LEGISLATIVE EMANCIPATION OF NEW CALEDONIA: COMPARISON WITH MOROCCO'S AUTONOMY INITIATIVE FOR THE SAHARA REGION

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A French colony since its annexation by France in 1853, New Caledonia is an archipelago located in the South of the Pacific Ocean. As a settlement, it is now home to a diverse society, deeply divided on a mainly ethnocultural basis, which clearly reflects on a political level. On the one hand, you have the original people, indigenous Melanesians called "Kanaks", overwhelmingly pro-independence. On the other hand, you have the descendants of former settlers and former convicts, but also descendants of Asian and Oceanian workers who migrated to this territory during the second half of the 19th century and throughout the 20th century.

In 1946, New Caledonia became an overseas territory. Under the pressure of a pro-independence movement encouraged by a French State unable to maintain the autonomy granted in 1956, New Caledonia later on had to go through a series of statutes, also called 'institutional yo-yo'[13] which started in the 1960's and lasted almost three decades. Indeed, between 1956 and 1988, around ten statutes were successively implemented, which were to progressively shape New Caledonia's current statute.

New Caledonia's current institutional architecture indeed stems from progressive statutory evolution which turned this overseas territory into a collectivity (*collectivité*) of indisputable originality within France's unitary State[14].

Therefore, Deferre's 1956 framework law initiated a considerable autonomy through massive devolution of power and a local collegiate executive. The Lemoine Statute of 1984 introduced internal federalism by dividing the territory into 'six countries', the logic of which will be confirmed in the successive statutes that culminated in 1988 in the current provincial division. The 1998 Nouméa Accord finalized this architecture by providing the local parliament, called Congress of New Caledonia, with a legislative power that elects the local executive whose members, elected under a proportional system, represent the main local political forces, loyalists and pro-independence.

The Nouméa Accord of 5 May 1998, which for the first time went beyond the constitutional framework established by the 1958 Constitution, stemmed from a tripartite negotiation between the State and local political representatives from two political movements, and required a revision of the French Constitution to lead to the establishment of a *sui generis* territorial collectivity with strong institutional and normative autonomy.

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[13] G. Agniel, "The statutory experience of New Caledonia or the study of the yo-yo movement in the service of the institutional evolution of an overseas territory", in "The statutory future of New -Caledonia. The evolution of France's links with its peripheral communities", Studies of French documentation, 1997, p. 41.

[14] C. David, "Essay on the law of the Caledonian country - The duality of the legislative source in the unitary State", ed. L'Harmattan, Coll. GRALE/CNRS, 656 pages, 2009

The exceptional legal and political framework thus established can be explained by a logic of progressive emancipation[15], New Caledonia being on the United Nations' list of non self-governing territories in need of decolonization. It is thus no coincidence that the 20 year cycle established under the Nouméa Accord would end with the exercise by the Caledonians of their right to self-determination. Three referendums thus took place in 2018, 2020 en 2021, which each time led to the rejection of independence for New Caledonia[16].

Uncertainty nevertheless remains in New Caledonia due to the fact that most pro-independence voters did not take part in the third referendum organized on 12 December 2021. The comparison with this territory nevertheless remains useful in so far as while the current statute is only meant to last for another few years, the next statute can only a priori move towards greater autonomy. In any case, the granting of legislative power is an achievement which will never be questioned in the future statute of New Caledonia.

New Caledonia's political and administrative organization is based on several elements, resulting from the political balance found during the tripartite negotiations between the State, pro-independence representatives and loyalist representatives during the negotiation of the Nouméa Accord.

New Caledonia is subdivided into three provinces, endowed with a deliberative assembly and an executive through the Speaker of the Assembly, and deputy speakers. This political structure allows for power sharing between the main political parties of the territory. New Caledonia itself has its own assembly, the Congress of New Caledonia, whose members come from the provincial assemblies; a government elected by the Congress by proportional representation; a customary Senate representing the Kanak custom, whose members are appointed by the traditional authorities and a state representative who ensures the exercise of state competencies, as well as the legality of decisions made by local authorities.

Within the Caledonian institutional setup, the Congress of New Caledonia acts as a real parliament (I). In this respect, it is the only assembly of French territorial authorities with legislative power, thanks to its capacity to adopt 'country laws'.

