CANCELLING A *LOI DU PAYS*[1]

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The following is a case note on the decision of the Conseil d'Etat of 7 April 2023 in the matter of Société Pacific Mobile Télécom. Vodafone, the telecommunication company involved, challenged the constitutionality of a piece of French Polynesian legislation. That challenge gave rise to administrative litigation as to the appropriate jurisdiction in which to institute such a challenge. The decision of 7 April 2023 is not without its difficulties, and those difficulties are explored in this piece.

La société Pacific Mobile Télécom, opérateur de télécommunications en Polynésie française, a déposé un recours contre l'octroi, sans mise en concurrence, de la délégation de service public (DSP) des télécommunications par l'Office des Postes et Télécommunications de la Polynésie française (OPT) à sa filiale Onati.

A l'appui de ses prétentions la société Pacific Mobile Télécom, soutenait qu'un article d'une loi du pays de 2009 relative aux délégations de service public de la Polynésie française était entaché d'illégalité faute de respecter les principes de la commande publique.

La société Pacific Mobile Télécom s'est dans un premier temps, adressée au Président de la Polynésie française pour lui demander de saisir l'Assemblée de la Polynésie française d'un projet de loi du pays procédant à l'abrogation de l'article litigieux.

1 The nature of a *loi du pays* (literally "law of the country") is fully discussed in the paper by Alain Moyrand "L'avènement de la «loi du pays» en Polynésie Française" which appears in this volume. A *loi du pays* is a rule made by the local legislature but with a status less than that of an Act. There is no direct equivalent of the term in the Common Law, although the Ordinances passed by subordinate legislatures in the British colonial system give some idea of the status of a *loi du pays* within a hierarchy of legislation. A *loi du pays* of French Polynesia has a constitutional status different from that of a *loi du pays* of New Caledonia.

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En l'absence de réponse du Président du Pays, la société Pacific Mobile Télécom, a saisi le tribunal administratif de la Polynésie française pour faire annuler le refus implicite de déposer le projet de loi du pays.

Cependant le tribunal administratif estimant que cette demande d'abrogation devait être rattachée au «contrôle juridictionnel spécifique» qui relève de la compétence exclusive du Conseil d'État, a choisi de directement saisir ce dernier.

La question à résoudre pour le Conseil d'État était donc de savoir si le tribunal administratif était compétent pour connaître du contentieux relatif à ce refus implicite, comme il l'est à l'égard de tous les actes de l'exécutif de la Polynésie française, ou bien si le litige relevait de la compétence directe du conseil d'état au titre du «contrôle juridictionnel spécifique».

La Haute Assemblée administrative a, dans son arrêt Société Pacific Mobile Télécom, du 7 avril 2023, estimé d'une part, que la loi du pays pouvait être soumise à une procédure d'abrogation et, d'autre part, qu'en cas de contestation du refus d'abroger celle-ci, le recours devait être introduit devant le tribunal administratif de la Polynésie française.

Les deux auteurs portent leurs observations sur le bienfondé et la portée de cette décision.

I THE BACKGROUND

This case concerned the challenge by Vodafone an operator of telecommunication services in French Polynesia, to the grant of an agency authority by the Post and Telecoms Office of French Polynesia (OPT) to its subsidiary Onati. This was done without the seeking of public tenders.

Three cases were brought by Vodafone.

The first was to challenge the grant of the authority to Onati; the second was a request for information on the details of this grant of agency authority of a public service; the third was a request for the cancellation of a *loi du pays* of 2009 which allows a public body (OPT in this instance) to confer on a subsidiary an agency authority for a public service without having to put the matter out for public tender.

In the third case Vodafone made it clear that it had requested the Council of Ministers of French Polynesia to cancel a *loi du pays* on the grounds that that *loi du pays* was not in accordance with the Constitution, with Organic Laws relating to the status of French Polynesia, nor with international undertakings made by France, and finally not with the general principles of law.

In the absence of a response from the government of French Polynesia, Vodafone went first to the Administrative Tribunal of Papeete. That Tribunal decided that the matter in question was one within the jurisdiction of the Conseil d'Etat. The Conseil d'Etat in its turn, by decision of 7 April 2023, decided that the Administrative Tribunal did have jurisdiction to decide on a matter relating to the cancellation of a *loi du pays*.

The decision in *Société Pacific Mobile Télécom* provided the opportunity for the Conseil d'Etat to resolve a question relating to the legal regime and the status of a *loi du pays* of French Polynesia which had until then been undecided.

