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Constitutional Design: Special autonomy and other measures - Tha case of New Caledonia

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SESSION 2

Constitutional design: Special Autonomy and other measures

- **Kearnneth Nanei:** Bougainville
- **Carine David:** New Caledonia
- **Miriam Coronel-Ferrer:** Philippines

In this session, we consider cases in which regional autonomy within an otherwise unitary state is pursued as a potential solution to societal conflict. As in Session 1, the focus here is on the features of constitutional design to provide some degree of local autonomy to a territorially defined group within the state, but the questions also touch on some questions of process.

The principal case studies are the Philippines, and in particular its experience with Bangsamoro, Bougainville and New Caledonia.

The experiences of Indonesia and India are also particularly relevant to this topic.

Questions

1. *What are the main societal divisions that special autonomy is designed to address?*

The main societal division the special autonomy is designed to address in New Caledonia is an ethnic division. Indeed, New Caledonia is what the doctrine in political sciences calls a “divided society” on an ethnic basis. New Caledonia was a French colony since 1853 and is now a French overseas territory, that benefits of an important autonomy that goes further than what is usually tolerated within a unitary state. As New Caledonia is a settlement colony, there are several communities living in the territory. The results of the last census (2014) state that 40% of the population is kanak (i.e. indigenous population settled in New Caledonia) and about 30 % is European. The remaining population declares itself as Wallisian or Futunian (Wallis & Futuna being another French overseas territory in the Pacific), metis, Polynesian (from French Polynesia) or from diverse Asian countries.

The ethnic division corresponds with socio-economic and political divisions.

As a matter of fact, the indigenous population suffers deep social and economic inequalities in terms of education, access to employment or housing...

Moreover, it has to be underlined that the question of the access to independence of New Caledonia is deepening the division of the society as the indigenous population, the kanak people, predominantly claim for independence whereas the other communities (mainly European population) wish to stay within the French state. In such a context, the ethnic conflict is also a political conflict. As a consequence, the political debates tend to systematically focus on this opposition to the detriment of any other issue.

2. *For Bougainville and New Caledonia*

i. What form might local autonomy take?

As we said above, New Caledonia is already a *sui generis* territory of the French Republic that enjoys a very large autonomy, in particular since 1988. The local autonomy takes diverse forms that are not usually encountered within a unitary state like France.

First, there is a normative autonomy. The local Parliament, the Congress of New Caledonia, is provided with a legislative power. New Caledonia is the only French territory which can adopt laws, the other local authorities, even oversea, can only

adopt regulatory provisions, generally submitted to the regulatory power of the French state.

Secondly, the autonomy is granted by important transfer of powers in various fields either to New Caledonia or to its 3 provinces. Powers such as tax law, labour law, civil law or commercial law have been progressively transferred to New Caledonia. The provinces have jurisdiction in all matters that are not devolved to the French state or to New Caledonia and they have powers in environmental law, economic development (tourism for example) and can also regulate social protection or primary education among other matters.

Anyway, power sharing between New Caledonia and its provinces is of primary concern in order to maintain the balance among the political movements.

The French State is therefore more and more reduced to a role of mediator and retains sovereign powers such as defence, money, public order. Even powers such as international relations or criminal law are shared with the local entities.

The autonomy is also economic. Important financial transfers from French State, as well as autonomy in tax law are some tools allowing the local authorities to decide their own economic strategies. A policy of economic rebalancing has been established since 1988 to enable the development and equipment of the parts of the territory that were underdeveloped and suffering from lack of infrastructures. For instance, two of the three provinces benefit from a larger budgetary allocation than the other province, where the capital is and that is more developed.

ii. *How and why did independence become part of the options on offer?*

Kanak people were deprived of any citizenship from 1853 and the annexation of New Caledonia. They gained access to citizenship and then were entitled to vote from 1946. By 1957, every Kanak people were French citizens. From then, Kanak representatives claimed for autonomy. In 1957, the French Parliament voted a status of wide autonomy which satisfied in great part the Kanak demand. It explains why, in 1958, the inhabitants of New Caledonia voted in favour of the new French Constitution at 98%, even though the General de Gaulle stated that the ancient colonies that would vote against the Constitution project would become independent. Nevertheless, during the 60's, the French state progressively went back on autonomy with several laws. This shift in the situation caused a toughening of the demand, which gradually but quickly moved from a demand for autonomy to a claim for independence. At the beginning of the 70's, the first claims for independence were formulated by some political parties.

By the mid-70's, the shift was clear and marked a bipolarisation of the political spectrum that still exists today.

The option of independence is on offer since the 80's when the political situation radicalized as a result of the civil conflicts that occurred from the beginning of the 80's. But the discord about the electoral college for a referendum of self-determination, i.e. who should be allowed to vote, prevented the organization of such a consultation, as the separatist parties refused or boycotted the consultations.

Finally, it is in 1988, after the civil war reached its paroxysm, that it was decided to proceed with a consultation asking the question of the accession of New Caledonia

to independence, scheduled to take place in 1998. Nevertheless, the political leaders of both camps decided to postpone the referendum within the Noumea agreement of 1998. The referendum should take place at the latest in November 2018.

iii. *What processes are involved on the road to referendum, including collaboration with other governments and planning for a post-referendum future?*

The Noumea Agreement states that the referendum should take place between 2014 and 2018. Till May 2018, it is up to two thirds of the members of the Congress of New Caledonia to decide for the date of the consultation. If the Congress has still not decided at that date, then it is the French government that will set the date, at the latest in November 2018. Today, the date is still not decided and the consultation will most probably take place in November 2018.

