MOROCCO'S INITIATIVE FOR NEGOTIATING AN AUTONOMY STATUTE FOR THE SAHARA THROUGH THE LENS OF THE AUTONOMY STATUTE OF NEW CALEDONIA

By: ***Carine David,*** *Lecturer in Public Law, University of New Caledonia, Centre des Nouvelles Études du Pacifique (CNEP).* (CV in the annex)

INTRODUCTION

It may at first sight seem surprising to compare Western Sahara and New Caledonia. Indeed, why compare two territories whose geographical, societal, historical, cultural and religious characteristics are so different? New Caledonia is an island territory in the South Pacific with a population of 250,000 belonging to two main ethnic groups: the Melanesian native people (the Kanaks) and the descendants of European settlers. Its main religions are Catholicism and Protestantism. However, upon closer scrutiny, the two territories do display common features that make the comparison more meaningful than it first appears. What are these common features?

Firstly, just like New Caledonia, Western Sahara is on the United Nations list of territories to be decolonized. They both experienced violent clashes with their administering powers when asserting their right to self-determination, although these clashes were not of the same intensity. Second, the two territories are attached to a unitary state which is finding it hard to grant a large degree of autonomy to what it considers a territorial authority. For instance, granting legislative power to sub-state authorities doesn't come naturally to unitary states that are conservative by nature, and are in the throes of a fight against multiculturalism. In this respect, the constitutionalisation of "advanced regionalisation" in 2011 in Morocco is progress. These two territories also share another feature: an indigenous people eager to autonomously manage their territory and its valuable underground and nearshore natural resources.

It is, however, worth noting that several of these concepts (decolonization, Sahrawi identity, Sahrawi people, administering power, identification of the electoral body, registration of camp populations) give rise to totally divergent interpretations by Morocco and Algeria, hence Morocco's proposal to overcome these through a draft autonomy statute.

Last but not least, the Moroccan Initiative for the Sahara Region[2] bears undeniable similarities with the autonomy statute given to New Caledonia in 1999, despite notable differences, either that the Moroccan project is more ambitious (for instance in terms of regional jurisdictional competence), or on the contrary, that it is more cautious. Finally, a number of elements that are nowhere to be found in the Moroccan document turned out to be key to the success of the Caledonian solution which, though imperfect, did bring about great advances in a guaranteed democratic framework.

[2] Letter dated April 11, 2007, sent to the Chairman of the Security Council by the Permanent Representative of Morocco to the United Nations Organization (Document S/2007/206 dated April 13, 2007).

Political institutions are never a mere coincidence but rather the reflection of a society's history in so far as they bring to fruition the evolution of its social pact. The product of explicit choices and compromises, they can lay the foundations for a social project in a nascent democracy or a composite state structure. The same applies to the autonomy statutes granted to different territories within unitary states the world over, whether or not they are accompanied by a decolonization process. These statutes bear witness both to the legitimate claims for self-government or independence of territories and to the willingness of central authorities to grant to a greater or lesser extent a share of the political power to these territories. New Caledonia's current statute explains this situation and is part of a peaceful and gradual process of decolonization negotiated and accepted by the three parties involved: the indigenous independence movement, the Caledonians who want New Caledonia to remain in the French Republic, and the French state.

The autonomy statute granted to New Caledonia is a reflection of the institutional maturity of the constituent power on the one hand and of Caledonian politicians on the other. The latter have experienced a great number of statutes during their tumultuous post-colonial history. This statute is the crowning achievement of the evolution of this multi-ethnic Oceanian society whose main components finally decided to live together and build a common destiny in a peaceful manner.

In this context, the process for implementing a negotiated autonomy statute can be divided into two distinct stages which we shall study in turn. The political stage leading to the adoption of regulatory acts that allow for the incorporation of the political decision into substantive law is obviously crucial since it involves making choices that will determine the success or failure of the negotiations. It thus seems logical to begin by addressing the political options offered to negotiators (I) and then to look at their meaning in terms of institutional engineering (II).

I – Political Choices

Negotiating a political agreement on autonomy involves compromises, as the parties often have diametrically opposed aspirations. As noted, in New Caledonia the success of the negotiations therefore essentially rests on the opportunities offered by the political agreement (A). Acknowledging the unique identity of the people concerned or the local specificities of the population concerned[3] in order to even partially meet the underlying claims at the root of the conflict (B).

A. Opportunities offered by the political agreement

When the negotiated autonomy statute is considered a second-best solution to claims of independence, as is the case in New Caledonia and Western Sahara, it seems essential that the solution put forward doesn't preclude all prospects of future developments. Ownership of the agreement by the populations is moreover crucial. On this basis, it can be said that a number of elements contained in the Moroccan Initiative for the Sahara Region raise certain questions in the light of the Caledonian experience:

[3] Indeed, it seems difficult to talk about a Sahrawi identity due to the nomadic nature of Sahrawi tribes that have always moved about freely over huge areas and across borders. These tribes are also seen as the extension of Southern Morocco's tribal societies, and their Hassani culture is enshrined in Morocco's 2011 Constitution as a component of the Moroccan national identity.

- Will the agreed solution necessarily be final or could it be considered an interim solution?
- Who are the parties who hold legitimacy to negotiate the autonomy statute?
- Who will take part in the referendum that will be organized to approve the agreement?

Moreover, in the light of the Caledonian experience, one item in the draft statute for the Sahara Region seems fundamental: the conclusion of the agreement must be part of a process of reconciliation among the populations and must enable them to envisage a "common destiny".