More notably the Conseil d'Etat unexpectedly held both that a *loi du pays* could be subject of a cancellation procedure and that where such a cancellation procedure was refused any appeal against the refusal had to be brought before the Administrative Tribunal of French Polynesia. In principle, cases concerning *lois du pays* arise under art 74 para 8 of the Constitution which provides for the "specific jurisdictional control" of non-standard laws and places them within the exclusive jurisdiction of the Conseil d'Etat.

A *loi du pays* of French Polynesia, unlike a *loi du pays* of New Caledonia, does not have the force of a statute; it remains, in form, an action of a regulatory nature. That said, it is not an ordinary regulation. This is made clear by François Luchaire;[2] it is because a *loi du pays* is subject to a system of control which takes many of its features from the constitutional control of legislation exercised by the Conseil Constitutionel.

Among the most original features of the law relating to a *loi du pays* of French Polynesia is the fact that on the one hand the rules on legality to which such a *loi du pays* is subject are more constraining than the body of laws to which other administrative acts are subject while, on the other hand, the practice of the Conseil d'Etat in relation to *lois du pays* is the same as the practice of the Conseil Constitutionel in respect of legislative norms. That is to say, the control exercised over a *loi du pays* of French Polynesia is significantly less strict than that which

2 *Le statut constitutionnel de la Polynésie française*, (Economica, 2005) 33; by the same author: *"La Polynésie française devant le Conseil constitutionnel", RDP* 2004, 1733: "(…) a *lois du pays* is more than an administrative action and less than a legislative action". In the same vein, Julien Boucher and Béatrice Bourgeois-Machureau, in their study of *lois du pays* state that *lois du pays* are "a bit more than ordinary administrative acts", *"Deux ans de contentieux des «lois du pays» de la Polynésie française devant le Conseil d'État", AJDA* 2007, 2366.

applies to regulatory actions under the *droit commun*, thus allowing a degree of discretion[3] to the Assembly of French Polynesia which adopts these *lois du pays*.

The facts of the case were simple. The Société Pacific Mobile Télécom maintained that an article of a *loi du pays* of 2009 relating to the authorisation of public service agencies in French Polynesia was tainted with illegality because it did not conform to the rules governing public procurement. That was why Vodafone made a request to the President of French Polynesia in order to have the matter brought before the Assembly of French Polynesia in the form of a proposal for a *loi du pays* which would repeal the article in question.

The President of French Polynesia did not respond to the request so the company seized the Administrative Tribunal of French Polynesia of the matter in order to quash this refusal to initiate the repeal proposal.

The Administrative Tribunal decided to refer the matter to the Conseil d'Etat on the grounds that the request for cancellation related to a "specific jurisdictional control" matter of the type which is in the exclusive jurisdiction of the Conseil d'Etat. The latter decided that the Administrative Judge at first instance had the jurisdiction to deal with the request.

The questions whether the Administrative Tribunal had the jurisdiction to deal with litigation relating to an implied refusal, as it does in respect of all executive acts of French Polynesia, or whether the litigation was within the direct jurisdiction of the Conseil d'Etat as a matter of "specific jurisdictional control".

Before proceeding to the resolution of this conflict of jurisdictions in respect of cancelling a *loi du pays*, it is necessary to look to the possibility of seeking the cancellation of a *loi du pays* by the authorities of French Polynesia, and to which administrative jurisdiction can seize the Assembly with a request for cancellation. This is because the institutional organisation of an overseas collectivity such as French Polynesia cannot be compared to the territorial collectivities of the *droit commun*.

II CAN A LOI DU PAYS BE SUBJECT TO A CANCELLATION PROCEDURE?

Articles 176 and following of the Organic Law of 12 February 2004 (relating to the status of autonomy of French Polynesia (LOPF)) which concern the manner in

3 Ferdinand Mélin-Soucramanien, *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel*, (PUAM – Economica, 1997) 47: "(…) the degree of discretion granted to regulatory bodies in relation to the rules they make is, by its very nature, less than that granted to the legislator".

which a *loi du pays* can be challenged, vest this "specific jurisdictional control" in the Conseil d'Etat alone.

The latter can be seized in respect of a *loi du pays* either by way of a request for the *loi du pays*' cancellation (in that case it can declare that the *loi du pays* is not in conformity with the principle of legality – art 176 LOPF), or it can cancel it if it relates to a fiscal matter (art 180 – 1 LOPF), or by way of exception, it can decide that the request is inapplicable in litigation before it (art 179 LOPF), or by a declassification procedure (art 180 LOPF). In the latter situation the Conseil d'Etat will accept the request on the basis that the *loi du pays* is simply a regulation and thus not subject to the special regime reserved to *lois du pays*.

