



## New Caledonia looking at the experiences of other Pacific Island countries

### *Borrowing from Pacific pasts?*

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#### **Abstract**

Decolonisation has always been tragic in French history. How can such a situation be avoided in New Caledonia? New Caledonia has been on the United Nations list of non-self-governing territories since 1986. Civil unrest, which culminated in 1988, led to agreement with France on increased autonomy under the Matignon Accord of 1988 and the Noumea Accord of 1998. The Noumea Agreement borrowed from the Melanesian tradition called *palabre*, in which Kanak communities, traditionally, sit and talk together in order to solve problems. The Noumea Agreement also borrowed separate citizenship from the Anglo-Saxon tradition.

The Noumea Agreement describes the process of transfer of powers from France to New Caledonia as *irreversible*. It provides for mandating a referendum sometime after 2014 on the contentious issue of independence. This referendum could be a recipe for disaster. What could New Caledonia borrow from Pacific Pasts?



## Introduction

Decolonisation has always been tragic in French history. France still retains control of three territories in the Pacific: Wallis and Futuna, New Caledonia and French Polynesia. Both French Polynesia and New Caledonia were removed from the list of non-self-governing countries in 1950. However, New Caledonia only has been re-installed on the United Nations list since 1986.

Things have changed since then. In 1985, agitation by the *Front de Libération Nationale Kanak Socialiste* (FLNKS) began advocating for independence. The FLNKS (led by the late Jean-Marie Tjibaou, assassinated in 1989), asked for the creation of an independent state of *Kanaky*. The troubles culminated in 1988 with a bloody hostage-taking in Ouvéa. This unrest led to agreement on increased autonomy under the Matignon Agreement (*Matignon Accord*) of 1988 and the Noumea Agreement (*Nouméa Accord*) of 1998. The latter describes the process of transfer of power as *irreversible* and also provides for a local Caledonian citizenship and local official symbols of Caledonian identity, as well as the duty of mandating a referendum sometime after 2014 on the contentious issue of independence from the French Republic. The 1998 Noumea Agreement in New Caledonia and the 1999 Statute of Autonomy in French Polynesia have seen a shift of power from Paris to the Pacific.

The Noumea Agreement emerged through a political negotiation between the two main political forces of New Caledonia (Independentists or advocates of independence and Loyalists or supporters loyal to the Republic of France). As a result, it has been a well-balanced and odd compromise between two incompatible logics. New Caledonia, for the first time, found its own solution: the Noumea Agreement borrowed from the Melanesian tradition called *palabre*, in which Kanak communities, traditionally, sit and talk together in order to solve problems. That is why our political system is so strange; this borrowing from the Melanesian past is ambivalent in its effects (I).

New Caledonia has to hold a referendum on the contentious issue of independence from the French Republic, sometime after 2014. This could be a recipe for disaster. Could New Caledonia borrow 'the associated State' from Pacific history as a political compromise with France, so as not to jeopardise development and the gradual construction of a new nation? This borrowing from the Pacific Past would be very positive (II).

### I – New Caledonia borrowed from the Past collegial policy

The Noumea Agreement borrowed from the Melanesian tradition called *palabre*. This is why the New Caledonian Congress elects the government under a system of proportional representation and all the main political parties join the government. The constitutional status of New Caledonia was crafted to prevent a majority from holding political power. Its aim is to lead to a consensus between the political forces, both Kanak and non-Kanak, without going straight to a deadlock. Thus, political power is shared. To explain this: the voting system used to elect the Congress is proportional representation, which makes it very difficult to get a majority. This situation is classical, even in the Australian Senate. Furthermore, the Noumea Agreement provides that the members of government themselves may be elected by the Congress under a system of proportional representation. So, all the main political parties may join the government. It is called *collégialité*, in English 'Collegial Policy'.

This differs deeply from the classical political system. The Caledonian system is based on a simplistic electoral mathematic rule, slightly limited by the possibility to choose the number of members

of government. Proportional representation in both Congress and government gives the New Caledonian political system its exceptional character. This internal borrowing from Kanak political forms regarding decision-making looks mostly at weaknesses, because the government is weak. However, although we could expect instability as a result, the system has given a secure government.

#### *A – A secure government*

The way of electing the government appears to be simplistic: first, the parties, which are represented in Congress, present a list of names of members or non-members of the Congress. Secondly, each representative votes for his or her favourite list. The number of members is proportionate to the votes cast. What is strange is that there is not any political debate about the governmental framework prior to the election, nor is there a policy choice. Each party delivers its own opinion separately.

