THE ELEVATION AND ISOLATION OF THE CONSTITUTIONAL STATUS OF NEW CALEDONIA: A CASE STUDY OF FRENCH INTERIM CONSTITUTIONAL REFORM

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INTRODUCTION

Constitutional reform is very often needed in order to adapt constitutional rules which govern the distribution or decentralization of powers between different federal and federate entities in federal countries. However, the relationship between constitutional reform and decentralization is not only relevant to federal countries. It can also be relevant to unified or centralized countries which do not have a constitutional federal status, such as France, where sovereign executive as well as legislative powers can be shared between the French central state and the French overseas dependencies.

Among these French overseas collectivities, New Caledonia benefits from a special constitutional status and is vested with the most extensive sovereign executive and legislative powers ever transferred from the French state to a French decentralized territory. Following the *Noumea Accord* of 5 May 1998, the constitutional and institutional status of New Caledonia was entirely modified in order to resolve political conflicts between the Kanak independence movement and New Caledonian political forces opposed to any secession of New Caledonia. This reform resulted in the transfer of sovereign powers traditionally exercised by the French state to the New Caledonian political and administrative authorities, in particular the government, the Parliament ("Congress"), and the Provinces of New Caledonia.

The present paper will demonstrate why the transfer of sovereign powers from the French state to the decentralized New Caledonian authorities needed this constitutional reform, and how this reform operates as a progressive constitutional devolution process (1).

This paper will also analyse the originality and elevation of the new legal status of New Caledonia enshrined in the French *Constitution*, as opposed to the constitutional status of other legal classes of French overseas dependencies. It will also explain why this specific status remains isolated and confined, in order to limit its possible systemic effects on the overall constitutional structure of the French Republic (2).

Finally, this paper will explain the constitutional limits of the autonomy and sovereignty of New Caledonia as long as access to full independence from the French Republic is not achieved. In particular, this paper will explain how French constitutional rules and the French Constitutional Court have not only limited, but also restricted the scope of application of the sovereign powers initially transferred to New Caledonian authorities by the 1998 *Noumea Accord*, making the status of New Caledonia even more hybrid and transitional (3).

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1. CONSTITUTIONAL REFORM RESULTING FROM THE *NOUMEA ACCORD* (5 MAY 1998)

1.1 Constitutional status of New Caledonia before the constitutional reform of 1998

In order to comprehend any legal developments related to New Caledonia, which is one of the biggest islands of the Melanesian area in the South Pacific Ocean, it is essential to bring to mind the particularities of the legal framework of this territory.

First, this territory was made a French possession in 1853 as a result of a colonial military campaign, and is therefore one of territories where the rule of law had to be adapted to secure a possible transition from colonization to decolonization.[1] Second, as part of the French Republic, New Caledonia is subject to the French legal system and sources, particularly French superior legal rules such as the French *Constitution*. However, since 1946 the French *Constitution* has always provided for a specific set of rules for French overseas dependencies such as New Caledonia, in order to achieve decolonization via integration and not via independence.[2]

From 1946 to 1998, and in spite of multiple reforms of its local administrative government regime, New Caledonia as an overseas possession of France was vested with the specific legal status of "Overseas Territory" (*Territoire d'Outre-Mer* (T.O.M.)) as defined by the different Constitutions which were promulgated in France, including the currently applicable *Constitution of the 5th Republic*, created in 1958.

Until 2003, according to the French *Constitution* (Articles 72 and 73), France was subdivided in Departments and Territories (*Départements* and *Territoires*), including Overseas Departments and Overseas Territories. Other classes of territories could be created by a specific law, as it was the case for the Overseas communities (*Collectivités Territoriales d'Outre-Mer*).

Unlike the French Overseas Departments,[3] New Caledonia as a French Overseas Territory was not systematically subject to either legislative or regulatory laws issued by French authorities in the mainland territory of France known as "metropolitan France" (*France métropolitaine*). New Caledonia was only subject to the laws specially extended to this territory in accordance with the principle of "speciality of legislation" (*spécialité législative*).

Pursuant to Section 74 of the French *Constitution* of 4 October 1958 as applicable until 2003, French Overseas Territories had "a distinctive organization with consideration to their own interests among all the interests of the Republic", which led to the following result in New Caledonia: regulations set out in New Caledonia originated either from specific texts[4] or from

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1 For an historical introduction to the colonial past and decolonization of New Caledonia see Alan Berman, 'Future Kanak Independence in New Caledonia: reality or illusion?' (1998) 34-2 *Stanford Journal of International Law* 287–346.

2 See Dominique Custos, 'New Caledonia, a Case of Shared Sovereignty within the French Republic: Appearance or Reality?' (2007) 13(1) *European Public Law* 100.

3 As explained by Dominique Custos, 'the "overseas department" status allowed for similar, albeit adapted, institutions and laws as the rest of the French 'departments', and has applied to Guadeloupe, French Guiana, Martinique and Reunion'. Ibid 100.

4 See for example the *Decree on Forests* of 18 March 1910 and the *Decree on Forest Protection* of 15 September 1943.

national texts which included a special reference rendering them applicable in overseas territories.[5]

This specific constitutional status not only guaranteed a certain level of autonomy compatible with the decolonization claimed by the New Caledonian population, but also protected the integration of New Caledonia into the constitutional system of the French Republic. This process intended to achieve decolonization via integration and not via immediate independence. At the international level, New Caledonia was withdrawn from the list of non-self-governing entities of the United Nations General Assembly in 1947.[6] The Territorial Assembly of the Overseas Territory of New Caledonia also voted on 17 December 1958 for the integration of New Caledonia into France when the 5th Republic of France was established, thus rejecting the independence of the territory.[7]

However, during the following decades, this level of autonomy and decentralization appeared increasingly inadequate to satisfy the political desires of New Caledonian authorities and political forces, including the Kanak independence movement, which claimed in the 1980s a specific law-making power incompatible with the status of Overseas Territory.

After several years of political troubles and conflicts between the Kanak movement and the other movements controlled by French settlers favoring French rules between 1980 and 1988,[8] which led to the re-inclusion of New Caledonia in the United Nations General Assembly list of non-self-governing territories in 1986,[9] the main pro-independence coalition, the F.L.N.K.S,[10] on the one hand, and the main loyalist party, the R.P.C.R,[11] on the other hand, agreed on a new and transitional status for New Caledonia.

The first agreement made on 26 June 1988 and known as *Matignon Accord* extended the decentralized powers of New Caledonian authorities but maintained its "Overseas Territory" status and did not require a substantial modification of the French *Constitution*. This agreement was subsequently amended by the *Oudinot Accord* on 26 August 1988.

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5 For example, Acts related to the water irrigation regulations of 29 April 1845 and 11 August 1847 and the *Draining Act* of 10 June 1854.

6 This decision also resulted from France's refusal as admninistering power to provide information to the United Nations General Assembly, which was presented as a *fait accompli* to the UN. For an historical analysis of this evolution, see Jean-Marc Regnault, *L'ONU, la France et les décolonisations tardives: L'exemple des terres françaises d'Océanie* (2013); see also Alan Berman, above n 1, 287–289 and 'The Noumea Accords: Emancipation or Colonial Harness?' (2001) 36 *Texas International Law Journal* 278.

7 See Mathias Chauchat and Vincent P. Cogliati-Bantz, 'Nationality and citizenship in a devolution context: Australian and New Caledonian experiences' (2008) 27-2 *University of Queensland Law Journal* 200.

8 In this respect, the constitutional history of New Caledonia illustrates the following paradox described by John Elster: 'the task of constitution-making generally emerges in conditions that are likely to work against good constitution-making. Being written for the indefinite future, constitutions ought to be adopted in maximally calm and undisturbed conditions' but 'the public will to make major constitutional change is unlikely to be present unless a crisis is impending'. John Elster, 'Forces and Mechanisms in the Constitution-Making Process' (1995) 45 *Duke Law Journal* 394.

9 See *Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 41/41A, UN GAOR, 41st sess, 92nd plen mtg, Supp No 53, UN Doc A/RES/41/41A (2 December 1986) 49.

10 F.L.N.K.S stands for *Front de Libération Nationale Kanak et Socialiste* ('Kanak Socialist National Liberation Front').

11 R.P.C.R stands for *Rassemblement pour la Calédonie dans la Republique* ('Rally for New Caledonia within the Republic').

Amongst other provisions (such as an amnesty for prisoners), the *Matignon-Oudinot Accords* provided for the right of the New Caledonian population to vote on the independence of the territory in 1998.[12]

During the ten-year period of application of the *Matignon-Oudinot Accords*, and in compliance with them, the French state provided economic and social aid, and further decentralized the powers exercised by three new Provinces of New Caledonia, two of which were delineated so that they could be controlled by Kanak pro-independence forces.[13]

The autonomy and participation of the Kanak population in local institutions were also facilitated by the employment of Kanaks into the public sector, investments into development projects in the Kanak-controlled provinces,[14] and the establishment of a Customary Senate comprised of representatives from eight customary areas, having each its own customary council.[15] Through their control of the Provinces, and their representation in the Territorial Assembly, the Kanaks were recognised representation in both the legislature and the executive, and benefited from territorial forms of autonomy.[16]

Associated with proportionality electoral rules,[17] the main features of this reform belong to the ethnic and consociational model, which is more and more often used in post-conflict states.[18]

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[12] In this respect, the ten-year transitional regime contemplated by the *Matignon-Oudinot Accords* provided a model for the constitutional reform process needed for conflict resolution in Bougainville at the same period, in which the constitutional law specialist Yash Ghai was involved. As he explains, 'the Papua New Guinea settlement gives the people of Bougainville the option to raise the issue of secession after a suitable period when the new autonomy arrangements have been given a chance'. Yash Ghai, 'A journey around constitutions: reflections on contemporary constitutions' (2005) 122 *South African Law Journal* 824.

[13] Which was a condition for ending the troubles in Kanak-controlled areas. As explained by Donald L. Horowitz, 'there is no doubt that a key claim in settlement negotiations to end secessionist warfare will be that the rebels or regional politicians who succeed them control the putative secessionist region and be allowed to rule it autonomously'. Donald L. Horowitz, 'Conciliatory Institutions and Constitutional Processes in Post-conflict States' (2008) 49 *William and Mary Law Review* 1238.

[14] The focus on local development was key in the *Matignon-Oudinot Accords*, so that the Kanak people can not only improve their political and administrative autonomy, but also their financial autonomy. As explained by Nicholas R.L Haysom:

> …in many developing countries there are simply no economic sector and no economic opportunities to speak outside the state itself. The economy is the polity (…) When this is combined with the group-based politics of divided societies, the necessary implication is that minorities are destined to be perpetual losers both economically and politically. Not surprisingly, the temptation for such minorities is to choose to opt out of the constitutional framework, and to demand a separate existence within, or secession from, the new state.

'Constitution Making and Nation Builing' in Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World: Learning from each other* (2002) 221.

[15] For an analysis of the history of this transition, see Alan Berman, above n 6, 278–280; François Luchaire, *Le statut constitutionnel de la Nouvelle-Calédonie* (2000) 30–50; Jean-Yves Faberon, 'Nouvelle-Calédonie et Constitution: la révision constitutionnelle du 20 juillet 1998' (1999) *Revue du Droit Public et de la Science Politique en France et à l'Etranger* 113–130.

[16] The Kanak population is in a position to control majority in two of the three Provinces of New Caledonia because the geographical boundaries of these Provinces have been mainly designed along the geographical boundaries of the local ethnicities. As explained by Lauren E. Miller, this type of policy of ethnic separation may increase inter-cultural potential conflict instead of reducing it. 'Designing Constitution-Making Processes' in Laurel E.Miller (ed), *Framing the State in Times of Transition* (2010) 601–665.

[17] As explained by Thomas Fleiner et al, in multicultural states which need to guarantee equality for majorities as well as minorities, 'a political compromise has to be found between a cultural majority having enough power to define a majority regime on the one hand, and cultural minorities seeking recognition in the constitutional framework and participation in political decision making on the other. The institutional

However, the referendum on independence was never arranged because the F.L.N.K.S was not confident in its capacity to win a majority vote in favor of the self-determination process, given the minority position of the Kanaks among the overall population.[19] Instead of voting on independence, the main political forces of New Caledonia[20] promoted a "consensual solution",[21] a new modification of the status of the territory, as well as a deferral of the time limit for the referendum on self-determination.

This led to a second political agreement named the *Noumea Accord*, which was signed on 5 May 1998 and was contemplated as a new and additional step in the decentralization process modifying the status of New Caledonia.[22]

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equilibrium is always compromise between a majority regime and institutional forms of minority protection and power sharing'. 'Federalism, Decentralisation and Conflict Management in Multicultural States', in Raoul Blindenbacher and Arnold Koller (eds), *Federalism in a Changing World: Learning from each other* (2002) 208.

[18] As explained by Yash Ghai, 'central to this framework is the constitutional recognition of communities as corporate groups and the bearers of political entitlements'; see above n 12, 818; see also Donald L. Horowitz, above n 13, 1215–1216; and Arendt Lijphart, 'Constitutional Design for Divided Societies' (2004) 15(2) *Journal of Democracy* 96–109.

