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Etienne Cornut

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# UNDERSTANDING NEW CALEDONIA

Edited by **Caroline Gravelat**

Translated into English by Elaine Sutton – Editorial coordination, Françoise Cayrol



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## NEW CALEDONIAN NATIONALITY AND CITIZENSHIP ACCORDING TO THE OUTCOME OF THE NOUMEA ACCORD<sup>1</sup>

Étienne CORNUT

Jean Monnet University, Saint-Étienne, CERGRID

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New Caledonia occupies a unique place within the French Republic, by reason of its history, its status as set out in Title XIII, added to the 1958 French Constitution and referencing the Noumea Accord of 5 May 1998, thereby enshrined in the Constitution, and its unusual institutional and legal framework which takes it close to independence. The referendum process of accession to full sovereignty, inaugurated on 4 November 2018<sup>1</sup>, represents a key stage in the constitutional transition known as “exiting” the Noumea Accord. Factors involved in this transition include the “citizenship of New Caledonia granted to French nationals meeting the conditions laid down in Article 188”, as established by Article 4 of Organic Law no. 99-209 of 19 March 1999.

While much has already been written about this controversial “citizenship”, the biggest bone of contention is the exclusion of those members of the French community who cannot lay claim to sufficiently close ties with New Caledonia, in particular French nationals who settled in New Caledonia after 8 November 1998, the date of the referendum on the Noumea Accord. Although French nationals who arrived just before that date may, after ten years of residence, claim access to citizenship, those who arrived after that date are excluded, regardless of their length of residence.<sup>2</sup> From now on, only young people aged 18 and over having one parent who is him/herself a citizen can be added to the special electoral roll for the election of members of Congress and the Provincial Assemblies (known as the “LESP”).<sup>3</sup> A significant number of French nationals are thus excluded, even though they are subject to obligations established by these institutions under their legislative powers. This may well elicit sympathy, but it is nevertheless necessary to appreciate that by setting New Caledonia apart in the Constitution, the constituent authorized multiple exceptions to the fundamental principles and values of the French Republic.<sup>4</sup> Such limitation of the special electoral body was not

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1 A slightly different French version of this paper was published under the title: “La citoyenneté de la Nouvelle-Calédonie selon l’issue de l’accord de Nouméa”, in A. Dionisi-Peyrusse, F. Jault-Seseke, F. Marchadier & V. Parisot (ed.), 2019, *La nationalité : enjeux et perspectives*, Varenne-LGDJ-Lextenso, p. 201-216. This text will be cited as a source of additional scientific references not essential here.

The 174,165 registered voters on the special first referendum electoral roll (liste électorale spéciale à la première consultation – LESC) voted by 56.67% (138,933 votes) for New Caledonia to remain within France (Official Gazette of 7 November 2018, text 1). Alongside New Caledonian citizenship, there is another special referendum-specific electoral body, provided for in Article 77 of the Constitution, the composition of which is governed by Articles 218 and 218-3 of Law No. 99-209. This citizenship is herein called “referendum citizenship”.

2 Constit., art. 77 last paragraph; art. 188 I. b) of Law no. 99-209.

3 Art. 188 I. c) of Law no. 99-209.

4 Cons. Constit., 15 March 1999, No. 99-410 DC, consid. No. 3, and 19 April 2018, No. 2018-764 DC consid. no. 3.

deemed to be an infringement of fundamental rights and freedoms<sup>5</sup>, insofar as it applies “strictly and solely to polls forming part of a self-determination process”<sup>6</sup>, “involving the participation of residents who, regardless of ethnic or political affiliation, have contributed and contribute to the construction of New Caledonia by possessing sufficiently strong ties to the territory.”<sup>7</sup> Citizenship was designed to serve for the duration of the Noumea Accord as a provisional and evolving instrument, the aim of which is to create a New Caledonian community across ethnic and community lines.

However, citizenship was not designed as a fixed concept, and the Noumea Accord laid down its flexible nature right from the start, with a view to its possible future transformation into New Caledonian nationality. The twenty-year period initiated in 1998 was intended to take concrete shape through the gradual assertion of this citizenship, instilling a sense of belonging shared by all New Caledonia’s communities, towards a common destiny.<sup>8</sup> But apart from the usual consequences regarding the right to vote and to be elected, it confers few social rights<sup>9</sup> and no obligations, reflecting the fact that it still conveys little sense of identity. Whatever the outcome of the referendums, this “community of destiny” cannot be built on a citizenship that, in itself, remains so constricted. In this respect, the purpose of the Noumea Accord has not been accomplished, and the elements to reshape the concept as a citizenship based on a sense of belonging should be defined through a process of reflection on the institutional transition begun by the referendum process<sup>10</sup>, whatever the result of the referendum. However, is such reshaping possible?

