

# THE 1988 PARIS AGREEMENT ON THE FUTURE STATUS OF NEW CALEDONIA

By

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## 1. Introduction

The process of decolonisation of New Caledonia, a French administered territory in the South-West Pacific, is as old as the United Nations itself. Pursuant to the post World War decolonisation trend, New Caledonia was classified as a non self-governing territory and included in the UN decolonisation list in 1946. Nevertheless the territory still remains to be decolonised and its peoples are yet to attain independence. Recently the issue of decolonisation of New Caledonia has received a better appreciation from the French Government and the leaders of both pro and anti-independence forces following the re-election of the Socialist President in the 1988 French Presidential elections. Indeed, an agreement on the future political destiny of the territory was reached on 21 August 1988 between the French Government, the leader of the loyalist Republican Party — the RPCR, and the leader of the pro-independence party — the FLNKS.

In the past, a series of attempts and plans were devised successively to prepare New Caledonia for decolonisation. None of these efforts brought the pro and anti-independence fronts any nearer to an agreed formula for the decolonisation of the territory. The present agreement has, for the first time, secured the formal approval of both groups. It is therefore not surprising that this unprecedented breakthrough has assumed and will continue to assume paramount significance in the history of decolonisation of New Caledonia.

An appraisal of this agreement is presented in this paper. It reveals that the agreement represents a radical change in the relationship between the pro and anti-independence forces with a potential for the peaceful decolonisation of New Caledonia.

## 2. A Brief Factual Background

France took full control of New Caledonia and its indigenous peoples, the Melanesian Kanaks in 1853 pursuant to the instructions of Napoleon III and has been administering the territory ever since. Initially France encountered strong resistance from the Kanaks who were gradually forced to submit.<sup>1</sup> France scrupulously pursued a policy of mass immigration from Europe, particularly from the metropolitan territory, to New Caledonia.<sup>2</sup> This in effect has altered the population balance, increasing the numerical strength of the settlers steadily, until they outnumber the natives who have been reduced to a minority in their own land.<sup>3</sup> This affords the settlers and their descendants, being the majority, an upper hand in the determination of the political future of New Caledonia. It may be noteworthy that the transplanted population of New Caledonia also includes Wallis and Futuna, Polynesians,

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1. J. Carter (ed) *Pacific Islands Year Book* Vol. 15, Pacific Pub. Sydney 1984 at 277. For early native revolts, see J. Connell, *New Caledonia or Kanaky? The Political History of a French Colony* National Centre for Dev. Stud. ANU 1987 at 58-83.
2. A.W. Ward *Land and Politics in New Caledonia* Research School of Pacific Stud. ANU 1982 at 15.
3. The 1983 Census shows a total population of 145,000 with a Kanaky population of 62,000. See J. Connell, 'New Caledonia: A Colonial Crisis' *Network, Aust. Dev. Stud. ANU Sept. 1987 at 1.*

Islanders and Indo-Chinese.<sup>4</sup> Almost all of these groups oppose the Kanaky claim to independence.

Following the inclusion of New Caledonia in the UN decolonisation list in 1946, the French Government transmitted information to the UN on the territory under Article 73(e) of the UN Charter.<sup>5</sup> Subsequently France unilaterally discontinued the supply of information on New Caledonia from 1947 by conferring on it the status of an overseas territory of France.<sup>6</sup> However after nearly forty years, the UN, on 2 December 1986, once again assumed jurisdiction over New Caledonia as a non self-governing territory. The General Assembly Resolution 41/41 classifies New Caledonia a non self-governing territory within the meaning and range of Chapter XI of the UN Charter. It affirms the inalienable right of the peoples of New Caledonia to self-determination and independence according to the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. It imposes upon France an obligation to transmit to the UN information on moves towards decolonisation of the territory.<sup>7</sup> France predictably declined to cooperate with the UN Decolonisation Committee to implement this resolution and reiterated that New Caledonia is essentially an integral part of the French Republic and not a non self-governing territory.<sup>8</sup>

The Conservative Government of France proposed and held a self-determination referendum in New Caledonia on 13 September 1987. Its terms entitled all inhabitants of New Caledonia, irrespective of their country of origin, with a minimum of three years continuous residency in the territory to vote in the referendum. Confronted with their numerical minority and unfavourable terms, the FLNKS, the main proponent of independence, boycotted the referendum. The anti-independence front of the settlers and their descendants voted overwhelmingly to remain a part of France. Notwithstanding this referendum and its results, the UN Decolonisation Committee reaffirmed on 28 October 1987 the earlier General Assembly resolution classifying New Caledonia as a non self-governing territory.<sup>9</sup>

Tension and violence between the pro and anti-independence forces became frequent and widespread in New Caledonia in 1987 and early 1988. A shift in the FLNKS strategy from conciliation to confrontation emerged during this period. The FLNKS leader in his address at the Seventh Annual Congress of the party held in February 1988 called upon the Kanaks to defend themselves with arms if necessary. He also threatened to wage an Algerian-style war of independence against France.<sup>10</sup> This 'muscular mobilisation' was displayed during the French Presidential election in May 1988. The militant Kanaks kidnapped and held hostage 23 French officials and gendarmes and demanded the realisation of their right to self-determination and independence. This hostage crisis ended on 5 May 1988 when French Security forces liberated the hostages killing 15 Kanaks in a full-scale military operation.<sup>11</sup>

The Socialist President of France was re-elected. The new government immediately opted for rapprochement to avert further deterioration of the New Caledonia crisis. This new

4. Europeans constitute 36%, Wallis and Futunans 8%, Polynesians 4%, Indonesians 4%, Vietnamese 2% and others 2% (the 1983 Census); See *Connell supra* n.1 at 97, 211.