I - The Congress of New Caledonia, the only local parliament in the French legal order

The Congress is thus the only local assembly with legislative power under French law. Just like in the case of Morocco, the fact that France is a unitary state indeed normally prohibits any devolution of legislative power.

In order to fully understand the role played by the Congress of New Caledonia in the local institutional architecture, it is important to understand how it is appointed, based on a distortion of representation among its members with a view to ensuring political rebalancing (A). We shall also look into its role within the Caledonian legal order (B).

[15] Despite this logic of progressive emancipation, the local population is represented in the national Parliament, just like the rest of the population, since two Caledonian MPs are members of the National Assembly, the lower house of the national Parliament, and two senators are appointed to the upper house.
[16] https://www.nouvelle-caledonie.gouv.fr/Politiques-publiques/Elections

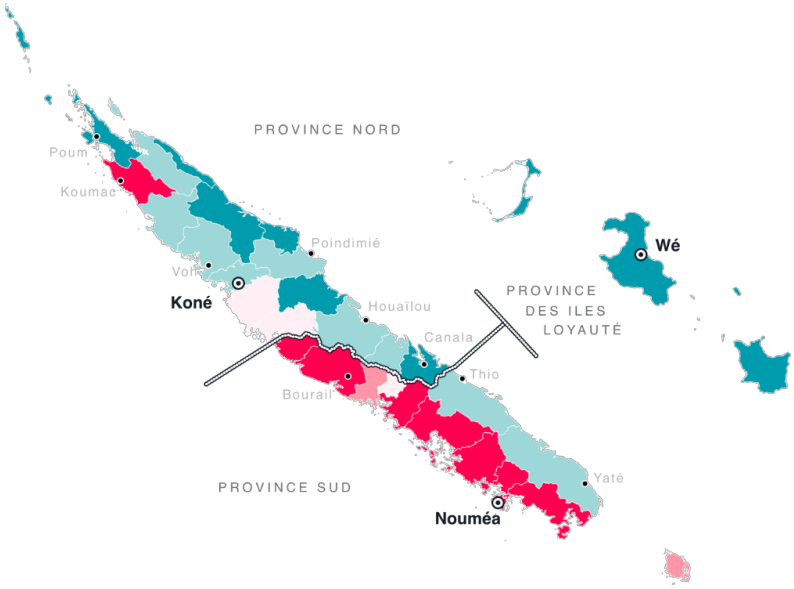
A - The Congress of New Caledonia[17], a symbol of the political rebalancing wanted in the Nouméa Accord

The Congress of New Caledonia is in many respects an original institution. The same applies to its composition which implies that certain parts of the territory are overrepresented to ensure political rebalancing in favor of the first people (2). This distortion rests on the appointment of local parliaments by proportional representation within provincial constituencies and by a highly restricted electorate (1).

1/ Appointment of the members of Congress

The appointment of the members of Congress of New Caledonia is not subject to an election as such. Councilors are indeed appointed during the elections to the provincial assemblies.

It is worth highlighting here the major political clout of the provincial level. The provinces were established by the Matignon agreement following bloody events, and they are a federal response to the need to ensure political power sharing in a territory that is deeply ethnically divided. The three provinces thus allow each major political group to enjoy political power over the parts of the territories where it represents the majority.



https://www.lemonde.fr/les-decodeurs/visuel/2017/12/02/nouvelle-caledonie-l-histoire-d-un-territoire-divise_5223594_4355770.html

Each province thus represents one electoral district for the purpose of electing the members of the Congress, based on a first-past-the-post proportional representation system. The election takes place every five years. The 1st Congress took office in 1999 and was later renewed in 2004, 2009,

[17] www.congres.nc

2014 and 2019. The next election will thus take place in 2024, unless political representatives find an agreement by then, which would lead to a new institutional set-up.

The peculiarity of this election lies in the electorate allowed to vote. A static and restricted electoral roll was indeed established. To put it simply, we can say that anyone who came to settle down in New Caledonia after 1998 is not allowed to vote in this election. In other words, as we speak, some residents of over 20 years are not allowed to vote in the elections to the provincial assemblies and to the Congress. These people are not citizens of New Caledonia since formal citizenship is only based on the right to vote in this election.