[19] The inconvenience of the majority rule often explains the need for further strengthening of consociational democracy, as agreed in the case of the *Noumea Accord*. See Donald L. Horowitz, above n 13, 1215–1216. The reference to the risks of a negative vote on the conflictual issue of self-determination was naturally used by the political forces opposed to the secession of New Caledonia in order to reach an agreement with the pro-independence movement, which also illustrates the role of threat-based bargaining in constitutional reforms. As explained by John Elster, threat-based bargaining can operate 'as a mechanism of aggregation. Vote trading may of course also be considered in this perspective, with the threat being that of with-holding one's vote on an issue of vital importance to the opponent'. John Elster, above n 8, 390–395.

[20] Like the *Matignon-Oudinot Accords*, the *Noumea Accord* was designed and structured only on existing dominant party lines, and were not designed on the basis of a full participatory constitution revision process. These Accords were peace negotiations as well as institutional arrangements, which ideally would have required separate processes. As explained by Nicholas R.L Haysom, above n 14, 233:

> …when the processes are conflated, the constitution making process is unlikely to be transparent, inclusive or popular. Peace negotiations typically take place between the principal protagonists-government/military junta and insurgent leaders-in secret. They exclude significant players such as internal opposition parties, or other ethnic nationalities. This poses risks to the long-term or broader constitutional acceptability of any arrangements agreed to.

On the contrary, participatory constitution making and revision processes such as the ones experimented in Canada, South Africa, Nicaragua or Rwanda may include the establishment of elected constitutional reform commissions, training and sensitization of the population about the Constitution, consultation of the population on the content of the draft Constitution prior to its negotiation, validation of the draft Constitution, approval of the final text of the Constitution by referendum, review of the Constitution even after its implementation, or other innovations. For an analysis of these techniques, which were not used in New Caledonia apart from the approval referendum, see Vivien Hart, "Democratic Constitution Making", in *U.N Institute for Peace Special Report 107* (July 2003) 455–458.

[21] The replacement of majoritarian democracy by consensual democracy is typical of consociational constitutional arrangements. See Daniel L. Horowitz, above n 13, 1216.

[22] 27 May 1998, 8039–8044 [hereinafter *Noumea Accord*]. For a general review see Alan Berman, above n 6, 277–297; Jean-Yves Faberon, above n 15, 113–130; Olivier Gohin, 'L'évolution institutionnelle du statut de la Nouvelle-Calédonie' (1999) *Actualité Juridique Droit Administratif (AJDA)* 51; G. Rossinyol, 'Les accords de Nouméa du 5 mai 1998: un nouveau statut pour la Nouvelle-Calédonie' (2000) *Revue du Droit Public et de la Science Politique en France et à l'Etranger* 445–486.

1.2 The *Noumea Accord* (5 May 1998) and the needed constitutional reform of the status of New Caledonia

The *Noumea Accord* extends the measures already agreed under the terms of the *Matignon-Oudinot Accords*, but, in addition, strengthens the ethnic and consociational dimension of the status of New Caledonia in the following different areas such as the recognition of the responsibilities of France in the colonization of the territory,[23] the legitimacy of the decolonization of the territory, the recognition and promotion of the Kanak culture[24] and identity[25] and the recognition of a New Caledonian citizenship which attracts preferential employment and voting rights.[26]

In terms of institutions, the *Noumea Accord* modifies the status of the customary authorities, and, more importantly, proposes a staged irreversible devolution of power from the French state to decentralized New Caledonian institutions in matters such as external trade, communications, employment, rules for the administration of the provinces, education, land ownership, property rights and representation in international organizations.[27]

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[23] In this respect, the origin of the *Noumea Accord* may be characterised as 'historic revenge for lost self-determination, past discrimination, or other past wrongs', to follow the typology proposed for the 'causes of conflict within multicultural states' by Thomas Fleiner et al, above n 17, 202.

[24] Combined with the French state's undertaking to finance a Cultural Memorial of the Kanak Culture, the different obligations and transfers of powers accepted by the French state in order to promote the Kanak culture and traditions have introduced in the constitutional reform a strong emotional element, which confirms that passion plays a role in constitution making and reform. As explained by John Elster, above n 8, 364–396, feelings like self-love, *amour propre* or community pride charge the language of constitution with emotional concepts. As he explains, 'we find [passion] both in the framers and in the assumption they make about the framed (…) the call for a new constitution usually arises in turbulent circumstances, which tend to foster passion rather than reason'. On the relationship between Constitution and culture, see also Gunter Frankenberg, 'Comparing Constitution: Ideas, ideals, and ideology – toward a layered narrative' (2006) 3 *International Journal of Constitutional Law* 439–459.

[25] Hence the establishment of Kanak customary authorities (*autorités coutumières*) and special land status for customary lands (*terres coutumières*). The 1998 reform was needed because of the incapacity of the French traditional constitutional model to address the questions raised by cultural or ethnic minorities, in particular the question of 'who should govern whom', as analysed by Thomas Fleiner et al, above n 17, 199–201. As explained by these authors, France remains an old nation-state, where

> nation is made by the Constitution (…) held together by political values (…) it can incorporate other cultures as long as no political recognition is claimed for them (…) This implies that individuals are conceived as rational human beings who ignore their cultural roots (...) Their cultural identity is of no political value (…) Cultures that consider themselves excluded, and in particular those that previously inhabited the territory, may not find the ideology of the melting pot acceptable, and to that extent may threaten the legitimacy of the state.

[26] Even though this new local citizenship status is not defined by reference to ethnic conditions, but by residence conditions, as we will explain later, the *Noumea Accord* reflects the dynamics of ethnic politics in that it is based on a clear separation of the Kanaks from the rest of the New Caledonian population. To a certain extent, the Kanak identity is also defined by opposition to the rest of the local population. Furthermore, the *Noumea Accord* of 1998 also recognises the Kanak people as a 'people' (*peuple*), i.e. a nation-in-waiting, rather than a minority 'population' (*population*). This recognition of a people that would be distinct from the French people, and therefore the French nation, is unprecedented in French constitutional law, because of the indivisibility of the French nation stated under Article 3 of the *Constitution* of the French Republic. This terminology implies that the Kanaks qualify as a colonised people rather than an ethnic minority, which opens new Kanak perspectives for a decolonisation process that would be based on UN principles and practice rather than French constitutional law. As explained by Ulrich Preuss, 'ethnic politics involves a "re-naturalization" politics in that "ascriptive" properties determine the perception of oneself, of others, and of society at large'. See Ulrich Preuss, 'Rule-making and policy actors in the transition and the issue of the strategy of transformation' (2001) 53 *Studies in East European Thought* 193.

[27] For a complete review of the complete devolution process in respect of these different matters, see Jean-Yves Faberon, above n 15, 113–130; Jean-Yves Faberon and Guy Agniel, *La souveraineté partagée en Nouvelle-*

The last step of this devolution process will follow the referendum on the final status of New Caledonia, to be held between 2014 and 2018.[28] If the voters so decide, New Caledonia will be given international full-responsibility status, New Caledonian citizenship will be converted into nationality and all powers currently reserved for the French state will be transferred to New Caledonia (including justice, public order and security, defense, currency and international affairs).[29]

To operate such a major transformation of New Caledonia, a substantial constitutional reform was required, even though this reform remains an interim reform[30] as long as there is not a referendum on the independence of this territory.[31]

Certainly, the *Noumea Accord* of 5 May 1998 appears to be the first step of the constitutional elevation of the legal status of New Caledonia insofar as it states a different and single legal framework for New Caledonia within the French *Constitution*. The contribution of the *Noumea Accord* to the constitutional definition and regime of New Caledonia was subsequently confirmed in 1999 by the French Constitutional Court (*Conseil Constitutionnel*), which ruled that the *Noumea Accord* is in itself an agreement of a constitutional nature and thus is part of the French Constitutional principles.[32]

Calédonie et en droit comparé (2000); Olivier Gohin, above n 22, 51; Philippe Portet, 'Le nouveau statut de la Nouvelle-Calédonie' (1999) 3 *Revue de la Recherche Juridique* 938; François Luchaire, above n 15; Mathias Chauchat, 'Transferts de compétence et avenir de la Nouvelle-Calédonie' (2007) *Actualité Juridique Droit Administratif (AJDA)* 2243–2247.

28 Following the ten-year transitional period contemplated by the *Matignon-Oudinot Accords*, the new transitional phase reserved by the *Noumea Accord* for the preparation of the referendum on the emancipation of New Caledonia confirms that 'important design and process elements can add tens of years to constitutional lives, perhaps allowing the charters to survive even these intense shocks' as noticed by Tom Ginsburg, Zachary Elkins and James Melton, *The Lifespan of Written Constitutions* (2007) 3. However, a time-limit for the transition is also necessary because, as explained by John Elster, 'if people find themselves with all the time they need to find a good solution, no solution at all may emerge'. Above n 8, 395. For contrary examples that do not validate this statement, such as the latest Polish constitutional reform, see Laurel E. Miller, above n 16, 638–639.

29 See *Noumea Accord*, Paragraphs 3.3 and 5.

30 As explained by Laurel E. Miller, above n 16, 625, an interim constitutional arrangement

> may take a variery of forms, including a fully elaborated but explicitly temporary constitution, a statute that serves in place of a constitution, or a political agreement among conflicting parties who intend to engage in constitution making. Whatever the form, two main aspects of such arrangements relevant to constitution-making processes are, first, the provision of operative transitional measures intended to serve as a constitutional placeholder, and, second, the specification of fundamental principles to guide the future…

31 This major constitutional reform was a condition of the political stabilization of New Caledonia required by the deferral of the referendum on the independence of the territory for an additional period of ten years. It illustrates 'the role that negotiations over a constitution play in resolving conflict, rather than making a constitution after conflict has ended', as explained by Yash Ghai, above n 12, 824. In this respect the experience of New Caledonia offers some similarities with the interim constitutional arrangements used in South Africa in 1993, which were 'intermediate reforms made for a transitional period where there is a need for immediate compromises not suited for a constitution that is meant to endure, and where it is not feasible to craft those compromises in a democratic and transparent forum', as described by Laurel E. Miller, above n 16, 625.

32 Conseil constitutionnel [French Constitutional Court], decision n° 99-409 DC, 15 March 1999, on New Caledonia, NOR CSCL 9903472S and NOR CSCL 9903473S. Here again the case study of New Caledonia offers some similarities with the 1993 constitutional reform process in South Africa, where the Constitutional Court also protected the constitutional rank of the initial constitutional arrangement, even though this document was agreed on an interim basis. For an analysis of the South African constitutional reform, see Laurel E. Miller, above n 16, 626–627.

However, such a political agreement as the *Noumea Accord* was not contemplated in 1998 as sufficient to fix the legal status of New Caledonia. It was rather a new step of a constitutional reform process which had already started and had to be followed by different steps and sequences.[33]

A substantial revision of the content of the French *Constitution* of 4 October 1958 was required to provide New Caledonia with a new and 'tailor-made' status.[34] This revision was implemented by the *Loi Constitutionnelle (Constitutional Act) No. 98-610* of 20 July 1998,[35] which provided for a referendum on the *Noumea Accord* on the one hand (Article 2), and allocated an entire new and single title in the French *Constitution* to New Caledonia (Article 1), on the other.

This allocation of an entirely new title to New Caledonia in the *French Constitution* (i.e. Title XIII, which grouped the new Articles 76 and 77 resulting from the *Constitutional Act* of 20 July 1998) meant that the constitutional revision was aimed at vesting New Caledonia with a constitutional status different from the status of Overseas Territory (T.O.M.) as governed by other titles (Title XII) and Articles (72, 74) of the French *Constitution*.

Subsequently, as the result of the approval of the *Noumea Accord* by a large majority of the population in the referendum of 8 November 1998,[36] the new and single constitutionally defined legal status of New Caledonia was to be completed by several implementation laws.

Therefore, according to the newly revised French *Constitution*, a *Loi Organique* (Organic Act) and a *Loi Ordinaire* (Ordinary Act) were drafted to define and govern the steps needed to implement the *Noumea Accord*.[37]

The *Organic Act (Loi Organique) No. 99-209* of 19 March 1999 was passed to implement the *Noumea Accord*, particularly for the procedures and time schedule of the transfer of major responsibilities from the French state to New Caledonian local authorities.[38] This was

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[33] Because of this sequencing, and the articulation of its different steps, and its intention to rebuild a new social contract of government in New Caledonia, the language of the *Noumea Accord* reflects more a constitution-building process than a simple constitution-making process. On the distinction between constitution building and constitution making, see *IDEA Report* (2011).

[34] As explained by Alan Berman, above n 6, 282, 'France was forced to revise its constitution to allow for a change in the territorial status of New Caledonia within the French Republic'.

[35] *Loi Constitutionnelle nº 98-610 du 20 juillet 1998* [Constitutional Act] (France) JO, 21 July 1998, 1143. This *Constitutional Act* was subsequently revised by the *Loi Constitutionnelle nº 2007-237 du 23 février 2007* [Constitutional Act] (France) JO, 24 February 2007, 3354. For a critical review of this Act, see Olivier Gohin, above n 22, 51; Jean-Yves Faberon, above n 15, 113–130.

[36] Pursuant to Article 2 of *Loi Constitutionnelle nº 98-610 du 20 juillet 1998* [Constitutional Act] (France) JO, 21 July 1998 concerning New Caledonia. For a full description of the approval process, see Jean-Yves Faberon, above n 15, 113–130.