5. GA Res. 66(I) of 14 Dec. 1946, *UN Resolutions 1946-48* Vol. 1 Oceana 1973 at 111.

6. The new status was given under the Constitution of the Fourth Republic. See M. Dornoy *Politics in New Caledonia* Sydney Univ. Press Sydney 1984 at 90-91.

7. See *Resolutions and Declarations of the GA* 41st session, UN, New York, 12 Jan. 1987 at 74-75.

8. See *Pacific Islands Monthly* Feb 1987 at 13-15; *Far East. Econ. Rev.* 19 Mar. 1987, at 29.

9. See *Post Courier* PNG, 30 Oct. 1987 at 8; *Weekend Nius, PNG*, 31 Oct. 1987, at 9.

10. See *Pacific News Bulletin* Vol. 3 No. 2 April-May 1988 at 1, 4; *Pacific Islands Monthly* April 1988 at 15, June 1988, at 12.

11. For an account of this incident, see *Pacific Islands Monthly*, June 1988 at 5, 8-11; *The Times of PNG*, 12-18 May 1988, at 10; *Far East. Econ. Rev* 2 June 1988 at 15; *Post Courier* PNG, 2 May, at 3; 5 May 1988, at 7.

government seemed to have a better appreciation of the gravity of the crisis and the urgency of its resolution. With its new outlook, this government opened dialogue around one negotiating table between the leaders and pro and anti-independence fronts and eventually succeeded in concluding an agreement which may lead to the independence of New Caledonia.

### 3. Negotiations Leading to the Agreement

Immediately after the hostage crisis, the new Prime Minister of France, Rocard, wanted to know the "whole truth" about the incident and ordered a "thorough and honest" inquiry of what exactly happened at Ouvea, the place where the hostage saga took place. Two defence department inspectors were sent from Paris to investigate. This was followed by the arrival at Noumea on 19 May 1988 of a six-man study mission appointed by the new Prime Minister of France to establish dialogue between the pro and anti-independence forces in New Caledonia.<sup>12</sup> The leaders of both communities welcomed, and held talks independently with the mission which opened channels of communication with all sections of the New Caledonian political community during its three-week stay in the territory. The mission, in its report to the French Prime Minister, recommended (a) the division of the territory into three regions, (b) economic development to be targeted to the Kanak regions, and (c) a self-determination referendum in ten years time in which all Caledonians residing in the territory in 1988 and their descendants of voting age should have the right to vote.<sup>13</sup>

With the success of the mission, the French Prime Minister formally invited both leaders (Lafleur and Tjibaou) to take part in talks with him on the political future of New Caledonia. In response to this invitation, both flew to Paris in mid-June 1988. In the Paris talks, the Kanak and loyalist leaders met for the first time in five years, and the French Prime Minister achieved a breakthrough. An initial accord — the Matignon Accord — was reached between himself, Lafleur, and Tjibaou on 26 May 1988. This preliminary accord provided the broad framework of a ten year transition plan leading to the decolonisation of New Caledonia,<sup>14</sup> much along the lines recommended by the mission.

The final talks on the plan were scheduled to be held after a "cooling off" period of one month during which the two leaders were expected to persuade their supporters, especially militants and extremists of both groups, to agree to the terms of the accord. The plan was approved by a special conference of French loyalists in New Caledonia on 23 July 1988 in the face of criticisms by the hard-core loyalists.<sup>15</sup> The FLNKS leaders attempted in vain to convince the militant Kanaks on the terms of the accord at a special congress on 16 July 1988. The FLNKS demanded basic changes in the deal, particularly with regard to the composition of the electorate eligible to vote in the self-determination referendum. Many Kanaks thought that the plan did not offer any guarantee for their achieving independence. However, a consensus on the plan was arrived at in the adjourned meeting of the FLNKS at Ouvea on 23 July 1988.<sup>16</sup> Thus, the stage was set to conclude a final agreement.

Intensive negotiations went on between the French Minister for Overseas Territories, Lafleur, and Tjibaou during the seven weeks after the signing of the initial accord. Two delegations, one nationalist and one loyalist, flew to Paris from New Caledonia in order

12. See *Islands Business*, June 1988, at 6, 7.

13. See *Pacific Islands Monthly* Aug. 1988 at 19.

14. For details on the Paris talks and the accord, see *Island Business*, Aug. 1988 at 9-10.

Lafleur was accused of surrendering to terrorism. The critics regarded immigration control as undemocratic and the amnesty scandalous. See *supra* n.10; also *Direct Action* Sydney No. 664 16 Aug. 1988 at 11.

