New Caledonia Constitutional Transition from Melanesian states recent experiences

Carine DAVID, Associate Professor, University of New Caledonia

New Caledonia entered about 30 years ago into an emancipation process, a progressive institutional framework being determined by political agreements between the French State and representatives of separatist and autonomist political parties. The Matignon Agreement in 1988 and then the Nouméa Agreement in 1998 stated an institutional engineering leading to more and more autonomy, in the perspective of a self-determination referendum that should take place between 2014 and 2018.

This paper will put into perspective the constitutional transitions in Melanesia (Fiji Islands and Solomon Islands) in order to provide elements of method in relation to the near transition that will take place in New Caledonia. Indeed, whatever will be the result of the self-determination referendum to be held probably in 2018 in this territory, a reflection on the ways of preparing the new statutory / constitutional framework needs to be initiated. Therefore, it should be interesting to analyze the constitutional transition processes that took place in Fiji and is still in progress in Solomon Islands from the point of view of the methods of drafting the fundamental text as well as in determining the content of the status or the constitution, depending on the answer that will be given by the population.

As part of this study, we will first address the issue of public participation in the drafting of the constitutional text and its impact on its content, bringing into light the need to promote the democratization of the process leading to the writing of the statutory / constitutional text in New Caledonia. Indeed, populations of New Caledonia should be involved more closely than in the past, where only leaders of local political parties and representatives of the French state were associated.

In the second part, the study will focus on the institutional and political tools used to make more efficient the process of nation building that previous status have, for various reasons, failed to found. Indeed, the heterogeneity of Fijian, Solomon Islands and New Caledonia societies makes such analysis relevant as the choices between integrationist or multiculturalist logic cover the options available to the Caledonian drafters of the next status/constitution.

I. The public participation in the drafting of the institutional framework

Despite the fact that the status implemented according to the Nouméa Agreement is known to be ending between 2014 and 2018 from the beginning, that is to say since 1998, no measure has been taken to promote public participation in the transition process in New Caledonia. Today, while local

political leaders seem not to consider any participation of the population apart by the way of a referendum that should take place after the self-determination consultation, French State representatives are wondering about the implication of Caledonian population in the determination of the next institutional framework.

Indeed, no campaign of public forums or any other sort of exchanges with the population is scheduled in the next months.

A few months ago, Manuel Valls, the French Prime minister came in New Caledonia along with a delegation. The members of the delegation were surprised about what they felt being a lack of interest of the local population about the institutional future of their territory.

Actually, the problem is not about interest but more about having an area of speech. Indeed, the speech seems to be confiscated by local political leaders who are not really considerating the eventuality of public consultations about the institutional future of New Caledonia.

However, an effective transition means a new social contract between and among the governed and the governors. The processes used have become crucial in the success or failure of democratic transitions in ethnically divided societies. Ideally, the construction of the Constitution is a meticulous effort to a socio- political reform and conflict resolution. In the context of a democratic transition, this entails a number of crucial choices that will determine the stability of long-term plan.

The terms of the transition, the way political actors are organized and the various institutions that emerge during the transitional process are fundamental, with regard to the sustainability of the democratic organization of a state or territory.

International law and comparative law have brought about "good practice" in the matter:

The first principle is inclusiveness: all voices - including political opponents, civil society and minorities - must be heard and valued in the process, from the beginning to the end.

The second principle is participation: the population is formed in the process and must be able to speak genuinely.

Participation must be understood as more than open spaces for dialog. This involves analyzing the goals of the participatory process and impart the skills which gives the ability for citizens to participate effectively and with meaning in the process.

This principle is particularly important because the process should develop the trust between people belonging to different communities and legitimate the final document in the public eyes, thereby reducing the risk of instability during the transition process and after.

The third principle is transparency: The public is informed of what is happening at every stage of the process.

The fourth principle is consensus. The key words are consensus-based discussion, negotiation, persuasion.

The fifth principle is national ownership: the process is developed and implemented by national actors, provides an open and accountable framework for reaching a consensus on the fundamental values of the state.

The analysis of constitutional processes raises several difficulties :

- Avoid non inclusive constitutional processes or antagonist constitutional processes (ie when there is an inability of stakeholders to resolve their differences to achieve common decisions).
- A source of complexity is the delimitation of the subjects of negotiation and the way to discuss them in order to prevent discussions on particular point to the detriment of fundamental elements. It requires repeated search for integrative solutions (win-win deals), keeping in mind that one party can derail the system!

