth referendum, if there is one, would be a mandatory referendum. That is also the conclusion under s 53 (3) of the Constitution of France, because the population would have to give its consent to the solution. It can be expected under the right to self-determination that such a final referendum is decisive, and it is entirely possible that the decision on self-determination is postponed until a fourth referendum takes place. It is equally possible that the decision made on the mode of self-determination in such a fourth referendum is not in favor of independence, but in favor of some other political status, such as continued autonomy.

The referendum procedure used to effectuate the right to self-determination of New Caledonia is thus multi-faceted and far more complex than in many other situations of de-colonization. For instance, the definition of the different categories of voters results in a multi-layered electorate in New Caledonia, where those entitled to participate in the independence referendums constitute a relatively narrow category of persons. There is a general level of persons entitled to vote in New Caledonia that follows the French definition of the right to vote and covers presidential and legislative elections, EU Parliament elections and local government elections. This group comprised 209,832 voters in the European Parliament elections of 2019.<sup>62</sup> However, the group of voters that is entitled to vote in the independence referendums is more identity-based and found, on the basis of s 218 of the IA, on a special list of voters for the purposes of the independence

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<sup>62</sup> Elections Européennes 1er tour, 26 Mai 2019 <<http://www.nouvelle-caledonie.gouv.fr/content/download/5997/46160/file/20190527%20001-R%C3%A9sultats%20europ%C3%A9ennes%20class%C3%A9s.pdf>> accessed 2 October 2020.

referendum. This group, composed of those on the list of voters in the elections to the Congress and the provincial assemblies<sup>63</sup> as well as those who fulfill the criteria in s 218, paras a) through h), of the IA, comprised 180,799 voters in the 2020 independence referendum,<sup>64</sup> which is some 5600 persons more than during the referendum of 2018. This nonetheless means that there is a difference of around 29,000 persons between this group and the general group of voters.

As indicated by the case of *Py v France* (see above, section 4.1.) and also by the case of *Gillot v France* before the UN Human Rights Committee,<sup>65</sup> a segmentation of this kind can be problematic from the point of view of human rights, such as Art 25 of the CCPR, which is based on equality between citizens. However, the HRC reminds that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable. Ms Gillot and a number of other persons were prevented from participating in the 1998 referendum on the Nouméa Accord.<sup>66</sup> After that vote, they concluded on the basis of the provisions of the legislation in force that they would also be excluded from voting in the independence referendums that would take place after the year 2014, on the basis of s 218 of the IA. The HRC noted on the basis of its decisions in relation to Art 25 of the CCPR that the right to vote is not an absolute right and that restrictions may be imposed on it provided they are not discriminatory or unreasonable. The HRC continued by saying that the evaluation of any restrictions must be effected on a case-by-case basis, having regard in particular to the purpose of such restrictions and the principle of proportionality. On this basis, the HRC took

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**63** It has been pointed out in Chauchat (n 20) 7–11 that the list of voters in elections to the Congress and the provincial assemblies is ‘frozen’ at the year 1998, but is in part sliding as regards persons fulfilling the residence requirement after 2008. The article also analyses court practice on the matter and also the fraudulent administrative practices prior to the elections of 2014. See also Pastorel (n 14) 9. This means that the additional qualifications in s 218 paras a) through h), can open up the list of voters in the independent referendums so as to make the group of voters in the independence referendums larger than in the elections to the Congress and provincial assemblies, although one might think that almost the opposite should apply.

**64** Résultats définitifs, Référendum du 4 octobre 2020 Nouvelle-Calédonie <<http://www.nouvelle-caledonie.gouv.fr/content/download/6849/53341/file/R%C3%A9f%C3%A9rendum%20du%204%20octobre%202020%20-%20R%C3%A9sultat%20d%C3%A9finitifs.pdf>> accessed 5 October 2020.

**65** Ms. Marie-Hélène Gillot v France, Communication No 932/2000, UN Doc A/57/40 at 270 (2002).

**66** Mr Py, who took a case concerning the right to vote in elections of the Congress and provincial assemblies to the European Court of Human Rights (see above), had also tried to register as a voter for the independence referendum. He had been denied registration for failure to fulfill the requirement of constant residence since 1988, but did not complain against the decision. See *Py v France* (n 33), para 10. Mr Py did not launch any individual complaints concerning elections with the HRC on the basis of Art 25 CCPR, which means that this avenue of complaints to the international level may still be untested.

into account the context of self-determination and also Art 1 of the CCPR when interpreting Art 25 of the CCPR. The question before the HRC was whether the differentiation between two categories of voters mentioned above, the general voters and the voters in the independence referendums, is compatible with Art 25 of the CCPR.

