

**THE STATUS OF AUTONOMY
OF FRENCH POLYNESIA AFTER
THE CONSTITUTIONAL AMENDMENT
OF 28 MARCH 2003 AND THE ORGANIC
LAW OF 27 FEBRUARY 2004**

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The constitutional reform of 28 March 2003²⁰⁷, and the organic law of 27 February 2004²⁰⁸, made it possible for French Polynesia to have its third law on its status of autonomy in 20 years. This continues the modernisation of the law relating to France beyond the seas²⁰⁹, which began at the end of the 1990s in the Pacific with the grant to New Caledonia of a novel form of status within the Republic²¹⁰.

These reforms produced a major change for the law affecting French overseas territories: They replaced the traditional dichotomy between

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²⁰⁷ Constitutional Law n° 2003-276.

²⁰⁸ *Loi organique* n° 2004-192, 27th February, J.O 2nd March 2004, p.4183; complemented by an ordinary statute of the same day (law n° 2004-193) and promulgated in the Official Gazette on 2 March 2004. A. Delblond, “Editorial, Une révision constitutionnelle fait-elle le printemps”, *Cahier Administratif et Politique du Ponant*, Automne/Hiver 2002, n° 7, p.5.

²⁰⁹ Also called “*la France ultra-marine*”.

²¹⁰ Constitutional revision of 20 July 1998. On the previous status of autonomy in French Overseas Territories, see J.M Pontier, “Les avancées toujours renouvelées de l’autonomie locale: Le cas des TOM”, *Rev.adm.*2000/1.p 67; B. Gille & Y-L Sage, “The Territory of French Polynesia”, in *Essays on French Law in the Pacific*, VUWLR Monograph 8, 1993 (A. Gordon, Editor); O. Gohin & M. Joyau, “L’évolution institutionnelle de la Polynésie française”, *AJDA*, 21 July 2004, p.1242.

DOM-TOM, which dates back to the end of World War II, and takes account of the aspirations of the bulk of the overseas communities.

This major change meant the immediate end to the description of an “overseas territory”, a notion created in 1946 for the overseas possessions of France and which were recognised as “territorial communities of the Republic”²¹¹. Henceforth the territories are under the same rubric as the “*communes*” and departments.

Since the 2003 reform, the Constitution has regrouped the overseas communities into at least three new categories with greater powers and which are managed, as noted by an author²¹², in a more democratic manner than in the past.

These communities are listed in article 72-3 (paragraph 2) of the Constitution²¹³. The article states: “Guadeloupe, French Guiana, Martinique, Reunion, Mayotte, Saint Pierre and Miquelon, Wallis and Futuna, and French Polynesia are governed by article 73 in respect of the departments and overseas regions and the territorial communities created by the application of article 73 (last paragraph), and by article 74 in respect of the other communities.” More precisely, a distinction is made between “overseas departments” (DOM) and the “overseas regions” (ROM) on the one hand, and the “overseas communities” (COM) on the other hand²¹⁴.

There are four overseas departments and overseas regions. They are: Guadeloupe, French Guiana, Martinique, and Reunion²¹⁵. All of these have two particular characteristics:

They remain subject to the legislative assimilation principle established in article 73 (paragraph 1) of the Constitution, and they are an

²¹¹ Articles 72 and 74 of the Constitution of 4 October 1958.

²¹² P. Jan, “L’Outre-mer entre mimétisme et spécificité constitutionnelle”, *Petites Affiches*, 3 août 2004, n° 154, p.3 to 12. A. Oraison, “Le Nouveau statut d’autonomie renforcée de la Polynésie française”, *RFDA*, mai/juin 2004, p.530 to 548.

²¹³ As amended by the Constitutional Law of 28 March 2003.

²¹⁴ M. Joyau, “La loi constitutionnelle et l’Outre-mer”, *Cahier Administratif et Politistes du Ponant Automne/Hiver 2002*, n° 7, p.94.

²¹⁵ Paragraph 7 of the Constitution, and possibly “territorial communities” with article 73 (last paragraph).

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

integral part of the European Union and subject to community law both of direct and delegated nature²¹⁶.

The six overseas communities are Mayotte, Saint Pierre and Miquelon, French Polynesia, Wallis and Futuna, Saint Barthelemy, and the French part of the Franco-Dutch island of Saint-Martin. They are governed by article 74 of the Constitution, which aims to bring them together. The overseas communities have four common characteristics:

- They are, in principle but necessarily subject to the legislative speciality principle and are identified by article 74 of the Constitution;
- Their deliberative assemblies can exercise powers which in France are matters of legislative power;
- They have a common legal regime vis-à-vis the European Union and are not subject to community law;
- They have a status unique to them, which is set out in the organic law of each.

Since the constitutional reform of 28 March 2003, French Polynesia is more clearly than ever an overseas territory,²¹⁷ and must therefore be listed among the overseas communities. The usage “overseas country” (*Pays d’Outre Mer*)²¹⁸ has no legal significance and no constitutional base under the reform of 28 March 2003. French Polynesia does not have a status that is analogous to that of New Caledonia²¹⁹.

Importantly, these pieces of legislation have been declared valid by the Constitutional Council²²⁰.

²¹⁶ A.Oraison, “Quelques réflexions générales sur l’article 73 de la Constitution de la Ve République, corrigée et complétée par la loi constitutionnelle du 28 mars 2003”, RFDA 2003, p. 42-58.

²¹⁷ Despite its appellation as an “overseas country”.

²¹⁸ P.O.M.

²¹⁹ Established by Title XIII of the Constitution. O. Gohin & M. Joyau, op. cit; p. 1242; A. Oraison, op. cit, p. 532 to 535. P. Pactet, “La loi constitutionnelle du 20 juillet 1998 sur la Nouvelle Calédonie”, in *Mélanges P.Gelard, Droit Constitutionnel*, Montchrestien, Paris 1999, p.199-204, J-Y Faberon, “Nouvelle Calédonie et constitution: La révision constitutionnelle du 20 juillet 1998”, RD pub.199, p.113-130.

²²⁰ Decisions 2004-490 DC and 2004-491 DC of 12 February 2004. For a detailed analysis of these two decisions, see J-E Schoettl, “Un nouveau statut

French Polynesia has a large degree of autonomy, evidenced by the increased number of powers and adaptation of local institutions. It is an overseas community regulated by article 74 of the Constitution²²¹.

Article 7 (paragraph 1) of the law of 27 February 2004 states that “in respect of matters which are within the authority of the State, those legislative and regulatory provisions which are expressly stated to apply to French Polynesia, do so.”

It is important to emphasise that this article lists (for the first time and in an exclusive manner) the areas in which legislative and regulatory provisions will apply automatically to French Polynesia²²². These include provisions relating to the composition, organisation, functioning and allocation of constitutional powers of the Republic and of the final courts of appeal such as the Council of State (*Conseil d'État*) and the Court of Cassation (*Cour de Cassation*). Also within this category are laws relating to national security, the public domain, citizenship, the status and capacity of individuals, provisions relating to the status of the national public servants, and those relating to the ratification or approval of international agreements and proclamations that relate to their publication. Subject to these important reservations, the organic law of 27 February 2004 is characterised by an increase in the powers of French Polynesia.

pour la Polynésie française après la révision constitutionnelle du 22 mars 2003”. RFDA, Mars-Avril 2004, p.248/272, more specifically p. 263 to 272

²²¹ M. Joyau, *De l'autonomie des collectivités territoriales françaises*, LGDJ, 1998, coll. Bibl. droit public, n° 198, p. 285-290; “Pourquoi priver la Polynésie française des principes généraux du droit? Ou comment le Conseil d'Etat a probablement protégé les droits de la population polynésienne”, Tahiti-Pacifique novembre 2003, p. 28

²²² O. Gohin & M. Joyau, *op. cit.*, p.1244.