The maintenance of this electoral roll in the upcoming statute is a sticking point in the political discussions to come. Pro-independence activists indeed want to keep this electoral body because it gives them more representation since the people who settled down in New Caledonia generally come from mainland France and want the territory to remain a part of France and thus mainly vote for loyalist parties. As for loyalist political representatives, they want, at the very least, a more flexible electoral roll, with the support of the State. The main argument has to do with the fact that such deprivation of the right to vote is unconventional. The European Court of Human Rights was indeed given the chance to express itself on this electorate in the case Py vs. France in 2005[18]. If it hasn't condemned France for a violation of the convention it is only because this restriction is said to be transitional and that perpetuating it would therefore not be possible.

Some 50.000 people are currently excluded from the electoral roll[19], they can vote in the national elections (presidential and legislative), in the European and municipal elections, but not in the elections to the provincial assemblies and to the Congress of New Caledonia.

This measure favors the representation of the pro-independence camp by minimizing the electorate of loyalist political parties, and goes hand in hand with an overrepresentation of voters from the Northern province and from Loyalty Islands Province.

Finally, it is worth noting that gender equality applies in the election of the members of provincial assemblies and of Congress, there must be perfect balance between men and women on the lists of candidates. In this respect, they seem to go further than the Moroccan initiative which provides for *"adequate representation of women"*, without giving any more details.

2/ Overrepresentation of the Melanesian population in the Congress of New Caledonia

The allocation of seats in the Congress of New Caledonia is thus decided at provincial level. However, the number of seats allocated to each province is not proportional to their population

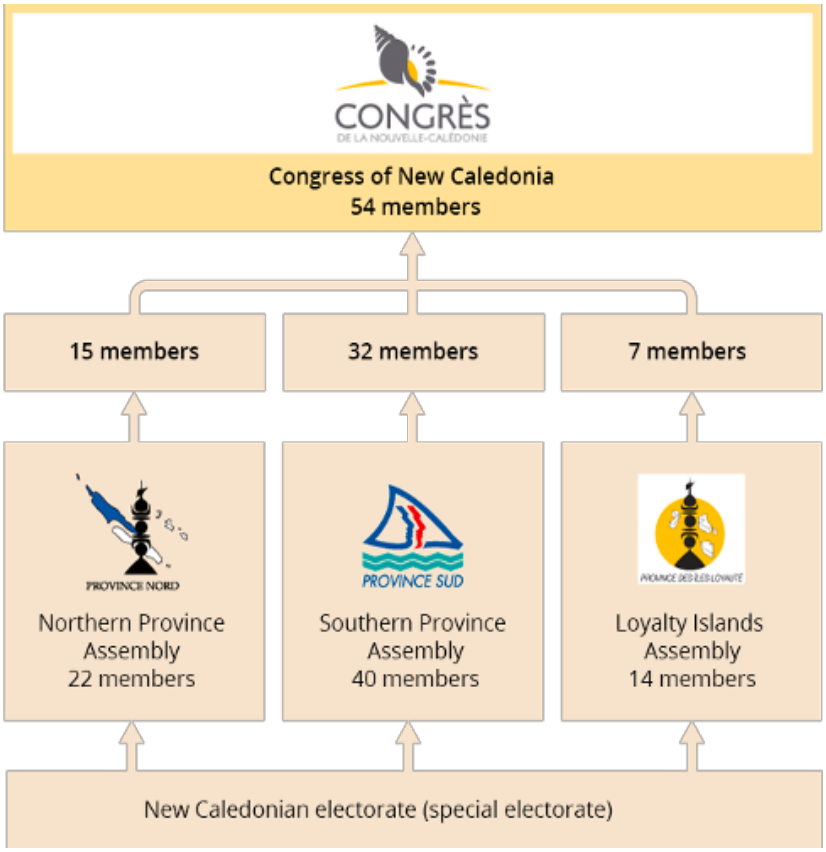
[18] CEDH, Court (second section), Affaire Py c. France, 11 January 2005, 66289/01.