What is becoming harder is choosing the head of government. The president has to be elected by his colleagues during their first meeting. This requires at least a majority within the members of the government. Every issue can be linked to another and it is a hard bargain. Philippe Gomès, the current president, was elected unanimously. At this time, a ‘tacking practice’ takes place. As you know, ‘tacking’ was the habit of the House of Commons to attach (to tack) substantive provisions to money bills to make it difficult for the Lords to reject them. That practice is still going on in the USA and it has appeared in New Caledonia. Furthermore, after a president has been elected, the portfolios still have to be allocated. This is difficult, because the Organic Law (which implements the Noumea Agreement) requires each minister to countersign the collaborative decision. Thus, any one of them can stop the process. That is the main reason why the government is secure. Nobody has a real interest in overturning the government. And the creation of another government would lead to the same structure. A crisis cannot be avoided by the dismissal of a minister, the resignation of the government itself or even through the use of the parliamentary couple of censure and dissolution. These three solutions do not really exist in New Caledonia:

- There is no way to force a minister to resign and the resignation of the government also requires a majority vote. Only the resignation of the president can drag the government down.
- Passing a vote of no confidence in the Caledonian government makes no sense, because all the parties are represented. Its only use would be to change the president of the government. But there is an easier way to challenge the president. If all the members of the same party in the government resign at the same time, proportional representation cannot be achieved and the Organic Law forces the government to resign.
- Dissolution of Congress could be a solution, but this is not in the hands of the president of the Caledonian government; it is in the hands of the French government. The French government does not use discretionary power: indeed, it is under hard constitutional pressure. Dissolution can be pronounced only if ‘*the running of the government is proved to be impossible*’.

Therefore, the government is secure, which differs from many current governments in Melanesia. However, this government is weak.

### B – A weak government

To make any decision, the government has to find a majority; and this is not a relative majority. It requires the consent of a majority of the members of government. No one party has a majority. So, each decision takes a long time to reach. The president of the government still has a casting (predominant) voice but only when the government is divided into two, with only one abstention. For example, in a government of 10 or 11 members, which is an average size, the majority needed is 6. If the deadlock concerns 5 members against another 5, the president can use his predominant vote, but not if it is 4 against 4, with 2 abstaining members. Consequently the parties have quickly found a very easy way to fight the predominant voice scheme. They only need not to attend the government meeting, which makes it impossible to get 5 votes in favour of an executive decision. Furthermore, the collaborative decision, if adopted, must be countersigned by *'the minister in charge of enforcing the regulations'*. Thus, each minister 'in charge' can easily refuse to add his signature to a decision, even if it has been adopted by a majority of the members of government.

All these rules, which force people to work together, are understandable. But they make the decision-making process rough. Therefore, what has happened was inevitable. Because a tough decision is difficult to make, even in a strong and homogeneous government, such a decision in any matter has never been adopted. So, all you have to do is to give some electoral gifts to the voters, and never increase taxes. This way of governing favours one of the worst French flaws: the irresponsibility of government. The previous governments could easily fool the voters, because the Treasury coffers were full with the booming mining industry taxes and the contributions from France. But if the economic situation takes a bad turn, it would be hard for any government to keep up with such a high level public expenses. As you know, the economic downturn began in 2009 and the mining taxes have been reduced drastically.

Nevertheless, Collegial Policy could work, if the political parties found compromises and created some constitutional conventions. The New Caledonian system might lead to the acknowledgement of a 'right of implicit veto'. This veto could be used by the most important parties in the case of disagreement about any decision made by the government. On the other hand, the government has to be prevented from passing a project without consensus. The constraints placed on the majority and the power of veto of the minority undoubtedly lead to a 'democracy of concordance'. The opposite (and the usual way of governing) is the democracy of competition. As in ancient times, when the old chiefs sat together, no solution can be adopted without consensus.

As a result of the decolonisation process, the Noumea Agreement provides for mandating a referendum on the issue of independence, sometime between 2014 and 2018. The deadline is getting closer. This could be a recipe for disaster. Could New Caledonia borrow 'the associated State' from Pacific history as a political compromise with France?

## II – New Caledonia could borrow ‘the associated State’ from Pacific history

Instead of Yes or No to independence, what could be an intelligent question to ask in the referendum?

### *A – The Noumea Agreement could lead to association with France*

Pursuant to the Noumea Agreement, both Congress and the government are increasingly empowered via the gradual implementation of a transfer of power from France to New Caledonia. Key areas (e.g. Taxation, Labour Law, Health, Foreign Trade and many others) are already in the hands of the Territorial Congress and government. Further authority will be given to the Congress in the near future (e.g. Civil Law, Corporate Law, Secondary School Education, University, even Radio and Television, etc.). Ultimately, before New Caledonia decides on its future, the French Republic should remain in charge of only *Foreign Affairs, Justice, Defence, Public Order and Currency*, one would say, the ‘sovereign functions’. This is already a situation that is close to association.