Chapter I

THE SHARING OF POWER BETWEEN THE STATE AND THE TERRITORY

SECTION 1 - CONFIRMATION OF THE EARLIER PRINCIPLES

Since the statute of 12 July 1977, the distribution of powers between the State and French Polynesia has been the key element of the new institutional arrangements²²³.

On this point the new status differs little from what went before. Indeed, article 13 (paragraph 1) of the organic law of 27 February 2004 builds on the common law principle of power delegated to French Polynesia and to the *communes* of French Polynesia²²⁴.

In its new status of autonomy French Polynesia has power in all matters²²⁵, which the law has not expressly attributed to the State or to the Polynesian *communes* or “other laws which by reason of their purpose necessarily apply to the whole of the territory of the Republic”²²⁶. That is the clearest possible evidence of the administrative autonomy

²²³ It was the same under the law of 1996. O. Gohin & M. Joyau, op. cit, p.1243. On the subject in general, see S. Al Wardi, “Tahiti et la France”, R.J.P 2001 Vol.7, p. 755-760. (NB: All R.J.P’s articles mentioned in the following developments, are freely accessible on and can be freely downloaded from the following Internet site: <http://www.upf.pf> (Recherche; RJP).

²²⁴ Provided in the laws of 1977 and 1996.

²²⁵ This corresponds in French administrative law to an advanced status of territorial decentralisation.

²²⁶ Constitutional Council 12 February 2004, cons 18. On the scope of French law in French Polynesia, see Y- Brard, “Autonomie interne et source du droit en Polynésie française”, AJDA septembre 1992, p.553; J. Peres, “Application des lois et règlements en Polynésie française: Répartition des compétences”, R.J.P Vol. 8, 2002, p.181-208; Y-L Sage, “The application of Legislation in the French Overseas Territories”, in *Essays on French Law in the Pacific*, op. cit, p.15-36.

that French Polynesia now has in the sharing of power between the community and the State²²⁷.

The basic rules for sharing of power are set out in the new articles 72 to 74-1 of the Constitution.

Article 72 makes it clear in paragraph 2 that “territorial communities may take decisions in respect of all matters which are best dealt with at their level”.

Article 74 indicates in paragraph 4 that the law of an overseas community “defines [...] the powers of that community” and “subject to powers already exercised by it, the transfer of powers of the State cannot effect matters listed in article 73 (paragraph 4) as detailed and supplemented, where necessary, by the organic law.”

Article 73 (paragraph 4) lists matters, which cannot be transferred to overseas communities because those matters relate to the sovereign character of France, an independent and unitary State²²⁸.

Within the framework of the new status as it results from the organic law of 2004, article 14 lists these same matters, that is to say: citizenship, civic rights, electoral law, the status and capacity of individuals, the guarantee of public freedom, the organisation of the courts, criminal law, criminal procedure, foreign affairs, defence, internal security and public order, credit and exchange transactions.

Leading commentators have noted that “the list in article 73 (paragraph 4) is the irreducible minimum because those matters relate to the sovereign character of an independent and unitary State”²²⁹.

Therefore, it was perfectly lawful to attribute other powers to the State and, reading the new status law it is clear that the State has fully exploited this possibility. So there are 37 powers in all, which in addition to the 12 provided in article 73 (paragraph 4) of the Constitution, remain within the sole authority of the State. Examples of these are the policing and security of civil aviation, inter-community cooperation and public markets, and branches of the National Public Service and its public institutions.

²²⁷ J. Peres, “La Nouvelle répartition des compétences entre l’Etat et la Polynésie française”, R.J.P vol 10, 2004, p. 481-504.

²²⁸ O. Gohin & M. Joyau, op. cit., p.1244

²²⁹ Ibidem

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

Further, the legislation has not provided for the transfer of power of the State authority in respect of gambling institutions, thus continuing in this area, the provisions of article 65 of the Status of Autonomy Law of 1996²³⁰. Article 24 of the organic law of 27 February 2004 clearly acknowledges French Polynesia's authority relating to regulations of gaming, specifically the issuing of permits for the opening of clubs and casinos, while at the same time making it clear that the overall control of gaming and setting of penalties in respect of gaming offences remains within the authority of the State²³¹.

SECTION 2 - THE LIMITED EXTENSION OF THE FIELD OF AUTHORITY OF FRENCH POLYNESIA

It is necessary to engage in an *a contrario* interpretation of article 14 of the organic law of 27 February 2004 in order to determine what new powers have been transferred to French Polynesia²³². Possibly they are the fundamental principles of commercial obligations, and the general principles of employment law²³³.

The benefit of the amount of power shifted to French Polynesia cannot be under-estimated. This is all the more so since the shift was accompanied by the transfer of power in relation to the importation and sale of petroleum gases and liquids, as well as for maritime and air services within French Polynesia and any transit points situated outside the territory.

French Polynesia is now also responsible for civil law with the exception of the rules relating to the status and capacity of individuals, parental authority, and marital property regimes, succession and gifts.

Article 25 of the organic law of 27 February 2004 also²³⁴, allows French Polynesia to establish companies for the production and broadcast

²³⁰ This was inspired by article 36 of the *sui generis* status of New Caledonia. See J-E Schoettl, op. cit., p. 262-263.

²³¹ Ibidem

²³² A. Oraison, op. cit., p. 535

²³³ Powers granted to the administrative subdivisions, called "*Communes*" are not considered, since they are governed by the same rules and principles as applied in France, Constitutional Council 12 February 2004, Cons.18.

²³⁴ This reaffirmed the previous status of 1996.

of television programmes and for it to be associated with the State in policy development in respect of audio-visual communication.

French Polynesia can by virtue of article 26 of the new statute set up its own organisations for training and research services, although the State remains in charge of education and research.

As a result, in some areas, of the difficulties involved with State responsibilities and the territorial community, the new article 74 (paragraph 11) provides conditions to determine when French Polynesia “can participate, under the control of the State, in the exercise of the powers retained by the State, in respect of the guarantees granted over the whole of the national territory for the exercise of public freedoms”²³⁵.

The circumstances under which French Polynesia may exercise powers of the State, identified generally by the organic law, are provided in articles 31 to 42 of the autonomy law. The provisions in the new constitutional framework are aimed at ensuring, in the most efficient manner possible, respect for the laws made by the community itself. At the same time members of that community benefit from the guarantees inherent in the sovereign nature of the powers exercised.

There is thus a role to play in matters of criminal procedure. The community has the power to determine the penalties, which relate to the offences committed, it being understood that the public officials who decide the cases have been approved by the state.

Also on the list of possible areas of participation for French Polynesia is audio-visual communication, the financial services of the Post Office, and immigration of foreigners. However the right of asylum²³⁶, the deportation of foreigners, and the freedom of movement of citizens of the European Union are excluded from the powers of the community²³⁷.

²³⁵ O. Gohin & M. Joyau, op. cit., 1244.

²³⁶ On the refugees issue in general, see Sir K. Keith, M. Joyau, T. Angelo, *Stemming the Tide or Keeping the Balance- The Role of the Judiciary*, R.J.P Hors Serie Vol 3, 2003 (more specifically M. Joyau’s introduction).