[19] For the 2022 legislative elections in New Caledonia, 219,260 people were on the general electoral roll. For the latest 2019 provincial elections, 169,552 people were on the electoral roll (21,205 in Loyalty Islands Province, 39,903 for the Northern Province and 108,444 for the Southern province.

or its electorate and the people of the Northern province and that of Loyalty Islands Province, where the Kanak population is largest, are overrepresented.

Therefore, nearly 95% of the population of Loyalty Islands proclaimed themselves Kanak during the latest census carried out in 2019.[20] They were 72% in the Northern province.[21] By way of comparison, the Kanak people only represent some 29% of the population of the Southern province.

The Congress of New Caledonia is made up of 32 of the 40 representatives elected to the Southern Province Assembly, 15 of the 28 members of the Northern Province Assembly, and 7 of the 14 members of the Loyalty Islands Province Assembly, i.e. 54 members in total.

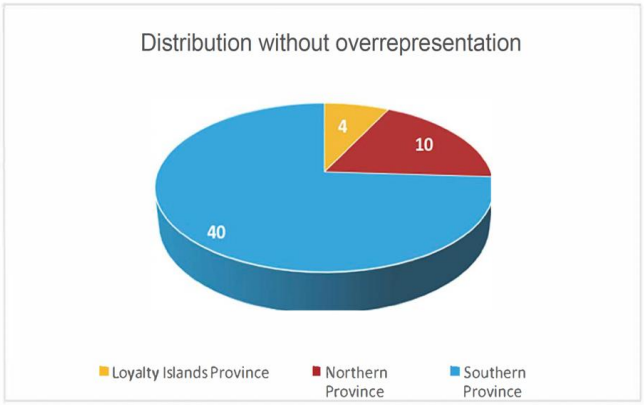


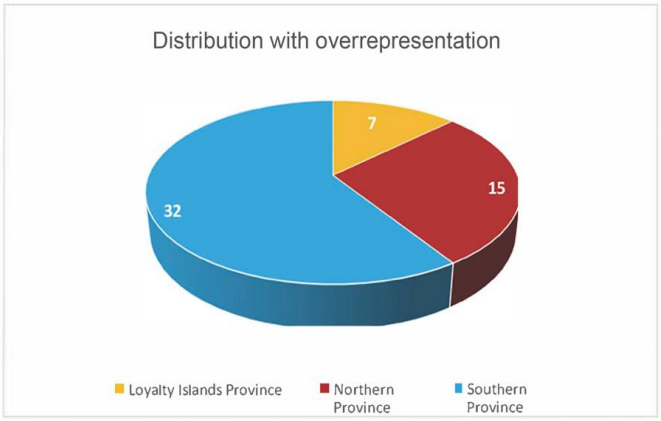
https://www.congres.nc/lassemblee/composition

[20] Knowing that out of the remaining 5%, 2% declared that they belong to several communities. Only 1.75% of the population declares itself of European origin.
[21] Moreover, 10% of them declared that they belonged to several communities. Just under 10% of the population declared themselves of European origin.

This distribution is however not proportional to the population of the various provinces. The Southern Province has 203,144 inhabitants, the Northern Province has 49 910 inhabitants, and the Loyalty Islands Province has 18,853 inhabitants.

Here is how biased representation is:





This overrepresentation of the Northern Province and of Loyalty Islands Province stems from the logic of political, economic and social rebalancing wanted in the Nouméa Accord and ensures relative political balance within the local assembly.

During the latest renewal of the assembly in 2019, a new political party representing the population of Wallesians and Futunians (another French territory in the Pacific), i.e. around 8% of the population, made inroads. Therefore, there currently are in Congress 26 pro-independence representatives, 25 loyalist representatives, and 3 representatives of this party.

As we shall see, beyond the leading role this gives the new party within the very assembly, by tipping the majority one side or the other, the distribution of seats in Congress is also important in the light of the place of Congress within the local institutional architecture.

B - The Congress of New Caledonia within the local institutional architecture

The role of Congress within the institutional architecture of New Caledonia is typical of a parliamentary system. In any event, New Caledonia's statutory organization is much closer to that of a state than to that of a local government. The functions of New Caledonia's Congress are clearly characteristic of a parliament, in that it carries out the following typical missions: the exercise of legislative power and the oversight of government actions. This attests to the parliamentary nature of New Caledonia's political system in so far as the policy direction of the executive depends on that of the assembly which appoints its members and holds the power to stop it from acting through a vote of no-confidence.

