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THE STICKINESS OF FRENCH COLONIALISM IN THE PACIFIC – CONSTITUTIONAL AND RIGHTS-BASED MUSINGS ON THE SITUATION IN NEW CALEDONIA

Posted on 31 Luglio 2024 by [Jock Gardiner](#), [Marleen Kappé](#)

Introduction

The political unrest in New Caledonia has captured the attention of the [Pacific region](#) and has made headlines [across the world](#). While many contributors have sought to understand and address the causes and potential ramifications of the crisis through a [postcolonial lens](#), or from the perspective of the [ongoing strategic battle](#) between ‘the West’ and ‘the East’ in the Pacific region, few, in English, have considered the situation from a constitutional and human rights angle, particularly since the recent French parliamentary elections. Beginning with the historical context, the aim of this piece is to not just to step you through the various legal developments that have served as the foundation for much of the unrest, but to also critically assess what the future may hold for New Caledonia and its Kanak indigenous population in the immediate post-election period.

The 1998 Nouméa Accord and its Colonial Past

France’s rule over New-Caledonia began in 1853, when it annexed New-Caledonia to use it as a colony for exiles. The *Indigénat* was introduced in

New-Caledonia [in 1887](#). This 'regime' or 'code' governed the lives of people classified as France's 'native' colonial subjects, which in New Caledonia are the Kanak people. The Kanak were given a separate status to allow for the imposition of policies aimed at civil, political, and cultural control. The *Indigénat* ended six decades later, in 1944.

Universal suffrage was granted [in 1956](#), providing the Kanak with an opportunity to debate the future of their society after the *indigénat*. The Kanak wanted control over their reserves and to live under traditional laws. The French rejected this, arguing that it would undermine the core organising principle of the French legal order, *the principle of uniformity*. A climate of violence intensified on the island over a number of years, leading to the signing of the [Matignon Accords](#) in 1988. The Accords set out a 10-year transition, with a vote on the future of New Caledonia scheduled for 1998. Following the negotiation of the [Nouméa Accord](#), this referendum on self-determination was deferred for another 20 years. The accord provided for the possibility of organizing two successive referenda in case of a negative outcome of the first one. Moreover, the Nouméa Accord limited the electoral body for the consultations relating to the political organisation of New Caledonia to people who lived on the archipelago before 1998, excluding more recently arrived people representing today around 20 per cent of the territory's population.

The Nouméa Accord was constitutionally enshrined by [Constitutional Law No. 98-610 of 20 July 1998](#). It introduced a title on "transitional provisions relating to New Caledonia", and prescribed: (a) the irreversible nature of the transfer of competences from the French State to the institutions of New Caledonia; (b) the possibility for the Congress of New Caledonia to take acts of a legislative nature (laws of the country), which may be subject to the control of the French Constitutional Council, and (c) the recognition of a citizenship specific to New Caledonia, also allowing restrictions on the electorate for elections to congress and provincial assemblies. [Organic Law No. 99-209 of 19 March 1999](#) further elaborates on this. Article 188 of that law limits the electoral body for New Caledonian provincial elections in a similar manner as described in the Nouméa Accord for referenda related to the political organization of New Caledonia. This limitation of

the electoral body for provincial elections was “frozen” in article 77 of the French Constitution by a [2007 Constitutional amendment](#).

The lead-up to the immediate crisis and the proposed constitutional amendment that sparked it

The Nouméa Accord was the beginning of a new political and legal era in New Caledonia. This era has been marked by a challenge to this Accord before the European Court of Human Rights, a series of failed independence referenda attempts, civil unrest and the declaration of a state of emergency, and a proposal for constitutional reform.