The Noumea Accord provides that “For as long as the referendums have not resulted in the proposed new political structure, the political structure implemented by the 1998 Accord will remain in force in its final stage of development, without the possibility of going back, and this ‘irreversibility’ will be constitutionally guaranteed ”.<sup>11</sup> The Accord here lays down the principle of the constitutional irreversibility of achievements introduced under the Accord. While the precise compass of the expression “political organization” may be open to interpretation, and the actual scope of the guarantee of irreversibility may vary depending on whether it concerns the principle of an established setup and/or its legal system, this nevertheless constitutes a fundamental element of the Noumea Accord, without which the Accord would probably not even have been signed. The irreversibility guarantee thus gives the impression that, over and above the developments expressly provided for in the Accord and not yet finalized, the political structure will remain unchanged for an indefinite period. Therefore, before considering the ways in which citizenship would be transformed depending on the outcome of the referendum process (II), we should determine to what extent citizenship is an irreversible achievement of the Noumea Accord (I).

5 CEDH, 11 January 2005, no. 66289/11, *Py c. France*, spec. consid. nos. 61 and 64. France’s highest courts adopt the same line: CE Ass., 30 October 1998, *Sarran*, nos. 200286 and 200287; Cass. Ass. Plén., 2 June 2000, *Fraisse*, no. 99-60274, Bull. AP no. 4.

6 United Nations Human Rights Committee, 15 July 2002, cited by the *Py v. France* decree pt. 13.16, p. 13.

7 *Ibid.*, p. 14.7.

8 Noumea Accord, Preamble, points 4 and 5.

9 Only precedence for local employment: art. Lp. 450, 451 and ff., Lab. Code NC.

10 É. Cornut, “L’identité comme socle du pluralisme juridique calédonien”, in Ch. Bidaud (ed.), 2020, *L’identité et le droit*, Nouméa, Presses Universitaires de la Nouvelle-Calédonie, PUNC.

11 Art. 5 al. 5.

## I. CITIZENSHIP: AN IRREVERSIBLE ACHIEVEMENT OF THE NOUMEA ACCORD?

Applied to the issue of citizenship, the question is whether the concept forms part of the scope whose irreversibility is constitutionally guaranteed (1) and, if so, whether the scope of such irreversibility is absolute or relative (2).

### A. The scope of the guarantee of irreversibility

The guarantee of irreversibility applies to some issues (a), for a period which should be defined (b).

#### 1. Material scope

Is citizenship covered by the constitutional guarantee of irreversibility set out in the Noumea Accord? Is this citizenship as defined by Articles 4 and 188 of the Organic Law, and/or referendum citizenship as set out in Article 218? The scope of the guarantee of irreversibility is a complex issue for two reasons.

The first is linked to the polysemic nature of the expression “political structure”, which can be taken as including or excluding myriad aspects of New Caledonia’s institutional, social, political, judicial and legal systems. The perusal of Title XIII of the Constitution and the Noumea Accord itself will doubtless help in outlining this scope.<sup>12</sup> Article 77 of the Constitution states, for example, that “French government competencies [...] will be definitively transferred to the institutions of New Caledonia”, thus making such transferred competencies an irreversible acquisition. This also applies to citizenship and referendum citizenship, both of which are covered by Article 77 and also by the Accord, and which provide the basis for establishing a new nationality in the event of accession to full sovereignty.

The second concerns the reference to “the 1998 agreement”, raising the issue of the integration of constitutional changes since that date. While the Noumea Accord is not designed to be amended, the Constitution has been amended, particularly as regards matters concerning the “political structure” set out by the Accord. This is the case for citizenship under Constitutional Law no. 2007-237 of 23 February 2007. Amending Article 77 of the Constitution, this law restricted accession to citizenship for French nationals with at least ten years’ residence in New Caledonia to people having settled in New Caledonia no later than 8 November 1998. Is this fixed requirement a constitutionally guaranteed irreversible achievement? The answer depends on the constituent or interpretative nature of the 2007 Law, on the basis of its retroactive effect. What we have here is undoubtedly an interpretative reform<sup>13</sup>, as borne out by preliminary work and discussions<sup>14</sup>. The aim was not to modify citizenship by making it subject to increased restrictions but to close a gap resulting from the opposing legal and ideological standpoints adopted by independentists basing their arguments on preliminary

<sup>12</sup> M. Chauchat, “La transition constitutionnelle en Nouvelle-Calédonie, référendums et irréversibilité”, in, 2018, *L’avenir institutionnel de la Nouvelle-Calédonie*, Nouméa, Presses Universitaires de la Nouvelle-Calédonie, PUNC, p. 41 s.