²³⁷ O. Gohin & M. Joyau, op. cit., 1244. On the evolution of the relationships between the Pacific Territories and Europe, see S. André, “L’*évolution des politiques de l’Union Européenne dans la zone du Pacifique*”, in *Contemporary Challenges in the Pacific: Towards a New Consensus* (S. Levine, A. Powles, Y-L Sage, Editors) R.J.P Hors Série 2001, Vol. I, p.105-121.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

Article 31 of the law of 27 February 2004 is indicative of the system that the French legislator has put in place. Thus, and to speak only of five of the matters or groups of matters within the competence of the State which are listed in that article (for example, audio-visual communication), the participation will follow one of two procedures depending on whether the matters are of a legislative or a regulatory nature²³⁸.

As for participation in legislative matters, which are within the competence of the State, this will be regulated by the operation of principles provided in article 32-1 of the organic law²³⁹. It is a consequence of this provision that the Council of Ministers, or the Assembly of French Polynesia can, in respect of any one of the five subject areas or groups of subjects, draw up a legislative proposal or a proposition for a “law of the country” which is first submitted to the Prime Minister for approval by way of a decree. Then, in the case of total or partial approval, it is submitted to the indirect agreement of Parliament given by way of legislative ratification of this decree of approval, which the Assembly of French Polynesia can then transform at any time – but always in the same terms – into a “law of the country”²⁴⁰.

Therefore by way of protection of the power of the State as legislator, the agreement of Parliament is a precondition to the entry into force of a “law of the country” and, absent ratification by legislation, the “law of the country” is without effect.

In respect to participation in regulatory matters that are within the power of the state, there is less difficulty. In fact the Council of Ministers of French Polynesia can in respect of any of the matters draw up a draft order, which is submitted to the Prime Minister for approval in the form of a decree. If there is total or partial approval this decree is then transformed in the same terms into an Order of the Council of Ministers and its entry into force is then (as was emphasised in the decision of the Constitutional Council of 12 February 2004) subject to the issuing of a decree of approval.

²³⁸ O. Gohin & M. Joyau, *ibidem*.

²³⁹ A. Oraison, *op. cit.*, p.535.

²⁴⁰ On this concept, see below Chapter IV, section 2, §3.

Chapter II

INTRODUCTION OF THE IDEA OF POSITIVE DISCRIMINATION AND PROTECTION OF LOCAL LAND RIGHTS

Special powers have been granted to French Polynesia in the field of protection of the local people in employment matters and land holding.

SECTION 1 - PROVISIONS FOR THE PROTECTION OF LOCAL EMPLOYMENT

For the first time, the Constitution authorises territorial communities overseas (which have the status of overseas communities and covered by article 74 of the Constitution) to take the steps justified by local circumstances in relation to access to employment and the right to exercise professions²⁴¹.

French Polynesia can therefore now, by means of “laws of the country”²⁴² for each type of professional activity and each sector of the economy, establish measures, which favour the local population by reference to “objective criteria, which have a direct relationship to the need to support and develop local employment”.

In the abstract, these measures are clear contraventions of the right to work and of the right to move freely within the State and amount in practice to instituting a principle of national preference, which is not without its difficulties in relation to the French legal tradition. This new discriminatory power is considered as a positive one by most of the Polynesian politicians class who see it first and foremost as an effective bulwark against the arrival of too many foreigners in French Polynesia and as a way of taking account of the small size of the local employment market.

²⁴¹ A. Oraison, op. cit., p. 540; O. Gohin & M. Joyau, op. cit., p.1246-1247.

²⁴² See below at D, 2 (c).

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

At the theoretical level one challenge remains. The Assembly of French Polynesia must first clearly identify the notion of local population. In strict law the emphasis must be placed solely on “a sufficient length of residence” of people in French Polynesia, irrespective of their ethnic origin or their place of birth. There is no doubt that this exercise in definition will be a very difficult one²⁴³!

To the extent that the system put in place in French Polynesia to support and promote local employment owes much to the system which is presently operating in New Caledonia, it will also be possible for the Polynesian legislature to take inspiration from the New Caledonian concept of “local population” where the criterion used is that of sufficient length of residence based on objective and rational criteria which refer directly to the promotion of local employment without imposing any other restrictions²⁴⁴.

SECTION 2 - PROVISIONS FOR THE PROTECTION OF POLYNESIAN LAND

Land issues are a major concern in all island states in the South Pacific, including in French Polynesia²⁴⁵. There are closely linked to the notion of national (or regional) identity. As noted by one commentator: “this reflects underlying cultural values as well as political/nationalistic views about rights to ownership (or use) by non-indigenous individual, groups or business interests”²⁴⁶.

In its original formulation the law of 12 April 1996 had made specific provision for land matters and more precisely had provided for a

²⁴³ In the South Pacific, the concept of local population refers not only to legal rules but is also closely linked to societal parameters. It belongs to the fast growing field of legal anthropology which is gaining an increasing interest among legal scholars in this part of the world, see Y-L Sage, “Quelques observations sur la contribution des petits Etats insulaires du Pacifique Sud à l’étude du pluralisme juridique”, in *Contemporary Challenges in the Pacific: Towards a New Consensus*, (S. Levine- Y-L Sage, Editors) Vol.1, 2001, R.J.P Hors Série.

²⁴⁴ Constitutional Council 15 March 1999.

²⁴⁵ R. Calinaud, “Les principes directeurs du droit foncier polynésien”, RJP. Vol.7.2001, p. 741-750; Y-L Sage, “Evolution of Land Policies in French Polynesia”, *Canterbury University Law Review*, August 1997.

²⁴⁶ S. Levine, “Introduction”, in *Contemporary Challenges in the Pacific: Towards a New Consensus*, R.J.P Hors Série, Vol. 2, op. cit., p. xi- xvi.

discretionary system of prior authorisation for transactions involving the transfer of title to land. The avoidance of the subdivision of local land and of land speculation were then the objectives of the legislator²⁴⁷. However in its decision of 9 April 1996 the Constitutional Council struck down the mechanism that was envisaged because it involved direct limitations on the right of disposal of land, which is one of the essential attributes of the right to property. These limitations had such a serious characteristic affecting the right to property that the result was to change the meaning and purport of this right, which is guaranteed by article 17 of the Declaration of the Rights of Man and of the Citizen²⁴⁸.

Consequently, in order to get round this decision, the constitutional proposal for French Polynesia which was voted on by the Senate on 12 October 1999 – but never put to Congress – had envisaged the possibility of special rules in relation to the acquisition of land. It was therefore for the organic law of 27 February 2004 to be innovative and introduce into French Polynesia a system of safeguards for land consistent with what is now authorised by the Constitution after its revision on 28 March 2003. The provisions of this organic law are thus in conformity with the new article 74 of the Constitution which deals with all of the overseas communities and particularly with French Polynesia. In paragraph 10, article 70 states that “Measures justified by the local situation can be taken by the community in favour of its population for the protection of the land”.

More concretely, in article 19 the law of 27 February 2004 opens up the possibility of French Polynesia putting in place a system which subordinates to declaration *inter vivos* transfers of land situated in the territory or of rights relating to land other than gifts in direct lineal line or collaterally to the fourth degree. This system is moreover supported by the possible exercise of a right of pre-emption over land, or of rights relating to land, which can be exercised (within two months of the declaration) by the Council of Ministers of French Polynesia.