[37] Under French constitutional law, statutes can be promulgated in two forms: ordinary statutes or organic/institutional statutes. Institutional or organic statutes are designed to implement the *Constitution* as they further provide for the organization of powers or entities of a constitutional nature.

[38] See *Loi Organique nº 99-209 du 19 mars 1999* [Organic or Institutional Act] (France) JO 21 March 1999, 4197. Pursuant to Article 3 of the *Constitutional Act No 98-610* of 20 July 1998 relating to New Caledonia, the purpose of this act of enforcement was to 'ensure the development of New Caledonia with full respect of the orientation set down by the [Noumea Accord] and in compliance with the procedures required in respect of the same, the transfer of State power to the institutions of New Caledonia, timing and procedures for these transfers, and the sharing of the resulting costs'.

followed by a *Loi Ordinaire* (Ordinary Act)[39], and has also been revised several times since 1999.[40]

This chain of constitutional, organic and ordinary laws, which were required to implement the new constitutional status of New Caledonia, and which have all a constitutional function, is typical of the growing development of a 'Constitution outside the Constitution' as observed by authors like Ernest Young or Tom Ginsburg.[41]

1.3 Effect of the constitutional reform on the decentralization and transfer of sovereign powers from the French state

The new constitutional status of New Caledonia is unique, specific and unprecedented in French constitutional history.

1.3.1 New sharing of competence and sovereignty between the French state and local authorities

The new political and administrative structure of New Caledonia strengthens the devolution of power by applying a fairly strict limitation on French state powers, which are reduced to the pillars of French sovereignty, and by widening local normative and executive powers, whilst awaiting a new consultation on full emancipation expected to take place during the Congress session commencing in 2014; or, in any event, before 2018.[42]

The new status of New Caledonia is based on the principle of "shared sovereignty" (*souveraineté partagée*).[43] This implies that executive and law making sovereign powers can be "jointly shared" between the French central state and New Caledonia, and not simply

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[39] *Loi Ordinaire n° 99-210 du 19 mars 1999* [Ordinary Act] (France) JO, 21 March 1999, 4226 (relating to New Caledonia).

[40] It was modified by the *Loi Organique n° 2007-223 du 21 février 2007* (France) JO, 14 April 2007, 6818; the *Loi Organique n° 2009-969 du 3 août 2009* (France) JO, 6 August 2009,13095; the *Loi Organique n° 2009-1523 du 10 décembre 2009* (France) JO, 11 December 2009, 21379; the *Loi Organique n° 2011-333 du 29 mars 2011* (France) JO, 30 March 2011, 5497; the *Loi Organique n° 2011-410 du 14 avril 2011* (France) JO, 19 April 2011, 6826; the *Loi Organique n° 2011-870 du 25 juillet 2011* (France) JO, 26 July 2011, 12705; the *Loi Organique n° 2013-906 du 11 octobre 2013* (France) JO, 12 October 2013, 16824; the *Loi Organique n° 2013-1027 du 15 novembre 2013* (France) JO, 16 November 2013, 18616; and the *Loi Organique n° 2015-987 du 5 août 2015* (France) JO, 6 August 2015, 13481. We refer here to the consolidated and updated version of the *Organic Act No 99-209* of 19 March 2009 [hereinafter *Organic Act No 99-209*] as available from the French official legislation website, www.legifrance.fr. For a review of the recent evolution of the status of New Caledonia see Mathias Chauchat, above n 27, 2243–2247; Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 193; Laurence Henry, 'La Nouvelle Calédonie est-elle encore une collectivité territoriale de la République?' (2008) *Revue de la Recherche Juridique: Droit Prospectif* 2135–2149.

[41] See Ernest A. Young, 'The Constitution Outside the Constitution' (2008) 117 *Yale Law Journal* 100; see also Tom Ginsburg, Zachary Elkins and Justin Blount, 'Does the Process of Constitution-Making Matter?' (2009) 5 *Annual Review of Law and Social Sciences* 201.

[42] The purpose of the *Noumea Accord* was supposed to 'ensure the development of New Caledonia with full respect of the orientation set down by this agreement and in compliance with the procedures required in respect of same, the transfer of State power to the institutions of New Caledonia, timing and procedures for these transfers, and the sharing of resulting costs'. Article 3, *Loi Constitutionnelle n° 98-610 du 20 juillet 1998* concerning New Caledonia.

[43] As explained by Dominique Custos, above n 2, 99,

> this term refers to the transitional partitioning of powers between the French Republic and one of its territories in the Pacific in which the indigenous Melanesian people have been fighting for independence and have been opposed to descendants of French settlers advocating French rule. Under such "shared sovereignty", henceforth inscribed in a specific title (Title XIII) of transitional provisions of the 1958 Constitution, the powers of the central government are enumerated.

distributed or decentralized.

The powers reserved for the French state are enumerated symetrically.

The devolution process is gradually arranged in three distinct phases and on an irreversible basis.[44] This gradual devolution process is typical of interim constitutional reforms, which promote constitution making or revision as "a process rather than a once-and-for-all defining moment",[45] and gives enough time to "transform enemies into adversaries", "find procedural support for reconciliation" and enhance equality and diversity among different multicultural minorities.[46]

In respect of institutions, the *Noumea Accord* and the *Organic Act* have organized the devolution of both the executive and legislative powers in New Caledonia.

The *Haut Commissaire de la République* (French Government's Delegate or High Commissioner) remains in office to exercise the powers of the French Republic which are not transferred to the New Caledonian authorities, and represents the French government.

Executive power is transferred to a collegial multi-party government, known as the *Gouvernement de la Nouvelle Calédonie* (New Caledonia's Government), whose composition is decided by the Congress and to which the government is responsible. This government represents the executive branch and exercises all executive powers that were previously exercised by the French Government's Delegate.

The President of the Government promulgates the legislation and regulations issued by the New Caledonian Congress, represents New Caledonia in court and is the head of the civil service of New Caledonia. The President of the Government is given new powers in respect of international relations since he or she can be authorised by the French central government to negotiate and sign treaties with Pacific states, territories and regional organizations or specialised bodies of the United Nations, or participate in these negotiations and this signature, as a member of the French delegation.[47]

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[44] In accordance with Paragraph 3 of the Preamble of the *Noumea Accord*, there is immediate devolution of powers in the area of employment regulation, trade, natural resources and primary education, postal and telecommunication services, shipping services, administration of the Provinces and customary mediation in sentencing. During the second and third five-year Congressional terms of office, other powers are transferred to New Caledonia, including: policing and security regulations for domestic air and sea traffic; rules for civil defense; accounting and financial regulations for Territorial local administration entities; civil and commercial law; land ownership, real property rights; rules for administration of communes (municipal districts); administrative control over local administration entities and their controlled entities and secondary education. For more details see François Luchaire, above n 15, 35.

[45] As explained by Vivien Hart, above n 20, 449. As she suggests, '"interim" or "transitional" constitutions that include guarantees for a continuing, open and inclusive process for the longer term offer one solution to urgent needs for a framework of governance in new, divided, or war-torn nations'.

[46] Which are all techniques and policies that can be used by multicultural states to meet the challenge of multiculturalism according to Thomas Fleiner et al, above n 17, 204–205.

[47] See Articles 28, 29 and 30 of the *Organic Act No 99-209*. In accordance with Article 28 of this *Act*, the President of the Government can negotiate international treaties and accords in respect of matters which are relevant to the New Caledonian authorities, provided that the French central government authorises this negotiation and delegates the power to sign. On such international powers see Cameron Diver, 'La Nouvelle-Calédonie dans l'exercice des ses relations internationales: l'Accord de Siège entre le Gouvernement de la République Française et la Communauté du Pacifique' (2004) 3(1) *Revue Juridique, Politique et Economique de la Nouvelle Caledonie* 10–13.

The *Congrès* (Congress) is the local Parliament of New Caledonia. Members of Congress are elected for five years. As the deliberative and representative assembly of New Caledonia, the Congress enacts laws for New Caledonia as a whole, which apply to the entire territory and all the *Provinces* (Provinces).[48]

Indeed, this is the devolution of powers to the Congress which informs the special essence of the new status of New Caledonia.

1.3.2 Devolution of the law-making process

The Congress of New Caledonia is vested with legislative power and operates as a parliamentary assembly in charge of law making for the entire territory, within the scope of its competence and the powers transferred from the French state to the Congress, which represent 12 major areas of intervention.[49]

According to the *Loi Organique (Organic Act) No 99-209* of 19 March 1999, it is for this new parliamentary assembly to adopt local laws reserved for New Caledonia and called "statutes of the country" (*lois du pays*), which are of a legislative force (see Article 107) though they remain different from the laws issued in metropolitan France by the French Parliament.[50]

As such, parliamentary *lois du pays* are vested with a legislative status: they can only be challenged by the *Conseil Constitutionnel* (Constitutional Court),[51] the French Constitutional Supreme Court, which checks the compliance of all the parliamentary laws issued in a French territory with the French *Constitution* and other constitutional rules.

In respect of the matters transferred to New Caledonia, New Caledonia's Congress is given the same powers as those which the French *Constitution* gives to the French Parliament exercising legislative power in France, even though the devolution is arranged step-by-step.[52]

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[48] As a result of the 1998 reform, New Caledonia is also divided in three different Provinces: the North Province, the South Province (including *Kunié* Island) and the Province of Loyalty (*Loyauté*) Islands (*Ouvéa, Lifou, Tiga and Maré*). For further definitions, see Olivier Gohin, above n 22, 51; Jean-Yves Faberon and Guy Agniel, above n 27; François Luchaire, above n 15.

[49] In accordance with Article 99 of the *Organic Act No 99-209* the New Caledonian Congress has legislative competence for essential matters, including:

> 2°- Regulations concerning the calculation base and collection of all taxes duties or levies whatsoever;
> 3°- Basic principles of labor law, trade union law and social security law;
> 4°- Regulations relating to foreign worker access to the job market; (…)
> 6°- Rules relating to hydrocarbons, nickel, chrome, cobalt and rare earth elements; (…)
> 8°- Rules concerning access to employment; (…)
> 10°- Underlying principles concerning ownership, real property rights and civil and commercial obligations.

[50] See also Article 2.1.3 of the *Noumea Accord*. The legislative nature of the *lois du pay*s has been acknowledged by most of French constitutional law specialists; for instance, see Olivier Gohin, above n 22, 51; Régis Fraisse, 'La hiérarchie des normes applicables en Nouvelle-Calédonie' (2000) 16-1 *Revue Française de Droit Administratif* 81.

[51] This condition was included in the *Noumea Accord* itself (Article 2.1.3) in order to guarantee a maximum legal force of the *loi du pays* against any potentially conflicting rule, except Constitutional rules. In accordance with Article 73 of the *Organic Act No 99-209*, the draft *lois du pays* can be initiated either by the Government of New Caledonia or directly by the Congress of New Caledonia.

[52] This allocation of competence and 'shared sovereignty' to the New Caledonian Congress is a direct consequence of the intention of the French public authorities to grant genuine legislative power to this

This also means that the New Caledonian Congress is given substantial law-making powers. If the French state retains jurisdiction in respect of foreign affairs, justice, defense, public order and treasury, the New Caledonian Congress is empowered to legislate in respect of all matters already transferred to New Caledonia under the 1988 agreement, and also all new matters enumerated in the *Organic Act No 99-209* of 19 March 1999 such as mining[53], local employment[54] or international relations.[55]

In addition to tax legislation[56], the Congress of New Caledonia is also empowered to define and govern under its own legislation the economic, social, commercial and foreign investment policy of New Caledonia,[57] which entitles New Caledonia to govern its own future economic and social development.[58]

In this respect, because the Congress was also transferred quasi-exclusive authority in respect of mineral legislation,[59] it is not surprising that one of the first pieces of legislation implemented by the Congress was dedicated to the development of foreign investments in the mining sector of New Caledonia.[60]

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representative assembly, identical to those exercised by the mainland French Parliament. As explained by Dominique Custos, above n 2, 115:

> these local institutions are the national ones in miniature (…) Until shared sovereignty, as an Overseas Territory, New Caledonia's Congress could only issue administrative acts subject to judicial review by administrative courts. Under shared sovereignty, in addition to its rulemaking powers, as an 'Overseas country', New Caledonia's Congress may vote statutes, which are called statutes of the country, in enumerated areas. It is symptomatic that the procedural provisions regarding the formation of these local statutes mirror those applicable to the only statutes known in French law until then, i.e those adopted by the national parliament.

53 See arts 39–42 of the *Organic Act No 99-209*.

54 See ibid art 24.

55 See ibid arts 28–33.

56 This competence also derives from Article 22-1o of the *Organic Act No 99-209*, which situplates that the New Caledonian authorities have jurisdiction in respect of the following matters:

> taxes, duties and levies collected for the benefit of New Caledonia; creation or allocation of taxes, levies and duties for the benefit of funds reserved for local municipalities, public establishments or organisations vested with public service responsabilities; creation of taxes, duties and levies for the benefit of the Provinces, the Communes, and public establishments of cooperation between the Communes…

57 In accordance with Articles 22 and 99 of the *Organic Act No 99-209*.

58 In this respect, this constitutional design is also intended to prevent political conflicts by enabling an acceleration of economic development at local level. As explained by Thomas Fleiner et al, above n 17, 210, 'decentralised forms of government help to dilute potential conflicts by giving some political power and some control over economic resources to all parts of the population, including minorities'.