<sup>13</sup> *Ibid.*, p. 48.

<sup>14</sup> Rapport AN no. 3506 (2006), D. Quentin; Rapport Sénat no. 145 (2006-2007), J.-J. Hyest.

work for the Accord and the 1999 Law, and anti-independentists basing their arguments on the position taken by the Constitutional Council.<sup>15</sup>

## 2. Temporal scope

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A reading of the Accord, the rulings made by the highest courts or the parliamentary reports points up the temporary nature of the constitutional guarantee of irreversibility, given that the political structure set in place in 1998 is “transitory”. In point of fact, the political structure will only be maintained as irreversible “As long as consultations do not succeed in achieving the proposed new political structure”. Once this process has been accomplished, the Noumea Accord will lapse and the institutional framework can be redesigned. So we find written views on the citizenship issue stating that: “at the end of the process, the Noumea Accord would cease to have effect and, in particular, a constitutional basis for New Caledonian citizenship as defined by the Organic Law would no longer exist”.<sup>16</sup> Likewise “Following the self-determination referendum, whatever the outcome, a new system as regards the electoral roll would need to be determined. This is the logical consequence of the transitional nature of Title XIII of the Constitution. Either the right to vote will be tied to New Caledonian nationality in the event of accession to full sovereignty. Or it should be redefined in the light of New Caledonian citizenship if the vote goes to remaining within the French Republic.”<sup>17</sup>

However, assuming the process has reached completion (through independence, remaining within France or any other negotiated solution), while some people will argue that all cards could be reshuffled, some reversals will be difficult to introduce. Indeed, there are achievements which are not simply gained because an instrument, regardless of how high it ranks in rule of law hierarchy, proclaims them as gained, but because they are rooted in the collective legal consciousness, because they are considered as the very foundation of the legal and institutional system concerned, in the same way as the general principles of law or values upholding public order. Further, although the guarantee of irreversibility provided for in the Noumea Accord assumes the continuing legal force of the Accord, the new political structure resulting from these referendums, which make the Accord obsolete, cannot, without disavowing its very origins, refute these fundamental achievements the irreversibility of which was once guaranteed. These irreversible achievements, or at least some of them, will remain irreversible even on the “day after”. From this perspective, it appears that the existence of a citizenship intrinsic to New Caledonia, whatever the assumption entertained for the “day after”, is integral to these achievements, even though differences as to terms of accession to citizenship, and thence the scope of the guarantee of irreversibility, remain more profound here than they do elsewhere.

### B. The scope of the guarantee of irreversibility

After having demonstrated that the guarantee of irreversibility varies in scope (a), we should apply the distinction as regards types of citizenship (b).

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15 Cons. const., 15 March 1999, no. 99-410 DC, consid. no. 33.

16 *Mission d'écoute et de conseil sur l'avenir institutionnel de la Nouvelle-Calédonie*, A. Christnacht, Y. Dassonville, R. Fraisse, F. Garde, B. Lombrière, J.-F. Merle, report, October 2016, p. 19.

17 D. Quentin above-mentioned report. p. 44.

## 1. Absolute or relative irreversibility

We shall posit that the guarantee of irreversibility, once it is shown as applying to a given issue, can vary in scope. The guarantee is absolute when it affects the principle of an achievement as much as its related legal system, in that nothing can be modified. The scope of the guarantee is relative when it only affects the principle of an achievement under the Accord, but its related legal system and the terms and conditions of its implementation may vary insofar as such modifications do not call into question the principle of the achievement and insofar as they “comply with the guidelines established by the Accord and the terms and conditions for its implementation”<sup>18</sup>.

This distinction derives, in particular, from the transfer of powers. Article 77 paragraph 2 of the Constitution provides that the Organic Law shall determine “the French government powers which will be definitively transferred to the institutions of New Caledonia, the timing and terms and conditions of such transfers, and breakdown of costs resulting therefrom”. While the principle of transfer from France to New Caledonia may be irreversibly acquired, conversely, how such powers are to be shared between the institutions of New Caledonia does not appear likely to be set in stone, allowing, for example, Congress to play a changing role through an extension of its legislative powers in all aspects relating to the “country”<sup>19</sup>. We do not consider that the guarantee of irreversibility as applied to the transfers should preclude this kind of internal transfer of powers, as long as this transfer does not call into question the balanced division of powers between New Caledonia’s institutions, in particular at a provincial level. Similarly, with the existence of Congress and its autonomous legislative power a given, the direct election of its members is arguably a legitimate reform.