²⁴⁷ R. Calinaud, “Un organisme “sui generis” propre à la Polynésie française: La commission de conciliation obligatoire en matière foncière”, R.J.P Vol. 10, 2004. p. 477- 483.

²⁴⁸ Y-L Sage, “Is it still possible for foreigners to invest freely in French Polynesia? Comments on the decision of 21 November 1996 of the Territorial Assembly of French Polynesia”, VUWLR Special Issue (1997) Vol. 29.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

Absent agreement on the value of such property or the rights involved, compensation is fixed as in matters of expropriation. The exercise of the right of pre-emption must be justified by the preservation of the lands belonging to the cultural patrimony of the people of French Polynesia, the preservation of the identity of this population or even the safeguarding or the protection of natural spaces.

Here again it falls to “laws of the country” to fix quite specifically what is the residence of a sufficient length of time which is required for any dispensation from the declaration of transfer.

Chapter III

A BETTER DIVISION OF AUTHORITY BETWEEN THE STATE AND FRENCH POLYNESIA IN CONNECTION WITH INTERNATIONAL RELATIONS

Articles 15 to 17²⁴⁹ deal with the international affairs powers of French Polynesia and provide French Polynesia with new duties, which serve to strengthen its autonomy.

Without a total upsetting of the principles relating to the sharing of international affairs power, which has already been established in the status arrangement of 1996, the status reform of 2004 confirms and to a certain degree strengthens the area of authority of French Polynesia particularly as it relates to international relations and regional cooperation in the Pacific.

The 2004 text breaks new ground in respect of the representation of French Polynesia internationally. This particular development goes hand in hand with an increase in the powers of the President of French Polynesia.

²⁴⁹ With which should be read Articles 38 to 42.

SECTION 1 - THE CONFIRMATION OF EARLIER POWERS OF FRENCH POLYNESIA IN RELATION TO INTERNATIONAL AFFAIRS

Article 16 of the organic law authorises the President of French Polynesia to negotiate and sign documents, which are described as “administrative arrangements” in respect to international agreements with the administration of any state or territory of the Pacific where the goal is to promote the economic, social and cultural development of French Polynesia²⁵⁰.

In fact article 16, while confirming the authority already granted to the territory of French Polynesia in 1996²⁵¹, restricts itself to providing (paragraph 1) more detail as to the exercise of this power of the President of French Polynesia.

These details relate to two matters:

Substantively, the “administrative arrangements” relate to the application of international undertakings, which are already in force and have a geographically limited application because they can be entered into only with the administration of independent states and of Pacific territories.

Moreover, these “administrative arrangements” must have very precise objectives of a kind, which were not set out in the preceding status law: They must be signed “in order to promote the economic, social and cultural development of French Polynesia”²⁵².

As to form, these “administrative arrangements” are signed by the President of French Polynesia, approved by the Council of Ministers of French Polynesia, and enter into force on the date of their transmission to the High Commissioner of the Republic.

In so far as the participation of French Polynesia in the exercise of the international powers of the state are concerned, these are regulated by

²⁵⁰ A. Oraison, op. cit., p. 536-540.

²⁵¹ Following the path already established in the 1984 status law (amended by the law of 12 July 1990); D. Dormoy, “Les compétences externes du Territoire”, in *Première Table Ronde sur le Droit Territorial*, 28 juin 1991, p. 20-26, Université française du Pacifique.

²⁵² J-E Schoettl, op. cit., p. 251.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

articles 32 to 48 of the new status document and there too, the principle is to provide detail on the responsibilities of the President of French Polynesia which are already provided in article 40 of the status document of April 1996 (paragraph 1). Thus, although it is possible for the authorities of the Republic, in the fields of the State's competence to confer on the President of French Polynesia powers which permit the President to "negotiate and sign agreements with one or more states, territories or regional organisations of the Pacific and regional organisations which are affiliated to the specialised agencies of the United Nations", such agreements must be submitted to ratification or approval in accordance with the conditions set out in articles 52 and 53 of the Constitution of the French Republic²⁵³.

The President of French Polynesia can also "be authorised by the authorities of the Republic to represent the Republic in international organisations". This does derogate from the sovereignty of the French Republic; the organisation of cross-border regional cooperation of a durable nature between French Polynesia and the authorities of neighbouring countries is a veritable necessity particularly in the economic, health, education, maritime safety environmental protection and cultural and agricultural fields.

Since 1992, consistently with article 72 of the Constitution of France, French Polynesia has had the ability to make cooperation agreements with territorial authorities both of France and of foreign countries²⁵⁴.

These powers had already been provided for in the organic law of 12 April 1996²⁵⁵ and are confirmed by article 17 of the organic law of 17 February 2004 which states that the President of French Polynesia, in respect of the matters that are within the powers of the Council of Ministers, negotiates and signs, in the international undertakings of the Republic relating to the authority of French Polynesia, cooperation agreements of a decentralised nature with territorial authorities both of France and foreign countries, local government organisations and public bodies.

When they have been agreed to, these conventions are then submitted to the Council of Ministers of French Polynesia for approval and enter

²⁵³ A. Oraison, *op. cit.*, p. 536-537.

²⁵⁴ D.Dormoy, *Les relations internationales et l'outre-mer : L'exemple polynésien*, AJDA, Dalloz 1992, p. 595.

²⁵⁵ M.Joyau, *The External Relations of the Territory of French Polynesia*, RJP, Vol 9, 2003, p. 35.

into force from the time of their transmission to the High Commissioner of the Republic.

In a general sense, French Polynesian politicians have for a long time been convinced of the inevitability of the inclusion of French Polynesia in regional arrangements.

The need to involve French Polynesia both in the network of multilateral cooperation and in bilateral cooperation was clear.

As was already the case for New Caledonia from the time of the constitutional revision in 20 July 1998, France had then to do all in its power for French Polynesia to strengthen the links of good neighbourliness with the inter-governmental organisations and the sovereign states of the Pacific.

SECTION 2 - NEW DEVELOPMENTS IN RESPECT OF THE REPRESENTATION OF FRENCH POLYNESIA

The organic law of 27 February 2004, like that of 12 April 1996, encourages multilateral cooperation by both direct and indirect participation of political representatives of French Polynesia in the work of the international cooperative organisations for economic matters which exist in the Pacific.

But the text of 2004 in article 15 provides French Polynesia with the possibility of “having representation in any independent state or in any of its territorial entities or in any territory recognised by the French Republic, or in any international organisation of which France is a member, or of any international organisation of the Pacific”.

The establishment of such representations and the naming of representatives are within the power of the President of French Polynesia who must inform the French government.

In its decision of 2004, the Constitutional Council however entered an important reservation, the object of which is to emphasise – once again – that the status of autonomy which French Polynesia enjoys has its limits and does not amount to independence.

The decision underlines the fact that what is provided for in article 15 of the organic law could not, without intruding in areas of the exclusive

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

competence of the State, entitle any such representations abroad to diplomatic status.

Moreover, article 42 of the organic law of 27 February 2004 envisages that French Polynesia can, with the agreement of the authorities of the Republic “be a member or an associate member of international organisations in the Pacific or an observer at any of them”²⁵⁶. In respect of any such membership or associate membership, French Polynesia is represented by the President or the representative of the President. This clause makes it clear that the President of French Polynesia or the President’s representative “can be associated, with the agreement of the authorities of the Republic, with the work of Pacific regional organisations in those areas which are related to powers held by French Polynesia”²⁵⁷.