Moreover, in order to take into account the sociocultural specificities of New Caledonia and its projection in the functioning of the political system, the members of the Government of New Caledonia are appointed by Congress based on proportional representation. The lists of candidates, who are not necessarily members of the assembly, are presented by the political groups constituted within Congress.[22]

The composition of the local executive is undeniably original. Its appointment based on proportional representation means that the Government in its composition reflects that of the assembly and representatives of the various political movements represented in Congress sit side by side, in other words loyalist and pro-independence representatives serve together in government.

As can be seen, the role of the local parliament and its relations with the local executive differ substantially from what is offered in the Moroccan Initiative for the Sahara Region. If the regional parliament plays a key role in the appointment of the executive, its role is limited to the appointment of the head of government, who then forms his government. The other difference is that, in New Caledonia, the state isn't involved in the appointment of the government since it is the Speaker of the Congress who announces the results of the elections of the members of government and immediately sends them to the High Commissioner, while it is expected that the Head of the Government of the Sahara is invested by the King.

Besides the exercise of legislative power, to which we will return in part 2, Congress enjoys powers in terms of oversight of government action, which can lead it to end the government's term.

Congress can therefore, at the request of the Bureau or at least 20% of its members, establish commissions of enquiry based on proportional representation of elected groups. These are mandated to collect information either on specific incidents, or on the management of New Caledonia's public services with a view to presenting their conclusions to congress.

This mechanism is rarely used since, as a matter of fact, only one commission of enquiry was ever established since 1999.

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[22] Section 11 of Congress deliberation No. 0009 dated 13 July 1999 establishing the standing orders of the Congress of New Caledonia provides that a minimum of 6 members are required to set up a political group in Congress.

The Organic Act also makes it possible for congress to question the government of New Caledonia's management by voting a no-confidence motion modeled on its national counterpart. It must be signed by no less than one-fifth of its members (one-tenth at the national level). Congress must then meet two days after the no-confidence motion has been tabled. Members vote over the two following days. Only votes in favor of the no-confidence motion are counted and it can only be carried by an absolute majority of congress.

The adoption of the motion terminates the government, although it must continue to manage day-to-day business until a new government is elected.

This system is however not balanced since the government of New Caledonia has no power to dissolve the Congress. The Organic Act indeed provides that when it is impossible for the Congress to operate it can, on advice from its Speaker and from the government, be dissolved by reasoned decree in the Council of Ministers. Such dissolution, pronounced by the state, automatically leads to the dissolution of provincial assemblies and necessarily terminates provincial and territorial executive powers.

The fact that the Government of New Caledonia is appointed based on proportional representation implies that political groups are somehow neutralized, which makes no-confidence motions pretty unlikely since the decisions made within government are made collectively during so-called "collegiality" meetings. This is why the motion of no-confidence has never been used.

II - The legislative power of the Congress of New Caledonia[23]

The primary function of the Congress of New Caledonia nevertheless remains the exercise of legislative power, in the form of the power granted to the local assembly to adopt acts of a legislative nature, called "country laws", which in the hierarchy of norms stand at the same level as the acts adopted by the National Parliament in its fields of competences. Since the State no longer exercises the powers irreversibly transferred to New Caledonia, it can no longer involve itself in these matters. However, there is no procedure by which local bodies could establish the State's encroachment on the powers of the collectivity, whereas such a mechanism exists in other overseas collectivities[24] though they have no legislative power.

Such legislative power is exercised on a substantial matter (A) and through an adoption procedure (B) according to the monitoring procedures (C) established in the Organic Act adopted by the national parliament.

A - Matters covered by country laws

The Organic Act distributes powers between the State, New Caledonia and the provinces, the first two enjoy jurisdiction ratione materiae whereas the provinces - a politically highly sensitive level

[23] Collective, “Fifteen years of local laws in New Caledonia – On the paths to maturity”, C. David (dir.), ed. PUAM, coll. Overseas law, 2017, 330 pages.

[24] A procedure before the Constitutional Council allows French Polynesia and Saint Martin and Saint Barthélemy's collectivities in the Antilles to enforce their powers in case of encroachment by the State.