## 2. Application to types of citizenship

While the principle of a citizenship intrinsic to New Caledonia, accession to which is restricted, may be an irreversible achievement, we consider that changes to its legal system appear legitimate. However, we should draw a distinction between citizenship as defined by Article 188 and referendum citizenship as defined by Article 218 of Law no. 99-209.

As long as the referendum process under the Noumea Accord has not been finalized, referendum citizenship will remain an absolute irreversible acquisition. The conditions for registration on the special electoral roll for the first referendum (*liste électorale spéciale à la première consultation - LESC*) are not subject to change, even the condition relating to twenty years of residence in New Caledonia prior to 31 December 2014.<sup>20</sup> This could not be otherwise as it would amount to a denial of the balance aimed at in negotiating the Noumea Accord, which provided the grounds for creating an electorate distinct from citizenship of New Caledonia, solely for the purposes of the exit referendum.

18 Art. 77 para. 1 of the Constitution.

19 For instance, as regards environmental legislation, currently under the jurisdiction of the provinces: É. Cornut, “Le pluralisme juridique en Nouvelle-Calédonie. Assimilationisme ou différentialisme pour la sortie de l’accord de Nouméa”, in *L’avenir institutionnel de la Nouvelle-Calédonie*, *op. cit.*, p. 125 ff., spec. p. 139-140.

20 Art. 218 f) of Law no. 99-209.

However, citizenship as provided for by Articles 4 and 188 of Law no. 99-209 enjoys a guarantee of relative irreversibility. While the constitutional reform of 23 February 2007 fixed the conditions for access for the ten-year period of residence, and some people view the reform as a simple interpretation of the Accord's intentions, this restrictive citizenship was designed to be for a limited period which cannot be that – potentially indefinite – of the “political structure” resulting from the Accord. By creating a citizenship, and indeed a restricted citizenship, intrinsic to New Caledonia, the intention of the Accord was to create a community with a common destiny, a sense of belonging transcending diversity within the community and building towards a new future. It is therefore easy to understand the original restriction: the purpose was to define this community of common destiny as being formed from the start around a “hard core” comprising a mix of communities and identities. The institutions as intended by the Noumea Accord could then be set up – members, roles and exercise of powers – only by this “hard core”.

But twenty years after the Accord, with these institutions now well established, and the instruments for creating and developing standards specific to New Caledonia having been created *via* the powers transferred to such institutions, with this set of rights and obligations, as yet imperfect and incomplete but applying or designed to apply to these citizens, and also to people settled permanently in New Caledonia, taking definite shape, to perpetuate this initial design, so restricted in both personal and material terms, appears increasingly meaningless, given the challenges the concept is henceforth faced with. Insofar as referendum citizenship is retained as long as the referendum process lasts, the decolonization purpose is preserved. Seen from this point of view, this “hard core” of citizens must be capable of expanding beyond its natural growth, even if access to it must remain restricted since such restriction is, as a principle, constitutionally guaranteed.

A transformation of New Caledonian citizenship is therefore essential, but requires very careful management.

## **II. THE TRANSFORMATION OF CITIZENSHIP DEPENDING ON THE OUTCOME OF THE REFERENDUM PROCESS**

Transformation of citizenship will depend on the outcome of the referendum process mandated and regulated by the Nouméa Accord. Article 5 of the Accord provides that “The referendum process will concern the transfer to New Caledonia of sovereign powers, access to an international status entailing full responsibility and the organization of citizenship into nationality”. Citizenship will become nationality if New Caledonia accedes to full sovereignty (1). Should independence be rejected, a managed recasting of citizenship would appear necessary (2).

### **A. In the event of access to full sovereignty**

Transforming citizenship into nationality (a) raises the issue of its perpetuation (b).



## 1. Transformation of citizenship into New Caledonian nationality

“Nationality is generally defined as an individual belonging in legal and political terms to the population constituting a state”.<sup>21</sup> Nationality thus conveys a “dual dimension”: vertical by creating a political bond of allegiance between the individual and the state, horizontal by making each national a member of the population constituting such state.<sup>22</sup> “Viewed solely from a legal perspective, the bond of nationality rests on a close relationship between the individual and the state. Each state is responsible for deciding how to determine who are nationals of that state, according to a range of criteria linked to the state’s own historical traditions and political requirements.”<sup>23</sup>

