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Codification and Creation of Community and Customary Laws in the South Pacific and Beyond

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Beyond Legal Pluralism, the hybridization of the norm

The case of the Loyalty Islands Province (New Caledonia) Environmental Code

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New Caledonia is a territorial collectivity of the French Republic in the process of emancipation whose institutional organization has been the subject of successive developments according to the revendications of the separatist political leaders and the balance of power between secessionists and Pro-France political movements . Since the 1980s, the intensification of the independence movement has led to a growing territorialization of New Caledonia. The creation of “pays” by the Lemoine statute in 1984, and then of “regions” by the Fabius Pisani status in 1985 symbolize the realization of the need for political power sharing on a territorial basis to take into account the demographic distribution of population.

In this respect, the provincialization initiated by the Matignon-Oudinot agreements in 1988 and confirmed by the Nouméa agreement in 1998 is a key element of the political system put in place to achieve a sustainable return to civil peace. Indeed, the geographic division of the territory has been used as a tool of territorial federalism allowing each political group to gain power over the parts of the territory where it benefits from a majoritarian representation. Unlike the regions created in 1985, the provinces have broad powers and significant financial resources.

It is within this framework that jurisdiction over environmental matters is included in the common law jurisdiction that the provinces have had since their creation. Lightly invested at first, it has gradually become an emblematic provincial field of intervention. Gradually, each province has adopted its own code of environment. While the North and South Provinces adopted their respective codes in 2008 and 2009, the province of the Loyalty Islands waited for April 2016 to do so. In a province populated at 97% by the indigenous population and 98% of which is customary land, the challenge posed by the writing of this code is to overcome the difficulties linked to the necessary articulation between formal law and custom, in order to elaborate regulations, which must reflect the traditional ways of life of the people and respect the role and powers of the customary authorities. We will therefore first look at provincialization as a means of establishing an institutional framework conducive

to the adoption of a law reflecting the socio-cultural identity of the populations living there (I), before raising the difficulties posed by the construction of a formal law, that is to say elaborated within the framework of republican institutions, in the respect of the traditional values, combination which is necessarily source of tensions between the two systems (II).

I - Provincialization, territorial institutional framework conducive to taking into account cultural identity in formal law

As is often the case in plural societies seeking a balance between their different components, in New Caledonia, the current political framework reflects the ethnocultural characteristics of the population. Indeed, in a divided society, “*differences are politically salient*”: “*they are persistent markers of political identity and basis for political mobilization. Ethnocultural diversity translates into political fragmentation*”¹.

The consequences of this situation are well exposed by Arend Lijphart. According to him, “*in plural societies ... the necessary flexibility for majority democracy is absent. Under these conditions, the law of the majority is not only undemocratic, but also dangerous, because the minorities to whom the access to power is constantly denied feel excluded, and they are victims of discrimination. They will stop showing allegiance to the regime*” if the political system is not adapted to these specificities².

The provincialization in New Caledonia can be considered as a tool of consociation³ within the framework of a society divided on an ethnocultural basis. Indeed, it establishes a segmental autonomy on a territorial basis, allowing the sharing of power between two groups, one being numerically inferior and subsequently could never reach power within the framework of a system of classical majoritarian democracy⁴.

As a result, the provinces were a key concept in the institutional conception of the Maignon-Oudinot agreements in 1988 and the Nouméa agreement in 1998, because they allow a faithful representation of the population and an equitable distribution of powers between the separatists and loyalists, in accordance with the reality of the representation of the different political tendencies.

Provincialization answers the major difficulty encountered by liberal democracy which do not work in divided societies. Indeed, in these societies, the cleavages are not transversal but mutually reinforcing. The result is a system of segmental cleavages, where

¹ Sujit Choudry, *Bridging comparative politics and comparative constitutional law*, in *Constitutional design for divided societies – Integration or accommodation ?*, Oxford University Press, USA, 2008, pp. 3-40.

² Arendt Lijphart, *Democracies : patterns of majoritarian and consensus government in twenty-one countries*, New Haven, London, Yale university press, 1984, p. 22-23.

³ Arendt Lijphart, *Democracy in plural societies : a comparative exploration*, Yale University Press, USA, 1977.

⁴ Cf. « *Partager le pouvoir territorialement ; puisque les kanaks et les indépendantistes ne peuvent être majoritaires territorialement, qu'ils le soient dans les zones géographiques où ils sont démographiquement majoritaires ;* ». A. Christnacht, « L'avenir de l'accord de Nouméa », *Revue Juridique, Economique et Politique de Nouvelle-Calédonie*, Nouméa, N2, 2003.

political divisions are drawn on the basis of objective social differentiation, such as language, culture or ethnicity⁵.