59 Article 99-6 of the *Organic Act No 99-209* explicitly included one specific provision in this purpose, in order to authorise the Congress of New Caledonia to legislate in respect of 'hydrocarbons, nickel, chrome, cobalt and rare earth elements'. This competence was extended to rare earth elements under the last revision of the *Organic Act No 99-209* by the *Organic Act No 2013-1027* of 15 November 2013 (see *Loi Organique No 2013-1027 du 15 novembre 2013* (France) JO, 16 November 2013, 18616).

60 The Congress of New Caledonia is empowered to enact tax laws as well as mineral laws, in accordance with Article 99-1 and 6 of the *Organic Act No 99-209*. The French territory of New Caledonia is part of a group of countries which have the largest nickel deposits of the world, which may be estimated at some 40 million tonnes, representing one quarter of the world's known nickel resources. Nickel represents the principal source of export earnings. For further details and references on nickel mining in New Caledonia, see Guillaume P. Blanc, 'Environmental regulations and mining industry in New Caledonia' (1999) *Mining Journal, Mining Environmental Management supplement* 17–18; Elsa Faugere and Isabelle Merle, *La Nouvelle-Calédonie, vers un destin commun?* (2010).

The Congress enacted a new *Mining Code* in 2009, but started its intervention in the mining sector legislation through the enactment of tax laws specifically applicable to the mining sector.[61]

In relation to employment legislation, the Congress of New Caledonia is authorised to enact legislation designed "to bolster and promote local employment" to such an extent that it can reserve employment for citizens of New Caledonia or residents who have been residents during a minimum number of years in the territory.

1.3.3 Recognition of New Caledonian citizenship

There is recognition of New Caledonian citizenship under Article 4 of the *Organic Act No 99-209* of 19 March 1999, which gives preferential rights on the basis of the residency status[62] in respect of employment or the right to vote when there is a consultation on the full emancipation of the territory between 2014 and 2018.[63] French citizenship is a condition of the granting of New Caledonian citizenship, both citizenships being cumulated.[64]

By defining constitutionally special citizenship, voting, employment and social rights for a specific part of the population of New Caledonia, the 1998 reform represents a considerable innovation in French constitutional law[65] in that traditionally, as explained by Dominique Custos, "French citizenship pays attention only to an abstract individual and limits enjoyment of citizenship-based rights to civil rights (…) New Caledonia citizenship concerns itself with the real environment of its beneficiaries and accordingly also grants social rights".[66]

Because the regime of this new New Caledonian citizenship is associated with primordialism and priority employment rights, separate electorate rolls, proportionality electoral rules for the election of the Congress, the collegiality of the Government, and the right to choose identity

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61 For an overview of the competence of the Congress of New Caledonia in respect of mining, see Guillaume P. Blanc, 'Recent changes in the Institutional and Legal Framework for the Mining Industry in New Caledonia' (2002) 6 *International Energy Law and Taxation Review* 146–152.

62 This citizenship was defined by reference to residency in order to avoid any reference to ethnic or racial conditions, which would have created discriminations totally incompatible with French constitutional law. In this respect, the 1998 constitutional reform used an inclusive method

> by which the democracy can function in a more inclusive manner, granting greater benefits for minorities, a stake holding and ownership of the system without recourse to the explicit constitutionalisation of ethnic categories (…) By choosing not to constitutionalise an ethnic basis of representation, it allows the society to move towards interest-based politics, and the impact of other cross-cutting identities (e.g.class, region, occupation) to blur the raw ethnic dyamic encouraged by opportunistic elites.

Nicholas R.L. Haysom, above n 14, 225.

63 For an analysis of this citizenship from a comparative Australian-New Caledonian perspective, see Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 193.

64 As explained by Mathias Chauchat and Vincent P. Cogliati-Bantz, 'while a New Caledonian citizenship was created in 1998 by agreement between the French and New Caledonian representatives, this local status is superimposed on the French citizenship that New Caledonians possess and therefore is concurrently held with their French nationality'. Ibid 193.

65 This innovation reveals that 'constitutional frameworks, whether inherited or long entrenched, appear incapable of managing the increasing assertiveness of identity politics' where 'conflicts are about the very sense of who the protagonists are, and about the survival or recognition of their identity (…) Whether there is little or no shared concept of the "nation", only the group identities matter'. Nicholas R.L. Haysom, above n 14, 216–218.

66 See above n 2, 120.

symbols for the territory,[67] the status of New Caledonia meets most of the tests of a consociational model.[68]

These rules can be compared to the affirmative action[69] or black empowerment principles that have been enshrined in other constitutional or organic/institutional documents in different developing and formerly colonised territories, which belong to "independence" or "ethnic" constitutions.[70]

2. ELEVATED, ISOLATED AND TRANSITIONAL NATURE OF THE CONSTITUTIONAL STATUS OF NEW CALEDONIA

New Caledonia's constitutional status has been not only elevated, but also isolated and confined.

There is a "confinement" of the concept of shared sovereignty to New Caledonia, such concept remaining accepted for New Caledonia on an exceptional basis, in order to avoid the multiplication of potentially concurrent sovereignties within the French constitutional system.[71]

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[67] In accordance with the *Noumea Accord*, the Congress of New Caledonia voted in 2010 a *loi du pays* which defines three new 'identity symbols' (*signes identitaires*) for New Caledonia, including a new anthem and new symbols on New Caledonian bank notes. See *loi du pays nº 2010-11 du 9 septembre 2010* (New Caledonia) JONC N° 8537, 8264. With the consociational model, as explained by Donald L. Horowitz, above 13, 1215–1216, 'the underlying principles are proportional inclusion, mutual group vetoes on major issues and group cultural autonomy'; see also Arendt Lijphart, above n 18, 96–109.

[68] The restrictive rules governing access to New Caledonian citizenship, the New Caledonian electorate and the electorate allowed to vote on the emancipation of the territory are designed to secure a possible majority position to the Kanak voters in respect of key elections related to matters of major concern for them, i.e. Provincial elections and the future consultation on self-determination. These provisions have been sharply contested by the 23,000 French citizens who are not able to vote in elections for the three provincial assemblies and Congress. However, a succession of international bodies has recognised that these alleged 'discriminatory' laws are valid in the context of a decolonisation process. An appeal to the UN Human Rights Committee was rejected in July 2002, and the January 2005 ruling by the European Court of Human Rights in the case of *Py v. France* (European Court of Human Rights, Application No 66289/01, 6 June 2005), rejected claims that restricting voting rights for French nationals in assembly elections was discriminatory. For further details, see Nic Maclellan, 'Under a new flag? Defining citizenship in New Caledonia' (SSGM Discussion paper 2010/2, State, Society and Governance in Melanesia Project, ANU, Canberra, 2010).

[69] This policy is typical of affirmative action models which promote equality for all communities. As explained by Thomas Fleiner et al, above n 17, 204, 'some states may go beyond tolerance by extending it not only to individuals but also to their communities, through a policy of affirmative action, falling short of collective rights. Affirmative action is directed to individuals who have unequal opportunities because they belong to a minority against which there is or has been discrimination'.

[70] As classified by Yash Ghai. The constitutional reform of New Caledonia belongs to both generations of constitutions. It integrates some of the features of an independence constitution because it intends to achieve the decolonization process, but it also innovates with constitutional asymmetries and consociational rules in order to do justice to the native ethnic group of the Kanaks. As Yash Ghai explains, in independence constitutions 'the structures of the state were redesigned to introduce democratic forms of representation based on a new concept of citizenship, not always equal or universal and also qualified by differentiation and inequality explicit in customary laws'; see above n 12, 817–819; see also Donald L. Horowitz, above n 13, 1213.

[71] As explained by Dominique Custos, above n 2, 99: 'Evaluated against the backdrop of the evolution of the French constitutional system, the status of New Caledonia appears to be a transitional and isolated regime in the overall constitutional scheme on which it has already produced some systemic effects'.

2.1 Lack of an explicit constitutional definition of New Caledonia

Although New Caledonia has been vested with a new and specific legal status of a constitutional nature, this status is not clearly defined by explicit and specific provisions.

Following the *Noumea Accord* and the amendment of the French *Constitution* (see new Articles 76 and 77) by the *Constitutional Act* of 20 July 1998,[72] New Caledonia ceased to be a French Overseas Territory (T.O.M.) and became a single and new type of French territory which is only called "New Caledonia" (*La Nouvelle-Calédonie*).[73] New Caledonia is now a *sui generis* collectivity, which benefits from specific institutions created for it alone.

New Caledonia remains different from the "Overseas Departments" (*Départements d'Outre-Mer*) or the "Overseas Regions" (*Régions d'Outre-Mer*) which are governed by the principle of legislative assimilation.[74]

It is also different from the category of "Overseas Territories" (*Territoires d'Outre-Mer*) which existed when the new constitutional status of New Caledonia was promulgated, and it is still different from the "Overseas Territorial Units" (*Collectivités Territoriales d'Outre-Mer*) which have replaced the "Overseas Territories" as a result of a constitutional amendment of the French Constitution in 2003.

However, there is no explicit definition of this *sui generis* collectivity.

The drafters of the *Noumea Accord* and the *Organic Act No 99-209* of 19 March 1999 only referred to "New Caledonia" without any more qualifications.[75] Even though there is a reference to New Caledonia as a "country"[76] which can enact "statutes of the country" (*lois du pays*), this concept of overseas "country" has not any constitutional definition. [77]

New Caledonia is classified as a *Collectivité territoriale d'Outre-Mer à statut spécifique* (literally, "Overseas territorial collectivity with a specific status"), but this definition could also be used for other French communities located overseas and benefiting from a specific status, particularly Collectivités Territoriales of French Polynesia, Wallis & Futuna and St-Barthélémy.

Therefore, the characterization of New Caledonia amongst all other French overseas dependencies is more difficult now, as New Caledonia is subject to a tailor-made and single status that did not exist before the constitutional revision of 1998.

2.2 Separation from other legal classes of French overseas dependencies

The formal change in the qualification of New Caledonia clearly means that the framers of the *Noumea Accord* and the *Organic Act No 99-209* of 19 March 1999 wanted to distinguish New

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[72] This reform was implemented by the *Organic Act No 99-509* dated March 19, 1999.

[73] New Caledonia is now subject to new Sections 76 and 77 of the French *Constitution* and is excluded from the scope of application of sections of the Title XII of the French *Constitution* that are entirely devoted to Overseas Territories (Sections 73–74).

[74] See Article 74 of the French *Constitution*.

[75] As explained by Dominique Custos, above n 2, 127, 'it constitutes a third category of French overseas sub-national units which currently, under the constitution, has no specific name'.

[76] See Article 1.5 of the Preamble of the *Noumea Accord*.

[77] See Olivier Gohin, above n 22, 52; for a dissenting opinion, see Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 193.

Caledonia from the other usual categories of French Overseas Territories (T.O.M.) which applied at that time.

The *Noumea Accord* defines New Caledonia as an "overseas collectivity provided with a specific status" (*Collectivité territoriale d'Outre-Mer à statut spécifique*) and never mentions the concept of T.O.M.[78], even though New Caledonia was precisely qualified as a T.O.M. until this agreement.

The French *Constitution* as revised by the *Constitutional Act No 98-610* of 20 July 1998 mentioned above allocated an entire new title (Title XIII) to New Caledonia, which means that New Caledonia was provided with specific constitutional provisions separate from the provisions then governing not only the Overseas Territories (*Territoires d'Outre-Mer* (T.O.M.)) (Article 74) but also Overseas Departments (*Départements d'Outre-Mer*) (Article 72) and Overseas Collectivities (*Collectivités Territoriales*) (Article 72).

In addition, according to Article 222-IV-1o of the *Organic Act No 99-209* of 19 March 1999 relating to New Caledonia, the existing and future legislative or regulatory laws must no longer refer to the "Territory" of New Caledonia but only to "New Caledonia", which clearly means that any confusion between "Overseas Territory" or T.O.M. and New Caledonia is prohibited.

According to the specialty of legislation principle, which still applies to New Caledonia, it is necessary to expressly provide for the extension of any new law to "New Caledonia" for ensuring the applicability of such new law in New Caledonia. Simply mentioning "overseas territory" or even "territory" is no longer sufficient.

Furthermore, pursuant to this Constitutional special regime of New Caledonia, the French legislators clearly and expressly rejected all the usual terminological categories used for classifying overseas territories when they drafted this *Organic Act No 99-209* of 19 March 1999.

Responding to an amendment submitted by Simon Loueckhote (Representative of New Caledonia) within the French Senate and aimed at vesting New Caledonia with the status of a "Overseas Collectivity" (*Collectivité Territoriale*),[79] the French Parliament and the French Government expressly rejected both the qualifications of T.O.M. or *Collectivité Territoriale* for New Caledonia.[80] This exclusion was also subsequently confirmed by the French courts.[81]

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78 See *Noumea Accord* (France) JO, 27 May 1998, 8039–8044.

79 For a description of the different categories of overseas territorial units see François Luchaire, above n 15; and also Jean Gicquel et Jean-Éric Gicquel, *Droit constitutionnel et institutions politiques* (2009); see also Michel de Guillenchmidt, *Droit constitutionnel et institutions politiques* (2008).