The HRC found that residents meeting the criteria requiring a particular link to the Kanak people and the territory for the right to vote are in a situation that is objectively different from that of Ms Gillot and the other complainants whose link to the territory is based on length of residence. The HRC noted that length of residence is taken into account in the criteria established for future ballots and that these criteria may be used alternatively. Hence the identification of voters from among the French residents of New Caledonia is based not solely on particular ties to the territory (such as birth and family ties) but also, in their absence, on length of residence. Consequently, every specific or general link to the territory – identified by means of the criteria on ties to New Caledonia – was applied to French residents. The HRC also considered that in the case of New Caledonia, the criteria for the determination of restricted electorates make it possible to treat differently persons in objectively different situations as regards their ties to New Caledonia. It would not be unreasonable, according to the HRC, to limit participation in local referendums in this particular case to persons ‘concerned’ by the future of New Caledonia who have proven and sufficiently strong ties to the territory, in particular as in every self-determination process, ‘limitations of the electorate are legitimized by the need to ensure a sufficient definition of identity’. As explained above, this is an explicit purpose of the process established on the basis of the Nouméa Accord. In that context, the HRC noted that the Noumea Accord and the Institutional Act ‘recognize a New Caledonian citizenship (not excluding French citizenship but linked to it), reflecting the common destiny chosen and providing the basis for the restrictions on the electorate, in particular for the purpose of the final referendum’.

On that basis, the HRC took the view that the ‘restrictions on the electorate resulting from the criteria used for the referendum of 1998 and referendums from 2014 onwards respect the criterion of proportionality to the extent that they are strictly limited *ratione loci* to local ballots on self-determination and therefore have no consequences for participation in general elections, whether legislative, presidential, European or municipal, or other referendums’. As a consequence, the HRC considered that ‘the criteria for the determination of the electorates for the referendums of 1998 and 2014 or thereafter are not discriminatory, but are based on objective grounds for differentiation that are reasonable and compatible with the provisions of the Covenant’. The HRC concluded its analysis by saying that the length of residence criterion is not discriminatory, which made it possible to hold that, in the present case, ‘the cut-off points set for the referendum of 1998 and

referendums from 2014 onwards are not excessive inasmuch as they are in keeping with the nature and purpose of these ballots, namely a self-determination process involving the participation of persons able to prove sufficiently strong ties to the territory whose future is being decided'. Because this was the case, the cut-off points 'do not appear to be disproportionate with respect to a decolonization process involving the participation of residents who, over and above their ethnic origin or political affiliation, have helped, and continue to help, build New Caledonia through their sufficiently strong ties to the territory'.

As a consequence, the HRC found that there was no violation of Art 25 of the CCPR or any other article of the Convention, which means that the arrangements of the Nouméa Accord and the Institutional Act are acceptable under the CCPR, although they constitute a *prima facie* violation of the universal right to vote. The special list of voters, established on the basis of s 218 of the IA for the purposes of the independence referendum is therefore not in violation of Art 25 of the CCPR as long as the self-determination process is on-going, but at a future point when the self-determination process has been brought to an end, whatever the final status of New Caledonia will be, the arguments underlying the special list of voters will cease to be valid in relation to Art 25. Of course, at such a future point of time, it will probably not be necessary to maintain any list of voters for independence referendums. However, at this moment, and with two relatively tight results from referendums, the population of New Caledonia remains sharply divided on the issue of independence.<sup>67</sup>

## 7 Concluding Remarks

The process for fulfilling the right to self-determination of New Caledonia is a unique and elaborate procedure with many stages. It is possible to say that New Caledonia is already in possession of a good portion of self-determination internally, because the territory is, under the constitutional law of France, a strong autonomy with its own law-making powers. The legal order and governmental system of New Caledonia is generally entrenched in the Constitution of France and also entrenched through an Institutional Act that can be viewed as special entrenchment because of its constitutional status. In addition, the principle of

