On Kanaks and Caldoches

New Caledonia's Electoral Reform and the Right to Self-Determination

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Over the past week, the French electoral reform in New Caledonia precipitated into violent unrest, resulting in the deaths of seven individuals, hundreds of arrests, and extensive damage to buildings, infrastructure, and vehicles. Although the French government lifted the state of emergency on Tuesday morning, in an attempt to initiate a process of de-escalation and to renew the dialogue with the independence movement, the reform will eventually move forward. Henceforth, France will further entrench its influence in the South Pacific and effectively deny the Kanak people to achieve their desired self-determination.

The Kanak people under French rule

The Kanak people are the descendants of the Lapita-Culture which originally populated the island around 1500 BC. The first European to arrive on the island in 1774 was James Cook before France annexed it in 1853 and declared it to be a French colony. While the Kanak people call the island "Kanaky", the international community adopted the name "New Caledonia" which is derived from James Cook himself (Ramsay, 2011).

Under French colonial law, the Kanak people were governed by the *Code de l'Indigénat* which provided for the application of metropolitan French law exclusively to French citizens in the colony. The Kanak people, however, were not considered as citizens (*citoyen*) but instead as "subjects" (*sujets*). As such, they were subject to their own laws and customs, but excluded from any participation in public or political life.

This situation changed with the end of the Second World War and the beginning of the decolonization movement: France formally transformed its colonies into overseas departments and in 1953, all inhabitants of New Caledonia were granted French citizenship. However, while the local legislative and administrative bodies were given more and more competences, independence was not a topic open for discussion (Fisher, 2024). The local communities were still not allowed to adapt any rules that concerned substantive constitutional topics such as electoral law.

Instead, France strategically undermined the local independence movements from the outset by pursuing a new form of settler colonialism. This may be exemplified by a letter that Prime Minister Pierre Messmer wrote in 1972 (cited in Besset, *Le dossier caledonien, les enjeux de l'après referendum*, 1998, p.76):

> *New Caledonia, colony of settlement, although destined to be a multiracial melting pot, is probably the last non-independent tropical territory where a developed country may send its nationals…In the short and medium term, the massive emigration of French citizens must allow the avoidance of the danger of the pro-independence cause through the maintaining and improving of the numerical balance of the communities. In the long-term, the indigenous nationalist cause will only be avoided if the non-indigenous communities represent a democratic majority mass.*

As a result of the ongoing immigration, the indigenous Kanaks have become a minority in their own land. Currently, they account for around 41% of the population. The differences between the native Kanak population and the descendants of the French settlers (the so-called Caldoche) are visible in everyday life: the Kanak population is disproportionately affected by poverty, unemployment, limited access to education and substandard housing while the wealth is accumulated mostly around the urban areas and among the Caldoche community (Robertson, 2024). The independence movement is therefore particularly attractive to

younger Kanak generations who see independence as a chance to achieve greater social and economic equality.

The struggle for Kanak independence

The most important driving force towards independence is the Kanak and Socialist National Liberation Front (FLNKS). The first serious confrontations between the FLNKS and the French State occurred from 1984-1988 and resulted in 70 deaths, political murders, as well as the first proclamation of the State of emergency. The situation escalated into the hostage-taking of 27 policemen and one judge on the island of Ouvéa when the French state enacted a law that would restrain the political influence of the pro-independence movement.

The insurrections were settled by the accords of Matignon (1988) and Nouméa (1998) in which France granted the New Caledonians the right to hold three votes on its independence. To define who would be eligible to participate in the referendums the parties agreed to reserve the right to vote in provincial elections exclusively to voters and their descendants that have been registered during a consultation in 1998. The purpose of what would become known as the "New Caledonian Citizenship" was to maintain an equilibrium between the indigenous Kanak population and Caldoche. The Nouméa Accord thereby effectively created a political community that was bestowed with the right to decide on its political future. The following votes, however, would eventually show how deeply divided this political community was.

The first two referendums failed with 56,4% (2018) and 53,3% (2020) voting to remain with France respectively. The results demonstrated a clear divide between the Kanak community that voted for independence and Caldoche who voted to remain with France. While these two referendums left the population already deeply polarized, it was the third one which caused the most controversies. After it was scheduled to be held in the midst of the Covid-19 pandemic in 2021 the FLNKS asked the French Minister for the Overseas Territories Sebastian Lecornu (nowadays Minister for Defense) to postpone the vote which he rejected. The FLNKS called for a boycott and in the end only 43,9% of the population participated, out of which – not surprisingly – 96,5% voted to remain with France. The FLNKS challenged the legality of the outcome, and the case reached the highest administrative French Court (*Conseil d'État*) which confirmed in 2022 the legality of the referendum, putting a temporary end to all hopes for an independent New Caledonia.