80 As it is expressly declared by the French Parliament: 'Although New Caledonia is a collectivity, it has such a specific status that it is governed by a reserved title of the French Constitution. It is no longer a *territoire d'outre-mer* (TOM), and it is not a *collectivité territoriale de la République* as governed by article 72 of the French Constitution'. See Parliamentary debates on the draft Organic Law relating to the legal status of New Caledonia, (France) JO Senat CR, 3 February 1999, 651 (Amendment n° 233 submitted by Senator Simon Loueckhote).
As one of the leading Magistrates of the Administrative Court of Noumea (*Tribunal Administratif de Nouméa*) noticed, 'New Caledonia is no longer neither a T.O.M. nor a *Collectivité Territoriale de la République* like Saint-Pierre-et-Miquelon and Mayotte.' Regis Fraisse, above n 50, 77.

81 The *Conseil d'Etat*, i.e. the French highest administrative court, ruled in 2006 that New Caledonia cannot qualify as an 'Overseas Territorial Collectivity' (*Collectivité Territoriale d'Outre-Mer*) as defined under Article 72 of Title XII of the French *Constitution*. See Conseil d'Etat [French Administrative Court], Section

From a legal substantiation perspective, regardless of the wording of the *Noumea Accord* of 1998, the French *Constitution* (Article 77) and the *Organic Act No 99-209* of 19 March 1999, one could consider that such changes only had a formal and nominal impact and did not substantially modify the very nature of New Caledonia.

Instead of adhering to the letters defining literally New Caledonia in the French constitutional, organic and ordinary laws, one could propose to go beyond the text of the French laws in order to amalgamate New Caledonia with other overseas territorial units by considering all the following features of the French overseas territories or territorial units that still exist in New Caledonia.

Firstly, looking at the nature of the laws issued by New Caledonia and the other French overseas dependencies which do not qualify as Overseas Departments or Regions, one can conclude that all such dependencies have in common their legal separation from laws enacted in metropolitan France; effectively, the constitutional revision of 1998 does not affect the "specialty of legislation" principle, which still applies to both New Caledonia and the French overseas territorial units.

Secondly, the right to claim for independence and secede from the French state is still conferred to both New Caledonia and the French overseas territorial units.

However, the very nature of the legal status of New Caledonia is significantly different from that of any other French overseas territorial unit. It is also more elevated than the status reserved for any other overseas dependency. As explained by Alan Berman, "New Caledonia has been conferred a status that is short of a sovereign state but more than an overseas territory".[82]

2.3 Specific elevation of the constitutional status of New Caledonia

The legislative power of the New Caledonian deliberative assembly (Congress of New Caledonia) clearly makes New Caledonia very different from all the other French overseas dependencies.

On the one hand, since the specialty of legislation principle still applies to New Caledonia, New Caledonia cannot be considered as an Overseas Department (*Département d'Outre-Mer*) or an Overseas Region (*Region d'Outre-Mer*). On the other hand, since New Caledonia can issue laws vested with a legislative and statutory value,[83] New Caledonia is not equivalent to a French overseas territorial unit (*Collectivité Territoriale d'Outre-Mer*), where a local deliberative assembly can only issue laws that have a mere administrative or regulatory rank.[84]

Within the French overseas territorial units, deliberative assemblies are only empowered to issue regulatory measures like the *Délibérations territoriales* issued by the Congress of New

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du Contentieux, 13 December 2006 [2006] Rec Lebon (case law decision 279323, *M.Genelle*), also published in *Actualité Juridique-Droit Administratif (AJDA)* 363 (commentaries by F. Lenica and J. Boucher). See also Stephane Verclytte, 'La Nouvelle-Caledonie n'est plus une collectivite territoriale' (2007) *Revue française de droit administratif* 18–26. See also comments of Mathias Chauchat, above n 27, 2243.

82 See above n 6, 282.

83 See Olivier Gohin, above n 22, 51.

84 Ibid 507.

Caledonia until 1998, and such measures are not vested with a legislative status. They are still subject to a validity control before the French Administrative Supreme Court (*Conseil d'Etat*).[85]

To take the example of the "overseas territorial unit" of French Polynesia, whose status was revised by the *Organic Act No 2004-192* of 27 February 2004,[86] the statutes promulgated by the French Polynesia assembly are also named *lois du pays* ("statutes of the country"), but these statutes, like mere regulations, can be referred to the *Conseil d'Etat*, i.e. the French Administrative Supreme Court, and not to the *Conseil Constitutionnel* or French Constitutional Court.[87]

Therefore, on the basis of the various provisions of the French constitutional, organic and ordinary laws, the respective positions of the contracting parties of the *Noumea Accord*, and the positions of the French Parliament and French academic doctrine, New Caledonia must be accepted as a new legal subdivision of the French Republic subject to a completely new and inaugural legal status, which is hardly challengeable as it is constitutionally protected.

Indeed, the status of New Caledonia also remains original, if not "baroque",[88] because the French central political powers reluctantly accepted it and, after the integration of the *Noumea Accord* into the French constitutional system, tried to confine and isolate this status so that an equivalent status or sovereignty devolution process are not claimed by other French overseas dependencies.

French legislators had to contain this status because, as suggested by Dominique Custos, it represents in many respects "a breach of the foundations of the politico-administrative architecture of the French Republic",[89] by allowing the implementation of a quasi-federal structure in New Caledonia.

2.4 Quasi-federal nature of the constitutional status of New Caledonia

By allowing shared sovereignty and decentralizing powers traditionally reserved for the French state, the constitutional status of New Caledonia has been rapidly compared with the status of a federate or quasi-federate state. [90]

First, the devolution of sovereign powers to New Caledonia is defined and protected under the terms of a new title of the French *Constitution*. This new title (Article 76) refers to the *Noumea Accord* which enumerates the powers reserved for the French state and the powers to

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85 Conseil d'Etat [French Administrative Court] 27 February 1970 reported in [1970] Said Ali Tourqui Rec Lebon 138, also published in *Actualité Juridique Droit Administratif* (AJDA) (1970) 220, with commentaries of Renaud Denoix de Saint-Marc (available at http://legimobile.fr/fr/jp/a/ce/as/1970/2/27/77577/).

86 (France) JO, 2 March 2004, 4183.

87 Regarding a comparative analysis of both the status of New Caledonia and French Polynesia, see Philippe Portet, 'Le nouveau statut de la Nouvelle-Calédonie' (1999) 3 *Revue de la Recherche Juridique* 938; Yves Brard, 'Nouvelle-Calédonie et Polynésie française: les lois du pays' (2001) 112 *Petites Affiches* 11.

88 According to Mathias Chauchat, the status of New Caledonia is even an alien construction (*étrangeté*) from a French law perspective. See above n 27, 2243.

89 Dominique Custos, above n 2, 128.

90 As explained by Dominique Custos, 'in the case of France, habitually considered the epitome of centralization this choice of technique is particularly significant as it denotes a certain balance between a centre and a periphery which equally have the ability to exercise powers'. Ibid 104.

be transferred to or shared with New Caledonian authorities.[91] Second, the new Article 77 included in Title XIII of the French *Constitution* makes this devolution of powers irreversible. For those devolved powers, different dates of transfer apply to the different powers transferred according to a prescribed devolution schedule which remains to be adjusted by the New Caledonian authorities themselves.[92]

In other words, those powers must be transferred during a certain period, but the exact date of the transfer is left to the discretion of the New Caledonian authorities, which means that such local authorities are vested with the power to define a part of the devolution process on their own. This power to define a part of the devolution process at a decentralized level is certainly of a sovereign nature and can be compared to the right that federate states have to protect their own jurisdiction from interference by the central federal powers.[93]

Thirdly, the parliamentary regime established at local level in New Caledonia, with the transfer of legislative power to the Congress, represents another feature of federalism.[94]

This federalist evolution may be seen as inevitable, because, as explained by many specialists, federalism is the appropriate constitutional mechanism to "enable diverse communities to participate in government".[95]

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91 As explained by Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 201, this methodology 'follows the US and Australian federal models: it enumerates the Caledonian powers (like the Commonwealth powers) and leaves all unlisted powers to the "Provinces" (like the States in Australia)'.

92 In accordance with Paragraph 5 of the *Noumea Accord*. According to some authors, this transfer of powers is irreversible and effective by the prescribed time limit under the constitutional provisions of the *Noumea Accord*, even though no legislation is enacted by the Congress of New Caledonia to schedule it. See Mathias Chauchat, above n 27, 2243–2247. *Contra* Olivier Gohin, 'Comment dépanner l'Accord de Nouméa?' (2008) *Actualité Juridique –Droit Administratif* (AJDA), 291.

93 The dynamics of federalism also often derive from the consociational goals of constitutional arrangements aimed at strengthening autonomy and power-sharing, if not self-determination, as it is the case in New Caledonia. As noticed by Donald L. Horowitz, above n 13, 1218, 'Consociationalists see federalism as a device to foster group autonomy in homogeneous regions or provinces'.

94 As explained by Dominique Custos, above n 2, 116:

> First the partition of the statutory power among different levels of government is in conflict with the classical politico-administrative organization of a unitary state such as France. In such a state, the expression of the general will is monopolized by the national parliament, consequently, local assemblies are confined to delegated legislation. The recognition of a New Caledonian source of statutory law (…) reflects a distribution of the expression of sovereignty among the different levels of government. To this extent, the sovereignty is shared and the legislative power is an undeniable asset of the co-sovereign status of New Caledonia. Thus such a feature provides a tangible power with which New Caledonia satisfies an important element of the autonomy requirement of the federate state.

95 As explained by Thomas Fleiner et al, above n 17, 206–207:

> Decentralisation gives communities limited autonomy and thus self-government. But central power continues to be exercised in accordance with the majority principle, and the decision as to what minority should have how much governmental power continues to depend on the majority. Only a balance between self-rule and shared rule can give communities the opportunity to promote their cultures within their territories.Only on this basis is it possible to provide the necessary base for the balanced development of all communities, together with the majority of the citizens and the people. Such a result can be constitutionally achieved only through a federal design.

2.5 Effect of the status of New Caledonia on the principle of indivisibility of the French Republic

The decentralization and division of sovereign powers resulting from the reform of the constitutional status of New Caledonia contradict several fundamental principles of French constitutional law, and in particular the principle of the indivisibility of the French Republic, its people, and the national sovereignty which belongs to its unified people.[96]

This fundamental principle of French constitutional law remains quite incompatible with the division of the legislative power into two Parliaments, i.e the Parliament of France and the Congress of New Caledonia.[97] It also fractions French citizens into French citizens who have one single national citizenship, on the one hand, and French citizens who cumulate the sub-national citizenship of New Caledonia with French national citizenship, on the other.[98]

As explained by Nicholas R.L. Haysom, "there has been a reluctance to constitutionalise difference in nation states", because this may increase secession risks, "erode the limited national identity or sens of common destiny" and entrench societies "within its segregated identities".[99]

2.6 Constitutional systemic effects of the reform of the status of New Caledonia

Because it was inspired by federalist models, the reform of the constitutional status of New Caledonia led to constitutional innovations which have affected the entire national constitutional structure of France, and not only the constitutional status of New Caledonia or other French overseas dependencies.

As explained by Dominique Custos, the new regime of "shared sovereignty"

> opens a window into constitutional change in a country conventionally portrayed as a land of entrenched centralization (…) It is an architecture torn between, on the one hand, the conventional principle pertaining to the unitary and indivisible state, and, on the other hand, the revolutionary-in the French context-principle of shared sovereignty. The first one is wide spread across the French institutional scheme; the second is limited to a single overseas subdivision. The first one is permanent, the second one is temporary. Pieced together, it presents a self-contradiction.[100]

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96 As mentioned in the very first article of the French *Constitution*: 'France shall be an indivisible, secular, democratic and social Republic'. Article 3 further provides that 'national sovereignty shall belong to the people, who shall exercise it through their representatives and by means of referendum. No section of the people, nor any individual may arrogate to itself, or to himself, the exercise thereof'.

97 As explained by certain constitutionalists, France has always been 'a unitary state, mono-constitutional and mono-legislative'. Olivier Gohin, above n 92, 291.

98 See Dominique Custos, above n 2, 117. According to Thomas Fleiner et al, above n 17, 201, an old nation-state 'is unable to accommodate a fragmented political identity (…). Either the minorities must be integrated within the majority culture, destroying their original cultural roots, or they must be denied the opportunity to enhance their cultural identity through political means. A fragmented political identity is rejected as a solution, because of is threat to the unity, homogeneity, and the very roots of the state's existence'. Although this evolution conflicts with French constitutional law, it remains quite compatible with public international law, in particular UN principles and practice of decolonisation, which recognises the specific rights of colonised peoples to claim their right to self-determination in a non-self-governing territory.

99 See above n 14, 224–225.

100 See Dominique Custos, above n 2, 105 and 129.

The integration of a hybrid, semi-federal status[101] in the French constitutional system for the purpose of appeasing political tensions in New Caledonia does not in itself guarantee a peaceful transition from decolonization to independence. However, it has already had centrifugal effects on the French overall constitutional system, which will remain, whatever is the outcome of the future referendum on the full emancipation of New Caledonia.