16. *Ibid*; also *Post Courier* PNG 18 and 25 July 1988 at 8.

to assist their leaders in discussions on the draft statute implementing the plan. Whilst this final round of Paris talks headed by the French Minister for Overseas Territories was in progress and producing positive results, the French Prime Minister made a three-day goodwill visit to New Caledonia from 19 August 1988. The final round of Paris talks culminated in a formal agreement on a new constitutional framework for the decolonisation of New Caledonia which was signed on 21 August 1988 by the French Minister for Overseas Territories and leaders of both pro and anti-independence fronts of New Caledonia.<sup>17</sup>

#### 4. The Agreement

The agreement deals with the strategies of the gradual decolonisation of New Caledonia. It envisages a self-determination referendum in 1998 after a transitional ten-year period of limited self-government with one year of French direct rule in the beginning.<sup>18</sup> During this period, a series of political and economic reforms will be embarked upon in New Caledonia to be observed and controlled by France. The impoverished Kanaky regions will be encouraged to develop their own economies with financial support from France. All these measures are designed to give the separatist Kanaks a chance to prepare themselves for self-government by 1998.

##### (a) The French Direct Rule

The agreement authorises France to control and administer New Caledonia directly from Paris for one year from 14 July 1988. The French Cabinet approved this direct rule Act on 29 June 1988. The French High Commissioner in New Caledonia has full powers in all spheres. He acts as the representative of France. The High Commissioner is assisted by a Council of Advisors of eight, membership to be distributed equally between the FLNKS and the PRCR. This direct rule Act established a unitary system of administration throughout New Caledonia by dissolving its regions and the regional territorial assemblies elected in May 1988 which election was boycotted by the FLNKS. The Act also revoked the Pons statute of autonomy plan for New Caledonia devised by the former Conservative Government of France.<sup>19</sup>

A national referendum will be held on 6 November 1988<sup>20</sup> to approve new laws promulgated since the commencement of French direct rule and to define French responsibility towards New Caledonia.<sup>21</sup> The referendum is intended to ratify (i) the requirement of ten-year residency to vote in the 1998 independence referendum, (ii) indemnity for all actions in New Caledonia in the past few years, and (iii) a general amnesty for all crimes committed with the exception of murder. The French authority in New Caledonia will prepare a new census from January 1989 to facilitate the enrolment of Kanaks on the electoral role which will be used in the 1998 self-determination referendum.

17. For final rounds of talks see *The Sydney Morning Herald* 22 Aug. 1988 at 1, 20; *Islands Business* Sept. 1988 at 21.

18. The silent features of the agreement are published in *Islands Business* Aug. 1988 at 10; *Pacific Islands Monthly*, Sept. 1988 at 15.

19. Following the 1987 referendum in New Caledonia which brought about an anti-independence victory, Bernard Pons, the former French Minister for Overseas Territories prepared a plan for New Caledonian autonomy which was adopted by the Conservative Chirac Government in November 1987. For details of the Pons statute, see *Pacific Islands Monthly*, Dec. 1987, at 12.

20. [Editorial Note] The referendum succeeded with about 80% of those voting in favour of the accord. The turn out was a record low — only 37% *The Australian*, 7 Nov. 1988 at 9.

21. Due to low turn out of French voters (only 48%) in the September 1988 polls, which indicated a strong support for the plan. There will be another poll on the issues in November 1988; see *Post Courier*, PNG 4 Oct. 1988 at 7; also *The Australian*, 5 Oct. 1988 at 6.

During its one year direct rule, the French Government will divert loans and credits to backward and underdeveloped areas and launch a scheme to encourage private investment. A programme of accelerated training for several hundred Kanak professionals will also be initiated.

**(b) New Caledonia — A Federal Territory**

Following the end of the French rule, New Caledonia will be transformed into a federal territory with a federal administrative structure from 14 July 1989, which will continue until the 1998 referendum. The entire territory of New Caledonia will be divided into three federal units or provinces, namely the Loyalty Islands, the North, and the South. The first two of the three provinces will be controlled by the Kanaks, the other by the settlers and their descendants. Each province will have an Assembly to be elected for a period of six years on the basis of proportional representation. There will be elections in March 1989 for these provincial Assemblies. Each Assembly will control major sectors of the economy, notably land reform, public works, economic development and finance.

Members of the three provincial Assemblies will constitute a Territorial Congress which will control the territorial budget and sectors of public interests that are too complicated to be administered by the provinces, such as education, hospitals and roads. Acting as a co-ordinator between the provinces, France will have control over law, defence, foreign policy, police, secondary and tertiary education, broadcasting and more importantly immigration.<sup>22</sup>

Under the proposed provincial boundaries, the South, being an economically powerful and self-sufficient area, will be controlled and dominated by the white settlers and their descendants. Quite apart from Noumea, the capital, the South contains the bulk of the developed wealth of New Caledonia — the nickel mining town of Thio, the hydro-electric dam of Yate and the tourism centre of the Isle of Pines. The Kanaky dominated provinces are economically poor and backward, based on village economy. In addition to the economic disparities between the provinces, there is also a population imbalance. Of the total population of 145,368, the South alone contains 120,000 peoples. The agreement recognises these differences between the provinces and promises an immediate economic development plan to redress the imbalance between the white South and the remainder of New Caledonia.