Furthermore, the Noumea Agreement, surprisingly, plans multiple referendums during the 4<sup>th</sup> mandate of the Congress (i.e. 2014 to 2019). This strange provision requires three repeated questions, each year if necessary, if the previous asking has failed. If the people’s answer is negative for the third time, the Noumea Agreement stipulates that the political parties negotiate the matter, but provides an effective standstill provision. Until the dialogue succeeds, the political system will remain unchanged ‘at its latest stage’. The French Constitution defines this ‘irreversibility rule’ as a constitutional principle.

The Congress of New Caledonia is involved in both choosing the date of referendum and in formulating the question. This hard task is achieved by a majority of three-fifths of the members of Congress. There are many issues at stake:

- Will New Caledonia be able to afford independence? If not, how can it retain financial aid from France?
- If New Caledonia ever has to, how will it fulfil sovereign functions?
- Could New Caledonia afford a local currency or should it keep the fixed exchange rate between the Pacific Franc and the Euro?
- How will New Caledonia control the influx of migrant workers from metropolitan France to New Caledonia?

All these issues are very controversial and potentially conflicting. That is why the development of an elaborate and complicated question for the referendum might be an avenue worth investigating for the Congress. Although decolonisation can be achieved by attaining independence, establishing a ‘free association’ status, or integrating with the administering power (France, or even another State), the Noumea Agreement has ruled out the possibility of integration. Thus, if France really respects International Decolonisation Law, only two solutions are conceivable: full independence or free association status. The latter solution could be an exercise in conciliation. However, the association status has to be put down in writing. Therefore, looking at Pacific history is very important.

*B – Highly inspiring solutions from Pacific history*

An 'associated state' is the minor partner in a formal free relationship between a political territory with a degree of statehood and a larger nation. All free associated states are either independent (and therefore subject to International Law) or have the potential right to independence. The colonial name was 'the protectorate'. This is no longer used, because of the unfairness of this relationship. It is not a Federal State either, although the states in a Federacy have a lot of power. In terms of International Law, the federated subunits are not independent international entities and have no potential right to independence.

The Federated States of Micronesia (since 1986), the Marshall Islands (since 1986) and Palau (since 1994) are associated with the USA under what is known as the Compact of Free Association, giving the states international sovereignty. The details of such free association are contained in a Compact of Free Association or Associated Statehood Act and are specific to the countries involved. However, the governments of these countries have agreed to allow the United States to provide defence. The USA benefits from the use of the islands as strategic military bases. In return, the US federal government funds grants and access to US social services for the citizens of these Pacific countries. This type of relationship has a great disadvantage for New Caledonia. It presupposes that the country is independent. The plunge might be too hard for the Caledonian electorate to take.

On the other hand, the status of the Cook Islands is particularly interesting. Oscar Temaru, the leader of Tavini, which is the independentist party in French Polynesia, is strongly in favour of this model. It is not as easy to guess the political opinions in New Caledonia, because the time of compromises has not yet arrived. Nevertheless, we can have a close look at the Cook Islands and see if their status is adaptable in New Caledonia. The Cook Islands are not a dependency of New Zealand; in constitutional terms, the Cook Islands (since 1965) are formally referred to as '*a state in free association with New Zealand*'. The country is classified as 'a Non-member State' by the United Nations, but has the right at any time to move to full independence by unilateral action. The situation for Niue (since 1974) is very similar. In early February 2006, Tokelau (a dependent territory of New Zealand) voted in a referendum to determine whether it wanted to remain a New Zealand territory or become the third state in free association with New Zealand. While a majority of voters chose free association, the vote did not meet the two-thirds threshold needed for approval. A repeat referendum in October 2007 under United Nations supervision yielded similar results with the proposed free association falling 16 votes short of approval. New Caledonia also has this right by referendum.

However, the Cook Islands retain a constitutional link with New Zealand in relation to citizenship (i.e. use of the New Zealand passport). Although Cook Islanders have a distinct status (Cook Islands citizenship), there is no distinctive Cook Island nationality for the purpose of International Law. As in New Caledonia today, nationality in this sense can be distinguished from citizenship. Although the French and the Caledonians (Kanaks included) have French nationality, only Caledonians have the right to vote in the election of the New Caledonian Congress. Moreover, maintaining French nationality for Caledonian citizens is essential for a peaceful solution. Nevertheless, the Joint Centenary Declaration of the Principles of the Relationship between the Cook Islands and New Zealand (on 6 April 2001) recognised a sovereign state: (Art 4) *'In the conduct of its Foreign Affairs, the Cook Islands interacts with the international community as a sovereign and independent state'. And, according to Article 5, 'the Government of the Cook Islands possesses the capacity to enter into treaties and other*

*international agreements in its own right with governments and regional and international organisations*'. Because of this, Cook Islands participates in some international organisations: because the Cook Islands can enter into treaties in their own right, they participate in the World Health Organization and the United Nations Educational, Scientific and Cultural Organization, and are an associate member of the United Nations Economic and Social Commission for Asia and the Pacific. These points are important, because New Caledonia has already obtained the right to a diplomatic service, hosted in the French Embassies, and the capacity for signing international agreements on behalf of France in the Pacific Region. New Caledonia also participates in the Secretariat of the Pacific Community (SPC) and, as an associated member, like French Polynesia, both since 2006, in the Pacific Islands Forum Secretariat.