There is no doubt the evolution of New Caledonia fuelled other claims for self-governance, self-organization or further decentralization.[102]

Though it remains contained, the status of New Caledonia inspired the revision of the very first article of the French *Constitution* in 2003[103] which recognised the decentralized basis of the organization of the French Republic,[104] and the revision of the decentralization regime applicable to local governments within the French Republic.

Following the revision of Article 72 of the French *Constitution* in 2003, local governments part of mainland France have been granted a rulemaking power and the right to experiment with derogations from national statutes or regulations. Because this right can be exercised by all decentralized governments being part of the French central state, it can be exercised by Overseas Departments (*Departements d'Outre-Mer*), narrowing the differences between the status of Overseas Departments and the status of the Overseas territorial units which are guaranteed the right to adopt "special legislation".

In 2004, the revised status of New Caledonia also inspired the reform of the status of French Polynesia to such an extent that the French Polynesia assembly was granted the right to adopt laws named *lois du pays* like the statutes adopted by the Congress of New Caledonia.[105]

In addition, the reform of the status of New Caledonia probably inspired the reform of the special status of Corsica,[106] and to another extent, may have facilitated the approval by the French Parliament of the transfer of sovereign powers to European Union institutions at supra-national level under the European *Constitutional Treaties* of Nice and Lisbon.[107]

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[101] The status of New Caledonia still does not meet all the conditions of a federate state, in particular because of the lack of constitutional guarantees which protect the authority of the different New Caledonian powers, the lack of financial guarantees regarding the adequate provision of resources to the New Caledonian authorities, the existence of New Caledonian citizenship which creates an inequality incompatible with the equality of all citizens in a federal state, or the right to secede reserved for New Caledonian citizens. As explained by Nicholas R.L Haysom, 'federal units do not usually have the right to secede as matter of conventional practice or even under international law', above n 14, 228. For other differences between the New Caledonian status and the federal model, see Dominique Custos, above n 2, 128–129.

[102] As explained by David Marrani, 'it is obvious that France has probably forgotten, for many reasons, to take into consideration the specificities of its overseas populations and sometimes the reality of the French population itself'. David Marrani, 'Will New Caledonia be another Tokelau?' (2006) 31-2 *Alternative Law Journal* 103.

[103] Even though this reform does not apply to New Caledonia. See Mathias Chauchat, above n 27, 2244.

[104] In accordance with the new Article 1 of the French *Constitution* resulting from the amendment of 28 March 2003, France 'shall be organized on a decentralized basis'.

[105] Although, as explained, such statutes of the French Polynesia do not have legislative force, unlike the *lois du pays* voted by the Congress of New Caledonia. See Yves Brard, above n 87, 11; Dominique Custos, above n 2, 97.

[106] Dominique Custos, above n 2, 131.

[107] There are also similarities between the European Union citizenship and the New Caledonian citizenship. The status of New Caledonia was influenced by the debates about European Union citizenship, and, in return, may have influenced the evolution of French constitutional law in respect of the applicability in France of both the European and French citizenships. According to Mathias Chauchat, and Vincent P. Cogliati-Bantz,

By borrowing principles of federalism, the revised status of New Caledonia may facilitate the conversion of the French Republic to the European federal model which is actively promoted by the European Union institutions.[108] In this respect, the New Caledonian devolution process may have systemic effects not only in France, but also within the European Union, like movements such as the regionalisation of Italy or the devolution and partition process in Scotland and Wales.[109]

Accordingly, the reform of the status of New Caledonia shows an example of the possible modification of the overall constitutional system of a central state by a constitutional reform limited to one single peripheral overseas dependency of this central state, however specific and transitional this reform may appear in the first instance, in particular if this state is an old nation-state.[110]

Though this status was reserved for a peripheral territory owned by France, its effects are far from being peripheral within the French constitutional system.[111] The destabilization of the French *Constitution*[112] which resulted from the revision of this status may explain why the devolution or decentralization of sovereign powers in favor of New Caledonia has been gradually limited, in particular by the French Constitutional Court.

3. LIMITATION OF DECENTRALIZED SOVEREIGN POWERS OF NEW CALEDONIAN AUTHORITIES BY FRENCH CONSTITUTIONAL RULES AND THE FRENCH CONSTITUTIONAL COURT

On the one hand, and though they have been revised to provide for a specific status for New Caledonia, French constitutional provisions still preserve the central role of the French central institutions in the devolution process, to such an extent that there is no real sovereignty transferred to New Caledonia.

On the other hand, French courts have gradually restricted the scope and the substance of the law-making powers transferred to the New Caledonian institutions, even if court intervention might modify the balance of powers achieved by the *Noumea Accord*.

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above n 7, 199, 'reference to the European evolution could not have been ignored by the negotiators of the Noumea Agreement'.

[108] In this respect, the evolution of the New Caledonian status has sub-national as well as supra-national effects, which reflect the dynamics affecting the national levels of government in different old nation-states like France. As explained by Vivien Hart, 'Nation-states, defined by established boundaries and the sole possession of sovereignty, have been challenged from inside by claims for self-determination or secession, and from without by the proliferation of transnational political or economic treaties and powers with global reach'. Vivien Hart, above n 20, 451. For similar comments, see Yash Ghai, above n 12, 808.

[109] For a comparison between the New Caledonian devolution process and the UK devolution process, see David Marrani, above n 102, 102–103.

[110] As explained by Dominique Custos, above n 2, 131, 'whether it is analysed as an apparent or a real albeit partial partition of sovereignty, the Franco-Caledonian shared sovereignty emerges as an institutional laboratory whose catalytic effects run from the Pacific to the mainland and overseas France'.

[111] According to certain constitutionalists, the *Noumea Accord* generated a form of New Caledonian Constitution artificially inserted into the French *Constitution* through the creation of a new and isolated Title, i.e. Title XIII. It has been argued that this Title is so 'heretic' compared to the rest of the French *Constitution* that it creates another Constitution rather than amends the existing one. See Mathias Chauchat, above n 27, 2244; Olivier Gohin, above n 92, 291.

[112] For certain constitutionalists, it is the entire French public law that is destabilized by the constitutional reform of the status of New Caledonia. See Olivier Gohin, above n 92, 291.

3.1 No sovereignty of New Caledonia in respect of its sovereign powers

The whole concept of "shared sovereignty" has been questioned because unlike a true sovereign state, New Caledonia does not have the sovereign power to define what is included in its sovereignty.

Even though the local institutions of New Caledonia have been vested with executive or legislative powers, these powers are not equally shared with the French state, but remain transferred by the French state under the terms of constitutional and organic acts which are exclusively controlled by the French Parliament, not any New Caledonian parliamentary assembly.

Even though the Congress of New Caledonia was authorised to take decisions regarding the time schedule of the transfer of certain competences from the French state to New Caledonian authorities, it was not given any *pouvoir constituant*, or self-organizational powers, which it could use to modify the scope of its executive or legislative powers. In other words, New Caledonian institutions do not have "the competence of the distribution of the competences", which is another translation of *pouvoir constituant* under French constitutional law or the *Kompetenz-Kompetenz* principle under German constitutional law.[113]

The *Noumea Accord* was negotiated by France and was integrated into the French *Constitution* after its approval by referendum not only in New Caledonia[114] but also in mainland France.[115] It required a revision of the French *Constitution* by a Constitutional Act and the promulgation of an Organic Act by the French Parliament.

Because the entire *pouvoir constituant* was reserved for French sovereign institutions, any new modification of the constitutional status of New Caledonia would require the same procedure. The New Caledonian authorities would only be given the right to express an advisory opinion.[116] This limit to the level of sovereignty shared with the decentralized New Caledonian institutions, combined with the mere advisory role of the Customary Senate representing the native Kanak tribes, have generated doubts about the sincerity of the decolonization language of the *Noumea Accord*.[117]

Whatever the commitment of the French central institutions to share, and not simply delegate, sovereign powers to New Caledonia, there is no doubt that the entire devolution process has never contemplated any public participatory constitution revision regime that would authorise the New Caledonian population, including the indigenous Kanak people, to participate in any modification of the *Noumea Accord* or other constitutional provisions which may define the current or final constitutional status of New Caledonia, beyond the act of voting.

Some authors have argued that direct participatory constitution making or revision is not only a right, but a necessity to secure a sustainable legitimacy of any constitutional reform.[118] Yet,

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[113] See Dominique Custos, above n 2, 131–133.
[114] Held on 8 November 1998.
[115] Held on 20 July 1998.
[116] See Article 90 of the *Organic Act No 99-209*.
[117] For a critical review of the *Noumea Accord* as a simple disguisement of post-colonial tactics, see Alan Berman, above n 6, 277–297. *Contra* Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 193.
[118] According to Vivien Hart, above n 20, 454–458, public participatory constitutionalism is based on the idea that

as explained, even New Caledonian institutions still do not have the right to design or modify the constitutional status of New Caledonia.

3.2 Lack of a constitutional guarantee of New Caledonian powers

Because the *pouvoir constituant* remains unshared between New Caledonian institutions and French institutions, and reserved for these French institutions, the French Parliament can still amend, modify or change the constitutional status of New Caledonia despite the irreversibility of the devolution process mentioned as a general principle of the *Noumea Accord*.[119]

Because the French Constitutional Court (*Conseil Constitutionnel*) authorizes the retroactivity of laws, there is no constitutional prohibition of the retroactivity of constitutional revision laws.[120]

The *pouvoir constituant* is in itself a fully sovereign power and cannot be limited by constitutional provisions it has created. Therefore, the conclusion made by David Marrani that "the progress towards independence seems definitive" must be challenged.[121] Indeed, there is no constitutional guarantee of the stability of the New Caledonian powers and there is no mention in the *Noumea Accord* of the key words of "self-determination" or "independence".[122]

In respect of the final status of New Caledonia, the *Noumea Accord* contemplates different options, including "associated statehood", which is different from full independence.[123] Given this fact, there cannot be constitutional protection against constitutional revision of the status

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> citizens also participate directly in the conduct of public affairs when they choose or change their constitution (…) "participation is now promoted as both a right and a necessity. The right is established in international declarations and conventions adopted by most nations, as well as in many recent national constitutions. The necessity stems in part from the forceful advocacy of democracy as the sole model for legitimate governance in a would-be "new world order". Ironically, older nations in the western liberal tradition from which such calls have come have not often themselves extended the idea of democratic governance to constitution making.

France clearly belongs to this tradition, whereas there is international legal recognition of the right of the population, specially native tribes, to participate into constitution making or reform beyond the act of voting, as explained by Vivien Hart by reference to the United Nations Committee on Human Rights (UNHCR) *Marshall v. Canada* ruling (Human Rights Committee, *Views: Communication No 205/1986*, 43rd sess, UN Doc CCPR/C/43/D/205/1986 (4 November 1991) and the UNHCR General Comment on Article 25 of the United Nations International Covenant on Civil and Political Rights (ICCPR) (Human Rights Committee, *CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service*, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996). See Vivien Hart, above n 20, 454–458.

119 If this transfer is defined as irreversible, the document which defines this transfer as irreversible, is not itself irreversible, in spite of its constitutional nature, because French constitutional law is not irreversible. See Olivier Gohin, above n 92, 293.

120 Conseil Constitutionnel [French Constitutional Court], decision DC N°82-142, 27 July 1982 reported in JO, 29 July 1982, 2424. The *Conseil Constitutionnel* has held that 'the legislator cannot bind itself, as a law may always and with no conditions whether or not implicit, be repealed or amended by a subsequent law'.

121 See above n 102, 103.

122 See Alan Berman, above n 6, 292; Dominique Custos, above n 2, 124.

123 The associated statehood option has been considered multiple times, even by the Kanak pro-independence F.L.N.K.S movement, before and after the *Noumea Accord*, and even more recently in 2006 during its 37th Congress. In addition, this solution would be compatible with UN international rules since the UN General Assembly Resolution 1541 (XV) of 15 December 1960 declares that a non self-governing territory can be said to have reached a full measure of self-government by emergence as a sovereign independent State, free association with an independent State, or integration with an independent State. See Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 205.

of New Caledonia or even "trespassing" initiated by the French constitutional or parliamentary bodies in respect of competences transferred to New Caledonia. The New Caledonian authorities could not challenge the validity of constitutional revisions initiated by the French Parliament which would modify the constitutional status of New Caledonia.[124]

Here again, sovereign powers are not shared equally. The powers reserved for French institutions cannot be affected by adverse statutes or regulations issued by New Caledonian institutions. On the contrary, statutes or regulations of New Caledonia are subject to administrative and judicial review. As we will explain, the High Commissioner delegated by the French government to represent the French state is in charge of the administrative control of the validity of both the regulations and the statutes or *lois du pays*, which he can refer to the competent French courts.[125]

3-3 - Interference of the French Constitutional Court

The New Caledonian authorities have been vested with executive and legislative powers which they share with the French state, but there is still no judiciary court system exclusively controlled by New Caledonia. New Caledonia does not have a local court system of its own and all courts having jurisdiction in New Caledonia are controlled by the French courts. In this respect, New Caledonia does not have a status equivalent to that of a federate state.[126]

More importantly, from a substantial legal point of view, the jurisdiction of French courts, and in particular the jurisdiction of the highest constitutional and administrative courts of the Republic, has led to a limitation of the devolved law-making powers of the Congress of New Caledonia.

Because of the multiple controls exercised by French courts, the substance of the New Caledonian legislation must comply with French substantive superior rules and principles.