Article 56 of the ECHR (known colloquially as the colonial clause) allows for the protections contained in the Convention to be extended to the external territories of Member States. Post the 1988 Accord, in the case of *PY v France*, the ECtHR was called-upon to assess whether the limited electoral role component to the Nouméa Accord was in violation of Article 3 Protocol No 1 of the ECHR. This Article establishes the right to free elections. The applicant was a Metropolitan French National, living in New Caledonia, who had applied to be registered on the electoral role in anticipation of local elections. He was refused the right to vote on the ground that he did not meet the terms of the Accord. In response, the French Government claimed: 1) that the New Caledonian legislature was not a fully functioning parliament, therefore ought not fall within the remit of Art 3 Protocol 1; and 2) even if it did fall within its remit, Art 3 Protocol 1 should not apply as the voting rules agreed to were part of a temporary politically negotiated settlement aimed at facilitating self-determination in a specific postcolonial context (a margin of appreciation-type argument). Dismissing the first argument, the Court then agreed with the second, referring to Art 56(3) of the Convention, which calls for the Court to consider ‘local requirements’ when coming to a decision on the application of the Convention to external territories, and the fact that the franchise restriction provisions were temporary in nature.

As hinted at by the ECtHR and as set out in the Accord, the expectation was that the referenda process would result in New Caledonian

independence. The first referendum, held in 2018 returned 56.6 against independence and 43.3 per cent in favour ([voter turnout 81 per cent](#)). The second, held in 2020, saw 53.3 per cent against and 46.7 per cent in favour ([86 per cent turnout](#)). The third and final referendum, held in 2021, returned 96 per cent against and 4 per cent in favour of independence ([44 per cent turnout](#)). Although President Macron claimed the 2021 result as a victory for a unified France, the truth is that the final referendum was boycotted by the Kanak independence movement after the [French Government refused Kanak calls](#) to delay the referendum until after the COVID-19 pandemic. This is because the Kanaks adhere to strict mourning customary rules that prevent them from engaging in certain activities after a member of their community has died.

Since the 2021 result, New Caledonia has been in a political stalemate. While the Accord calls for a negotiated settlement between the major political parties in New Caledonia, talks between pro-independence and loyalist parties have not been fruitful. Facing pressure from French citizens living in New Caledonia that are currently barred from voting in New Caledonian elections (approximately 20,000), and from an emboldened loyalists in Metropolitan France, [Macron took steps](#) early in 2024 to amend Article 77 of the of the Constitution. This amendment sought to extend the New Caledonian franchise to all those who meet a 10-year New Caledonian residency requirement. The constitutional amendment passed the Assembly and Senate, but also requires approval by three fifths of a joint sitting to be formally adopted.

This was the issue that sparked the weeks of protests, [eight deaths, 1 billion euros in damage, and a whirlwind visit by the President](#). Prior to his arrival, the President, with his Cabinet, declared a [state of emergency in New Caledonia](#). The declaration [provided extraordinary powers to local law enforcement](#), including: website blocking; curfews; the ability to impose travel bans; [conduct home invasions; enforce house arrests](#); and the banning social gatherings and protests. In addition to initially sending an additional 1800 law enforcement officers, one of the first steps put in place to quell the violence was to block the use of TikTok, a platform being used to great effect by the pro-independence protesters. While the State

of Emergency Act 1955 provides the Interior Minister with the power to interrupt online communications “provoking the commission of acts of terrorism or glorifying them”, such moves have attracted criticism for being [unnecessary and disproportionate](#).

While visiting, Macron offered to delay the joint sitting to broker a temporary cessation to the violence. However, it was his decision [on 9 June to dissolve the French Parliament](#) that put a real pause on the constitutional and political crisis. While it is difficult to predict how the makeup of the new National Assembly will affect the constitutional amendment process, what is clear is that the situation has become even more complicated [by a pro-Independence candidate winning](#) one of the two seats reserved for New Caledonia; the first time a pro-independence candidate has won a seat in decades.

The legal vacuum created by the negative outcome of the third Nouméa Accord referendum

Constitutionally

The failure of the third independence referendum in 2021 marked the end of the process envisaged by the Nouméa Accord. In an attempt to provide some clarity in light of the constitutional vacuum created by this situation, the government decided to publish advice from the [French Conseil d'Etat on the continuity of institutions in New Caledonia](#). The advice took the form of responses to a series of questions, the most important of which were:

"1. What is the law applicable in New Caledonia at the end of the self-determination process provided for by the Nouméa Agreement? Can this outcome be seen as a change in circumstances likely to modify the scope of certain normative provisions? To what extent?