The right to acquire nationality, on the “day before” falls within the sole jurisdiction of the French Republic. This is set forth in section 6-2, paragraph 2, 4° of Law No. 99-209 of 19 March 1999 submitting such rules to the principle of legislative unity: the right to acquire nationality applicable in New Caledonia is the same as that applicable in France, unaffected by any special legislative status. This is reiterated by Article 21.I, 1° of Law No. 99-209, justifying the exclusion of the right to acquire nationality from the transfer of legislative competency in matters of civil law and civil status regulations<sup>24</sup>, even though the Civil Code encompasses all regulations relating to the granting, acquisition and loss of French nationality (C. civ., art. 17 to 33-2). Although this principle of legislative unity is fully endorsed today, this has not always been the case and, until 1973, the right to acquire nationality applicable in New Caledonia, as in other overseas territories, was subject to a special procedure. Furthermore, local New Caledonian law, written as customary, can apply tangentially in the process of implementing the right to acquire nationality.<sup>25</sup> In the event of New Caledonia acceding to full sovereignty, citizenship will mutate into New Caledonian nationality, thereby underlining the bond between a new state and its constituent nation. The right to grant nationality, as a mark of sovereignty, is included in the so-called sovereign powers which will be transferred, along with currency, defence and justice. The “community of common destiny” which this citizenship is considered to represent on the “day before” will form the foundation of the New Caledonian nation on the “day after”. The issue, typically associated with one state succeeding another, will be twofold:<sup>26</sup> who will accede to New Caledonian nationality? who may retain their French nationality?

On the day their country accedes to full sovereignty, New Caledonian citizens will become, on that day and automatically, New Caledonian nationals. The letter of the Accord is confined to this one constitutionally guaranteed achievement. Nevertheless the intent of the Accord does not appear to exclude from this founding nation the members of the “New Caledonian population” who may be non-citizens: people of customary status and people with referendum citizenship who would not also qualify as New Caledonian citizens.

21 P. Lagarde, 2011, *La nationalité française*, 4th ed. Dalloz, no. 00.02.

22 *Ibidem*.

23 H. Fulchiron, Synthèse 60: “Nationalité”, J.-Cl. inter., 2017, no. 4.

24 Country Law no. 2012-2 of 20 January 2012: *JONC*, 26 January 2012, p. 571.

25 É. Cornut, “Le droit de la nationalité française en Nouvelle-Calédonie”: *Cahiers du Larje*, 2018-6, p. 19-26.

26 As regards all such issues: É. Cornut, “Citoyenneté, nationalité et accès de la Nouvelle-Calédonie à la pleine souveraineté”, *Revue du droit public*, 2019-6, p. 1485-1526.

Conversely, French residents of New Caledonia who do not have New Caledonian citizenship should also be assured of retaining their French nationality, to avoid any risk of statelessness, prohibited by international law and French law on the right of nationality. The Noumea Accord implicitly provides for this. However, maintaining French nationality for New Caledonian nationals is guaranteed neither by international law nor by French law nor by the Noumea Accord. The criteria for citizenship and Kanak customary status could be employed in approaching these highly complex and politically sensitive issues. That New Caledonian nationals should not automatically retain French nationality is not only consistent with international law<sup>27</sup> but also represents an obligation for France under Article 1, § 3 of the New York Covenant.<sup>28</sup> This approach is also in line with the thinking enshrined in the Noumea Accord. The effect this would give citizenship and customary status with regard to French nationality, may appear as the logical outcome of the institutional transition process. Has Kanak customary status not been acknowledged as the legal recognition of Kanak identity and the Kanak people? Has not citizenship, from the outset, been designed as the identity marker of the emerging New Caledonian community of common destiny? Namely, this community which, because potential independence was fully approved in 1998 by *all* New Caledonia's parties through their signing of the Accord and the moral and legal force of the commitment thus made, could constitute the "original New Caledonian people" brought together by shared values? Taken literally, the Noumea Accord preamble makes the same point in alluding to "the gradual acknowledgement of a New Caledonian citizenship which should reflect the chosen community of common destiny which can, at the end of the period, become a nationality, if that is what is decided". If the acquisition of New Caledonian nationality, in itself restricted by citizenship criteria, does not entail the corresponding loss of French nationality, it is easy to see how the members of the New Caledonian people would become a minority in their own country.

## 2. Maintaining a citizenship disconnected from New Caledonian nationality?

In parallel to this transformation of citizenship into nationality, one can raise the issue of the elimination or, conversely, the conservation of an autonomous New Caledonian citizenship. The classic notion of citizenship is tied to the status of being a national: a citizen is a national of the State. An independent New Caledonia could enshrine this concept which, with a few reservations<sup>29</sup>, is that of French law. However, in view of two foreseen developments, we can consider the scenario of disconnecting the two notions, and therefore maintaining a

27 International Covenant on Civil and Political Rights - New York, 19 December 1966; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965; Convention on the Rights of the Child, New York, 20 November 1989, together with the general rules and principles of international public law and the texts relating to succession of States: Council of Europe Convention on the avoidance of statelessness in relation to State succession, 19 May 1966; European Convention on Nationality, 6 November 1997, art. 18 to 20; Venice Commission Declaration on the Consequences of State Succession for the Nationality of Natural Persons, 13-14 September 1996. *Adde* The Draft Articles on Nationality of Natural Persons in relation to the Succession of States, adopted by the International Law Commission at its fifty-first session, in 1999 (Yearbook of the ILC, 1999, vol. II (2), p. 24 ff).