1/ A final or interim agreement?

In the light of the Caledonian experience, it may seem problematic to state that the negotiated solution is final insofar as this would, by definition, preclude any chance of future evolution vis-à-vis the independentist claims of part of the Sahrawi population; this could be a spanner in the works which might jeopardize the success of the negotiations. The Moroccan Initiative is, however, presented as a means to settle the dispute once and for all with a statute negotiated by all parties and put to a referendum of the populations affected, in keeping with the principle of self-determination and with the United Nations charter. This compromise solution has been described as "serious and credible" by the Security Council in all its resolutions since April 2007.[4] In this respect, a quick look at New Caledonia's recent history seems indispensable in order to illustrate this issue.

After being granted the status of "overseas territory" in 1946[5], New Caledonia first experimented self-government through a status granted in 1957[6] which granted considerable autonomy in that it covered areas as numerous and diverse as primary and secondary education, the economy, fiscal matters, land tenure, health, urban planning, the budget, the status of territorial civil servants, civil procedure and the customary civil status. This status involved first and foremost "*much more than mere administrative and political decentralization. For the Melanesians, it amounts to recognition of their dignity and their ability to govern themselves. It instills in them the conviction that a progressive move towards full internal autonomy, bringing together the Kanak and European communities within the French Republic, is now underway with the help of the metropolis and not against it. Future disillusionment will be as great as the hopes raised*"[7].

Indeed, France's attempts to restrict autonomy between 1963 and 1969 turned out to be extremely disappointing, particularly for the Melanesians. For New Caledonia they were to mark the beginning of an "institutional yoyo"[8] between autonomy and centralization from one statute to the next. Due to this lack of visibility, beginning in 1976 Melanesian politicians decided to trade in one goal for another and to demand independence, which showed the

---

[4] Resolutions 1754 and 1783 (2007), 1813 (2008), 1871 (2009), 1920 (2010) and 1979 (2011).

[5] No longer considered as indigenous populations, the Melanesians stopped being subjects and progressively became French citizens. The Caledonian Union was created in 1952, an autonomist party of Melanesians and non-Melanesians, whose motto was "one people, two colours".

[6] Territorial institutions then comprised a Chief of Territory, a Government advisory body and a territorial assembly. The government advisory body was headed by the State representative and was made up of 6 to 8 members elected by the territorial assembly. In 1958, New Caledonia chose to remain with the French community.

[7] Report by Mrs Catherine Tasca for the National Assembly Committee on Constitutional Law, Legislation and the General Administration of the Republic, on the draft constitutional law related to New Caledonia, n°972, p.16, quoting Mr Claude Deslhiat.

[8] Guy Agniel, "L'expérience statutaire de la Nouvelle-Calédonie ou de l'étude du mouvement du yo-yo au service de l'évolution institutionnelle d'un territoire d'outre-mer" in "L'avenir statutaire de la Nouvelle-Calédonie. L'évolution des liens de la France avec ses collectivités périphériques", *Les etudes de la Documentation française*, 1997, p.41.

bipolarization of politicians and the Caledonian populations. It was thus clearly the lack of prospects for politicians that led to the radicalization of their claim.

From then on, the independence movement grew in intensity, led by its charismatic leader Jean-Marie Tjibaou, and encouraged by the fact that some territories in the Pacific had gained their independence[9]. Violence escalated and one statute followed another. It was against this tense political background that talks were launched in Nainville-les-Roches in July 1983, bringing together for the first time the state and the leaders of the two local political factions, the loyalists and the pro-independence movement. The talks did not, however, lead to an agreement, for loyalist leaders led by Jacques Laffleur refused to acknowledge the innate right of the Kanak people to self-determination. Several years of unrest ensued, marred by protests and violence that the state tried to control by granting statutes which at times were favourable to the independence fighters and at others favourable to the loyalists. The issue of the referendum and of the electorate for this referendum was at the centre of the dissent throughout this period. Violence came to a head with the hostage crisis in Ouvéa in 1988, an incident which became infamous in France and which ended in a bloodbath. It was, however, a watershed, encouraged by the return of the socialists to power at the national level. Forced to choose between chaos and dialogue, Caledonian political leaders shouldered their responsibilities, aided by the state[10]. Mr Jacques Lafleur and Mr Jean-Marie Tjibaou agreed to meet for the first time since the events started. New negotiations were thus launched between the State and the leaders of the two main political factions.

It had become critical to emerge from the political impasse New Caledonia was in to avoid getting mired down in civil war. The key questions yet to be answered remained that of the referendum on self-determination and of the electorate allowed to participate in it. The mission organized by Prime Minister Rocard did a remarkable job and the talks led to the Matignon Agreements of 1988.[11]

Without excluding independence, this agreement did put it on the back burner: the referendum on self-determination was postponed for ten years, until 1998, and only those living in New Caledonia as of 1988 would be allowed to vote. The Matignon Agreements were obviously signed by both parties because a balance was struck regarding the referendum on self-determination: without excluding it, the negotiators agreed to postpone it for 10 years. This solution gave both sides partial satisfaction.

The peaceful political situation that prevailed during the implementation of the statute was totally different from the situations that had existed before. Indeed, until then the consultation on acceding to sovereignty had always been raised in emergency situations and amid violence. With the 1988 statute, political parties were given 10 years to convince each other with serenity. At the same time, the territorial delimitation stemming from the creation

---

[9] Kiribati, Papua-New-Guinea, Vanuatu.