SECTION 3 - SPECIFIC POWERS OF REPRESENTATION AND OF NEGOTIATION OF THE PRESIDENT OF FRENCH POLYNESIA IN CONNECTION TO INTERNATIONAL AFFAIRS

The status law of 27 February 2004 grants to French Polynesia and more precisely to its President, particular duties in respect of international representation which exceed those which existed in the past.

New powers have been recognised for the President of French Polynesia in the fields of representation of the territory in independent states and in territories recognised by the French Republic as well as in Pacific regional organisations.

In those areas of competence, which belong to French Polynesia “the President of French Polynesia can after discussion in the Council of Ministers, negotiate in respect of the international undertakings of the Republic, agreements with any state, territory or international organisation”²⁵⁸.

In the field of the special powers of French Polynesia, article 16 of the new status law authorises the President of French Polynesia to negotiate and sign “in respect of and for the application of international agreements of the Republic, administrative arrangements with the

²⁵⁶ Article 42, paragraph 1.

²⁵⁷ Article 42, paragraph 2.

²⁵⁸ Article 39.

administrations of any state or territory of the Pacific”. This relates to agreements of limited scope or of a technical nature which are made necessary by other international agreements.

This provision is not new; the principle was already enunciated in article 41 of the organic law of 1996. However, the provision is viewed as of some significance. The President of the French Polynesia no longer has to obtain letters of authority from the Republic in order to negotiate these “administrative arrangements”.

Protections have nevertheless been put in place by the organic law of 27 February 2004 and they find their inspiration in the provisions of the organic law of 12 April 1996. Thus, the relevant authorities of the Republic must be kept informed of the intentions of the President of French Polynesia as to the negotiation of such arrangements and at their request those authorities may be “represented at the negotiations by being part of the delegation of French Polynesia”.

The authorities of the Republic also have “a period of one month from the date of notification of the intention to negotiate an arrangement to oppose the negotiation of any arrangement”. Furthermore, the signature in the name of the Republic of an agreement, which relates to a matter within the competence of French Polynesia must be authorised by the authorities of the Republic. The entry into force of such an agreement is also subject to the approval of the Assembly of French Polynesia, and thus of the passage of a law which authorises the ratification or approval of the arrangement in accordance with the conditions set out in articles 52 and 53 of the Constitution of France²⁵⁹. Article 41 of the status law of 27 February 2004 also recognises a new power in the head of government of French Polynesia.

Article 41 says that “the President of French Polynesia or the representative of the President may participate as a member of the French delegation in negotiations which are related to the relationship between the European community and French Polynesia”.

It remains to address a final problem, which concerns the international representation of French Polynesia and its participation in the activities of international organisations of the Pacific.

²⁵⁹ Article 39.

Chapter IV

THE STRENGTHENING OF THE INSTITUTIONS OF FRENCH POLYNESIA

The law of 27 February 2004 provides the rules for the organisation and functioning of the organs of government of an overseas community and also provides for its powers. Other details relating to these matters are promulgated by way of ordinary legislation on the same day²⁶⁰.

These laws follow the tri-partite legislative arrangement, which was put in place in 1996. They have however strengthened it and in such a way that allows French Polynesia to “govern itself” from now on. The government institutions concerned are the executive organs (the President of French Polynesia, and the government), the deliberative institutions (the Assembly, and the advisory bodies (the Haut Conseil and the Economic and Social Council)

SECTION 1 - THE POLYNESIAN EXECUTIVE

The government of French Polynesia consists of a President and several ministers.

§ 1 - THE PRESIDENT OF THE GOVERNMENT OF FRENCH POLYNESIA

The new statute on autonomy makes the President the essential feature of French Polynesia. The recent amendments go beyond the purely symbolic. The status of the President of the Republic has been the model for the status of that of the Polynesian President, and inspiration has been drawn from the office of Prime Minister in respect of the prerogatives of the President.

The organic law of 1996 used the title “president of the government of French Polynesia”. The title now is “President of French Polynesia”.

Articles 63 to 101 of the new statute provide the rules for the election of the President and for the role of the President. These have been amended and recast in the same way as those relating to the forming and

²⁶⁰ See footnote 2 above.

functioning of the government of French Polynesia. Article 69 of the new statute provides that the Assembly of French Polynesia elects the President for five years.

The President can be chosen from among the members of the Assembly but could equally be a person from outside of the Assembly. However if the candidate comes from outside the Assembly the nomination must have the support of at least a quarter of the members of the Assembly. A candidate from outside the Assembly must fulfil the conditions required of eligibility for election to the Assembly of French Polynesia. If there is doubt about the eligibility of a candidate, the High Commissioner of the Republic can, within 48 hours from the time of the nomination, refer the matter to the Administrative Tribunal, which must rule on the matter in 48 hours. The President of French Polynesia is elected by an absolute majority of the members of the Assembly following a process with two polls: that is to say if a candidate does not acquire an absolute majority of votes in the first round of voting the candidate may be elected by a simple majority on the second vote.

At the second vote, there are only two candidates –the two who obtained the greatest number of votes at the first poll.

Article 156 of the autonomy law says that the President may be removed by a vote of no confidence adopted by the Assembly of French Polynesia in conditions similar to those set out in article 39 paragraph 2 of the Constitution. The powers of the President of French Polynesia set out in Article 64 of the statute of 2004 are, following the model of the French Prime Minister, to lead the administration of the territorial community, to direct government action, to represent French Polynesia and to appoint the public servants of French Polynesia other than those specifically identified as being appointed by the President of the Assembly of French Polynesia.

The President promulgates “laws of the country”²⁶¹ and signs the resolutions of the Council of Ministers.

The President is moreover responsible for the implementation of the “laws of the country” and of the resolutions of the Assembly of French Polynesia and of its permanent committee. The President has the regulation-making power necessary for the implementation of decisions of the Council of Ministers, and he is the controller of the budget of

²⁶¹ On this notion, see Chapter V, section 2.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

French Polynesia. It is the President who is responsible for the publication of the Official Gazette.

§ 2 - THE POLYNESIAN GOVERNMENT

Under article 63 of the new status law, the government, which is the executive of the community, decides on and conducts the political life of French Polynesia. It oversees the administration and is accountable to the Assembly of French Polynesia by way of motion of censure in the circumstances provided in the law.

Ministers can be appointed both from within or from outside the Assembly. If Ministers are appointed from outside they must satisfy certain minimum conditions of eligibility. If a Minister is ineligible, his office will be declared vacant by decision of the High Commissioner.

Furthermore the members of the government cannot while they are members of the government, be members on a board of a public institution or of a national body unless their role is that of representing French Polynesia or a territorial institution and the office is an unpaid one. Unlike the situation under the Constitution of France, a member who has lost his or her seat on such a board because of performance of government duties automatically regains that seat on the completion of the government tasks. The new law has brought little change to the operation of government and, as in the previous law the duties of individual members of the government are performed by way of delegation from the President.

Ministers are responsible for the operation of their ministry to the body of Ministers.

Discussion of proposals for “laws of the country” and every other proposal for discussion in the Assembly of French Polynesia engages the collective responsibility of the Council of Ministers.

In respect of the “laws of the country” there is a duty to take advice on them from the “Haut Conseil”, which operates as an advisory body to the government. The “Haut Conseil”²⁶² gives advice on proposals for decrees, regulations required by the “laws of the country”, advice on other documents at the request of the executive authorities and advice on administrative problems.

²⁶² On this institution, see Chapter V, section 2, below.