The Organic Law does not provide a procedure for cancellation of a *loi du pays* and therefore that could not take place.

To maintain the contrary would have negated the guarantees which the legal regime for *lois du pays* enjoys in the context of the "specific jurisdictional control" granted by art 74 of the Constitution.

As for the rest, the same situation applies for a parliamentary act because that is submitted only to the control provisions which are in the Constitution: a means of action (art 61) and the means of exception (art 61-1).

Furthermore, the fact that the Organic Law does not expressly state that the procedure for cancellation could not be used against *lois du pays* is not proof that such a submission to the procedure is justified.

The Conseil d'Etat agreed to include in the legal regime for *lois du pays* the case law of the Conseil Constitutionel of 30 July 1982[4] by which parliamentary law came out of the legislative domain and moved into the regulatory domain without there being any unconstitutionality. This particularity was extended to the *loi du pays* even though that is not in the Organic Law on status.

It is possible to give multiple instances where the Conseil d'Etat has shown itself to be creative and willing to set aside, in respect of *lois du pays*, provisions which relate specifically to the control of legality as they apply to administrative acts, and has submitted those *lois du pays* to the systems of control of constitutionality which are otherwise reserved for parliamentary Acts.

The method was not used as one of defence by French Polynesia, but since it relates to "the field of application of the law" and to "the receivability of challenges",

4 Décision n°82-143 DC.

it is a matter of public policy and ought to have been raised as such by the Conseil d'Etat.

However, the Conseil d'Etat decided otherwise, and so a *loi du pays* of French Polynesia may be subject to cancellation. The question remains – Which administrative authority must be seized of the matter and which is the body which has jurisdiction to deal with the matter if the Polynesian executive authorities refuse to act?

III WHICH IS THE ADMINISTRATIVE AUTHORITY TO APPLY TO FOR THE CANCELLATION OF A LOI DU PAYS?

The Conseil d'Etat stated, in reference to the case law solutions which had already been given in relation to territorial collectivities of the *droit commun*, that a request for the cancellation of an action taken by the Assembly of French Polynesia (which is the only body competent to cancel such a decision) has to be addressed to the President of French Polynesia.[5]

This solution is applicable in the present case and has been accepted by the Conseil d'Etat, but it must be qualified because the control of the Parliament's Order of the Day does not lie with the President of French Polynesia and also because specific case law solutions in French Polynesia already exist. Indeed, it seems that the request for cancellation could have been addressed to the President of the Assembly of French Polynesia.

Under the system of the status law of 6 September 1984 it was provided that the Assembly of French Polynesia could adopt a decision so that the Councils of the Archipelagoes, which have obligatory consultative powers in a number of matters, could be established; but French Polynesia did not adopt that text.

A member of the Territorial Assembly requested that the Administrative Tribunal strike down a decision relating to maritime transport charges because it was tainted by procedural defects. The Council of the Archipelagoes which ought to have been seized of this matter had not been. By a judgment of 18 May 1994, the Administrative Tribunal of Papeete acceded to the request.

Seized of the matter by way of appeal, the President of the Administrative Court of Appeal of Paris referred the request to the Conseil d'Etat. The Conseil d'Etat in a decision of 31 January 1996 said that, given that the right of initiative is shared between the members of the Assembly and the government and that it is the Assembly which establishes its Order of the Day, responsibility for the absence of the item from the Order of the Day of the Assembly, which was to deal with the

5 CE avis 2 October 2013, n° 367023.

Councils of the Archipelagoes, could not be imputed to the government of French Polynesia.[6] The Conseil d'Etat also annulled the decision of the Administrative Tribunal because consultation with the Councils was an impossible formality.

When seized by the High Commissioner of a request for the quashing of the refusal of the President of the government to put before the Secretariat of the Territorial Assembly a motion for decision relating to the cancelling of a norm of this type which is tainted by illegality, the Administrative Tribunal of Papeete, following the decision of the Conseil d'Etat, rejected the request. This was done on the basis that it is for the Assembly of French Polynesia to put matters on the Order of the Day for its meetings and the Bills and motions that have to be dealt with by members or by the government.[7] But the Administrative Court of Appeal of Paris overruled that decision on the grounds of the notion of urgency which allows the Council of Ministers of French Polynesia to put a matter for deliberation on the Order of the Day of the Assembly.[8] It is clear that the Conseil d'Etat supported this case law.