In short, the Cook Islands are a sovereign state with full internal self-government (Nicolaus Lange, *The Cook Islands' unique constitutional and international status*, p. 1, <http://www.cookislands.de>; *European Pacific & others vs. KPMG Peat Marwick & others*, Unreported, High Court 29 August 1995). The Cook Islands have established their own nationality and immigration policies. According to the Joint Centenary Declaration, *'the Government of the Cook Islands will accord New Zealand citizens preferential consideration in respect of entry into and residence in the Cook Islands'*. At the same time, however, the Cook Islands have determined their own distinct citizenship, which, in effect, does not grant New Zealand citizens the same rights and privileges enjoyed by Cook Islanders in New Zealand. This point is important, because it solves the problem of the influx of immigrants. At the moment, all French people can settle freely in New Caledonia, which causes a problem in the relationship with France for the independentist movement. No long-standing solution can emerge without giving New Caledonia control of immigration.

New Zealand assists the Cook Islands in external affairs and defence and law enforcement, budgetary, administrative and other matters, but after mutual agreement and only on request. According to the Joint Centenary Declaration, *'any action taken by New Zealand in respect of its constitutional responsibilities for the foreign affairs of the Cook Islands will be taken on the delegated authority, and as an agent or facilitator at the specific request of the Cook Islands'*, which is surprising. It gives the Cook Islands unquestionable freedom and responsibility for both internal and external affairs, but when necessary they can request assistance. However, New Caledonia will not, in the short term and even in the long term, reasonably fulfil these sovereign functions. Justice, Defence and Police (specially maintaining law and order in a multicultural country) will be beyond reach. Moreover, this small country with 250 000 inhabitants will have to continue receiving financial aid from France. The associated status of the Cook Islands shows the way.

This highly inspiring solution from Pacific history would be very positive; it might include such a compromise, giving a mix of contradictory signs to the people of New Caledonia: New Caledonia might accept the sovereign functions, and as a result might develop into a State, but at the same time, it might sign an agreement with France to allow it to exercise these sovereign powers for 20 more years . . . To sum up, nothing has changed but everything is different.

Such a compromise would require a lot of prudence and shrewd negotiators to work out a deal. Hopefully, the worst will never happen. The Noumea Agreement is often compared to a 'bet on intelligence'; we shall find out in due time.



## References

- Chauchat, Mathias. (2006). *Vers un développement citoyen, perspectives d'émancipation pour la Nouvelle-Calédonie*, Presses Universitaires de Grenoble.
- Chauchat, Mathias. (2011). *Les institutions en Nouvelle-Calédonie*, Editions du CDPNC.
- Chauchat, Mathias & Cogliati-Bantz, Vincent. (2008). Nationality and citizenship in a devolution context: Australian and New Caledonian experiences, *The University of Queensland Law Journal*, 27(2).
- Lal, Brij V. & Fortune, Kate. (2000). *The Pacific islands, an encyclopedia*, (pp. 260ff.). University of Hawai'i Press, Honolulu, HI.
- Lange, Nicolaus. *The Cook Islands' unique constitutional and international status*, (p. 1), <http://www.cookislands.de>.

## Appendix

### *INDEPENDENCIES IN THE PACIFIC*

STATE	YEAR OF INDEPENDENCE	COLONIAL POWER
Western Samoa	1962	New Zealand
Cook Islands	1965 (Free Association)	New Zealand
Nauru	1968	Australia (with New Zealand and the UK)
Tonga	1970 (formerly a protectorate)	United Kingdom
Fiji	1970	United Kingdom
Niue	1974 (Free Association)	New Zealand
Papua New Guinea	1975	Australia
Solomon Islands	1978	United Kingdom
Tuvalu	1978	United Kingdom
Kiribati	1979 (formerly linked with Tuvalu)	United Kingdom
Vanuatu (formerly the New Hebrides)	1980	France/UK (Condominium)
Marshall Islands	1986 (Compact of Free Association)	United States of America
Federated States of Micronesia	1986 (Compact of Free Association)	United States of America
Palau (Belau)	1994 (Compact of Free Association)	United States of America

*Source* Parliamentary Research Service, 'No easy answers: Australia and the Pacific Islands Region', Research paper n° 5 1995-96, Department of the Parliamentary Library, p. 13.