In order to equip the Kanaks with education, skills, experience and resources essential for self-government, the agreement pledges major financial aid aimed at "ending the economic, social and cultural imbalances in New Caledonia and giving the Melanesian community its proper place".<sup>23</sup> The Kanaky regions are to receive 75 per cent of French aid, leaving the rest for the South. Educational grants and administrative jobs are to be distributed in favour of the disadvantaged Kanaks. A deep water port is to be constructed at Nepoul in the North-West and 400 Kanak middle and high-level public servants will be trained over the ten-year period. Two new highways will be built to minimise the problems of isolation and economic growth of the Kanaky regions.<sup>24</sup>

**(c) The 1998 Self-Determination Referendum**

The agreement provides for the structural and institutional measures to prepare for a self-determination referendum in 1998 on the future political destiny of New Caledonia. Those who are on the electoral rolls in 1988 and their descendants of voting age will be

22. See *supra* n.18.

23. See *supra* n.17 at 1.

24. See *supra* n.18 at 12; also *Direct Action* Sydney No. 664, 16 Aug. 1988 at 11.

entitled to vote in the 1988 referendum. The voters will be asked to make a stark choice between two alternatives: either to opt for complete political independence from France, or to remain as a part of the French Republic. This ten-year residency requirement is intended to prevent incoming Polynesian or European migrants changing the voting ratio. The current demographic trend featured by an outflow of non-Kanaks and the high Kanak birth rate is relied on to predict a Kanaky majority by 1998.

### **5. An Appraisal of the Agreement**

The process of decolonisation of New Caledonia has been one of the most controversial and complex issues in the South Pacific. Hardly any other regional problem has attracted the attention and concern of the world community as intensely as has the decolonisation of New Caledonia. It has constantly been stirring the minds and emotions of the peoples, particularly the Melanesians, of this region for more than a century. As a result, one who has been following the developments in New Caledonia was perhaps reluctant, prior to the signing of the present agreement, to believe that such a consensus agreement was attainable.

Nonetheless, it has happened which is indeed a positive sign. Understandably, several drastic changes in the overall equation, bargaining points and policy of "give and take" contributed significantly to its making.

The agreement was possible mainly due to a change in French power politics following the 1988 Presidential polls. The re-election of Socialist President Mitterand for the second seven-year term apparently generated an atmosphere of enthusiasm for the politics of tolerance, consensus and openness. The defeat of Conservative Prime Minister Chirac in the elections was a serious blow to conservative forces in French politics and dismayed the Caledonian loyalists. The changed political condition provided a solid basis on which meaningful discussions for an agreement could be held and the talks that ensued subsequently yielded auspicious results. Similarly, the spate of violence had added favourably to the changed circumstances. Widespread tension and resort to force in New Caledonia culminated in a massive scale of bloodshed during the hostage crisis. The overall peace and security in the territory was fast deteriorating and spiralling out of control to a point of no return. The continued insecurity and disorder presumably assisted in one way or the other in convincing the two communities in New Caledonia that it was hightime to negotiate and to move away from their set positions. The French Prime Minister successfully capitalised on this qualitatively changed situation and persuaded the leaders of both pro and anti-independence groups that none of them could achieve outright victory thus influencing their delegations at the Paris talks to arrive at a mutually agreed solution.

There is no over emphasis either on the immediate independence of New Caledonia or on its continued ties with France. The FLNKS has accepted a shift in its preferred stand of independence from one to ten years, whilst the RPCR has accepted the likelihood of independence of the territory, cutting off its ties with France. The agreement favours neither immediate independence which may not be politically and economically viable, nor the ruthless suppression of just causes and grievances of the Kanaks in the name of French territorial integrity and political unity. Viewed from these perspectives, it may be said that the parties seem to have followed a policy of "shared sacrifices" in working out the agreement to the best of their judgment and ability.

The agreement affords a new way of approaching the decolonisation of New Caledonia. It offers certain benefits — both short and long term — to the Kanaks. In the short run, it furnishes a basis for a return to calm, order and stability. It has unconditionally abandoned the previous right-wing government's statute of local government and autonomy plan for New Caledonia which was vehemently opposed by the FLNKS.

It manifests the official recognition of Kanaky cultural aspirations and of the extent to

which they are economically disadvantaged. This was unthinkable prior to the agreement. The Kanaks are empowered to make direct contacts with the French Government which can also deal with the Kanaky provinces directly. A great obstacle to independence may be the political, economic and educational backwardness of the Kanaks. This direct relationship with Paris may be of considerable benefit to the Kanaky provinces in making them economically self-reliant, particularly when three-quarters of French investment in New Caledonia will be channelled to these provinces. Hence the agreement is, in the long run, forward looking, evolutionary and may well lead to the independence of New Caledonia.

However, it must be stressed that it is an agreement which almost none had foreseen and could credit in advance as even a possibility. It has been achieved notwithstanding many unresolved issues. The consensus approach perhaps necessitated the drafters to ignore some vital questions and flaws. Consequently it is not surprising that the agreement may well suffer from imprecision, inconsistency and a motivation of political expediency. Its serious omissions encompass the following.