[10] Michel Rocard, then Prime Minister, entrusted Christian Blanc and other figures from various walks of life with a mission to restore dialogue between the populations. The mission was unanimously welcomed and helped to bring about talks between independence fighters and loyalists.

[11] This would lead to Law 88-1028 of 9 November 1988, J.O.R.F. of 10 November 1988, p. 1853, called the "Referendum Act". "Direct administration" of the territory is transferred to the State for one year pending the organization of a national referendum on the proposed statute and the holding of a vote on self-determination. It was organized on 6 November 1988 and the referendum was carried with a high abstention rate. As a consequence, Law 88-1028 dated 9 November 1988 was adopted. The new institutions now included provincial assemblies (North, South and Loyalty Islands, the Congress of the Territory, the Executive Authority of the Territory (i.e. the High-Commissioner), the Socio-Economic Committee, the Customary Advisory Committee and municipal councils. State attributions were limited to the usual areas such as exploration and exploitation of natural resources, immigration and monitoring of foreign nationals, civil rights except customary law, trade law...

of three provinces gave the Melanesians immediate access to power in two of them where they were in the majority.

A few years before the referendum on self-determination was due, MP Jacques Lafleur proposed that a consensus-based solution be sought. This idea enjoyed the support of the State as well as that of local political representatives on both sides. Aware of the mismatch between the solution of a "final referendum" in the light of the socio-political conditions at the time, the 1988 partners decided instead to go for a new interim status, before even seriously considering independence. Indeed, it appeared that the demographic ratio wasn't favourable to independence[12] and that a referendum would be a brutal measure that might undermine hard-won but fragile civil peace.

As in 1988, talks could therefore only take place between the French State and local elected loyalists and independence fighters, the latter representing the majority of the Caledonian population. It was the outcome of these tripartite negotiations that determined the content of the Noumea Accord, which is the basis for New Caledonia's current statute. The autonomy statute granted to New Caledonia under the Noumea Accord gave it enhanced autonomy as well as legislative power, a local executive power independent from the State representative and extended division of powers. The referendum on self-determination was postponed until 20 years later.

As one can see, in New Caledonia it is the transitional nature of the negotiated statute that made it possible to reach an agreement. It allowed the painful question of independence to be postponed to the medium term: 10 years under the Matignon Agreements in 1988, 20 years under the Noumea Accord in 1998, and perhaps 30 years under the next agreement that should be signed in the coming years. The advantage of this latency period is that it stabilizes political relations and avoids negotiations getting bogged down indefinitely. This evolving approach made it possible to experiment with various degrees of autonomy, leaving it to each side to assess the pros and cons of autonomy. Adopting a progressive approach seems essential since it keeps the door open for future developments without necessarily foreshadowing secession, at least in the short or medium term.

Its other undeniable advantage is that it strikes a new balance between territories and populations to allow them to exercise autonomy and prepare for possible sovereignty. Indeed, statute after statute, institutional provisions, whether limiting or enhancing local autonomy, systematically came with measures aimed at meeting Melanesian claims: land reform, promotion of the Kanak culture, socio-economic development plans, rebalancing in favour of the inside of the country and the islands by creating facilities for those areas where the majority of the population is Melanesian, by launching an executive training programme mainly geared toward Melanesians and power-sharing with the provinces that have considerable powers and financial resources.

In any case, presenting autonomy as a final solution is most likely insufficient to end the quest for independence. New Caledonia's contemporary political history shows that all negotiations that have totally ignored the issue of accession to independence have failed. On the contrary, the mechanism provided for in the Noumea Accord, which calls for three successive referendums on self-determination in the event of a "no" vote in the previous one(s) doesn't make independence more likely. The current discussions on the future statute

[12] Between 1956 and 1976, the number of Europeans doubled, the number of Melanesians rose by less than 2/3 and the number of Asians and Polynesians trebled. In the absence of demographic development, Melanesians were still in the minority and the 1998 vote was bound to be against independence.

only confirm this fact since negotiators are looking for the legal means to avoid a "final referendum".

Of course, the mere inclusion of self-determination in the autonomy statute doesn't solve all the problems and is no guarantee of success. Indeed, there are problems that have yet to be solved, such as who should be allowed to vote on the negotiated autonomy statute and on possible accession to sovereignty. The agreement must also be negotiated between the parties who hold the legitimacy to do so.

2/ The parties to the agreement

In New Caledonia, the agreements reached since 1983 have been the result of tripartite negotiations between the State, local political representatives in favour of maintaining New Caledonia in the French Republic and those representing the section of the population in favour of New Caledonia's full sovereignty. The idea of popular endorsement was only introduced recently. While the presence and legitimacy of State representatives at the highest level does not give rise to any difficulty, it is obviously easier for local interlocutors to show determination when each side brings easily identified representatives. So far this has always been the case in New Caledonia.

Regarding the draft Statute for the Sahara Region, a balance seems to have been struck in the tripartite negotiation between the representatives of the Moroccan Government, the Consultative Council for Saharan Affairs (CORCAS)[13] and the Polisario, with the addition of Algeria and Mauritania in the UN-led process. In this respect, the solution of the Consultative Council for Saharan Affairs may be a source of inspiration for New Caledonia for the negotiation of the future statute. Indeed, the fragmentation of the political landscape over the past 10 years makes it more difficult to identify political representatives able to legitimately negotiate the agreement envisaged in the coming years, especially on the loyalist side. Based on the results achieved by the various political parties in previous local elections, it would be possible to establish a body in which customary Kanak chiefs, who have been left out of the political negotiations thus far, could be represented.