With regard to the determination of its substance, the *loi du pays* must comply with principles set down by overriding sources of law which take precedence such as the *Constitution*, international treaties ratified by the French Parliament, organic[127] and ordinary[128] laws of the French Parliament extended to New Caledonia. In addition, the *loi du pays* must also be harmonized with other principles of equal or competitive legal force such as the numerous General Principles of Law[129] given superior status under French constitutional as well as administrative law.[130]

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[124] As explained by Dominique Custos, above n 2, 125, 'such an imbalance in respective means of protection of their jurisdiction between France and New Caledonia is indicative of mechanisms of control of sub-national governments within a unitary state and greatly contradicts the reciprocity of constitutional guarantee of respective jurisdictions in a federal state'.

[125] See Articles 200 and 204 of the *Organic Act No 99-209*.

[126] See Dominique Custos, above n 2, 122.

[127] The precedence of Organic Acts, and in particular the *Organic Act No 99-209*, was confirmed in the first case law decision of the *Conseil Constitutionnel* issued in respect of a *loi de pays* on 27 January 2000. Decision n° 2000-1 LP, 20 March 2000, on the *loi du pays* of New Caledonia concerning the introduction of a general tax on services, as published in [2000] *Actualité Juridique Droit Administratif (AJDA)*, 252, with commentaries of Eric Schoettl and Olivier Gohin.

[128] See Conseil Constitutionnel [French Constitutional Court], decision n° 95-364 DC, 8 February 1995, RJC-I, 637.

[129] For an example of applicability of a General Law Principle in New Caledonia, see Michel Joyau, 'Libertés médicales, principes généraux du droit et Nouvelle-Calédonie (à propos de l'arret du Conseil d'Etat du 18

All such overriding principles do not only limit the authority of the Congress of New Caledonia in respect of its law-making power, but also the substance of the legislation it can draft and adopt. Any new law or *loi du pays* must, before discussion by the New Caledonia's Congress, be referred for opinion to the *Conseil d'Etat* (Administrative Court). Even though this court is involved as an advisory body, it can check the compliance of administrative acts with French laws[131] and international conventions.[132]

Once adopted by the Congress, but before its publication, the *loi du pays* may be referred to the *Conseil Constitutionnel* (Constitutional Council)[133], which must then check its compliance with the French *Constitution* and all French constitutional principles. In the event of a referral to the *Conseil Constitutionnel*, any constitutional restrictions may result in the annulment of the *loi du pays*.

Referral to the *Conseil Constitutionnel* is available to the Republic's High Commissioneer or Delegate of the French Central Government[134], the President of the New Caledonian Government, the Presidents of representative assemblies (Congress and Provincial assemblies) and to one-third only of Congress members.[135]

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février 1998 Section locale du Pacifique Sud de l'Ordre des Médecins' (1999) 15 *Revue Française de Droit Administratif* 67–76.

130 For a more detailed review of the legal status and regime of the *loi du pays* in general under New Caledonian and French law, see the Ph.D. thesis of Carine Gindre David, *Essai sur la loi du pays calédonienne, la dualité de la source législative dans l'Etat unitaire français* (2009). See also Regis Fraisse, above n 50, 81; and Claire Marliac-Negrier, 'Du particularisme législatif: à propos de la nouvelle catégorie juridique des lois du pays en Nouvelle-Calédonie' (2003) 57 *Revue Juridique et Politique des Etats Francophones* 173–211.

131 In accordance with Article 100 of the *Organic Act No 99-209* concerning New Caledonia, the prior review by the *Conseil d'Etat* applies in any circumstances, whether or not the draft *loi du pays* is initiated by the Government of New Caledonia or directly by the Congress of New Caledonia.
The *Conseil d'Etat* will quite obviously apply the principles which it has itself set down for the purposes of its jurdisction over administrative acts referred to it for examination in the event of disputes. Its opinion N° 364083 of 23 November 1999 on the *loi du pays* of 7 December 1999 reintroducing the general tax on services, confirms this interpretation: for commentators, the *Conseil d'Etat* did not only exercise its control *a priori*, in line with its checking of the legal basis of the framework of disputes. It also anticipated a future constitutionality check by verifying the validity of legal provisions with regard to higher constitutional principles. See comments made by Olivier Gohin (2000) *Actualite Juridique Droit Administratif* 256.
As a result, the Government of New Caledonia immediately rewrote the law to comply with the objections of the *Conseil d'Etat* (see comments of Olivier Gohin, ibid 256). Because of the preventive control exercised by the Conseil d'Etat, there have not been many referrals of *lois du pays* to the *Conseil Constitutionnel.*

132 In its opinion, the *Conseil d'Etat* can therefore check the compliance of the *loi du pays* with constitutional principles as well as international conventions, including international tax treaties. See Conseil d'Etat [French Administrative Court], Assembly, 5 March 1999, *Rouquette*, reported in [1999] *Revue Française de Droit Administratif* 357, with conclusions from Christine Maugüé.

133 See Article 104 of the *Organic Act No 99-209* concerning New Caledonia.

134 The executive powers reserved for the Delegate of the French Central Goverment enable the French state to exercise preventive controls in respect of the legislation contemplated by the Congress of New Caledonia, through this referral process, but also through the participation of the Delegate or High-Commissioneer into various Consultative Committees which must be consulted on draft laws of the Congress of New Caledonia in certain areas of particular importance for the economy of the territory, such as the *Conseil des Mines* (Mining Council), which is the specific Consultative authority in charge of all draft laws dealing with mineral resources and investments in the mineral sector in New Caledonia. The French Government's Delegate (*Haut-Commissaire de la République Française*) is the President of the Mining Council. Article 42-I-§.1 of the *Organic Act No 99-209*.

135 See Article 104 of the *Organic Act No 99-209* concerning New Caledonia. A referral of a *loi du pays* to the *Conseil Constitutionnel* was rejected because it had not been signed by a sufficient number of Congress Members. See Conseil constitutionnel [French Constitutional Court], decision n° 2006-2-LP, 5 avril 2006 reported in JO, 11 April 2006, 5439.

Furthermore, even in the event that there is no referral to the *Conseil Constitutionnel* prior to the official publication of the *loi du pays*, this law can still be subject to the control of the *Conseil Constitutionnel* if, during the course of valid legal proceedings, a claimant alleges that it is unconstitutional and asks for the opinion of the *Conseil Constitutionnel*, provided that such request is accepted by the competent court. This claimant may be given the right to ask a priority question of constitutionality (*question prioritaire de constitutionnalité* (QPC)) in respect of a *loi du pays*.[136] This right to question the constitutionality of published and promulgated legislation directly results from a recent revision of the French *Constitution* in 2008, which was extended to New Caledonia in 2009.[137]

As initially voted, the *Organic Act No 99-209* of 19 March 1999 excluded any possible legal action against a *loi du pays* after its promulgation and publication (see Article 107).

The new right to question to constitutionality of a *loi du pays* even after its publication resulting from the 2008 revision of Article 61-1 of the French *Constitution* modifies completely the legal status and stability of the *loi du pays*, and, indirectly, the stability of the devolution process agreed under the terms of the *Noumea Accord*.

Because the French Constitutional Court can now annul the New Caledonian legislation that has already been promulgated, published and applied, it becomes apparent that the French Constitutional Court has a permanent capacity to request the modification of the law made by the Congress of New Caledonia by invoking French constitutional principles.

What is more problematic, the French Constitutional Court may be in a position to choose between competing contradictory constitutional principles, in particular between the constitutional principles derived from its own well established case law and the innovative principles of the *Noumea Accord* inspired by decolonization purposes which have been given constitutional force.

Following a priority question of constitutionality, the *Conseil Constitutionnel* recently ruled that a specific provision (Article Lp.311-2) of the *Labour Code* of New Caledonia was inconstitutional and had to be repealed accordingly. [138]

This creates a precedent which may inspire future claims and requests aimed at challenging the constitutionality of several other specific and tailor-made laws of New Caledonia, including *lois du pays* which have implemented or will implement the principles of the *Noumea Accord* dealing with New Caledonian citizenship, social rights and local employment.

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[136] Regarding the 'question of constitutionality' see Louis Favoreu, *Droit constitutionnel* (2009) 99.

[137] Which modified Article 61-1 of the French *Constitution* under the terms of Article 29 of the *Loi Constitutionnelle (Constitutional Act) No 2008-724* of 20 July 2008. This major reform was extended to New Caledonia by the *Organic Act No 2009-1523* of 10 December 2009 which modified Article 107 of the *Organic Act No 99-209* relating to the jurisdiction of the *Conseil Constitutionnel* in respect of *lois du pays.*

[138] See Conseil constitutionnel [French Constitutional Court], decision nº 2011-205 QPC, 9 December 2011 reported in JO, 10 December 2011, 20991. Following this decision, some New Caledonian associations and companies tried to challenge the constitutionality of different *lois du pays*, including the *Mining Code* of New Caledonia (though without any success). See Conseil constitutionnel [French Constitutional Court], decision nº 2013-308 QPC, 26 April 2013 reported in JO, 28 April 2013, 7401; see also Conseil constitutionnel [French Constitutional Court], decision nº 2012-258 QPC, 22 June 2012 reported in JO, 23 June 2012, 10356.

Should these laws excessively restrict the rights of the French citizens in New Caledonia as opposed to those of New Caledonian citizens, or should they create too many discriminations, however positive they may be for decolonization purposes, their constitutionality could be questioned even after their publication, and even though the *Conseil Constitutionnel* admitted in principle the constitutionality of the *Noumea Accord*.

This risk is material in that the capacity of the Congress of New Caledonia to promote an affirmative action or local employment preferential policy was limited from the outset by the French Constitutional Court. In its decision on the draft *Organic Act No 99-209* of 19 March 1999, the *Conseil Constitutionnel* indicated that the laws of the Congress or *lois du pays* must resort to rational and objective criteria that must be strictly defined and tailored to the promotion of local employment when defining the positively discriminated residents.[139]

This risk is also material if we consider the legal proceedings before the European Court of Human Rights that have been fuelled by the limitations of voting rights imposed by the *Noumea Accord* in respect of the election of the Congress of New Caledonia.[140]

To take other examples in other areas where the Congress of New Caledonia is vested with a sovereign law-making power, one can also expect a limitation of its sovereignty by reference to French overriding constitutional principles. In respect of economic, commercial and tax reforms, the content of the New Caledonian legislation the Congress can adopt to promote certain economic sectors or investments is limited by French substantive constitutional principles, in particular the principles which protect private ownership, freedom of commerce, fair trade, non-discrimination, or equality and parity between tax payers.[141]

In respect of tax reforms, and in particular tax exemptions, the applicability of French tax constitutional principles limits the capacity of the Congress of New Caledonia to enact laws which would create too blatant or excessive preferential tax treatments between taxpayers, or would excessively affect the principle of public contribution of all citizens to the public revenue.[142] Therefore, tax legislation of New Caledonia allowing tax incentives must apply rational, objective and adequate factors to the definition of the scope of application of those tax incentives and also the companies or other legal persons intended to benefit.

The French constitutional principle of retroactivity of laws in certain areas such as tax[143] can also be invoked to challenge the validity of existing or future *lois du pays* which grant long-term and rigid tax stability regimes, and therefore somewhere deprive the Congress of New Caledonia of its sovereign right to legislate in respect of tax matters.

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[139] See Conseil constitutionnel [French Constitutional Court], decision nº 99-409, 15 March 1999 reported in JO, 21 March 1999, 4234, s. 17.

[140] For a review of such complaints and the relevant decisions of the European Court of Human Rights, see Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 203.

[141] For a more detailed analysis of the tax status of New Caledonian *lois du pays*, see Guillaume P. Blanc, 'Une norme fiscale singulière en Nouvelle-Calédonie: la loi du pays' (2003) *Revue du Droit Fiscal* 2.

[142] Principle set down by Article 14 of the *Declaration of Human Rights* of 26 August 1789, which has constitutional force.

[143] In accordance with constitutional case law, tax laws can have retroactive effect. See Conseil constitutionnel [French Constitutional Court], decision nº DC 84-384, 29 December 1984 reported in JO, 30 December 1984, 4167; Decision nº DC 95-369 of 28 December 1995 reported in JO, 31 December 1995, 19099; Decision nº DC 88-250, 29 December 1988 reported in JO, 30 December 1988, 16700, and in *Recueil des Décisions du Conseil Constitutionnel*, 267. See also Decision nº DC 91-298, 24 July 1991 reported in JO, 26 July 1991, 9920, and in *Recueil des Décisions du Conseil Constitutionnel*, 82.

Therefore, even though the New Caledonian tax legislation adopted subsequent to the *Noumea Accord* and the *Organic Act No 99-209* of 19 March 1999 has introduced tax stability regimes, such as the ones applicable to the mining and metallurgical sectors, the validity, scope and effect of such regimes can be challenged under French constitutional principles, since the *Conseil Constitutionnel* has, on the contrary, authorized the legislature to change tax legislation at any time for both the future and the past.[144]

Accordingly, the legal force of the tax stability regimes recently granted by *lois du pays* in New Caledonia should not be overestimated because such regimes can be challengeable in French courts, even after the publication of the *lois du pays*, in particular in case of a priority question of constitutionality.