#### (a) The Ten Year Transitional Period

The agreement falls short of the Kanaky demand for the realisation of their inalienable right to self-determination and independence recognised by the international community and its forum — the United Nations. The prospect of achieving independence is no closer than it was before the hostage crisis. The Kanaks cannot wage any form of liberation movement for the next ten years. The General Assembly, as noted before, classifies New Caledonia as a non self-governing territory under Chapter XI of the UN Charter, and affirms the inalienable right to self-determination and independence of its peoples pursuant to the 1960 Decolonisation Declaration. This Declaration unequivocally requires the *immediate* transfer of all powers to the peoples of territories which have not yet attained independence without any conditions or reservations in order to enable them to enjoy complete independence.<sup>25</sup> The term “immediate” may constructively and contextually be construed to imply “as speedily as possible” in view of the fact that the Decolonisation Declaration proclaims “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations” (preamble). The proposed ten-year scheme of the probable independence of New Caledonia would be difficult to subsume under the 1960 Decolonisation Declaration.

The agreement overtly recognises the unpreparedness of the Kanaks to achieve independence immediately. And it promises a series of political, economic, administrative and institutional measures to be implemented in the Kanaky provinces over the ten-year transitional period to equip the Kanaks for independence. New Caledonia was classified as a non self-governing territory under Chapter XI of the UN Charter as early as 1946 and this was reaffirmed in 1986 and 1987. Being the administering power of New Caledonia, France has assumed under Article 73 of the UN Charter definite obligations to promote to the utmost the well-being and paramount interests of the Kanaks, to ensure their political, economic, social, and educational advancement, their just treatment and protection against abuses, with due respect for their culture. France is particularly obliged “to develop self-government, to take due account of the political aspirations of the [Kanaks], and to assist them in the progressive development of their free political institutions”. The agreement is evidence that France has failed lamentably to perform its assigned and assumed

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25. Para. 5 of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV) of 14 Dec. 1960 (for brevity it is cited as “The 1960 Decolonisation Declaration”), *UN Resolutions 1960-62 Oceania* Vol. viii 1974 at 188-189, emphasis added.

responsibilities towards the Kanaks since 1946, if not before. In consequence of this failure, the territory is deemed to be unfit for immediate independence. However, this plea of unpreparedness of the colonial peoples to achieve independence is not unique to New Caledonia. The process of decolonisation testifies to the fact that many colonial powers intentionally failed to make colonial peoples ready for independence and used this lack of preparedness as a basis for continuing colonial rule. This fact prompted the UN to state in the 1960 Decolonisation Declaration: "Inadequacy of political, economic, social or educational preparedness should never serve as a pretext for denying independence" (Para. 3). Given this provision of the Declaration it is indeed difficult to appreciate how the agreement could invoke the unpreparedness of the Kanaks as a justification to continue the French rule in, and to delay the independence of, New Caledonia for a further ten years.

Moreover, it may be recalled here that the French Socialist Government of Mitterand promised and prepared a bill in April 1985 to move New Caledonia towards independence by 1986 through a referendum. If the Kanaks were ready or could be made ready for independence in one year by 1986,<sup>26</sup> one may wonder why in 1988 the agreement pretends that they are not yet ready.

The 1960 Decolonization Declaration has been aimed at accelerating the process of decolonisation. Notwithstanding the extraordinary depth of legal, moral, ideological and psychological effects of colonialism, the task of decolonisation has not been smooth. Certain colonial powers are not prepared to accept the outlawing of colonialism. Nor do they concede that the colonial peoples are entitled to outright independence. In a desperate bid to hold their colonies, they have conferred upon colonies such constitutional status as "overseas provinces or territories" to legalise their possession. A concerted effort has been exerted by these powers to circumvent the tranquil process of decolonisation. France, for example, attempted in vain to justify its continued presence in Algeria by according that country the status of an "overseas territory" of France. The Portuguese territories in Africa were constitutionally integral parts, the "overseas provinces", of Portugal. Yet these territories were regarded as "colonial" and decolonised under the 1960 Decolonisation Declaration. This precisely explains how and why New Caledonia has become an overseas territory of France.

The French attitude towards decolonisation is not particularly praiseworthy. French techniques of continued colonialism mainly embrace the policy of mass immigration from France and its ex-colonies, the continuous harassment and intimidation of those who support independence and the creation of heavy dependence on French money, language and culture. In spite of the UN recognition of the Algerians' right to independence, France argued that Algeria was constitutionally an integral part of France and resorted to force, culminating in the Algerian war of independence in which France was physically overpowered.<sup>27</sup> France was also a co-colonial power with the United Kingdom in Vanuatu. France had to leave the territory reluctantly simply because the UK was keen to go. Yet French officials destroyed telephones, air conditioners, other equipment, took away movable goods, and made the process of decolonisation as difficult as possible.<sup>28</sup>

The fact that France has not been able to bring about any real progress of the Kanaks towards self-rule despite its prolonged presence in New Caledonia casts considerable doubt

26. This plan is known as the Pisani Plan. For details of this plan, see Connell, *supra* n.1 at 335-40 and 451 (text).

27. GA Res. 1573 (XV) of 19 Dec. 1960 *UN Resolutions 1960-62* Oceana Vol. viii 1974 at 129; also A. Fraleigh, 'The Algerian War of Independence' (1967) 61 *Am. Soc. I.L. Procd.* at 10-12.