In fact, ownership of the agreement by the Sahrawi population is essential. In the light of the Caledonian experience it appears crucial for the population to identify with the agreement. To that effect, the result of the negotiations has to be seen as legitimate. But legitimacy shouldn't be determined only by the political figures who negotiated the agreement but also by the population that ratified it.

In New Caledonia, whereas the statute stemming from the Matignon Agreements had been put to a national referendum in 1988, the Noumea Accord was only presented for ratification by the local population and was approved by 72% of the voters. Were allowed to vote only those who had been living in New Caledonia for at least 10 years, i.e. since the first political agreement, the Matignon Agreements of 1988, was signed under the negotiated autonomy process. In hindsight, it seems that choosing such a restricted electorate to approve the Agreements turned out to be decisive in the eyes of the local populations. It led to a sense of ownership of the Noumea Accord, freely approved by the Caledonians, excluding metropolitans recently relocated to New-Caledonia, and this in turn created a sense of solidarity between the populations of the territory.

---

[13] The Council is made up of members elected by their respective tribes, tribal Chioukhs (chiefs), members of civil society associations and youth organizations in the Sahara, representatives of Moroccan citizens from the Sahara living abroad.

Establishing a restricted electorate subject to a residency requirement therefore appears to be not only legally but also politically acceptable.[14] It should also be mentioned that an equivalent solution was found regarding the right to vote in the referendum on self-determination, except that the length of residence required in that case is 20 years. This meant that if the first referendum took place in 2014, the electorate would be limited to people who could prove 20 years residence as at that date, i.e. having taken up residence by 31st December, 1994 at the latest.

Until then, the issue of what electorate should decide on the "country's" destiny was always the same: article 53 of the French Constitution establishes that access to sovereignty of part of the territory of the Republic is subject to the consent of the populations concerned. Now, New Caledonia's demographic trend is such[15] that Melanesians no longer make up the majority of voters. Statutes have succeeded one another[16] but have never managed to solve the conflict. Even the creation of regions in 1985 to allow supporters of independence to hold a majority in parts of the territory where they are demographically more numerous failed to solve the problem, especially since the Melanesians decided to abstain from voting in the most important elections for want of an agreement on the electorate. That era is past and even if discussions on this point remain difficult, negotiators are aware of the fact that a compromise solution remains possible.

Whatever the provisions established in the agreement, there are several items that seem decisive to the success of the negotiations: the recognition of the other party and its identity/specificities, which must necessarily involve reconciliation and possibly repentance by the State. This stage turned out to be of prime importance in New Caledonia.

B. Differentiation through recognition of identity or local specificities

Above and beyond the actual provisions of the agreement per se, it must have political significance and be in line with the identity claims of the opposition that underpin the opposition to the colonial state in the case of New Caledonia. In this context, it does seem indispensable to provide a response to identity claims. There should also be a pre-existing desire for reconciliation. This is to be found in the Moroccan Initiative. In article 3, the Initiative states that it will "*bring hope of a better future for the region's populations, put an end to separation and exile, and promote reconciliation.*"

In this respect, the Noumea Accord is very far-reaching as it states that: "The time has come to recognise the darker aspects of the colonial era, even if it was not devoid of light. The impact of colonisation had a long-lasting traumatic effect on the original people... ignorance

[14] This is not a problem under international law since it is part of the "consultation of the populations concerned" under the right to self-determination. Article 27 of the Moroccan Initiative states: "The Region's autonomy Statute shall be subject to negotiations and shall be submitted to the populations concerned in a free referendum. This referendum will constitute a free exercise, by these populations, of their right to self-determination, as per the provisions of international legality, the Charter of the United Nations and the resolutions of the General Assembly and the Security Council.

[15] Between 1956 and 1976, the number of Europeans doubled, the number of Melanesians rose by 2/3 and the Asian and Polynesian communities trebled.

[16] General Principles Act 82-127 of 4 February, 1982, allowing the Government, under article 38 of the Constitution, to promote the refonms called for by the situation in New Caledonia, French Official Journal, 5 February, 1982, p. 471. Law 84-821 of 6 September, 1984 establishing the statute of New Caledonia and Dependencies, the "Lemoine Statute", French Official Journal, 7 September, 1984, p. 2840. Law 85-892 of 23 August, 1985 on the evolution of New Caledonia, French Official Journal, 24 August, 1985, p. 9775, accompanied by order 85-992 of 20 September, 1985 on the organization and functioning of New Caledonia's regions and dependencies and adapting the territory's statute, the "Fabius-Pisani" statute, French Official Journal, 21 September, 1985, p. 10934. Law 86-844 of 17 July, 1986 on New Caledonia, called "Pons I", French Journal Official, 19 July, 1986, p. 8927. Law 88-82 dated 22, January, 1988 on the statute of the territory of New Caledonia, the "Pons II" Statute, French Official Journal, 26 January, 1988, p. 1231.

and power strategies all too often led to the negation of the legitimate authorities and the installation of leaders with no customary legitimacy, which exacerbated the identity trauma... These difficult times need to be remembered, the errors acknowledged and the Kanak people's confiscated identity restored, which for them is equated with the recognition of its sovereignty, prior to the forging of a new sovereignty, shared in a common destiny...".