Two major pitfalls are then the risk of an abortive constitutional transition or of a victory of one side over the other. Therefore, there is a need for an inclusive process from the start.

In this context, two factors are essential to promote an integrative logic:

- Conviction of the need to reach a compromise for the successful establishment of a democratic regime;
- Anticipating strategies of negotiators, ie a partner who believes he can not win is going to try to build a strategy to pull out of the game.

Another question is about the choice of the structure which will discuss the text and its composition.

A first element is that there is a need for a single circle, central, in which all the actors stand together to take major decisions.

A second element is about the identification of negotiators. Unexpectedly, election is not necessarily the most appropriate tool because it does not guarantee multilateralism (as we saw in Egypt for example).

A preferred solution should be a body composed of members chosen for their representativeness, then whose credibility is based not on popular vote but on the agreement of recognized opposition members to integrate the structure.

To illustrate such an affirmation, the example of the Convention for Democracy in South Africa is interesting. According to President de Klerk "*negotiating a new constitution should be the responsibility of representatives of all political parties who enjoy popular support and are committed to finding a peaceful and negotiated solution*."

As the election of a constituent assembly would have induced a large victory of ANC, meaning an absence of multilateralism and then strong risk of rejection of the transition, it was decided to create the COSEDA (Convention for a Democratic South Africa) composed of unelected representatives bringing together representatives of national Government, of the government of the 10 bantustans (areas reserved for black people during apartheid) and 7 political parties (including the National party, the ANC and the Inkatha (Zulu party). Other extreme-right parties join the agreement later after initially refusing to join the negotiations.

Another interesting example is the ongoing transitional process in Salomon Islands. The conflicts between communities in 1999 were the starting point of a constitutional reflexion leading to a transitional process that is still in progress today.

After a first project was drafted in 2004, the Salomon government mandated a Constitutional Congress on the basis of a White Paper on the Constitutional reform of 2005. It was set up in 2007.

The constitutional Congress is composed of provincial representatives, appointed by the provincial executives and national representatives to represent the different groups of Salomon Islands society (young, elderly, women ...).

The constitutional congress is associated to the Eminent Persons Advisory Council (EPAC) that plays an important technical role, composed of experienced politicians and representatives of all communities of Solomon Islands.

The work started in 2008 with the identification of political communities (consisting in identifying in each province, the resource persons to consult).

Thematic committees (human rights, finance, justice, institutions, division of powers ...) were also established but they did not function because members of CC and EPAC decided it was more efficient to work all together within plenary sessions.

- In 2009: a first draft was validated by the 1st Joint CC & EPAC Plenary.

- In 2010: People were consulted on this draft at provincial level. Public hearings were then summarised in provincial reports via the CC provincial teams.

- In 2011: the 2nd Joint CC & EPAC Plenary validated the 2nd draft, taking into account provincial reports.

- In 2012, Provincial Conventions took place consisting in public consultations on the 2011 draft, including Solomon Islands communities abroad (Fiji, Vanuatu)

- In 2013, a 3rd Joint CC & EPAC Plenary validated a 3rd draft, which was then audited by external experts (including Yash Ghai).

- In 2014, the 4th Joint CC & EPAC Plenary validated a 4th draft after 7 weeks working on feedback from experts in their presence.

Then, the draft was submitted to the provincial teams of the CC and began in 2015 the Public Awareness Program on the project all other Salomon Islands and among population abroad. It ended recently.

The final steps are a last CC & EPAC Plenary to write the final draft which will then be transmitted to the PM and submitted to the Cabinet. Then, a Constituent Assembly will adopt the text of the constitution.

***These examples shows that the risk that each group search its own interests and is not prepared to work with other groups to seriously discuss the future and to resolve conflicts can be avoided.

***Yes, the process is slower, and discussions tend often to be narrow and turn about particular issues, but the example of Salomon Islands show that, in divided societies, it is possible to organize successfully a participatory, inclusive and transparent process.

***In this regard, the failure of the 2013 transitional process in Fiji is merely due to the authoritarian context in which it took place more than the fact that it has to operate conciliation between the 2 main communities in Fiji.