28 According to P. Lagarde, footnote to Cass. Civ. 1st, 19 Feb. 2002, *Rev. crit. DIP* 2003, pp. 77 ff., which states: "Article 1, § 3 of the Covenant, which obliges States Parties, including those having administered non-self-governing Territories, to facilitate the right of peoples to self-determination, which may include assisting them to establish a national self-governing population."

29 Minors, convicted criminals deprived of their civil rights, French nationals excluded from New Caledonian citizenship, in particular.

separate New Caledonian citizenship. On the one hand, new concepts of citizenship are emerging, “new citizenship” or “post-national citizenship”, which no longer accept as dogma that nationality and citizenship are one and the same.<sup>30</sup> On the other hand, the example of European citizenship, which establishes a supranational community of common destiny which bestows rights, demonstrates the advantage of a disconnect of this kind, which in no way affects the reality of national ties. In the context of a redefined citizenship, which would confer electoral, economic and social rights, several considerations provide grounds for raising the issue in the context of an independent New Caledonia.

Firstly as regards individuals, the retention of autonomous citizenship status arises as much in respect of New Caledonian nationals as French nationals (now foreigners) allowed to maintain their right of residence. In the case of the former, the right to waive the New Caledonian nationality they have automatically acquired must necessarily be acknowledged, subject to a few conditions. However, can renouncing New Caledonian nationality be equated with giving up New Caledonian citizenship? The individual concerned may indeed wish to hold onto his/her New Caledonian citizenship without acquiring a nationality which might lead to the loss of his/her French nationality and, consequently, European citizenship. Would there not be also an acquired right to New Caledonian citizenship, whereas the nationality of the new State could not be enforced?

In the case of the latter, a French resident who has not automatically acquired New Caledonian nationality: international texts on Succession of States grant him/her the right to remain in the new State and to be treated in terms of social and economic rights on the same footing as nationals of the successor State.<sup>31</sup> Assuredly, the directive does not concern citizenship as it is commonly understood. However, within the context of a redefined autonomous citizenship, offering this French resident the opportunity of acquiring such citizenship regardless of whether he/she ultimately chooses to take New Caledonian nationality<sup>32</sup>, would serve as an acknowledgement of the bond the person in question, who has become a foreigner in the country which, in spite of everything, they could still consider as their own, has formed with New Caledonia.

Furthermore, as regards the States, possible independence is highly unlikely to entail a dramatic break between France and New Caledonia. Bearing in mind their shared history, culture and language, and also geostrategic and socio-economic circumstances, ties will be maintained at an institutional level, taking the form, for example, of associated States or partnerships. This special relationship may in fact lead the States to negotiate a “multiple citizenship”. In this way, economic, social and even electoral rights may be granted to New

30 D. Schnapper, “Nationalité et citoyenneté”, *Pouvoirs* 2017/1 (no. 160), p. 61-71.

31 Art. 14 ILC Draft Articles, 1999, cited above; Art. 20.1. Eur. Conv. of 6 November 1997.

32 If New Caledonia should become independent, the right to acquire New Caledonian nationality should indeed allow the acquisition of that nationality to extend beyond former New Caledonian citizens who would automatically acquire it.

Caledonian nationals in France<sup>33</sup> and French nationals in New Caledonia<sup>34</sup>, rights that are special and preferential compared to rights granted to other foreigners.

## **B. In the event of remaining within France**

Given this assumption, as long as the referendum process is still ongoing and, over and above this process, as long as a new political structure has not been determined, the state of affairs arising from the Noumea Accord will continue to exist, along with the guarantee of irreversibility thereto attached<sup>35</sup>. In other words, New Caledonia with its current political arrangements can carry on for an indefinite period. Nevertheless, while the absolute inviolability of referendum citizenship may be a given since it is a guarantee of the decolonization Accord, on the other hand, citizenship would appear to require being reformulated as a citizenship which could be described as “statutory” (a), with access still subject to restrictions but more open (b).