3.4 Remaining transitional nature of the constitutional status of New Caledonia

The constitutional status of New Caledonia remains transitional in many respects. Obviously, it is necessarily transitional in that it directly derives from an interim constitutional reform, which did not intend to fix the final status of New Caledonia. Title XIII of the French *Constitution* devoted to New Caledonia is expressly titled "transitory provisions relating to New Caledonia" (*dispositions transitoires relatives à la Nouvelle-Calédonie*).

In accordance with Article 4 of the Preamble of the *Noumea Accord*, New Caledonia shares sovereignty "in preparation for full sovereignty"[145], which clearly reveals that there is a common understanding that the status of New Caledonia remains an "in-between" solution intended to move New Caledonia from colonization to the final step of its decolonization.

But the status of New Caledonia also remains transitional because of its sustance and its own dynamics, which create conflicting tensions between principles that it fails to reconcile.

The status of New Caledonia as conceptualised by the *Noumea Accord* cannot be fully stabilised because it directly conflicts with public international law either in relation to France's right to occupy this territory in the past or France's right to govern itself the emancipation process in the future.

Looking at the past, even if the *Noumea Accord* provides New Caledonia with a constitutional recognition of the colonial past, the Kanak culture, identity and land, it also stipulates that France took possession of this territory in accordance with the conditions of international law applicable at the time of colonization,[146] which is challengeable by reference to international legal principles governing the native rights of colonised people.[147]

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[144] In particular, certain authors have underlined the possible inconstitutional nature of the *loi du pays* No 2002-018 of 16 April 2002 relating to tax stability of companies of the mining and metallurgical sector, according to which 'the exoneration of duties, taxes and levies cannot be withdrawn during the entire application period of the tax ruling' granted under the terms of Article L-45-bis –5-I of the New Caledonian *Tax Code* resulting from the *loi du pays* No 2001-009 of 17 July 2001. See Mathias Chauchat, 'Recréer une fiscalité minière' (Paper presented at the *Exploitation et politique minières dans le Pacifique, Histoire, enjeux et perspectives* conference, Noumea, New Caledonia, 22–25 November 2011) 7.

[145] As explained by Alan Berman, above n 6, 284, 'under the Noumea Accords, the process of decolonization is slated to take place in stages, beginning with jointly-shared sovereignty with France over New Caledonia as a preparatory phase in the progression toward full sovereignty'.

[146] See Paragraph 1 of the Preamble of the *Noumea Accord*.

[147] In particular because the laws of the colonised people were not acknowledged or respected by the French colonial army and administration when France took possession of New Caledonia in 1853. For an analysis of this contradiction, see Alan Berman, above n 6, 283; see also Nehad Bhuta, 'New Modes and Orders: The

Looking at the future, even though the *Noumea Accord* entitles New Caledonia to exercise "shared sovereignty" with the French state, and the right to proceed with a referendum on its access to full sovereignty, it does not provide any constitutional guarantee for the access of New Caledonia to self-determination or independence at a certain date,[148] which contradicts the public international law principles governing self-determination.[149]

As explained by Alan Berman:

> Even though France acknowledges emancipation is appropriate (…) emancipation through full sovereignty and the possibility of associated statehood for all communities living in New Caledonia is dramatically different from a guarantee of a U.N.-sponsored referendum in accordance with U.N. principles and practices on self-determination or guaranteed full independence for New Caledonia at a certain date.[150]

From a French constitutional law perspective, the constitutional status of New Caledonia also remains of a transitional and ambiguous nature because of the contradicting interpretations and case law decisions that have affected its definition and implementation, and its blatant conflict with the most fundamental unitary and indivisibility principles of French national sovereignty, which we have described through our analytical review of the nature of the sovereign powers transferred to New Caledonia.

Following this analysis, it becomes apparent that the injection of federalist dynamics in the unitary overall structure of the French Republic has destabilized the different foundations of the French state and its different sub-national entities because of its systemic effects.

Difficulties of a Jus Post Bellum of Constitutional Transformation' (2010) *University of Toronto Law Journal* 12. According to Bhuta, a colonial power which qualifies as illegal occupier cannot either continue to exercise sovereign rights in the colonized territory, or design a new constitution for the colonized territory. As he explains, 'even if the occupier could entrench the entire legal order, it is not authorised to devise the means of replacing it'; therefore, should France qualify as an illegal occupier of New Caledonia from the beginning of the colonization of this territory, which is suggested by Alan Berman, it should not only be obliged to withdraw from New Caledonia. It should also be prevented from exercising any role in the design of the final status of New Caledonia and its accession to 'full-sovereignty' or independence.

148 The Congress of New Caledonia is given the right to choose the date of the referendum, which must be held between 2014 and 2018, and the formulation of the question, but such decisions require a majority of three-fifths of the Members of the Congress. If that majority cannot be obtained, the French state itself (and not the Congress) will submit the question for referendum. See Paragraph 5 of the *Noumea Accord* and comments by Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 204. It must be noted that the *Organic Act No 99-209* was recently modified by the *Organic Act No 2015-987* of 5 August 2015 ((France) JO, 6 August 2015, 13481), in order to secure the right for the Congress to organise up to three successive consultations on accession to "full-sovereignty", during the term of the Congress commencing in 2014, and better define the organisation of such consultation, which shows the intention of the French state to push the Congress to act and avoid a new deferral of this type of referendum.

149 The right of all peoples to self-determination is part of international human rights law and customary international law and has been enshrined in the UN Charter and other international treaties ratified by France. See Articles 1(2) and 55 of the UN Charter. See also Article 1 of both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*. See also the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 1514 (XV), 15th sess, 947th plen mtg (14 December 1960).

150 See above n 6, 293. This statement must be qualified in that the *Noumea Accord* accepts that 'the way of emancipation shall be brought to the attention of the United Nations' (Paragraph 3.2.1). For certain authors, this shows that 'the Noumea Accords provides guarantees to the United Nations'. Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 201 and nn 96 and 124. It must be also mentioned that the elected Territorial Assembly of New Caledonia already exercised its right to vote on the independence of New Caledonia, which it rejected on 17 December 1958.

In return, the authorities attached to the unity and stability of the French constitutional model and the indivisibility of the sovereignty of the French nation, and in particular the French Constitutional Court, have not hesitated to limit the effects of the innovative and pro-decentralization provisions of the *Noumea Accord*, to such an extent it is the stability of the political equilibrium achieved by this agreement that is now quite debatable.

Whereas the French and New Caledonian political forces tried to adjust French constitutional law so that it can be compatible with the new decentralised and co-sovereign status of New Caledonia, the French Constitutional Court reacted by limiting the scope and effects of the political agreement underlying the *Noumea Accord*. As a result, the new constitutional status of New Caledonia looks even more transitional than it was designed to be under the *Noumea Accord*.

This interim nature of the constitutional status of New Caledonia also raises some fundamental theoretical questions of constitutional law. It represents an additional example of the use of transitional or interim constitutional documents for the purpose of resolving a temporary political crisis, which contradicts the theoretical assumption that a constitution should be a document of a constitutive and essential nature, participating into the long-term foundations and the longevity of a political and legal system.

According to certain constitutional law specialists, a constitution should not be modified for short-term political purposes because it qualifies as a *Loi Fondamentale* ("Fundamental Law").[151] In other words, there is a contradiction in the terms "transitional" and "constitutional", to such an extent a constitutional provision of a transitional nature may be deprived from its constitutional force, from a substantive point of view, if it is designed and understood as transitional from the outset.

This theoretical comment may be relevant to the specific case of New Caledonia in that the constitutional status of New Caledonia was not only originally defined as transitional, but was also rapidly modified by the case law decisions of the French Constitutional Court, to such an extent it no longer has the stability that it was supposed to guarantee, at least until the consultation on the full emancipation of the territory by 2018.

As noticed by some authors, even the *Organic Act No 99-209* of 19 March 1999 already departed on several points from the *Noumea Accord*.[152]

Subsequently, as we have explained, the case law decisions of the French Constitutional Court significantly impacted on the scope of the legislation making powers of the New Caledonian law making assembly (the Congress). The French *Constitution* was even revised again in 2007 in order to "freeze" even more the New Caledonian electorate, and preserve the full applicability of the original principles the *Noumea Accord*.[153]

In this respect, however defendable the "freezing" conditions applicable to citizenship, residency and voting rights may be from a decolonization perspective, they create some rigidity and polarizing divisions between ethnic groups that may affect the sustainability of

[151] See Olivier Gohin, above n 22, 51.

[152] See Jean-Yves Faberon and Guy Agniel, above n 27, 275 and 282–284.

[153] See *Loi Constitutionnelle n° 2007-237 du 23 février 2007* (France) JO, 23 February 2007, 3354 and comments by Mathias Chauchat and Vincent P. Cogliati-Bantz, above n 7, 199.

the current interim constitutional regime as well as the final status to be adopted following the consultation on the emancipation of the territory.[154]

All these fluctuations show that the constitutional status of New Caledonia became more rapidly transitional that it intended to be,[155] and show the relevance of the suggestion made by Vivien Hart that constitution revision processes should be understood as necessarily transitional, conversational, continuing and flexible instead of being conclusive settlements, so that the dialogue of transition can continue.[156]

As explained by Yash Ghai, longevity is no longer neither the main goal nor the main feature of contemporary constitutions, which "are less final or definitive than older constitutions. Constitutions deal with complex and mutating realities".[157] Contemporary constitutions, and in particular constitutional settlements of an interim nature, "are not the solution of problems but rather institutional instruments of problem solving".[158]

On the contrary, the status of New Caledonia may also be considered as too constitutional from a different perspective, in that it had global systemic effects on fundamental principles of the French *Constitution*, and the status of other constitutional institutions, territories or rules of the French Republic, which have been affected or destabilized by the constitutional innovations introduced as the result of the *Noumea Accord*.

Looking at these systemic effects, the new status of New Caledonia has had an impact of a constitutional nature, on the foundations of the French state, nation and sovereignty, within France and within the European Union which go far beyond the normal impact we can expect of a simple "transitional" political agreement limited to a remote and peripheral territory.

CONCLUSION

The new constitutional status of New Caledonia was designed to be transitional, because it derives from an interim political agreement having a short-term purpose. It also represents a

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[154] As explained by Vivien Hart, above n 20, 451,

> traditional constitution making as a conclusion of conflict and codification of a settlement that intends permanence and stability can seem to threaten rather than reassure. Citizens who actively reject a final act of closure seek instead assurances that constitution making will not freeze the present distribution of power into place for the long term, nor exclude the possibility of new participants and different outcomes …(…) We used to think of a constitution as a contract, negotiated by appropriate representatives, concluded, signed, and observed. The constitution of new constitutionalism is, in contrast, a conversation, conducted by all concerned, open to new entrants and issues, seeking a workable formula that will be sustainable rather than assuredly stable.

On the polarizing dangers of consociationalist arrangements, see also Donald L. Horowitz, above n 13, 1221–1223.

[155] Which also illustrates the weakness of consociationalist constitutional models. According to Donald L. Horowitz, above n 13, 1220, 'Civil wars (…) can sometimes be brought to an end with consociational arrangements, but the desirability and durability of such agreements are often in doubt'.

[156] See in this respect her analysis of the South Africa interim constitutional reform, above n 20, 455–458.

[157] See above n 12, 824; see also for similar comments Tom Ginsburg, Zachary Elkins and James Melton, above n 28.

[158] And 'they are, as has been said, "possibility-engendering (Holmes) rather than devices that aim at the consolidation of a particular policy as willed by the people in a particular situation under particular conditions'. Ulrich Preuss, above n 26, 190.

transition in the constitutional history of New Caledonia because of its intrinsic hybrid nature.[159]

The particular transitional, if not equivoqual, political and constitutional status of New Caledonia reflects the traditional tension between peripheral overseas territories and central former colonial powers.

From an historical perspective, it reflects the difficulties old nation-states such as France face when they need to adapt their constitutional models, based on absolute, indivisible and consolidated sovereignty, where self-determination is defined against other nation-states. This old model conflicts with a new generation of constitutional models, in particular ethnic and consociational ones, and the dynamics of federalism which seem to be more appropriate to meet the challenges raised by multicultural societies.[160]

As many other hybrid constitutional construction, the current constitutional status of New Caledonia is not likely to survive, and a new political as well as constitutional status is likely to emerge whatever is the outcome of the referendum on the full emancipation or independence of the territory, or even if there is not, at the end of the time period contemplated by the *Noumea Accord*, any consultation on this fundamental question.

[159] As explained by Dominique Custos, above n 2, 126, 'New Caledonia's regime does not quite fit any ideal type, as it exhibits a specific mix of unitary, regional and federal institutional features, it is hybrid'.

[160] Referring himself to the case of New Caledonia, Yash Ghai, above n 12, 804, explains that

> "today's constitutions are based on what has been called internal self-determination, and aim to disaggregate state sovereignty into distinct packages (not merely in the form of federalism, but also other complex forms of dividing and sharing power (…) The skill required for contemporary constitution-making is to diffuse (or perhaps obfuscate) sovereignty". As he explains, "indeed, some recent settlements have been possible only by keeping open the option of sovereignty: in French New Caledonia and in Papua New Guinea (…) a group has reserved or been granted (the formulation depending on who you are) the entitlement to exercise the right of external self-determination (that is to say, secession and separate sovereignty) after a suitable period.