28. An account of secret French official documents may be seen in a series of articles by H. Van Trease in *Pacific Islands Monthly* May 1982 at 33; July 1982 at 31; Aug. 1982 at 27; and Sept. 1982 at 27.



as to French bonafides. This may lead one to surmise that the desired Kanaky progress, which has not been achieved during the past 125 years, may not be attained in the next ten years. Rather the present agreement may be seen as essentially a stop gap measure to improve order and stability in New Caledonia which was shaken seriously during the hostage crisis. The ten-year transitional period prolongs French rule in New Caledonia and fails to appreciate the sacred right of its peoples to immediate independence — a right recognised in, and protected by, international law.

### **(b) The Division of New Caledonia**

The division of New Caledonia into three provinces guarantees the settlers and their descendants virtually all mineral and commercial resources and a further ten years of uninterrupted accumulation of wealth. Such a division is likely to engender fresh bitterness caused by movement of refugees and border tensions between the South and the North, especially when the Kanaks are left with nothing but their rudimentary village economy. The division will cut through a principal Kanaky language group.<sup>29</sup> The basis of this division is not very clear. Nevertheless it may be inferred that the two main antagonistic communities — the Kanaks and the settler Caldoches — have been given separate regions. But the proposed regions are not homogenous. There are some French settlers and pro-France Melanesians living outside the South and vice versa in the North. The uncertain status of the settlers residing in the predominantly Kanaky provinces and of the Kanaks living in the South may undermine their respective rights and interests, given the degree of hatred and animosity between them.

The division of New Caledonia prior to its decolonisation may be inconsistent with, if not repugnant to, the 1960 Decolonisation Declaration which preserves the territorial integrity and political unity of new states emerging through the process of decolonisation. To prevent colonial powers from intervening in the peaceful decolonisation, the Declaration provides that when independence is granted to colonial countries and peoples, any arrangement disrupting their national unity and territorial integrity is incompatible with the UN Charter (Art. 6). Such division of New Caledonia may eventually become the permanent partition of the territory. Similar partitions by some colonial powers of their colonial territories in the past resulted in unwarranted secessionist claims, exemplified by the Ewe separation, the Somali separation, Mauritanisation, and Katanganisation.<sup>30</sup> The resource-rich Katanga, a province of the Republic of the Congo, made an abortive break-away attempt from the rest of the Congo within ten days of the independence of the Congo in 1960. The end purpose of the attempted session was that Katanga would not share its resources with the other extremely poor provinces.<sup>31</sup> The possibility of such a political ramification in New Caledonia may not be gainsaid in view of the overwhelming concentration of wealth in the South and its unwillingness to share its wealth with poor Kanaky provinces. The desire to protect its highly privileged position may induce the South to foster secession. Thus, the division constitutes a potential threat to the territorial integrity and political unity of New Caledonia. Should such a situation ever eventuate, there may be costs to the South Pacific regional order with international repercussions — a factor that challenges the wisdom of the division of New Caledonia.

29. See *Islands Business* Aug. 1988 at 12.

30. E. Zuzuki 'Self-Determination and World Public Order: Community Response to Territorial Separation' (1975-76) 16 *Virginia J.I.L.* at 842-43.

31. L.C. Buchheit, *Secession: The Legitimacy of Self-Determination* Yale Univ. Press Yale 1978 at 148.

### (c) The 1998 Self-Determination Referendum

The terms of this referendum are not substantially different from that of the 1987 referendum excepting the minimum residency requirement of a voter, which was three years in 1987 and ten years under the present agreement. In other words, all inhabitants of New Caledonia, of voting age, regardless of their country of origin, with a minimum of ten years residency in the territory will be entitled to vote in the 1998 referendum which will determine the future political destiny of New Caledonia.

Referendum is a recognised mode of exercising self-determination and is generally conducted under UN supervision. A self-determination referendum in New Caledonia, a chapter XI territory of the UN Charter, necessarily implies a means of allowing the dependent peoples to choose freely their own political future under the 1960 Decolonisation Declaration. The right of the dependent peoples should be the only issue in such a referendum. The 1960 Decolonisation Declaration recognises "the passionate yearning for freedom in all dependent peoples and the *decisive role* of such peoples in the attainment of their independence".<sup>32</sup> It advocates a free, honest and genuine choice of self-determination by the peoples of "territories which have not yet attained independence". The entire anti-colonial movement is based on this legal expectation. The lawful correlation between peoples and territory is one of the criteria of "selfhood" of "a people" entitled to self-determination.<sup>33</sup> Only those peoples who are inseparably related to a given territory can, if they so desire, exercise their right to self-determination on that territory. All clusters of people cannot exercise such a right in any territory of their own choice. The right of self-determination accrues to the peoples in their territory with which they are inextricably connected. The prevailing UN practice reveals that "populations which are not indigenous to the territory they inhabit do not have a right to self-determination (and) hence, no referendum should include migrants".<sup>34</sup>