### **1. A statutory citizenship**

Despite the constitutional guarantee of irreversibility, the intention of the Accord is not to set in stone *ad vitam aeternam* the institutional structure of New Caledonia which it brought into being. To the extent of this guarantee of irreversibility and taking into account the guidelines established by the Accord, moving forwards with institutional transition should also involve a redefinition of citizenship as it currently stands, limited in both personal and material terms, towards a more open concept in terms of rights and obligations and therefore people. The objective is to arrive at a citizenship of belonging, not granted solely in accordance with a temporary aim but conceived as the symbol of a lasting sense of belonging to a territory, a history, a multi-faceted culture, shared values as well as a shared future. This sense of belonging should give rise to rights and obligations sourced in New Caledonia, which should go beyond the rights currently attaching to citizenship alone.

All may still be left to the imagination, but at least a consensus seems to have been achieved. The fact-finding mission on New Caledonia’s institutional future undertaken in 2016 noted that “Only very incidentally did some groups raise the possibility of other rights conferred by New Caledonian citizenship (land acquisition or shares in local companies). All groups expressed the wish that duties be attached to this citizenship and that citizenship should be conferred in ceremonies held with solemnity and reflecting the sense of belonging to the community of common destiny.”<sup>36</sup> The “Charter of New Caledonian Values” is a step forwards in the process of endowing citizenship with a new dimension by defining common values.<sup>37</sup> Most importantly, New Caledonia now possesses very broad regulatory powers.

33 For example, by allowing New Caledonians access to government/civil service jobs open only to French nationals, thereby providing opportunities for young graduates with a view to the ultimate establishment of a New Caledonian senior civil service. New Caledonians having lost their French nationality could, like European citizens (which they would no longer be either), regain the right to vote in local elections.

34 For example, advantages conferred under local employment regulations, application of New Caledonian rules and standards in private law and, possibly, the right to vote in local elections.

35 Noumea Accord, Art. 5 para. 4-5; State Council, notice no. 395203 of 4 September 2018.

36 Above-mentioned report. p. 21.

37 The Charter, presented on 27 July 2018 by the “Committee of Dialogue for the Future”, but which in itself has no

With the transfer of jurisdiction in matters of civil and commercial law, on top of regulatory powers already acquired in the areas of labour law, taxation and insurance, almost all issues of private law now fall under the jurisdiction of Congress. The fund of New Caledonia-sourced rights and obligations, to be enjoyed and respected by people with strong ties to New Caledonia, is right there. But to whom, for example, does New Caledonian civil law apply? In the absence of rules governing conflicting internal regulations, the situation remains uncertain.<sup>38</sup> And while citizenship could be considered as a criterion for the application of New Caledonian civil law<sup>39</sup>, it cannot fully play this role in its current limited form.<sup>40</sup> It could only do so if it is reshaped and transformed into a statutory citizenship. However, people settled and residing permanently in New Caledonia should be able to enjoy the rights and be accountable to the obligations laid down by New Caledonian legislation and therefore to also take part in choosing the elected representatives who pass such legislation.

## 2. Opening up access to statutory citizenship

From an institutional and political standpoint, the real stumbling block will undoubtedly be defining the precise outlines of the scenarios for acceding to this statutory citizenship. If consolidating the current base appears as beyond dispute (the citizens of today will be the citizens of tomorrow); if the principle of expanding that base seems to be shared by all the New Caledonian parties (the citizens of tomorrow could be today's non-citizens), the difficulty will arise in defining the extent of such expansion.

The attribution and acquisition of French nationality could readily serve as a template. If attribution of citizenship by right of blood - descendants of a citizen, people with customary status - does not give rise to debate, citizenship by birthright needs to be reviewed, particularly as regards assessment of the strength and duration of ties binding people to New Caledonia. The current set periods of 10 and 20 years are too long for statutory citizenship, just as, in this context, the setting of a precise date of arrival in the territory as a condition for acceding to citizenship cannot continue. Without exhausting all the options, three example cases should provide access to statutory citizenship.

The first case should enable spouses and partners of a New Caledonian citizen to qualify for Caledonian citizenship. Conditions could be debated: automatic acquisition or by declaration; a set period of marriage/partnership; subject to the marriage/partnership being valid and in existence at the date the declaration is made, or even during a period subsequent to acquisition of citizenship. Measures to monitor fraud could be considered, to prevent marriages/partnerships solely for purposes of obtaining legal citizenship. The question of

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legal or even political validity, is posted on the website of the French High Commission in New Caledonia: <http://www.nouvelle-caledonie.gouv.fr>

38 Regarding this issue and proposed solutions, see É. Cornut, "Les conflits de normes internes en Nouvelle-Calédonie. – Perspectives et enjeux du pluralisme juridique calédonien ouverts par le transfert de la compétence normative du droit civil", *JDI*, 2014, doct. 3, p. 51 ff.; V. Parisot, S. Sana-Chaillé de Néré, "La méthode conflictuelle, une méthode de résolution du conflit de normes adaptée à l'intégration de la coutume dans le corpus juridique calédonien", in É. Cornut, P. Deumier (eds.), 2018, *La coutume kanak dans le pluralisme juridique calédonien*, Nouméa, Presses Universitaires de la Nouvelle-Calédonie, PUNC, p. 404 ff.