In other similar cases, the adoption of a long-lasting peaceful political solution is obviously impossible without a "common will to live together", which necessarily requires reconciliation of the populations. This must go hand in hand with the recognition of the people's own identity. Indeed, agreement after agreement, it appeared that the identity claims that underpinned the will for self-determination required the introduction in the autonomy statute if such a difference through the creation of specific identity traits. In other words, the idea was, at least temporarily, to make up for the refusal to accept claims of independence by acknowledging identity symbols and a citizenship that differed from state sovereignty symbols and from national citizenship. The recognition of identity should not, however, come at the expense of general and local cohesion. The aim is to build a common identity while respecting the differences between the members of the group.

In this context, a number of innovative features led to the current statute of New Caledonia: the recognition of local identity symbols, the establishment of a Caledonian citizenship co-existing alongside French citizenship and the launching of a scheme to protect local employment.

1/ New Caledonia's local identity symbols

The autonomy entitles New Caledonia to adopt its own identity symbols, i.e. a flag, an anthem, a motto, a design for its banknotes and a name. Whereas the hymn[17], the motto[18] and banknotes design did not raise major problems, the flag and the name turned out to be much more difficult issues which have yet to be resolved. No consensus has as yet been reached on the name. For the time being, those advocating change are in favour of "New Caledonia Kanaky". As for the flag, a controversial transitional solution was endorsed by the head of state; it entails flying the Melanesian pro-independence flag next to the French flag. Although this solution meets with the approval of a large part of the Melanesian population because it is a concrete result, it does not please a part of the loyalist movement for which this flag is associated with painful events.

This confirms the usefulness of giving the whole population in the territory its own identity symbols. For the local population, it means creating common standards and building a common future. To do this, the society has to engage in a deep soul-searching exercise and its members must forgive each other to make a fresh start. It also indisputably calls for local political accountability.

Indeed, transferring this responsibility to the local authorities, whose mission thus becomes to achieve a consensus on the identity symbols, gives the state a way around these very sensitive political issues for which responsibility is transferred to local elected officials.

It is worth noting that the majority required for the identity symbols to be adopted was set at three fifths of the members of the local assembly, which is a greater majority than that

[17] Written in one of the 28 Kanak vernacular languages.
[18] "Terre de parole, Terre de partage".

provided for in article 89 of the French Constitution that deals with its amendment[19]. This particularly high majority requirement stemmed from the "wish to find some form of consensus on these issues." The Noumea Accord mentions the need to express the Kanak identity but also the "future shared by all". In this framework, Caledonian citizenship appears as a remarkable instrument.

2/ Caledonian citizenship

The preamble to the Noumea Accord states that: *"It is now necessary to start making provision for a citizenship of New Caledonia, enabling the original people to form a human community, asserting its common destiny, with the other men and women living there".*

Allowing the Caledonian society to make a new start required symbolic choices. The creation of Caledonian citizenship as a way of fostering cohesion between the main components of the Caledonian population, and thus wiping the slate of the past clean, or simply to avoid having to partition the island, immediately emerged as a promising concept.

Here again, the progressive nature of the accord is reflected. Differentiated citizenship serves as a frontrunner for a new type of decolonization, along the lines of the aspirations of an innovative society. It makes incremental learning of democratic political life possible. Indeed, with citizenship comes the right to vote, and differentiated citizenship leads to the definition of a restricted electorate that will elect the members of the local assembly. By placing restrictions on the electorate, the people called upon to designate local representatives are clearly defined, i.e. the members of the local legislative assembly.

In this instance, only those who meet a given residence requirement and show a genuine desire to live in New Caledonia can take part in the local decision-making process. Anyone who arrived in New Caledonia after 8 November 1998 is not allowed to vote in the elections for the provincial assembly or for the Congress of New Caledonia and is consequently deprived of Caledonian citizenship. The European Court of Human Rights upheld this decision, deeming the restriction proportionate to the end sought, i.e. domestic peace.

However, local citizenship – or differentiated citizenship – cannot but be restrictive. Indeed, it undermines the principle of equal suffrage, based on objective circumstances. Besides the fact that citizenship indicates one's belonging to the group allowed to vote to elect the members of local institutions, citizenship also grants economic and social prerogatives.

The local employment market being limited, New Caledonia was allowed under article 77 of the Constitution and by virtue of with the Noumea Accord, to adopt measures to give priority in employment (in the public and private sectors) and access to professions to New Caledonian citizens, to the detriment of those who do not meet the residence requirement.[20]

Protecting employment promotes the creation of a common destiny for all citizens and has become a yardstick for the local legislator. It meets the population's common aspiration

[19] Article 89 of the Constitution requires a three-fifths majority of votes cast.

[20] It is worth noting that European Community citizens can also be discriminated against without breaching European rules on freedom of establishment applicable in New Caledonia. This is, however, only possible if mainland French citizens and EU citizens are treated equally.

for protection against the local labour market being swamped by French citizens from the mainland.

As explained by Article 24 of the statutory organic law[21], this measure was subject to an interpretative reservation by the Constitutional Council[22]. In doing so, the Council first confirmed the constitutional exception by specifying that "*nothing prevents the constituent power from introducing new provisions in the Constitution to deviate from rules or principles of constitutional value*". It then framed this exception with a "*neutralizing interpretation*"[23], a prescriptive recital that specifies that "*it is for the legislation of the country to establish, for each type of professional activity and each industry, a sufficient length of residence based on objective and rational criteria directly related to local employment promotion without imposing restrictions other than those strictly necessary for the implementation of the Noumea Accord, and this residence requirement shall in no case exceed* [10 years]"[24].

By so doing, the Constitutional Council strove to enforce the principle of positive discrimination in favour of the local population contained in the Constitution, and the equality principle by setting limits to differential treatment. This example shows that it can sometimes be difficult to turn political decisions into law in the pre-existing constitutional framework, for they depart from the legal tradition of the State. This is why they generally require incorporation into the Constitution and specific institutional engineering.