The electoral college is composed of the persons who live in New Caledonia since 1994 at the latest. Since last year, the French government has begun an information campaign for registration on the electoral list for the self-determination referendum. At this stage, it appears that 20000 Kanak are still not registered on this list. This is very important because it could affect the outcome of the consultation. Recently, a United Nations delegation called the French authorities to organize localized registration process of proximity. This is an important issue because it could lead to a boycott of the referendum by separatist parties if it was not resolved. The discussions about the post referendum future, which I call “the day after” are not really in progress, political leaders focusing on the issue of independence or maintaining the territory within France. At the moment, there is still no public participation to determine the post referendum future. Nevertheless, local political leaders asked the French state to assist them within the reflexions for the post referendum institutions and governance. Since 2014, French experts are regularly coming to New Caledonia to assist political leaders on different issues. This work of expertise is still in progress. The next issue to be examined is citizenship and nationality.

3. *What arrangements, if any, does the constitution make for shared ownership of the state by different societal groups at the national level?*

There is no arrangement at the national level to share the ownership of the state, the autonomy tools being used exclusively at the local level.

Nevertheless, the implementation of the Noumea Accord of 1998 required the review of the French constitution to allow certain exceptions to the constitutional provisions and principles to provide legislative power to the local parliament, the creation of a local citizenship, to restrict the right to vote for local elections for persons settled after 1998 in New Caledonia, the implementation of priority access to local employment for persons permanently settled in New Caledonia. New Caledonia’s status is subject to specific and derogatory provisions within the French Constitution.

4. *What obstacles or challenges exist to special autonomy and constitution building, and how might these be overcome?*

In regard of special autonomy, there are several challenges existing.

First, economic and social inequalities between communities are still very present in New Caledonia. Indeed, for example, the policy of affirmative action in higher education has not been efficient enough yet to train the local executives needed. It does not enable real empowerment of New Caledonia on this issue.

Another issue is about the remaining transfers of powers that should take place before 2018. As a matter of fact, the Noumea Agreement, and then the statutory law, provide for progressive transfers of powers. There are still 3 powers that can be transferred to New Caledonia:

- Audiovisual communication;
- Higher education;
- Rules for the administration of local governments, review of the legality of acts adopted by infra territorial public entities, accounting and financial regime of infra territorial public entities.

Unlike the other powers that were gradually transferred to New Caledonia since 1999, the Congress of New Caledonia must express its will to see these transfers happening. At the moment, there is no agreement between separatist and loyalist parties on these transfers. Nevertheless, they are not compulsory and do not condition the holding of the self-determination consultation.

In regard to constitution building, the main obstacle is the inability of political leaders to look to the future regardless of the result of the self-determination consultation. However, it appears clearly that the options in either situation are really similar. Indeed, New Caledonia being independent or not, the options that will be conceivable in terms of institutional engineering are very close.

Two examples can illustrate this affirmation:

- New Caledonia cannot take upon its own defence. Whatever will be the result of the self-determination consultation, defence has to be taken upon another state, much probably France.
- The alternatives available regarding the exercise of the power of justice are quite similar in any situation. Indeed, in either situation, the power of justice can be entirely or partly assumed by New Caledonia.

The other main challenge in order to build a constitution is the inability of local political leaders as well as the French State representatives to organize a constitution-making process that reach international standards. Indeed, good practices in that matter suppose to respect several principals, such as inclusiveness, participation of the public, transparency, consensus-based decision and national ownership. None of these are considered by political leaders at the moment. In this context, it seems that the process has to be questioned. It seems urgent that the population claims ownership of the debate.

5. *What insights can be drawn for constitution building in conditions of territorially-based societal conflict elsewhere?*

In divided societies, participation is often considered to be counterproductive because there is a high risk that each group search their own interests and is not prepared to work with other groups to seriously discuss the future and to resolve conflicts. Moreover, discussions are supposed to be more narrow, to turn around particular issues and the process is slower. That's why, it is often suggested that in divided societies, decisions be made by a small group of influential elites and the constitution-making process is often not transparent and not participatory.

The on-going situation in New Caledonia and the demand for more and more participation expressed by the population tend to contradict this analysis.

Moreover, as part of a negotiated autonomy status as a palliative response to a demand for independence, as is the case in New Caledonia, it seems essential that the proposed solution does not annihilate any prospect of later evolution. It is also essential that the population as a whole appropriates the agreement.

An important issue is to consider whether the solution is definitive or transitory. Indeed, from the Caledonian experience viewpoint, affirming a negotiated solution as final appears problematic because it excludes any expectation for further evolutions.

The progressivity of the autonomy of New Caledonia also allowed to experiment with different degrees of autonomy, allowing each camps the task of assessing the advantages and disadvantages of autonomy. It also has the advantage of allowing a rebalancing of territories and populations to enable them to assume autonomy and be ready for a possible exercise of sovereignty. Indeed, over the statutes, institutional arrangements have systematically been accompanied by measures to meet Melanesian claims: land reform, promoting of Kanak culture, economic and social development plan, rebalancing in favor of rural territories and islands by setting up infrastructure for the benefit of areas predominantly inhabited by Melanesian, introduction of a management training program, primarily for Melanesians and power sharing with the provinces with skills and significant financial resources.

In addition, it seems essential in view of the Caledonian experience that the conclusion of the Agreement must be part of a population reconciliation process for considering, in the Caledonian jargon, a "common destiny". There is a need to build a common identity while accepting the differences between the group members.