Indeed, a comparative study of 7 transitions in Latin America and Southern Europe shows that the more the control over the transition is authoritarian, the more there is an initial stability in the short and medium term. But the more there is instability in the long term because there is a lack of legitimacy in the process, and then a lack of confidence in the institutional framework.

That’s why, in an authoritarian context, it is crucial to set up a "caretaker government" or a specific committee to manage the transition to ensure independence from the government in place.

In this regard, the omnipresence of F. Banimarama in the 2013 transitional process explains partly the failure of the democratic process.

As a conclusion of this part, the transitional process in NC does not respond to any criteria of good practice : there is no inclusiveness, no participation, no transparency, so we can not say if there is any consensus or any national ownership.

II – The determination of the content of the institutional engineering for divided societies

***2 distinct public policies are possible in democratic states that wish or need to manage their diverse society: integrationism and accomodationism.

***Indeed, assimilationism should be avoided because It seeks erosion of diversity in the public sphere. The aim of assimilation is to create a common identity by merging or acculturation.

Fusion consist in 2 or more communities who merge to form something new: A + B = C

Acculturation consist in 1 or more communities adopt the culture of another and is absorbed: A + B = A

***1) The integrationism is influenced by liberal philosophy and seeks to promote a single public identity at the scale of the state territory.

***=> It supposes uniqueness of the public sphere where the principle of equality before the law is a priority.

***=> It implies the absence of recognition of groups identities, but acceptance of diversity in the private sphere. The goal is homogenization at the state level through a common citizenship.

It is presented by its proponents as a policy promoting political stability, unity and transcendence of group chauvinism. Indeed, integrationists believe that political instability and conflicts result from community supporters in political institutions. A state that serves the interests of one or more groups promotes the mobilization of excluded communities and therefore conflict.

***Therefore, there is opposition to ethnic political parties or community associations. The parties supporting non-ethnic programs are preferred.

They also promote electoral systems that discourage the mobilization of parties around cultural differences, preferring systems that require broad support from candidates.

They encourage majoritarian governments and they are opposed to the funding of communities school systems or any form of autonomy based on the groups.

2) Accomodationism

***Accomodationism is quite different because it aims at promoting multiple identities. Accomodation, in its various forms, allows to make proposals to manage the difference. It allows institutional and public expression of difference.

***While integration features to manage the diversity through institutions that transcend, minimize differences, accomodation seeks to ensure each group a public space allowing them to express their identity, to protect themselves against the tyranny of the majority and to make their own decisions in what they consider as fundamental matters.

***The philosophy of accomodationist is to secure the coexistence of different communities within the same state (although supporters of the accomodation can support secession or partition if the accomodation is not possible).

The accomodationnists define themselves as responsible realists, while providing arguments on the virtue of diversity. They insist that divisions / identities are durable, hard and resistant rather than malleable, soft and convertible.

Political prudence and morality require adaptation, adjustment and consideration of the interests, needs and concerns of the groups so that they can see the state as being done for them.

When the divisions are deep and enduring cleavages, the accomodationnists think that any attempt to integration will be considered unfair and therefore necessarily deemed to failure, especially because it usually involves a political choice in favor of a community, usually the largest one.

***After having exposed these theories to my postgraduate students in Nouméa, I asked them to think about the institutional engineering for New Caledonia after 2018, making them actors of the transition.

I don’t have time to detail what are their proposals but broadly they definitely opted for an accomodationnist solution. Indeed, they used almost all the tools implied by such a philosophy.

***- territorial federalism;

***- broad use of proportionality in institutions (parliament and government) and in administration, with when necessary use of quotas or policy of positive discrimination in favour of indigenous people;

***-use of veto by customary chiefs on customary and kanak identity issues;

***- internal boundaries corresponding to socio-economic issues as well as political orientations;

***- affirmation of a multiculturalist perception with a preambule recognizing the indigenous people first, then the historical communities

***- affirmation of the will to build a nation, in the respect of different identities (recognition of a right to be educated in primary school in its mother langage, laicity, customary civil status for kanak and other indigenous people (Wallis & Futuna).

***As a conclusion, I want to say that giving this experience with my students, it would be a good idea to let people of NC express themselves !!!