The non-Kanak population, most of whom are nationals of France, have come to, and settled in, New Caledonia after the colonisation of the territory as beneficiaries of a mass immigration policy of the coloniser. These peoples have "kith and kin" and voting rights in metropolitan France.<sup>35</sup> These peoples lack indigenous root, geographical identity and suffer from a crisis of legitimacy in New Caledonia. As such, these peoples do not come within the purview of "dependent peoples" of "territories which have not yet attained independence". The 1960 Decolonisation Declaration simply does not confer on them any right to determine the political end of New Caledonia. Any mode of exercising self-determination in New Caledonia must include the "colonial peoples" concerned quite independently of citizens of the coloniser and other independent states.

This is not to assert that only the Kanaks and none else should constitute and reside in independent New Caledonia. There are indeed many non-Kanak settlers and their descendants who have been living in the territory for many years and generations, many of whom have no connection with France any longer. The feeling of these peoples to consider themselves as members of the Caledonian community may not be overlooked. They may be desirous of living together with the Kanaks as lawful citizens of independent New Caledonia. However, it needs to be mentioned that the right of the Kanaks to colonial self-

32. Preambular para. 3, *supra* n.25, emphasis added.

33. For a full treatment of this criterion, see M.C. Bassiouni, 'Self-Determination and the Palestinians' (1971) 65 *Am. Soc. I.L. Procd.* 36.

34. See *supra* n.3 at 4.

35. See P. Larmour 'The Decolonisation of the Pacific' in Ali Ahmed and ors (eds.) *Foreign Forces in Pacific Politics* Univ. South Pacific Suva 1984 19.

determination and the right of the settlers and their descendants to be citizens of independent New Caledonia are not the same and there need not be any conflict between these two rights.

The right of self-determination possesses two distinct phases: external and internal. The external phase refers to the right of a people who are not yet independent, to choose freely their future political status in the international arena by opting for independence. Once independent through the establishment of their own body politic, that people is deemed to have achieved their right to external self-determination in the form of freedom from alien domination. These peoples, being the citizens of an independent state, are now entitled to their right to internal self-determination in the form of electing and keeping a government of their own choice and of having the right not to be oppressed or discriminated against by the government or by any other influential group.<sup>36</sup> The right of external self-determination belongs to dependent peoples who, once independent, acquire a right to internal self-determination. The realisation of external self-determination has received its greatest boost and sustenance from the illegality of colonialism. Many dependent peoples and their territories have become independent through the exercise of this right. These states are mostly multi-racial, contain many settlers and their descendants and provide internal self-determination to all citizens equally in the domestic sphere.

In New Caledonia, the right of external self-determination clearly belongs to the dependent peoples of the territory. Once independent, the settlers and their descendants would have a right of free choice either to become nationals of independent New Caledonia or to retain the nationality of their respective mother countries. Should they opt for the former, they would be on equal status with the Kanaks as "citizens" and all would be entitled to internal self-determination in the form of freedom and protection under the new constitution. Terms of nationality may be formulated in such a manner as granting the right of nationality to the long-term settlers and their descendants from the day of independence. Express provisions may be embodied in the constitution stressing that economic, political and professional opportunities would be open to all citizens without any distinction whatsoever. In fact, constitutional measures ensuring equality of all citizens may constructively be interpreted to include a wide range of legislation which could effectively be implemented to abolish or at least minimise the deprivation of equal rights in the domestic sphere. These measures of internal self-determination cannot embrace the right to determine the political future of New Caledonia which, being a right to external self-determination, is the exclusive prerogative of the colonial peoples of the territory.

The fact that the settlers and their descendants constitute the majority population of New Caledonia and that many of them have been residing there for many years does not qualify them as the beneficiaries of the right. Neither numerical strength nor long-term residence is a criterion for the determination of "selfhood" of a people entitled to self-determination.<sup>37</sup> The numerical majority of the settlers and their descendants and the minority of the Kanaks are immaterial with regard to the process of decolonisation of the territory. For only the beneficiaries of a right can enjoy that right, regardless of their numerical numbers. This does not mean that the right ignores, or comes into conflict with, the democratic principle of majority decision. Instead, the right adheres to the democratic principle which is operative among the beneficiaries of the right, the Kanaks, in that their majority vote would determine

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36. A. Cassese 'Political Self-Determination — Old Concepts and New Developments' in A. Cassese (ed.) *UN Law/Fundamental Rights* Sijthoff & Noordhoff. The Netherlands 1979 137.

37. The annex of the GA Res. 742(viii) of 27 Nov. 1953 contains a list of criteria of "selfhood". For a discussion on the "selfhood" of a people entitled to self-determination, see M.R. Islam 'The Recent Self-Determination Referendum in New Caledonia: Terms Militating Against Its Validity' (1987) 15 *Melanesian L.J.* 142-46.

the political status of New Caledonia. The democratic principle cannot supersede, take away or abridge a right guaranteed in law. Nor can it create a right which does not exist in law.