In addition, the division of New Caledonian society is particularly amplified by the context of emancipation, the ethnic fragmentation corresponding to the political demand for access to sovereignty. As a result, political parties are organized on the basis of these ethnic and political fragmentations.

Segmental autonomy consists of forms of federalism, either on a territorial basis when geographical boundaries correspond to ethnic boundaries, or of non-territorial federalism in areas closely related to ethnic identity (culture, land tenure, civil status). Both are used simultaneously in New Caledonia.

On the one hand, forms of non-territorial federalism are particularly present with customary civil status allowing the Kanak people to be governed by custom in the field of civil law. Customary property and more generally Kanak identity are areas in which non-territorial federalism applies.

On the other hand, territorial federalism has consisted of dividing New Caledonia into three provinces. Article 20 of the New Caledonia Organic Act of 19 March 1999 provides that: *“Each province shall have jurisdiction over all matters which are not vested in the State or New Caledonia by this Law or to municipalities by the applicable legislation in New Caledonia”*⁶.

Provincial jurisdictions include, for example, economic development, agriculture, primary education, culture, youth, sports and recreation, some aspects of health and social work, and environmental protection.

In this context, it is necessary to question whether the implementation of the provincial framework has led to the adoption of regulations reflecting the identity of the populations of each province. Thus, it will be possible to analyze whether the exercise of normative competence in the provinces managed by pro-independence representatives favors the emergence of a law that is more marked by the values of Kanak society. While it is quite obvious that there is a diversity of public policies⁷ implemented by the different provinces, it turns out that this "personalization" is less obvious when it comes to the construction of the standard.

Indeed, we note that provincial regulations are mainly developed from national legislation. They are not part of a real process of constructing the rule taking into account the sociocultural specificities of society. In other words, there is so far little thought at the level of the Caledonian authorities to build a specific right taking into account the particularities of New Caledonia, particularly in terms of environment or health. In fact, the miscegenation of the norm is ultimately little envisaged while legal pluralism is present in certain areas such as civil status, allowing two parallel systems to persist. On the one hand, there is a formal legal

⁵ Arendt Lijphart, *Democracy in plural societies : a comparative exploration*, op. cit.

⁶ Loi organique n° 99-209 du 19 mars 1999 relative à la Nouvelle-Calédonie, JORF du 21 mars 1999, p. 1182.

⁷ Séverine Bouard et al., *La Nouvelle-Calédonie face à son destin - Quel bilan à la veille de la consultation sur la pleine souveraineté ?*, éd. IAC-Karthala-Gemdev, 2016.

system consisting of texts, the vast majority of which are more or less faithful decalcs of metropolitan texts. On the other hand, the customary system, whose rules coexist as best they can with formal law, even if the leakage between the two systems gradually breaks down, in particular under the impetus of the judicial judge⁸.

In this context, it is therefore in a very original way that the Province of Loyalty Islands' exercise of its environmental jurisdiction in the development of a provincial environmental code illustrates in many ways of the territorialization of space can constitute a laboratory conducive to legal experimentation, insofar as this code appears quite original in its approach and content.⁹

The provincial authorities decided in 2013 to provide the province with its own Environmental Code, as it had done before the North Province (2008) and the South Province (2009). The province of the Loyalty Islands wanted to take advantage of this gap to build on the experiences of other provinces, either to be inspired by it or to distance itself to precisely take into account the specificities of the Loyalty Islands and the aspirations of the inhabitants on the one hand, and to learn from the difficulties or obstacles encountered by other provinces that have adopted codes largely inspired by the mother country, on the other hand.

The reasons that led the Province of Loyalty Islands to adopt an environmental code are multiple.

As is generally the case, codification was first considered to ensure better accessibility and readability of the law by citizens. Indeed, the goal of any codification is to bring together the necessary norms in a given field. Thus, the citizen has easy access to the applicable rules. Codification, by making the law more accessible, allows a better respect of the regulation.

Moreover, and this is particularly true in environmental law in the Loyalty Islands Province, the implementation of a code underlies both substantive and formal work. A double substantive work is necessary to determine the content of the rules and requires checking the consistency between the different regulations. Indeed, the scattered nature of the regulations does not favor a good articulation of standards. In the case of environmental law in the Province of the Islands, codification was particularly necessary since a number of regulations had become obsolete. Others, indispensable for good protection / management of natural resources, have never existed. Then, it becomes clear the need to take into account human-nature relationships as experienced in the Loyalty Islands. Therefore, the authorities of the three customary areas of the province must be closely involved in the development and implementation of the regulations. At the same time, formal work is essential to prioritize the effectiveness of the standard.