Alongside these matters there is the power to designate and to specify specific qualifications by the Council of Ministers in the context of issuing licences to aviation companies set up in French Polynesia and also in the context of opening airports.

SECTION 2 - THE DELIBERATIVE INSTITUTIONS

The Assembly of French Polynesia has become another important element of the Pacific overseas community. The former rules relating to the formation of the Assembly have been altered not only to ensure better representation of all of the archipelagos of French Polynesia²⁶³, but also by the granting of new power, most notably in the context of voting on “laws of the country”.

§ 1 - THE ASSEMBLY OF FRENCH POLYNESIA

The Assembly of French Polynesia now has 57 members (instead of the 49 under the 1996 statute) who are known as “representatives in the Assembly of French Polynesia”. They are elected by universal direct secret vote for a period of five years, and they may be re-elected²⁶⁴.

The election of members of the Assembly takes place in an electorate of six constituencies; the Windward Islands and the Leeward Islands,²⁶⁵ the West Tuamotu group, the Gambier Islands and East Tuamotu, the Marquisas and the Australia Islands.

The election of representatives in each constituency proceeds, as in the past, on the basis of a single ballot. Article 105 of the new statute gives an advantage of 30 to the list which attracts the most votes²⁶⁶.

²⁶³ A. Moyrand & Y-L Sage, “The Archipelago's Council in French Polynesia: Comment on the Decision of 18 May 1994 of the Administrative Tribunal of Papeete”, VUWLR 1996, Vol. 26.

²⁶⁴ E-P. Guiselin, “La représentation égale du suffrage en Polynésie française” RJP, vol 9, 2003, p.153; “Les élections à l'Assemblée de la Polynésie française: De nouvelles règles électorales”, R.J.P Vol 10, 2004, p. 505-523.

²⁶⁵ Which geographically form the Society Islands.

²⁶⁶ These provisions were confirmed by the Constitutional Council in its decision of 12 February 2004.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

This addition amounts to the number of seats equal to a third of the number of seats to be filled. It might have been thought that this threshold would prevent opposition parties from coming to power, but the elections of May 2004 under this new system enabled a grouping of parties that favoured autonomy and local sovereignty lead by Oscar Temaru, to become president²⁶⁷.

Once this allocation has been made the other seats are shared among all the lists on a proportional basis. Candidates get seats according to the order of their presentation on each list; the threshold for access to a seat is at least three votes.

The Assembly of French Polynesia sits in Papeete, which is the main centre of French Polynesia. The Assembly can however exercise its functions anywhere else if it so decides. There are two ordinary sessions each year. There can also be extraordinary session called by the President of the Assembly following a written request to him either by the President of French Polynesia or by an absolute majority of the members of the Assembly, or even by the High Commissioner of the Republic in certain exceptional circumstances.

The Assembly of French Polynesia elects its own President, Treasurer and Secretary as well as its staff and permanent commission.

As before, it has the power to determine its own internal rules. It can provide for all matters relating to the operation of the Assembly, which are not expressly governed by the legislation of 27 February 2004²⁶⁸.

Article 157 of the statute makes it clear that the Assembly of French Polynesia can be dissolved by a decree of the President of the Republic taken in the Council of Ministers after advice from the President of the Assembly and the President of French Polynesia, when the functioning of these institutions of French Polynesia becomes impossible.

²⁶⁷ According to official sources (from the Overseas Ministry), Mr. Flosse's list has obtained 46,75 % of the votes and Mr Temaru's list 36,81 %. However, the latter arriving first in the Windward Islands gained the majority premium (33%), a reform initiated by Mr. Flosse himself.

²⁶⁸ Instructed by the past, specific provisions have been enacted in order to proclaim absentees as having resigned from their seat of member of the Territorial Assembly, see A. Moyrand & Y-L Sage, "Compulsory Resignation Regime of Members of the Territorial Assembly of French Polynesia (the decision of 11 June 1993 of the Administrative Tribunal of Papeete)", VUWLR 1996, Vol. 26.

§ 2 - THE POWERS OF THE ASSEMBLY OF FRENCH POLYNESIA

The Assembly administers the territory by having a role in all matters, which are within the power of French Polynesia. First and foremost it is responsible for approving the annual budget and for approving the accounts.

The Assembly can establish commissions of enquiry, in which all of the political groups in it are represented on a proportional basis. It is consulted about the creation or dissolving of *communes* and on proposals for the ratification of international agreements. In regard to the matters which are within the authority of the State, the Assembly of French Polynesia and its permanent commission can adopt resolutions for the purpose of extending to the territory laws or regulations which are in force in the French métropole or for the purpose repealing, amending or supplementing legislative and regulatory measures which are applicable in French Polynesia.

The Assembly can also be seized by way of petition, of any matter, which relates to its responsibilities and can call a referendum on any proposal, which could affect matters within its authority.

Just as under the law of 1996, this is a parliamentary type regime. The Assembly can pass a motion of no confidence²⁶⁹. Such a motion requires the support of a fifth of all members of the Assembly.

The Assembly must then meet two clear days after the giving notice of the motion of no confidence and the vote on the motion must take place within the two days following that. The motion will pass if it receives the support of the absolute majority of the members of the Assembly.

The consequence of a successful vote of no confidence is the immediate dismissal of the government. The government however will continue in a caretaker role in respect of current affairs until the election of a new President²⁷⁰.

²⁶⁹ By article 156 of the organic law of 27 February of 2004.

²⁷⁰ . The 9th October 2004, after two days of debate, 29 members of the Territorial Assembly, terminating Mr. Temaru's government, have voted a motion of no confidence.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

§ 3 - THE “LAWS OF THE COUNTRY” (*LOIS DU PAYS*)²⁷¹

The power of the Assembly to pass “laws for the country” which can be proposed by members of the Assembly or by the government, is an important one. The use of the word laws (*lois*) in this context is interesting because in France this terminology is reserved for the formal legal decisions of the French Parliament.

Although constitutionally, there is no law of France other than that which is voted on by the holder of legislative power — the people of France acting through their elected representatives. Nevertheless, the idea of a “law of the country” is not new to French law because it is a part of the reform relating to the status of New Caledonia.²⁷² The use of the idea in French Polynesia is a direct borrowing from the New Caledonian model. There is however a strong symbolic value in the use of the phrase “law of the country” in the context of French Polynesia because it indicates the taking of one further step along the path to a strong form of autonomy. Article 139 of the organic law provides that “the Assembly of French Polynesia approves decisions in matters listed in Article 140 which are called *lois du pays*”.

Article 140 sets out in an exclusive manner those areas in which French Polynesia has legislative competence and those in respect to which it can make formal decisions called “*lois du pays*”.

1) The areas in which “laws of the country” may be made

Article 140 (paragraph 1) of the organic law of 2004 says that laws of the country may be made in relation to 17 subject areas where French Polynesia shares in the exercise of authority with the State. It can therefore make laws with retrospective effect in contractual matters where that retrospectivity is in the public interest.

²⁷¹ Y. Brard, “Nouvelle Calédonie et Polynésie française: Les “lois du Pays”, de la spécialité législative au partage du pouvoir législatif”, in *Contemporary Challenges in the Pacific: Towards a New Consensus*, Vol 2, op. cit, p. 47-72.

²⁷² Founded on the Nouméa Accord of 5 May 1998, background document, point 2.1.3. See paragraph 8 Decision n° 2004-490 DC, 12 February 2004 in JO 2 March 2004 p 4220 where the Constitutional Council is actually just repeating word for word what has been already said in its decision n° 99-410 DC 15 March 1999, about the status of New Caledonia (JO 21 March 1999, p. 4234.)