II – Institutional engineering

Once political choices have been made by consensus, they need to be legally translated into institutions that reflect the compromise. The institutional engineering that ensues is different for each society and must meet its own criteria. In this respect, Caledonian institutions are the result of unique solutions that cannot be directly copied but that may be a source of inspiration for institutional engineering in the draft Statute for the Sahara Region.

In New Caledonia dedicated institutions were set up and extensive powers were progressively and irreversibly transferred. The French Constitution had to be amended to make implementation of the Noumea Accord possible since a number of elements undermined the principle of equality, which is a republican principle par excellence. The constituent power, a sovereign entity concerned with promoting civil peace, constitutionalized the guidelines in the political accord in Title XII of the French Constitution. It may be noted that the transitional nature of the solution didn't prevent the statute being incorporated into the Constitution of the State insofar as the statute had been negotiated for the long term and the Constitution would only have to be amended again in 10, 20 or 30 years time.

A. Local institutions

New Caledonia's institutional architecture very much resembles that proposed by Morocco for the autonomy statute of the Sahara Region, with a few differences. The autonomy statute under the Noumea Accord offers New Caledonia much more autonomy than the previous one. Not only does the local executive authority no longer represent the state, but the Government of New Caledonia, as a direct offshoot of the local assembly, and more

[21] Organic law of 19 March.
[22] Decision 99-410 DC of 15 March 1999.
[23] Jean Gicquel, "Préférence territoriale et démocratie", in "La souveraineté partagée en Nouvelle-Caledonie et en droit compare", Jean-Yves Faberon and Guy Agniel (Dir.), *La Documentation française*, Paris, 2000, p. 384.
[24] Decision 99-410 DC of 15 March 1999.

importantly the local assembly is granted autonomous legislative power that will gradually be extended. Moreover, it turned out to be essential to provide institutions with powers and mechanisms to enable them to take New Caledonia's specific features into account.

1/ A Parliament with legislative power elected by a restricted electorate

In addition to special election procedures, with a restricted and "frozen" electorate, New Caledonia's Congress enjoys legislative power: it can adopt the country's laws. The granting of a political, autonomous normative power seems indispensable in an enhanced autonomy statute, especially when it is considered a palliative for sovereignty. The Moroccan Initiative provides for such a provision.

The law of New Caledonia is both the symbol and the spearhead of the country's specific legal organization. A federal instrument, the law of the country is a specific characteristic in a unitary state since it gives a community part of the legislative power that is normally the exclusive prerogative of the central authority. This solution is, however, quite common in unitary states that have to deal with territorial minorities[25].

In the New Caledonian system, this power is framed by state judicial authorities based (upstream) on the Council of State's mandatory prior opinion and (downstream) optional referral to the Constitutional Council. Though few cases have been referred to the Constitutional Council (only 2 in 12 years), this procedure works rather well due to the upstream intervention of the Council of State and makes it possible to preserve legal certainty and the indivisibility of the Republic, especially basic human rights.

The Moroccan Initiative for the Sahara Region, which provides for a distinct judicial system, differs from this solution. In France, the Constitutional Council's sole competence guarantees state unity by giving full power of scrutiny over legislative norms to a single jurisdiction. This might not be the case were the authority over local legislative norms to be entrusted to a local judicial body. Therefore, although a regional judicial organization may be apposite, it may be worth reflecting on the desirability of giving the Constitutional Court sole responsibility for testing the constitutionality of local legislative norms.

2/ The need for consensus-based institutions

The legislative body may raise another question regarding the unicameral or bicameral nature of the Parliament. Indeed, in a plural society, the doctrine largely argues in favour of implementing measures to qualify the majority rule of classical representative democracy. "Plural society", "societies that are sharply divided along religious, ideological, linguistic, cultural, ethnic or racial lines into virtually separate sub-societies with their own political parties, interest groups, and media of communication"[26]. New Caledonia can undoubtedly be called a plural society, just like Western Sahara.

Majoritarian democracy and its classical institutional mechanisms cannot be considered suitable for a plural society since the group which is largest in numerical terms automatically prevails over the other group(s). According to Arend Lijphart, "*in plural societies....the flexibility required by majoritarian democracy is absent. In this context, the law of the majority is not only antidemocratic, but also dangerous, since the minorities that are*

[25] The following countries can be mentioned: Italy, Spain, Denmark (Feroe Islands and Greenland), Finland (Aland Islands), Portugal (Azores and Madeira) or even Great Britain (Scotland, Northern Ireland).
[26] Arend Lijphart, *Democracies*, New Haven, Yale University Press, 1984, p. 22-23.

constantly denied access to power will feel excluded and discriminated against and will stop showing allegiance to the regime"[27].

In this respect, two original features of the Caledonian statute reflect this consideration and may be of interest for the draft Statute for the Sahara Region: the (partial) bicameral nature of the Parliament, and the special arrangements for the appointment of the local government.

a) Partial bicameralism

With "consociational" democracy, bicameralism can thus be described as an element, a tool to moderate the majority government by introducing a more consensus-based decision-making process. The second chamber must then be seen as a moderating element. Its legitimacy rests on this very function. The structure of Parliament is all the more crucial since we are dealing with the body that exercises the most important powers.

Along these lines, New Caledonia has a second chamber based on partial bicameralism. This institutional particularity can be explained by the structure of Caledonian society, made up of two main ethnic groups of equal size. The major cultural differences between the two communities required the creation of a specific entity to protect Kanak culture and customs: the Customary Senate.