Under the cloak of democratic principle, the majority can neither usurp a legal right of the minority, nor enjoy a right beyond legal authorisation. The application of democratic principle in New Caledonia must not deny the inalienable right of the Kanaks to determine the political destiny of the territory — a right which cannot be extended to the settlers and their descendants merely because it does not lawfully belong to them.

The 1988 self-determination referendum, as its terms stand, appears more like a democratic election in an independent state on a controversial domestic issue. It fails to comply with the UN principles and procedures on decolonisation. A large section of its voters — the settlers — cannot form a part of an appropriate “self” entitled to determine the political status of New Caledonia under the 1960 Decolonisation Declaration. As a result, the outcome of the referendum is likely to suffer from the lack of an important, if not the decisive, attribute of a valid self-determination referendum.

Further, it is not certain that the referendum will bring about a pro-independence victory. The most optimistic demography study in New Caledonia does not support the French Prime Minister’s claim that Kanaky voters will make up 53 per cent of the electorate in 1998.<sup>38</sup> Even if this narrow Kanaky majority is conceded this does not assure an automatic vote for independence either. The situation may give wealthy Caldoches an upperhand to divide, as they did in the past, the Kanaks by buying them off.<sup>39</sup> A slight pro-Caldoche swing of Kanaky votes will be enough to produce an anti-independence victory. Moreover, the agreement not only fails to prohibit any future migration to New Caledonia, it gives France exclusive control of immigration until 1988. Many supporters of President Mitterand, particularly members of the Front National party which supported him in the second round of polls, expect to double the population of New Caledonia within the next ten years by promoting immigration from Europe.<sup>40</sup> All these factors tend to indicate that the prospect for the attainment of independence through this referendum is bleak without significant electoral reforms. Certain supplementary measures may be adopted to ensure the independence of New Caledonia. Further immigration must be discouraged. Many French public servants who have retired in New Caledonia and been residing there should be withdrawn. The voting right in the referendum may be restricted to the Kanaks and those settlers with at least one parent born in New Caledonia. There is a constitutional precedent in France of such a franchise criterion. The wartime occupied Alpine Valleys of Tinee, Vesubie and Roya voted in a referendum in 1947 on whether to remain part of France or to become part of Italy. Electoral eligibility permitted only those having at least one parent born in the area or at least 25 years residency to vote in the referendum.<sup>41</sup>

#### **(d) The Lack of Guarantee of Permanence**

There is no strong guarantee that the agreement will not be overturned or reversed by a change in government of France in 1993. There should have been a guarantee clause which will make it impossible for a future French government to cancel the agreement. Given the past experience of the process of decolonisation of New Caledonia, such a clause is

38. See *Islands Business* Aug. 1988 at 12; also *Direct Action*, Sydney, No. 664, 16 Aug. 1988 at 11.

39. The enormous concentration of the territory’s main wealth and resources in the hands of the Caldoches and their potential access to poor Kanaky labourers is likely to have an adverse effect on the Kanaky solidarity. There are also some pro-France Kanak politicians, such as Senator Dick Ukeiwe.

40. See *Islands Business* June 1988 at 7; *Pacific Islands Monthly* Sept 1988 at 15.

41. See *Pacific Islands Monthly* July 1988 at 19.

indispensable. As mentioned before, the Socialist Government's plan establishing New Caledonia as an independent state in association with France by 1986 was rejected by the Conservative Government which came to power in 1986. This experience has created a great deal of mistrust and no confidence among the Kanaks in the agreement. These articles may come to play a role inimical to potential co-operation.

### **6. A Future Projection**

The most rewarding significance of the present agreement is that it was negotiated and agreed with leaders of the two antagonistic communities in New Caledonia. Seemingly the agreement reflects a great deal of compromise between the shared expectations of both pro and anti-independence groups. Its immediate effect is the transformation of confrontation into conciliation with a potential for increasing reciprocal cooperation. To this end, the agreement may be seen as a viable instrument for the peaceful decolonisation of New Caledonia.

The decolonisation of New Caledonia is of paramount importance to minimise disruption to the regional order and to maximise human rights in the South Pacific. Both hostile groups have now a better appreciation of the political realities in New Caledonia and the French Government must take advantage of this favourable climate for decolonisation. Any future change in French politics may well frustrate the existing promising prospect which took more than a century to reach. If the parties fail to exploit the present situation, no one knows when another firm ground for the peaceful decolonisation of New Caledonia can be found.

Admittedly, beneath the calm surface of the agreement there are some controversial points on which both communities appear to differ irreconcilably. These unresolved issues, should they ever gain momentum, may have the potential to militate against the effective implementation of the agreement. Nonetheless, it must be borne in mind that their positions were no less contentious prior to the conclusion of the present agreement which was achieved despite many complex differences. Relying on the precedential value of the agreement, a pragmatist may have good reason to believe that the peaceful decolonisation of New Caledonia through this agreement may be possible in 1998 should the current trend of goodwill, cooperation and reasonableness prevail on all sides. After all, there is hardly any palatable alternative to this agreement short of violence. This peace agreement, however fragile, is better than a tenacious and destructive civil war in New Caledonia.