These subject areas relate to the status and capacity of individuals, parental authority, marital property regimes, succession and gift law, the establishment of offences and penalties in the respect of gaming, and residence of foreigners (but not the exercise of powers in relationship to asylum, the deportation of foreigners or the free movement of citizens of the European union).

Equally the Assembly has power in respect of laws justified by the local circumstances which relate to positive discrimination in respect of the local population for access to employment, the right of setting up professional business, and in respect of the protection of land.

These benefits for the Polynesian population are not based on descent lines or on property ownership but depend on an individual being able to prove “a sufficient length of residence in French Polynesia”²⁷³ or of a person with whom that individual has a shared life by virtue of a stable public and established relationship (marriage, de facto relationship or relationship of civil union “Pacs”). The Constitutional Council did however note that such positive discrimination must not only be justified by the local circumstances but further can operate in those areas only “to the extent strictly necessary in the context of the status of autonomy”.

The fulfilment of these conditions is subject to judicial control. The French Polynesian authorities must therefore provide, in an objective and pre-established form, the reasons for resorting to “laws of the country” in respect of those matters relating to the protection of local employment²⁷⁴, the preservation of the ownership of the land as part of the cultural patrimony of the people, and for the protection and appreciation of the natural environment²⁷⁵.

The 15 or so subject areas, which are the sole province of French Polynesia.

Among those in this category are the civil law, public health law, environmental law, mining law, basic commercial law principles, town and country planning law and the law on the public property of French

²⁷³ Article 19 paragraph 4. On the concept of Polynesian citizenship, see G. Flosse, “The concept of Polynesian citizenship”, in *Contemporary Challenges in the Pacific: Towards a New Consensus*, Vol.2, op. cit., p. 13-22.

²⁷⁴ Article 18 paragraph 3

²⁷⁵ Article 19, paragraph 2.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

Polynesia, taxes and duties, labour law, trade union law, social security law and public welfare. Also on the list are the basic guarantees provided for public servants of French Polynesia and the local employment matters covered by article 18.

2) Disputes about “laws of the country”

Although they are called “laws of the country” the decisions taken by the Assembly of French Polynesia remain, as they were before 2004, administrative actions. The Constitutional Council in its decision of 12 February 2004 made it quite clear: “the formal acts called “laws of the country [...] are administrative acts”.

Since they are administrative acts, they are within the jurisdiction of the administrative courts and more specifically under the control of the Council of State which alone has authority to review “laws of the country” both in first and last instance, and this can be done a priori (article 176-178), by way of exception (article 179), or by way of the “*déclassement*” procedure (article 180).

The President of French Polynesia, the High Commissioner for the Republic, the President of the Assembly, or six members of the Assembly, may within two weeks from the adoption of a resolution for a “law of the country”, refer the matter to the Council of State. Under article 177 the Council of State has three months in which to deliver its verdict on the matter²⁷⁶.

A “law of the country” adopted by the Assembly of French Polynesia must be consistent with the provisions of the fundamental law as they exist after the constitutional amendments of 28 March 2003. A “law of the country” must also be consistent with the legislation on the status of French Polynesia of 27 February 2004, and with treaties and other international agreements which are applicable to French Polynesia.

Where there is a dispute about a “law of the country” for French Polynesia, article 74 paragraph 8 excludes the jurisdiction of the Constitutional Council and of the Administrative Tribunal of Papeete and rests special jurisdictional control in the Council of State. “Laws of the country” are different from ordinary resolutions of the Assembly of French Polynesia (article 139 of the organic law).

²⁷⁶ This is the same time limit as that which applies when the Constitutional Council is dealing with a “law of the country” of New Caledonia.

3) *The specificity of disputes about Polynesian law of the country*

There are two points to be noted here. The first is that this is the subject of special provisions in the law of 2004. For the rest these matters are within the general area of the traditional area of public law, however recent decisions of the Court of Cassation indicates the possibility of increasing intervention of the ordinary law courts in respect of these matters.

(a) Specific provisions in the law of 2004: The jurisdiction of the Council of State

Procedurally the matter may come before the Council of State by direct action or by way of reference from another court. When a matter comes by way of direct action it may be brought by one of the institutions with standing in the matter or on reference from an affected individual.

By article 176-1, the Council of State can be seized of a matter by the High Commissioner of the Republic (the representative of France in French Polynesia) or by the President of French Polynesia or the President of the Assembly of French Polynesia or by six members of the Assembly. The matter must be brought before the Council of State within the 15 days which run from eight days after the vote on the measure. When the Council of State is seized of the matter by an individual (article 176-11) the reference must be made within one month.

After the period of one month allowed for references by individuals, or following the publication of the decision of the Council of State within the three months of the reference to it (article 177 paragraph 1), the “law of the country” if upheld will be promulgated by the President of French Polynesia within ten days (article 178).

Article 180 of the organic law of 2004 provides, in paragraph 1, that “laws of the country” under article 140 may not be subject to any challenge after their promulgation. Thus the right to challenge such a law is both within the exclusive jurisdiction of the Council of State and is exhausted in respect of each such law by the first decision on it if there is one.

An ordinary court may refer a question to the Council of State if within litigation before the court a matter arises which is significant to

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

the specific case before that court. In such cases the Council of State must give its decision within three months²⁷⁷.

As a fundamental matter, and whatever the basis of referral to the Council of State, every “law of the country” must satisfy the requirements of article 176-111 of the organic law of 2004: the Constitution, the organic laws, international agreements and general principles of law. The Council of State is therefore not only monitoring respect for the unitary nature of the State, but also checking the guaranteed public rights and freedoms, and the honouring of international agreements and general principles of law.

(b) The role of the ordinary courts in respect of “laws of the country”

Commentators are agreed that the law of 2004 faithfully reflects the concern of the French Polynesian authorities that in the former law, the legal protection that they sought for their actions in the local administrative courts was not always achieved, because the judicially declared legality often came into strong conflict with the legitimacy of the views expressed by the electorate. In the past this led to a great deal of bitterness and was evident in the vigorous defence of the principle of autonomy.

This concern appears to have been addressed in the sense that power of the Administrative Tribunal of Papeete has been reduced and that of the Council of State increased²⁷⁸. This however does not mean that the local institutions are outside the jurisdiction of the local judges. In the field of control of “laws of the country” the possibility for the ordinary courts to be involved is clear each time that a question of general public interest is raised in litigation.

The Court of Cassation, taking advantage of the latest European Court of Human Rights case law²⁷⁹ has now stated clearly that it can deal not only with the substance of a particular claim, but can also refuse to give retroactive application to a law which the Court is satisfied is not justified by reason of the general public interest²⁸⁰. There are two areas that will be principally involved. The first arises under article 12 of the

²⁷⁷ Article 178.

²⁷⁸ The role devoted to the Administrative Tribunal in French Polynesia has always been a source of debate since its setting up in 1984, see for example, A. Moyrand, “Le tribunal administratif de Papeete et l’équilibre institutionnel de la Polynésie française”, R.J.P Vol.1, 1994, p.131-160.

²⁷⁹ CEDH 28 October 1999, *Zielensky*.

law on the status of French Polynesia. The Constitutional Council has declared that if a law promulgated after the entry into force of the new organic law involves matters, which are within the authority of French Polynesia, that law can be amended or abrogated by the Assembly of French Polynesia. This could happen each time that the Assembly of French Polynesia takes measures justified by local circumstances to favour the local population in matters of access to employment, or the exercise of a professional activity, or in respect of protection of land.