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<sup>67</sup> For an analysis of the situation after the 2018 referendum, see Mathias Chauchat, *La Nouvelle-Calédonie demeure française pour le moment* <<http://blog.juspoliticum.com/2018/12/06/la-nouvelle-caledonie-demeure-francaise-pour-le-moment-par-mathias-chauchat/>> accessed 2 October 2020, and Carine David, 'The road to sovereignty for New Caledonia? Analysis of the November 2018 consultation on self-determination' (2019) 2 *Small States & Territories* 141.

self-determination has an entrenchment impact on the position of New Caledonia, which protects the arrangement from (theoretical) attempts to weaken the current autonomy. In fact, the distribution of powers leading to adjustments of the two enumerations of legislative powers is unidirectional and gives the Congress of New Caledonia a space within which to increase its own legislative powers at the expense of the legislative powers of France. The domestic principle of irrevocability of powers therefore has a similar effect to the principle of self-determination and they may be understood as parallel concepts at the two levels of law, domestic and international.

In spite of the fact that the current autonomy arrangement could be viewed as an arrangement that at least in material terms caters for most of the self-determination needs of New Caledonia and recognizes the indigenous Kanak people, the territory nevertheless has the clear right to exercise self-determination in order to leave its colonial past and emerge into a status which is freely chosen by the population. The exercise of self-determination means that a decision has to be made on the matter, a decision that has several dimensions, including material and procedural dimensions.

As concerns the procedural dimension, the decision can be made directly by the people or by means of elections to a decision-making body, and in theory also by decision of the United Nations. French domestic law limits the mode of decision-making to referendum, or consultation of the population of New Caledonia, as the mechanism is termed in the Institutional Act. It is thus a direct decision of the people entitled to self-determination that will be used, through several referendums, two of which have already been held, with up to two additional ones in the future. However, the nature of the referendums in New Caledonia vary in a surprising manner. If independence is voted for, it is possible to view the referendum as decisive, leading up to a period of transition at the end of which independence is declared by the representative body of New Caledonia. However, if independence is not supported in a referendum, the decision is primarily of a consultative nature and opens up a pathway towards new referendums, provided that new referendums are requested. Also, only the first referendum projected in the Institutional Act and expected under the right to self-determination is mandatory, while the other two are facultative on the condition that a minority of the representatives in the Congress requests a referendum within a certain time-frame.

In light of the tightening races in the referendums of 2018 and 2020, resulting in No-votes, it is plausible that the result of a potential third independence referendum could be in support of independence. It appears that the struggle for independence amongst the Kanak population has been able to attract additional support from other communities of New Caledonia and that there is a possibility that the third

referendum in 2022 could produce a Yes-vote. That outcome would decide the matter. However, yet another, fourth, referendum is anticipated if even the third referendum fails to return a Yes-vote for independence. This fourth referendum is not regulated in French law yet, but it might be of both mandatory and decisive nature.

As concerns the material dimension, the law of self-determination opens up several alternatives as outcomes of the exercise of self-determination. Independence is one, while free association, integration, and any other political status are also possible.<sup>68</sup> Integration of New Caledonia with France is, however, ruled out by the domestic principle of irrevocability of the legislative powers of New Caledonia, which means that France has limited the alternatives by means of internal law. Free association may actually be viewed as an option which presupposes prior emergence into independence, which means that this alternative is subsumed in the independence alternative and left to the determination of the people of the newly independent state. This alternative is therefore also not among the options in the current self-determination process. The two alternatives available at this moment are thus independence and any other political status. The option of choosing any other political status is likely, in material terms, to equate to the current autonomy arrangement or an arrangement whereby the autonomy of New Caledonia as a part of France has been enhanced further in comparison with the current autonomy arrangement. The three referendums offered under the Institutional Act only present one alternative, independence, but in a possible fourth referendum, independence and a material alternative, eg, the current or enhanced autonomy arrangement, should be viewed as the options. In a referendum constructed in this manner, one of these alternatives should win and, on that basis, it would be possible to say that the people has chosen freely one of the two modes of self-determination and thus exercised the right to self-determination.