- enjoy ordinary jurisdiction. The State thus still exercises a number of powers, such as guaranteeing public freedoms, defense, the currency or even justice, higher education and research.

As for the Congress of New Caledonia, it exercises its powers through regulations, in the form of decisions, or through the legislative route, in the form of "country laws". In this respect, and this may be a unique case in the world, depending on the subject matter, Congress has to determine the nature of the measure adopted. This reminds us of New Caledonia's previous statutes in so far as the local assembly used to intervene - just like other collectivities (French Polynesia, for instance) - in matters that fell under national law but were regulated by local regulatory acts, since until 1998 and the Nouméa Accord, the devolution of legislative power to a local collectivity had never been considered by the French State.

Therefore, though article 22 of the Organic Law lists over 30 competencies entrusted to New Caledonia, to which now have to be added a certain number of competencies over time, only the subject matters mentioned in article 99 of the Organic Law are considered as the local legislative domain. It is worth noting that it doesn't match the national legislative domain. Some legislative powers at national level don't come under the purview of New Caledonia but are in the hands of the State[25] or of the provinces[26]. Moreover, certain local legislative powers have no national equivalent.[27] Finally, other competencies which are decided by New Caledonia, come under its regulatory powers[28].

In other words, the study of the substantial domain of the country law doesn't truly reflects the legislative powers of the Congress of New Caledonia and of the scope of the competencies devolved to the local authorities, even though the most important ones come under the country law.

Country laws are thus legally binding in the domain established in article 99 of the Organic Law. If they are adopted outside the local legislative domain thus established, they become regulatory measures. Such regulatory nature can be invoked during legal proceedings within three months.

In any case, in practice, country laws mainly come into play in two material fields:

- Rules related to the tax base and tax collection, duties and taxes of any kind. Taxation and customs are two domains in which country laws are frequently adopted with about 40% of the country laws adopted since 1999 in this area.
- The fundamental principles of labour law, union law and social security law; the fundamental guarantees of the public administrations of New Caledonia and the communes. This is the second biggest area in which the local legislator intervenes since, here again, some 40% of country laws have been adopted in these areas.

The local legislator thus only marginally intervenes in other areas, such as:

[25] Higher education, for instance.
[26] The environment, for instance.
[27] Customary law or the Kanak identity, for instance.
[28] Education, for instance.

- Identity signs and the name of the territory. Only one country law was adopted in this area to establish the motto of New Caledonia[29], it's anthem and the effigy on its bank notes;
- The rules regarding foreigners' access to the labour market;
- Customary civil status, customary land tenure and customary assemblies; the limits of customary areas; the procedures for appointing the members of the customary senate and traditional councils;
- The rules regarding hydrocarbons, nickel, chromium, cobalt and rare earth elements;
- The rules related to state lands law for New Caledonia and the provinces;
- The rules governing access to local employment, based on the principle of local preference;
- The rules governing people's condition and capacities, matrimonial regimes, successions and gifts;
- The fundamental principles governing property ownership, rights in rem as well as civil and commercial obligations;
- The distribution between provinces of operating and equipment grants;
- The powers transferred and the timelines for these transfers, within a calendar established by the statutory organic law;
- The establishment of independent administrative authorities, in the areas that come under its purview.

As can be seen, the local legislative field differs considerably from the one proposed in Sahara.

The budget or education, for instance, are indeed decided by New Caledonia but under its regulatory powers. The environment is regulated by the provinces and is therefore not covered by country laws, whereas it would be the case for the Sahara. A few commonalities however emerge: taxation, trade, social protection, employment or the culture of the local populations are decided at the local level.

B - The adoption of country laws

The statutory organic law establishes the modalities for the adoption of country laws, complemented by the standing orders that Congress adopted for itself.

The legislative initiative concurrently lies with the Government of New Caledonia and the members of Congress.

Draft laws and bills are presented to the Council of State for an opinion before they are adopted by the government deliberating as a Council for the draft laws, and before the first reading for the bills. This opinion focuses mainly on compliance of the provisions with conventions and with the Constitution; it is an advisory opinion which the Congress is free to disregard if it so wishes.

[29] "Land of speech, land of sharing".