The Province of the Loyalty Islands first chose to retain a perimeter and architecture of the code identical to that of the North and South Provinces, in a "country logic", thus

⁸ Isabelle Dauriac, *La loi du pays fera-t-elle la « constitution civile de la Nouvelle-Calédonie » ?*, in Carine David (dir.) 15 ans de lois du pays en Nouvelle-Calédonie. Sur les chemins de la maturité, PUAM, 2016, p. 257-280.

⁹ A number of elements highlighted in this article come from work in support of the assembly of the Loyalty Islands Province for the adoption of the Environmental Code of the province of the Islands on April 6, 2016 as well as research carried out as part of a PhD.

allowing to maintain a certain cohesion in the enactment and the application of environmental rules in New Caledonia. Nevertheless, beyond these similarities, the determination of the content of the rules is carried out taking into account the specificities of the Loyalty Islands Province in cultural, of course, and environmental terms. In this framework, innovative principles to optimize the protection of the environment have been proclaimed in the general principles of the Code.

Finally, the provincial authorities chose to proceed by favoring the participation of the customary authorities and the loyaltian populations in determining the content of the rules. Thus, each draft regulation is subject to the appreciation of the customary authorities and the population through a process of information and public participation, prior to their examination by the Provincial Assembly.

The participatory nature of the process involves a long time, consistent with the customary practice of palaver. Thus, interactions with customary authorities and populations are organized, making it possible to inform the stakeholders about the process and to involve them in the determination of the content of the regulations, so that they are as much in accordance with the practices as possible. traditional.

This way of proceeding leading to lengthy text preparation times, it was decided to adopt the Code in several stages. The first step was taken in April 2016 with the adoption of the scope of the Code, as well as the general principles and some regulations. The next steps will follow a flexible and evolving schedule, primarily based on participation needs.

II - Formal law and custom: between tensions and pluralism

Thus, if there is a real desire to devote a certain number of Kanak values, materialized for example in the affirmation of the wish to recognize rights to nature or even a principle of non-regression in environmental matters, as a formal translation and legal of the given word, such legal innovations are not without difficulties of various natures.

Indeed, a first level of tension lies in the articulation between the respective roles of provincial and traditional authorities on customary land. In addition to the question of the territoriality of formal law from provincial bodies, a delicate link between respect for customary practices and formalization of the law must be put in place in order to take care of existing collaborations, or even to change them into partnerships in the form of co-management. In this context, the emergent movement of co-construction of the law appears quite original, in a perspective of miscegenation or hybridization of the norm and no longer of legal pluralism.

A second point of resistance lies in the confrontation of the expression of principles and innovative practices in formal law, which is in many respects inadequate and too rigid to accommodate the common will of provincial and traditional authorities.

The reluctance to accept the very principle of the Loyalty Islands Province Environmental Code by the customary Senate is symptomatic of the difficulty linked to this articulation between customary and provincial authorities, particularly in a province constituted for almost all customary land and populated mostly by the Kanak community.

While the statutory organic law did not impose it, the president of the Loyalty Islands Province logically decided to refer the customary Senate of the first part of the Code for opinion. In an opinion issued on 8 July 2015¹⁰, the customary institution considered that *“the drawing up of a common environmental law is contrary both to the provisions of the aforementioned organic law and to the Noumea agreement recognizing the link to the land”*.

For the customary Senate, provincial authorities do not have to regulate environmental matters.

If such an interpretation of the law is incorrect because it is based on a confusion between the legal regime of customary land and the law applicable to it or the territorial scope of the norm, it nonetheless reveals a concern as to compliance with the rules and customary management practices of the environment. Moreover, this is expressed by the customary Senate in its opinion when it notes that this problem *“is even more acute in the case of the Loyalty Islands, where various normative orders issued by distinct natural gas corporations coexist on the same space normed by custom”*.

Conscious of these difficulties, the provincial authorities held a working seminar with the customary senators to explain the process and to reassure the customary authorities of the province's willingness to include environmental regulations in accordance with kanak values and traditional ancestral practices. This seminar thus made it possible to exchange on the methods of elaboration of the regulations in collaboration with the loyaltian customary authorities and to lift the objections formulated by the Senate in its opinion of July 8th, 2015. In addition, the fruitful exchanges which took place. During this seminar, the draft Code was amended by inserting a Preamble and finalizing the drafting of a principle of co-construction of law associating provincial and customary authorities both in the elaboration of the rule of law and in its implementation.