The Customary Senate is made up of 16 members appointed by each customary council[28] in accordance with recognised customary practices, on the basis of two representatives per customary area. Article 145 of the statutory organic law allows the Customary Senate, on its own initiative or at the request of a customary council, to refer to *"the Government, the Congress or provincial assemblies any question related to the Kanak identity"*. Furthermore, any draft law or bill on Kanak identity symbols or identity[29] is sent to the Customary Senate by the President of the Congress. Moreover, when the need arises, the Customary Senate is consulted by the President of the Government, by the Speaker of the Congress or by the president of a provincial assembly on the drafts or bills on the Kanak identity.

It does, however, appear that the power entrusted to the Customary Senate to adopt legislative or regulatory texts is not commensurate with its representativeness: 40% of the population is Melanesian and the vast majority is governed by the customary civil statute. For several years the institution has been working on acquiring greater powers in the next statute. The presence of customary representatives during negotiations, as provided for in the draft Statute for the Sahara Region, would most likely be better suited to respond this claim.

b) An executive appointed on a proportional representation basis

---

[27] Ibid.

[28] The Customary Council is the collegial body established in each customary area (New Caledonia is divided into eight customary areas).

[29] I.e. on the customary civil statute, customary land tenure and the customary oral regime, on the boundaries of customary areas as well as on the election procedure for the customary Senate and customary councils.

New Caledonia's executive branch is purposefully consensual. The members of the local government are thus appointed by the Congress of New Caledonia on the basis of proportional representation using the list system. This reflects the assemblies' political trends: parliamentary majority and minority coexist within the government. Established by the Noumea Accord and in keeping with "consociational" logic, this heterogeneous membership attests to the need to build a common destiny for the various components of the Caledonian society. By imposing on the majority the obligation to discuss with the representatives of minority groups, the government structure is thus truly original[30]. However, while Caledonian style collegiality "*implies dialogue, working together and sharing information*", in cases of disagreement a safeguard makes it possible to reach majority decisions[31].

Thirteen years after its creation, the results are quite positive, despite a few deviations from the principle of collegiality and the inertia that stems from this decision-making process. This collegiate solution leads to political decisions based on true consensus and guarantees that bills tabled in Parliament can be adopted even in the absence of a majority. It does, however, require a certain degree of maturity and a sense of public interest by political leaders who are members of the local government.

c) Provincialization

Provinces are another consensus-based institutional tool. Indeed, provincialization is key to the sustainability of the system in that it allows power sharing between the pro-independence movement and the loyalist movement[32]. The division of New Caledonia into provinces was guided by the need to give each political movement the chance to manage parts of the territory where it represents the majority of the population, in a spirit of federalism.

Thus while the Southern Province, which is the most populous, is mainly inhabited by Europeans and the vast majority of Asians, Polynesians and Wallisians, many of whom are in favour of a French New Caledonia, live there, the populations of the Northern Province and the Province of the Loyalty Islands are mostly Melanesians, many of them pro-independence. The country's administrative division, combined with strong devolution of powers (the provinces enjoy primary jurisdictional power), allows each political group to administer the parts of the territory in which it represents the majority of the population.

In addition to this, tools have been provided with a view to redressing the strong economic imbalances between the provinces, which are due in part to the secessionist claims in New Caledonia, with an apportionment formula for state and territorial funds that largely favours the North and Loyalty Islands Provinces, in order to close the development gap.

3/ The judiciary

The Moroccan Initiative proposes to set up a judicial system for the Sahara Region that would be subordinate to higher Moroccan courts. Such a proposal is much more ambitious than what exists in New Caledonia. Indeed, in New Caledonia the judiciary is part and parcel of the national judicial architecture, even if a few arrangements, such as the presence of

[30] To our knowledge, only the legal systems of Fiji, Northern Ireland and Lebanon have had such an executive branch.

[31] Article 128 of the organic law states that "the Government is jointly and severally liable for the conduct of cases under its jurisdiction. Its decisions are adopted by a majority of its members. In case of a tie, the President has the casting vote.

[32] This term is used to describe those that are not in favour of independence. Faithful to the French State, they are considered "loyal" to it.

customary assessors in a number of common law courts, have been made in order to reflect the customary civil status of a vast portion of the Melanesian population.

As for the rest, the system established in New Caledonia remains fully integrated to the national judicial order. This bias can be explained by several factors: the lack of local manpower, the desire to ensure unity of jurisprudence, especially in terms of fundamental guarantees of public liberties, the fact that justice if considered a sovereign power of the state, the risks of corruption in small territories... Therefore, the Caledonian statute makes it impossible to assess this ambitious proposal in the case of a unitary state. It nonetheless would seem a suitable response to the desire for autonomy while providing a number of guarantees, similarly to the Spanish regional system, for instance.

In addition to the institutions established, the powers exercised by the community are decisive in determining its level of autonomy. However, it isn't so much quantitative (how many powers) or qualitative (which powers) considerations that matter here, but rather the arrangements for transferring these powers.

B. Allocation of powers

Regarding the allocation of powers, I believe two items are worth highlighting upon reading the Moroccan Initiative for the Sahara Region: the progressive and irreversible transfer of powers in New Caledonia and the joint exercise of international relations.