Country laws are adopted by the congress in a public vote, by a majority of its members, unlike parliamentary deliberations which are adopted by a majority of the members present or represented.

For the rest, the procedure is mostly modeled on its national counterpart, subject to minor adaptations.

For each draft country law or bill, a rapporteur is appointed and tasked with drafting a written report to be presented, tabled, printed and sent to the members of Congress at least eight days before the session.

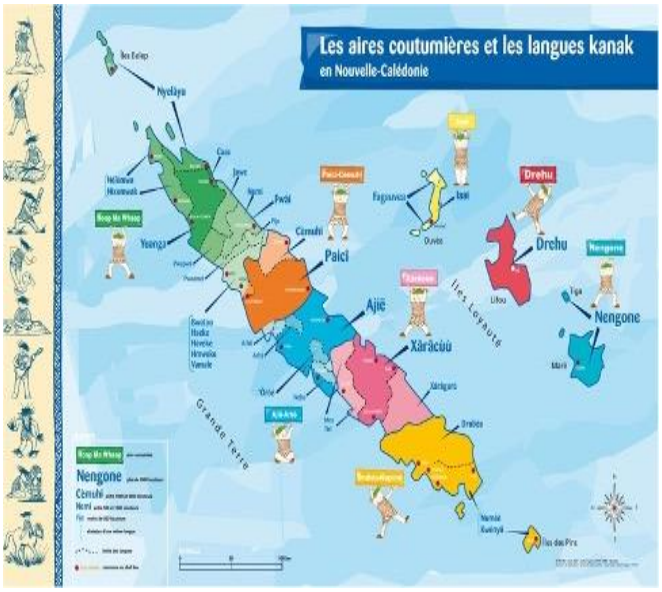
During the fifteen days that follow the adoption of a country law, the High Commissioner, the Government, the Speaker of the Congress, the president of a provincial assembly or eleven members of Congress can submit such law or some of its provisions to a new deliberation of Congress, which cannot be rejected.

This new deliberation is a mandatory precondition to be able to refer the matter to the Constitutional Council for an a priori constitutional review of the country law.

It is worth noting here that when the country law relates to the Kanak identity, in other words to customary civil status, customary land tenure, and customary assemblies, the limits of customary areas or the procedures for appointing the members of the customary senate, the procedure involves a legislative shuttle with the Customary Senate, the hallmark of partial bicameralism.

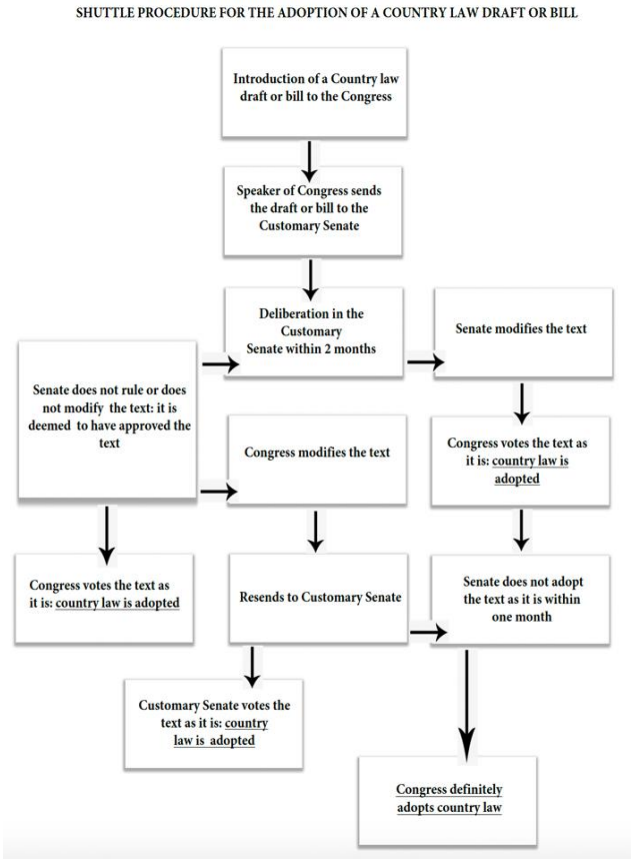
The Customary Senate is an original assembly made up of 16 customary senators, two for each of the eight customary areas of New Caledonia.