If autonomy were to be the chosen alternative, a question may remain as to whether the colonized Kanak people really managed to fulfill its quest for self-determination. If independence is the outcome, the people originally colonized, the indigenous Kanak, may still find itself in a minority position. Either way, it appears as if an enhanced position for the Kanak should be crafted, perhaps through a separate autonomy arrangement.

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**68** See UN GA Res 74/106 on the Question of New Caledonia of 13 December 2019 (A/Res/74/106), paras 4, 14, where reference is made to 'fostering an awareness among people of their right to self-determination in conformity with the legitimate political options' so that a 'peaceful progress of the territory towards an act of self-determination' is promoted in which 'all options are open and which would safeguard the rights of all sectors of the population'. The same text appears to have been passed in UN GA Res 75/115 on 10 December 2020 (A/Res/75/115), but without noticing that a referendum had already taken place on 4 October 2020.

The method of facilitating self-determination in New Caledonia is both creative and constructive. The law establishes a decision-making path with at least one clear objective, independence, but does not rule out some other outcome, such as strong autonomy. Also, the method facilitates deliberation between the various decision-making points without making a one-off decision. The down-side of the potentially protracted method is that it polarizes the population and may invite conflict, although that is precisely what the Nouméa Accord hoped to avoid. In addition, the method appears to induce a certain measure of uncertainty over the future, which is negative for individuals and also for business operations. However, the method applied in the case of New Caledonia could be useful in some other contexts of self-determination, such as Puerto Rico, which is a part of the United States and where several consultative referendums have already been held on the status issue, but without any conclusion imminent. In that respect, a solution is in sight in New Caledonia, which is positive from the point of view of self-determination. Somewhat similarly to the situation in New Caledonia, Danish law has, since 2009, contained a provision in the Self-Government Act of Greenland that creates a pathway towards independence for Greenland, which is currently an autonomous part of Denmark, should that be wished for and decided on by the population of Greenland: a consultative referendum may be held on the wish to become independent, and after negotiations between the governments of Denmark and Greenland, the settlement reached would be put to a decisive referendum.

Several problems are associated with the exercise of legislative powers and of self-determination in New Caledonia by means of the right to vote. The composition of the electorate to the Congress of New Caledonia is subject to a 10 year residence requirement. This continues to be a problem with regard to the right to vote established in Art 3 of the First Protocol to the European Convention on Human Rights, although the European Court of Human Rights found in *Py v France* that a reference to local circumstances can be used to allow the restriction of the right to vote. The Court opined that New Caledonia's current status reflects a transitional phase prior to the acquisition of full sovereignty and that this phase is part of a process of self-determination. For that reason, the system in place is 'incomplete and provisional'. It is possible that after self-determination has been exercised and if New Caledonia continues as an autonomous part of France, the issue will be re-visited with perhaps another outcome, although 'local requirements' will continue to apply.

The problems with the right to vote in elections to the Congress have not yet been tested against Art 25 CCPR, but there are reasons to believe that the current ten-year residence requirement is less likely to be upheld in this context, because decisions made in the Congress are not as directly connected to the decision on the self-determination of New Caledonia as the referendum decisions. While it might be possible to arrive at a conclusion concerning the right to vote in elections similar

to the *Gillot v France* concerning referendums under the transitional phase, that is, to uphold a long residence requirement, this should not be possible after self-determination has been exercised. It may thus be difficult to maintain a multi-layered electorate in a future scenario where New Caledonia continues as an autonomous part of France, especially as the independence scenario would most likely lead to an electoral system which is not multi-layered.

The future fate of New Caledonia appears, on the basis of this review, to be either independence or (enhanced) autonomy as a part of France. In both situations, the decision of the population of New Caledonia will result in constitutional amendments in France. Independence necessitates the revocation of the temporary provisions in ss 76 and 77 in the Constitution of France and of the Institutional Act. Of course, if New Caledonia decides to associate itself with France after acquiring independence, new constitutional provisions might have to be adopted in the Constitution of France and the future arrangement adapted to the principle of equality of the Constitution of France. A continued position as an autonomous part of France would, in turn, necessitate constitutional amendments by establishing a general entrenchment in the Constitution for the autonomy arrangement and developing the special entrenchment now included in the Institutional Act as well as safeguarding and perhaps strengthening the position of the indigenous population. The self-determination decision, whatever it is, will thus have several legislative consequences for France.