39 S. Sana-Chaillé de Néré, "Les conflits de normes internes issus du transfert à la Nouvelle-Calédonie de la compétence normative en droit civil", *JDI*, 2014, p. 33 ff., spec., no. 6 ff.

40 É. Cornut, "L'identité comme socle du pluralisme juridique calédonien", art. cited above.

spouses or partners of New Caledonian citizens has long been a subject of debate, particularly insofar as access to local employment is involved.<sup>41</sup> The issue is important because, for a citizen of New Caledonia, “marital capillarity” represents their only real hope of enjoying a peaceful private and family life in New Caledonia, through the socio-economic integration of their spouse or partner.<sup>42</sup> The second case should allow people born in New Caledonia, whose parents are not citizens, to acquire New Caledonian citizenship.<sup>43</sup> Conditions may vary, particularly to prevent *ius soli* (right of birthplace) becoming a gateway to unconditional automatic citizenship: automatic or statement of intent; minimum duration of residence in New Caledonia, whether or not based on a specific period of time<sup>44</sup>; residence in New Caledonia at the date of application or at the date at which citizenship would automatically be acquired.

The third case should allow people not born in New Caledonia, neither of whose parents is a New Caledonian citizen, to acquire citizenship. In this case, automatic acquisition of citizenship would seem ruled out, and a statement of intent would be the only basis for citizenship, in the same way as French nationality is acquired through naturalization. The conditions could also include a period of residence, to be defined; integration requirements, such as an appreciation of New Caledonia’s moral and material interests and a knowledge of New Caledonian culture, history and society, all of which could be verified. The people concerned are mainly those who are currently the main focus of negative attention. Once their possible accession to citizenship is admitted, the trickiest aspect will probably be stipulating the minimum period during which they would need to have been in New Caledonia. The “sufficient period of residence” required for non-citizen residents before they are granted priority access to local employment could serve as a basis<sup>45</sup>. Indeed, the periods laid down by law should be redefined accordingly.<sup>46</sup> The four-year period sometimes cited, corresponding to the typical length of stay of a French government employee, is too short, precisely because retaining it would effectively allow people residing in New Caledonia on a temporary basis and intending to return to France to accede to New Caledonian citizenship. The period should be at least five years of continuous residence in New Caledonia.<sup>47</sup> In terms of fundamental rights, the maximum period should probably be ten years.

Some conditions could relate to a common right to acquire citizenship, such as having no convictions for some types of crime.<sup>48</sup> A welcoming ceremony could also be held for new citizens, when, for example, they would be presented with the Charter of New Caledonian Values, the Charter of the Kanak People and a booklet on the rights and duties of citizens of

41 Const. Council, 30 July 2009, no. 2009-857 DC, consid. nos. 18-19.

42 Art. Lp. 451-2-1 para. 1 of Lab. Code NC.

43 In a *contra legem* interpretation of Article 188 I. c) of Law no. 99-209, the Court of Cassation went down that road by allowing people born in New Caledonia but having no New Caledonian ancestry to be entered on the LESP electoral roll: Cass. civ. 2, 3 November 2011, no. 11-60376.

44 Comp. art. 21-7, Civ. Code. This condition ensures that the individual concerned has spent a significant part of his/her childhood and schooling in New Caledonia, establishing the elements of his/her bond to the country.

45 Art. Lp. 451, Lab. Code NC.

46 In this regard, see art. Lp. 451-2, Lab. Code NC.

47 A five-year period is typically set as a requirement for the granting of French nationality, the same applies to naturalisation by decision of the French authorities, art. 21-17 Civ. Code.

48 Comp. art. 21-27 § 1, Civ. Code.

New Caledonia.<sup>49</sup> Far from being symbolic, such a welcoming ceremony and presentation of documents serves as an outward expression of the concept that endowing citizenship with a new dimension is not simply about redefining the conditions for acceding to citizenship, or in any case that this aspect of the issue can no longer constitute the only focus for debate. First and foremost, it is about defining new rights and duties bound up with New Caledonian citizenship and rooted in the legal framework being built in New Caledonia, that of a common destiny shared and open to others.

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<sup>49</sup> Comp. art. 21–28, Civ. Code.