Customary areas and the Kanak languages in New Caledonia



https://gouv.nc/gouvernement-et-institutions-les-autres-institutions/le-senat-coutumier

The adoption procedure is summarized in the figure below:



In C. Gindre-David, *Essai sur la loi du pays calédonienne - La dualité de la source législative dans l'État unitaire,* L'Harmattan publishers, Coll. GRALE/CNRS, 2009, p. 76.

C - Control of country laws[30]

Just like their national equivalent, country laws can be subject to a constitutional review by the Constitutional Council, which is the symbol of the legislative nature of country laws. This optional review can be carried out via two different procedures. The law can indeed be subject to an a priori review upon referral to political authorities. Since 2010, it can also be subject to a priority preliminary ruling on constitutionality, in other words a posteriori exceptional review.

In the framework of an a priori review, a country law that is subject to a new deliberation in Congress can be referred to the Constitutional Council by certain local political authorities: the High Commissioner, i.e. the representative of the State locally, the Government acting collectively, the Speaker of the Congress, the president of a provincial assembly or eighteen members of the

[30] C. David, "The incompleteness of the control of the law of the country", in C. David (Dir.), 15 years of laws of the country – On the paths of maturity, ed. PUAM, Coll. Overseas law, 2016, p. 97-108.

Congress, in other words a third of the members of the assembly. They have ten days to do so as of the transmission of the text adopted to the High Commissioner.

The Constitutional Council then takes action within three months after referral. Its decision is published in the official gazette (Journal officiel) of the French Republic as well as in the official gazette of New Caledonia.

If the Constitutional Council notes that the country law contains a provision which is contrary to the Constitution as well as inseparable from the law as a whole, it cannot be enacted. If the Constitutional Council decides that the country law contains a provision which is contrary to the Constitution without concurrently noting that said provision is inseparable from the law, only that provision cannot be enacted.

The High Commissioner enacts the country law, countersigned by the President of the Government, either within ten days after transmission by the Speaker of the Congress when the time limit provided for to bring the matter before the Constitutional Council has elapsed, or within ten days following publication in the Official Gazette of New Caledonia and the decision of the Constitutional Council.

Country laws can moreover be subject to an exceptional a priori review introduced in French law though the national law in 2010. The provisions of a country law can consequently be subject to a priority preliminary ruling on constitutionality in conditions that are very similar to those that apply for national laws.

Therefore, a litigant can in the course of proceedings raise an objection as to the unconstitutionality of a provision of a country law. This priority preliminary ruling on constitutionality can be lodged at any time during the proceedings, in the first instance as well as at the appeal stage or even in cassation. The court seized decides whether it is admissible and, as the case may be, the highest court decides whether it is admissible, in other words the Court of Cassation or the Council of State. If it is deemed admissible, then an ordinary court stays the proceedings, refers the question to the Constitutional Council which then has three months to decide whether the contested provisions infringe "the rights and freedoms guaranteed by the Constitution" in keeping with article 61-1 of the French Constitution.

Overall, it can be said that the Constitutional Council has made few decisions on country laws. Since 1999, only seven decisions were served under an a priori review. Since country laws, to a large extent, result from draft country laws collegially discussed within Government, and have to undergo a second reading before they can be referred to the Constitutional Council, the system seems to have limited the number of appeals against provisions of country laws.

A posteriori reviews, launched on 1 March 2010, were hardly more successful. In twelve years, only six priority preliminary rulings on constitutionality were lodged against local legislative provisions.

Over the months to come, local political representatives will have to try to find a solution to end the crisis caused by a disagreement over the third and final referendum provided for in the Nouméa

Accord that took place on 12 December 2021 without the participation of an overwhelming majority of the Kanak population. This led the pro-independence camp to challenge this consultation. One thing is certain however: no one will consider backtracking on the legislative power entrusted to the Congress of New Caledonia. It is more than likely that the scope of these powers will be broadened under the next statute.

Since 1999, date of the adoption of the first country law by the Congress of New Caledonia, the local legislative assembly adopted 261 country laws. After an adaptation period, the Congress of New Caledonia gained independence from the national framework and now produces country laws that more and more accurately reflect the Caledonian identity and the specificities of this territory.