However, it can nevertheless be considered that this has not resulted in a consistent solution to the question of cancellation of a *loi du pays* by the President of the Assembly because he has the power to table a proposal for a *loi du pays*.

IV WHICH ADMINISTRATIVE BODY HAS THE JURISDICTION IN RESPECT OF A REQUEST TO CANCEL A LOI DU PAYS?

If it is accepted that a *loi du pays* can be subject to a cancellation procedure, it is therefore logical to conclude that only the Conseil d'Etat could hear a dispute relating to the refusal to introduce a *loi du pays* for the cancellation of contested provisions, insofar that the Conseil alone is empowered because the "specific jurisdictional control" power rests with it for matters dealing with a *loi du pays*. Certainly, the dispute is not specifically directed against the *loi du pays* but against any administrative action taken by an administrative authority (which could be the President of French Polynesia in respect to a proposal for a *loi du pays* or the President of the Assembly of French Polynesia for a proposal for a *loi du pays*),

6 CE 31 January 1996, Gouvernement du territoire de la Polynésie française, req n° 161456. In this case, the commissaire du gouvernement, Mrs Denis-Linton, stated that "although the Council of Ministers has the power to initiate debate in the Territorial Assembly, it shares this power with members of the Assembly. Unlike the government of France in its relationship with Parliament, the territorial government in relation to fixing the Order of the Day for the Assembly only has the power to include urgent matters, by way of priority".

7 TA Papeete 10 June1997, Etat c/ Territoire, req n° 96-121.

8 CAA Paris 23 April 1998, Haut-commissaire de la République en Polynésie française, req n° 97PA02140 et 97PA02139.

which body refused to initiate the cancellation procedure – a matter which in principle is a jurisdiction which rests with the Administrative Judge of first instance.

It would have been possible to found an argument on a precedent relative to the challenging of the promulgation of a *loi du pays* which is signed by the President of French Polynesia which matter, if it is challenged, lies within the competence only of the Conseil d'Etat on the basis of the "specific jurisdictional control". In fact, seized at first and last instance with a motion for promulgation, the Conseil d'Etat has considered that it has jurisdiction to deal with this matter and not the Administrative Tribunal, and that this is a matter which concerns the rules of "specific jurisdictional control". This is because the Conseil d'Etat has applied the rules appropriate for this type of control.[9]

This solution depends on referring to the Conseil d'Etat alone litigation for the cancelling of a *loi du pays*. This is coherent because the jurisdictional authority is with the Conseil. It is the only body which has the power to decide on the legality of a *loi du pays* and to determine the consequences of any illegality. The opposite conclusion – which is that reached by the Conseil d'Etat – is defensible, but it involves several difficulties. In fact, if the Administrative Court of first instance thinks that the disputed provisions of a *loi du pays* are tainted with illegality and should be cancelled, it must remit that question (on the basis of art 179 of the Organic Law) to the Conseil d'Etat because only that body has the jurisdiction to consider a matter of illegality of a *loi du pays*. If the Conseil d'Etat finds that the *loi du pays* is tainted with illegality it must refer its decision to the Administrative Tribunal which in turn must annul the refusal by the President of French Polynesia or by the Assembly of French Polynesia to cancel the *loi du pays*.

It would have been better, particularly for all the parties in this case, for a ruling that the procedure for cancellation lies at first and last instance with the Conseil d'Etat.

In fact, to initiate it requires that the Conseil d'Etat evaluate, by way of exception, the legality of a *loi du pays*. Thus it is a question of procedure which brings into operation the "specific jurisdictional control", which only the Conseil d'Etat can deal with.

Moreover, the Administrative Tribunal could reject a call for cancellation on the basis that the question is frivolous. In such a case the applicants would have to appeal

9 CE 22 March 2006, M Edouard Fritch et autres, n° 288490, RFDA 2006, p 1111-1118, note Alain Moyrand et Antonino Troianiello; CE 22 January 2007, Mme Merceron et autres, n° 291760; CE 5 December 2011, Président de l'assemblée de la Polynésie française; CE 26 December 2012, Syndicat A TIA I MUA, n° 351262.

the decision to the Administrative Court of Appeal of Paris. If the rejection of the call for cancellation were sustained the applicants could seize the Conseil d'Etat of the matter by way of the cassation route. That would then result in the *loi du pays* being found to be tainted with illegality… but at the end of a very long process.

Would it not have been much easier to seize the Conseil d'Etat directly of such a matter? If the Conseil d'Etat believed that the case was well founded it would quash the refusal to cancel the *loi du pays*.