2. The Government considers it necessary to modernize the electoral rules to meet basic democratic requirements, particularly with regard to France's conventional obligations. In this spirit, do demographic changes and in particular that of the relative weight of the population of the three provinces require changes in the composition of the electorate or the electoral

framework in force?

3. Is the organic legislator competent to modify the electoral provisions in New Caledonia?

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In answer to the first question, the Conseil d’Etat stipulated that despite the completion of the implementation of the Nouméa Accord, the legal framework provided for by the [Organic Law No. 99-209 of 19 March 1999](#) remains applicable until a revision of the Constitution has taken place. In the same vein, the modification of electoral provisions in New Caledonia can only take place through a constitutional amendment, resulting in a negative answer to the third question. However, the Conseil d’Etat emphasised that the current rules derogate increasingly and “particularly significantly” from the principles of universality and equality of suffrage, flowing from articles 1 and 3 of the French Constitution.

In answer to the first and third questions, the Conseil d’Etat stated that in the absence of rapid intervention by the constitutional legislator, the National Assembly may have to take steps to address the increasing proportion of voters deprived from the right to vote and “to mitigate the extent of the derogations from the principles of universality and equality of suffrage, which will, with the passage of time, have effects exceeding what was necessary for the implementation of the Nouméa agreement.”

In answering the second question, the Conseil d’Etat referred to the arguments relied-upon by the ECtHR in coming to its non-violation determination vis-à-vis the freezing of the electoral roll. The Conseil all but rejected the basis for this position by emphasising the substantial increase in the number of disenfranchised New Caledonian residents (now close to 19 per cent of the total population) since this decision. However, the Conseil d’Etat also admitted that the “compatibility of the rules in force with France’s international commitments is uncertain while the process defined by the Nouméa agreement is completed.

Considering the human rights angle – the ongoing potential role for the ECtHR

The ECtHR, in many ways, is a colonial court. [The continued presence of](#)

[Article 56](#) in the ECHR is demonstrative of this, but so too is the general purpose of the court, which is the *universalisation of certain Eurocentric rights-based norms*. While on its face, *PY v France* looks like a good example of the Court finding an appropriate balance between its general purpose and the context to which it is to be applied, the outcome masks a slightly different story with important ramifications for the ongoing situation in New Caledonia. As is often way when courts are faced with 'hard cases,' the Court hedged its decision by utilising a temporal technicality (the provisional nature of the Nouméa Accord) to get around having to take a position on the substance of the conflict between the right to vote and the right to self-determination. This could be viewed as the Court deftly giving the political settlement aimed at independence a chance to work, or as the Court deliberately avoiding carving out a concrete exception to Art 3 Protocol 1 (the right to free elections) in post-colonial contexts. That is, creating some form of general rebuttable presumption in favour of a wider margin of appreciation being given to measures that are aimed at indigenous self-determination, or a narrower margin to those measures that take the means for self-determination away. Either way, should the Court be asked to consider the question again, depending on who brings the case and the political context, avoidance may not be an option.

Conclusion

The political situation in New Caledonia remains in a state of limbo. The election of a new pro-independence member to the National Assembly in the recent election complicates an incredibly complicated picture. So too does the increased the number of National Rally members, with Le Pen flip-flopping between a strong loyalist and vaguely pro- self-determinist position ([although the 40-year timeline Le Pen proposed](#) for a new referendum undermines the perceived sincerity of this position). While the ECtHR was there to protect the Accord that supported the Kanak independence movement in the past, given the Accord has run out of runway, the Court will not be able to, nor likely willing to, play the same role should it be called on to do so again. Instead, all domestic constitutional indications are, as expressed by the Conseil d'Etat, that

there will be a push to address the disenfranchisement issue in New Caledonia, inevitably leading to a dilution of the voting power of the Kanak people. So, while the political situation was fraught before the election, it seems even more fraught after. The peace holds, but only just, as everyone in New Caledonia holds their breath and looks to Paris for an indication as to what the future may hold.