Thus, article 110-11 of the Loyalty Islands Province Environment Code states that *“the Loyalty Islands Province recognizes the relevance of the application of a principle of subsidiarity with regard to the preservation of the environment. It implies, formally or informally, that provincial authorities on their own initiative or at the request of customary authorities and in consultation with them, recognize that customary norms and traditional practices specific to a given territory, subject to their compatibility with the Province's public rules and policies, are fully applicable when they allow optimal protection of the environment in accordance with local cultural values. In this case, they will be transcribed in the provincial regulations so that their non-compliance can be sanctioned in the same way as the other provincial regulations. This principle inspires, where appropriate, co-management by the Province and the customary authorities of natural ecosystems, particularly terrestrial and marine protected areas”*.

In this perspective, the general principles of the Loyalty Islands Province Environmental Code constitute an important element of the Code in that they set a course of action, consisting mainly of a mingling of formal and customary norms. These principles are

¹⁰ Délibération n° 11-2015/SC du 28 juillet 2015 portant avis relatif aux premiers projets de réglementation du code de l'environnement de la province des îles, *JONC* du 20 août 2015, p.p. 74012 et s.

based mainly on the Environmental Charter of the Loyalty Islands Province of April 24, 2012¹¹ and the 2004 Constitutional Charter for the Environment, as well as international conventions on the subject. Innovative principles are also introduced that are particularly adapted to the cultural and environmental specificities of the Loyalty Islands.

Thus, article 110-1 makes it possible to express from the outset the strong interdependence between preservation of the environment and Kanak culture. It establishes an Aboriginal vision of the protection of the environment in accordance with the lifestyles of the loyaltian population. This article highlights customary practices as a guiding principle in the development of environmental regulations.

The third paragraph of Article 110-2 introduces the temporal dimension of the duty of protection of the environment that is imposed on everyone, in a perspective of sustainable development, including the need to take future generations into account. The last part of this paragraph is also a nod to Jean-Marie Tjibaou who said: *“to be fully, you have to be in the rhythm of nature and it is wise to live in harmony with it. n these conditions, we do not see the utility of extracting time from the rhythm of nature to give it a certain autonomy that we could then use to give a new rhythm to people and things”*.¹²

Article 110-3 also makes it possible to assert the holistic perception of the environment and nature in Kanak society. It makes it possible to justify the introduction of the possibility of recognizing the legal personality of elements of nature considered emblematic in Kanak culture in order to give them optimal protection¹³. Devoted to Bolivia and Ecuador, and to a lesser degree in New Zealand, the recognition of rights to elements of Nature is indeed the legal tool offering optimal protection for Nature or some of its elements.

The other innovative principle, the principle of non-regression was devoted to Article 110-6, a few months before the National Parliament. In Loyalty Islands Province, it finds its equivalent in the tradition of respect for the word given. By enacting this principle, the Province of the Loyalty Islands is committed to the benefit of current and future generations not to reduce the level of protection afforded to the environment by subsequent regulations that would revert to prior learning.

Finally, the principle of information and participation affirmed in Article 110-10 is based on Article 7 of the Constitutional Charter on the Environment. It has been decided to adapt the application of this principle to the specificities of the Loyalty Islands Province, including the obligation to involve the customary authorities, which is already the case in practice, as well as the populations. The means used to involve the different actors must be adapted accordingly. hose retained by the other provinces as well as at the national level and

¹¹ Délibération n° 2012-17/API du 24 avril 2012 relative à la charte de l’environnement de la province des îles Loyauté, JONC du 29 mai 2012, p. 3796.

¹² Tjibaou Jean-Marie, Guiart Jean. Recherche d'identité mélanésienne et société traditionnelle [Avec une introduction de Jean Guiart]. In: Journal de la Société des océanistes. N°53, Tome 32, 1976. pp. 281-292. doi : 10.3406/jso.1976.2754 ;url : /web/revues/home/prescript/article/jso_0300-953x_1976_num_32_53_2754

¹³ It should be noted, however, that the legal feasibility of such recognition raises questions regarding the division of powers as it may require a prior amendment to the New Caledonian Civil Code..

based on the use of the electronic way are in fact hardly adapted to the culture of the dialogue and palaver specific to the Kanak culture. It is also necessary to take into account the digital divide in the Loyalty Islands.

The regulations that will be progressively incorporated into the Loyalty Islands Province Environment Code will be drafted and adopted taking into account these principles, thus establishing the link between territoriality and co-construction of the law through the close association of provincial authorities, and customary as an innovative practice promoting the enactment of an environmental law faithful to the lifestyles of the Loyaltian people.