1/ Progressivity and irreversibility of transfer of powers

The Noumea Accord provides for the *progressive* transfer of powers through different procedures depending on the type of power. Certain powers were thus automatically transferred as provided for in the organic law. In other areas, powers are to be transferred following the adoption by Congress of a national law identifying the powers to be allocated to New Caledonia, as well the establishment of a schedule for the transfer. Finally, the last set of powers shall be attributed only after a resolution is adopted by the Congress of New Caledonia and an organic law is enacted along the same lines by the National Parliament.

These differential transfer procedures can be explained by the fact that negotiators wanted to allow Caledonia to agree to the transfer of relatively cumbersome powers, in terms of their content and technicality, when it feels ready to do so. Indeed, the number of local lawyers and other specialists being rather limited by comparison with the importance of the powers to be transferred, New Caledonia will first need to find a sufficient number of technical staff to exercise the powers transferred.

Consequently, the areas that require highly technical capabilities and major logistic and financial support are subject to prior agreement by the Congress, based on a timetable it will establish. In any case, this staggered transfer seems appropriate inasmuch as local administrations would have been hard pressed to manage a tremendous inflow of new powers. Moreover, the scopee of the powers transferred from 2004 onwards, both quantitatively and qualitatively, is such that it would have been reckless to rush in. In this respect, it is a pity that the state somehow hastily transferred powers in areas such as civil law, trade law and secondary education based on a questionable interpretation of the statutory organic law when New Caledonia was not necessarily ready to take them on.

In addition to the principle of progressivity, transfers of powers follow the principle of irreversibility. This made it possible to satisfy the claim of pro-independence elected

representatives who wanted protection from any risk of an institutional yoyo phenomenon that would see the state backtracking on powers already transferred, as it did in the 1960s. Irreversibility ensures sustainability of the statute and of the powers exercised by local authorities.

Whereas it is understood that the constitutional enshrinement of the irreversibility of the transfer doesn't prohibit the constituent power from backtracking on this commitment - Article 28 of the 1793 Constitution states that: "*A people always has the right to review, to reform, and to alter its constitution. One generation cannot subject future generations to its laws*" - the political weight of asserting the irreversibility of transfers of powers however leaves little chance of a backward swing.

In this respect, under the Initiative for the Sahara Region, it may be worth considering whether it might be appropriate to set up a timeframe for the transfer of powers in order to enable the region to fully prepare to exercise its new attributions. In New Caledonia, some powers are also shared between the state and the territory, such as foreign relations.

2/ Foreign relations

International relations remain the purview of the state. However, the state has to take New Caledonia's own interests into consideration in international negotiations and, when the need arises, to involve it in the discussions. Under the Noumea Accord, provided it fully abides by France's international commitments, New Caledonia can directly negotiate agreements with one or several states, territories or regional entities of the Pacific as well as with regional bodies affiliated with United Nations specialized agencies. It thus enjoys an autonomous right of initiative in the field of external relations. With the agreement of the authorities of the Republic, it can moreover become a member of, associate member of or observer in international organizations where it is represented by the President of the Government.

It is also represented in the European Union and Pacific States or territories. It is normally involved in the renegotiation of the Decision on the association of the overseas countries and territories with the European Union. In this area the Noumea Accord states that training shall be provided to prepare New Caledonians to exercise responsibilities in the field of **international relations.**

As we have seen, the Caledonian system goes beyond regional cooperation as initially provided for in the Moroccan Initiative for the Sahara Region, since New Caledonia is equipped with the legal tools that will allow it to develop its own external policy while respecting France's international obligations. Indeed, Article 15 of the Moroccan Initiative states that "State responsibilities with respect to external relations shall be exercised in consultation with the Sahara autonomous Region for those matters which have a direct bearing on the prerogatives of the Region. The Sahara autonomous Region may, in consultation with the Government, establish cooperative relations with foreign regions to foster interregional dialogue and cooperation." However, whereas the New Caledonian statute is the result of long years of dialogue and evolution, the Moroccan Initiative is still only an initial proposal containing guidelines and principles meant to be fleshed out through a negotiating process aimed at adding detail to and improving its content.

CONCLUSION

By way of conclusion, it should be underscored that the autonomy statute must take into account the specific characteristics of each territory. While some elements of New Caledonia's statute may be a source of inspiration for the Sahara Region, the tools that will be developed will necessarily have to be customized.

We must agree that the balance to be struck during the negotiating process largely depends on one subjective factor. This requires officials who are able to convince their electorate that a solution reached by consensus, under which by definition each party will have to give up some of its claims, is preferable to a conflict that is both violent and futile. In New Caledonia, it was the meeting of Jacques Laffleur and Jean-Marie Tjibaou, two men who were able to temper their positions for the greater good in a forward-looking spirit and in order to preserve peace, that made it possible for New Caledonia to progress while respecting the right to self-determination and to bring it serenity while discussions are still going on regarding its institutional evolution, but in peace.

Morocco's aim in regard to the Sahara was to put forward a peace initiative which could end the standstill that has lasted for many years. The Initiative did indeed trigger a process of political negotiations that have been going on since 2007 under the aegis of the Secretary General of the United Nations and his personal envoy, Mr. Christopher Ross, with Morocco, Algeria, Mauritania and the Polisario also participating. However, bringing this agreement to a successful conclusion will require great political will, trust and détente in the region, as well as a deep sense of realism and compromise on all sides. It is this spirit of compromise for a consensus-based solution that will allow the negotiations to succeed and, *in fine*, make it possible for the populations in the Tindouf camps to return, for relations between Morocco and Algeria to return to normal and to give new impetus to the economic and political integration of the Maghreb region so that its countries can together take up their common development, democracy and security challenges.