The new electoral reform bill

On 7 December 2023, the Conseil d'État addressed the question of New Caledonian independence once more, this time in the form of an advisory opinion. The then-Prime Minister Élisabeth Borne requested that the Court may clarify the applicable law in the context of the self-determination process and ascertain whether France was entitled to modify the electorate composition once more. The Court responded in the affirmative, stating that the rejection of the third vote for independence had deprived the Nouméa Accords of their raison d'être (paras. 2, 11, 14). Consequently, the Court decided that the electoral law of 1998, which established the electorate for the provincial elections, contradicts with the principle of a universal and equal right to vote under the French Constitution and thus requires a reform (paras. 7 and 15).

France's motivation to keep New Caledonia as an overseas department is evident: the small island contains the incredible amount of 30% of the world's nickel reserves which is a key raw material to produce batteries as well as stainless steel.

The preceding analysis demonstrates that any attempt to influence the independence process would necessitate a change in the composition of the political community responsible for determining the future of the territory. The recently proposed French electoral reform bill is designed to achieve precisely this objective. Under the pretext of necessary democratic reform, the French Parliament (*Assemblée Nationale* and *Sénat*) passed a constitutional reform bill on 15 May 2023 which expands the electorate for provincial elections to include all citizens who have been residents of the country for 10 years. The reform means the factual end

of any aspirations for Kanak independence. Under the new law, the reform would mostly benefit the new immigrants to New Caledonia that are likely to contribute to the group of loyalist voters.

The resurging right of self-determination under international law

However, the Conseil d'État as well as the French legislator failed to consider an essential aspect that follows from the termination of the Nouméa Accords: the resurgence of the right of self-determination of the Kanak people under international law. Self-determination under international law refers to the right of every people to form its own political entity and has been considered by the ICJ as part of jus cogens (ICJ, Judgment of 30 June 1995, Portugal v. Australia, para. 29). New Caledonia is still listed on the UN list of non-self-governing territories and remains on the Agenda for the Special Committee on Decolonization which is charged with the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly Resolution 1514).

The main unresolved issue prior to the signing of the Nouméa Accords was the question of who the bearer of the right to self-determination should be and who should have the prerogative to determine the future of the territory. This proved to be particularly difficult in New Caledonia as it is populated by Kanaks and Caldoches to a similar extent. However, the first two referendums have clearly shown that the Kanak population is a homogeneous political entity that has clearly expressed its desire for independence. Allowing the Caldoches to opt for continued association with France by outvoting the indigenous community would be a travesty of the right to self-determination and would defeat the very essence of decolonisation. The new electoral reform bill is a prime example of how former colonial powers can induce demographic changes in the composition of a former colony in order to maintain control over it (see Blay, 1988).

From the perspective of international law, the Kanak people have suspended the process of self-determination in favor of the process as agreed upon in the Nouméa Accords. Assuming that the Nouméa Accords have been terminated, it follows that the Kanak people may once again invoke their right to self-determination under international law. The peremptory nature of this right requires France to refrain from any actions that would frustrate or contravene the independence process, even if it were obliged to do so under internal law (see Art. 27 VCLT).

Conclusion

History appears to be repeating itself in New Caledonia with the legacy of colonialism reaching its culmination in a conflict between the Kanak and the Caldoche communities. The roadmap to independence as outlined in the Nouméa Accord has proven unsuccessful, but the question of Kanak self-determination remains a salient issue. Against the background of the economic profitability and strategic importance of New Caledonia in the South Pacific, however, it seems to be highly unlikely that France will proactively take actions to enable the Kanak people's independence. The current electoral law reform rather aims at the opposite. In an open letter, published on 19 May, the presidents of four other French overseas territories (Réunion in the Indian Ocean, Guadeloupe and Martinique in the Caribbean, and French Guiana in South America) called on the French government to withdraw the electoral law reform. The response of the French government to this appeal remains yet to be seen. During his visit in Nouméa, Emmanuel Macron has asserted that "[t]his is not the Wild West, so the Republic must regain authority on all fronts and provide security for everyone." Hence, the prospects of the Kanak's New Caledonia remain dim.

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