If that happens an individual, who believes that the requirements of the general public interest have not been met, could properly seize the ordinary courts in Papeete for a decision on that matter and those courts could then set aside the retrospective application of the law and the amendment or repeal of it.

²⁸⁰ Court of Cassation (Assemblée Plénière) 23rd January 2004, see B.Mathieu, “La Cour de cassation et le législateur: ou comment avoir le dernier mot”, RFDA, mars/avril 2004, p. 224-229.

Chapter V

THE CONSULTATIVE ORGANS OF THE GOVERNMENT OF FRENCH POLYNESIA

Just as under the organic law of 12 April 1996, the Government of French Polynesia and the Assembly of French Polynesia have the benefit of the assistance of consultative organisations. One – the Economic Social and Cultural Council – is old; the other is new.

SECTION 1 - THE ECONOMIC SOCIAL AND CULTURAL COUNCIL

Articles 147 – 152 of the organic law of 27 February 2004 govern the composition and operation of the Economic Social and Cultural Council. This is a purely consultative body, which conducts its sessions in public. Its members are appointed for four years (the Chair is elected from within the group); its members represent professional groups, unions, institutions and associations which participate in the economic, social and cultural life of French Polynesia.

Its role is to give advice on matters of an economic and social character. It can take the initiative in preparing advice and, if so, does that on the basis of the decision of two-thirds of its members. Principally it is concerned with advice on proposals for “laws of the country”, and it has a period of a month (which may be reduced to 15 days in cases of emergency) in which to tender its advice.

SECTION 2 - THE “HAUT CONSEIL” OF FRENCH POLYNESIA

This new institution is established by articles 163 – 165 of the law of 27 February 2004.

This is a consultative body²⁸¹ whose services are engaged only by the Government of French Polynesia. It is made up of persons qualified by

²⁸¹ Some scholars consider that it belongs with the executive institutions, see O. Gohin & M. Joyau, *op. cit.*, p.1248.

their legal knowledge who are appointed by Order of the Council of Ministers for a non-renewable period of six years²⁸².

The main task of the “Haut Conseil” of French Polynesia is to give legal advice to the President and the Government. It must be consulted on all proposals for “laws of the country” before they are put on the agenda for the Assembly.

The “Haut Conseil” can consider a matter at the request of the government, even where the law gives the High Commissioner the right to place matters before the “Haut Conseil”.

This power in respect of “laws of the country” applies to rules concerning :

- Authority in respect of the organisation of services provided by public institutions and by organisations that operate in the public interest;
- Financial assistance which relates to teaching and to the quality and definition of the systems of organisation for international gatherings;
- The safety of traffic in lagoons, territorial waters, and in the exclusive economic zone;
- The management and licensing of ships, and qualifications in aviation matters;
- The physical conditions for the use of civil status records, in the contest of the transfer of part of the civil law responsibility to the Polynesian authorities (with the exception of matters relating to the status and capacity of individuals which remain in the sole presence of the State);
- Road traffic matters.

The “Haut Conseil” can also give advice on other proposals, which are submitted to it by the authorities of French Polynesia, and it may suggest any amendments that it considers necessary. It may also be responsible for the preparation and drafting of any documents, which are demanded or required by the Government of French Polynesia.

²⁸² So far three members have been currently appointed.

CONCLUSION

Because there has been little time to appreciate fully the consequences of the new regime of 2004, any conclusions must be tentative. There are, however, several matters that are clear and all things considered, the autonomy of French Polynesia has certainly increased, but clearly not to the degree that the people of French Polynesia had been led to understand.

On the encouraging side, the concept of positive discrimination will, within the limits set by the Constitutional Council, protect local employment and local land rights²⁸³.

The strengthening of the presidency is balanced by new rules such as those relating to the right to petition and referenda and they provide for better participation of electors in the democratic process.

The regime of 2004 has clearly reinforced the presidential nature of the institutional organisation of French Polynesia²⁸⁴. This could be illustrated by the noting that one of the first political decisions made by Mr. Flosse, acting president, was in order to reinforce his majority, to dissolve the Territorial assembly and to organise new elections²⁸⁵.

The presidential nature of the new status is to some extent counterbalanced by the right of petition²⁸⁶, which is now covered for French Polynesia by article 72-1 of the Constitution, and that right is expressed in a very broad form. A petition requires the signatures of at least one tenth of those on the electoral rolls of French Polynesia. A

²⁸³ Decision 2004-490 DC of 12 February 2004, con. 27-29.

²⁸⁴ Mr. Flosse has always strongly and lately successfully, campaigned for this. See Y.Brard, "La présidentialisation du système institutionnel territorial", in *Première Table Ronde sur le droit territorial*, op. cit., p.3-9; P. Jan, op. cit., p. 3 and also A. Oraison, op. cit., p. 542-543.

²⁸⁵ Decree from the President of the French Republic (2nd April 2004). In retrospect one might reasonably argue that this was an unnecessary move since it provided the opportunity for Mr.Temaru and his allies to obtain 29 seats at the Territorial assembly against 28 for Mr. Flosse's party, Mr. Temaru being elected President the 14th June 2004 by 30 votes on 57. See footnote 59 above.

²⁸⁶ Emmanuel-Pie Guiselin, "La réforme constitutionnelle et la démocratie locale participative", *Cahier Administratifs et Politistes du Ponant*, n° 7, p.75-76 ; R.Fraisse, "La loi et l'Outre-mer après la révision constitutionnelle", *AJDA* 19 avril 2004, p. 811-816.

petition must be presented to the President of the Assembly and will be considered by a group within the Assembly, which must give a reasoned decision on the petition within a reasonable period of time²⁸⁷.

The regime for referenda is almost identical to that which operates in metropolitan France²⁸⁸. Referenda cannot be held in relation to individual matters, and a referendum result will bind only if half of those on the electoral roll cast a vote on the matter. There have however been some adaptations to the metropolitan system provided for French Polynesia by the new status law of 2004. Some things²⁸⁹ have been excluded, but it is possible for any proposal for a “law of the country”, or any proposal relating to the functions of the Assembly of French Polynesia, or of the Council of Ministers, to be the subject of a referendum.

It still remains that some of the reforms introduced in 2004, which were presented by their promoters as being fundamental, are considerably less than that.

This is clearly the case of the “laws of the country” which are neither more nor less than administrative actions, which can, also in certain instances be subject to the control of the ordinary courts²⁹⁰.

Moreover, the exercise of autonomy remains a fragile thing because of the French constitutional orthodoxy, which continues to refer to the idea of the unitary state²⁹¹. It is therefore possible to agree with those who said, “To aspire, without independence, to an autonomy which is both political and administrative, would be to reopen the constitutional debate which has just ended²⁹²”.

²⁸⁷ It is probable that the petition right and the referenda to a lesser degree, will become in the next future, regularly tools used by the opposition in order to challenge Mr. Flosse political decisions.

²⁸⁸ *Loi Organique* 1st August 2003 on local referenda (JO 2 August 2003, p. 13218).

²⁸⁹ Such as resolutions of the Assembly of French Polynesia taken in the context of the exercise of French Polynesia of powers of the State.

²⁹⁰ See Chapter IV, section 2, 3, (b).

²⁹¹ First article of the French Constitution. A. Boyer, “Le statut constitutionnel des territoires d’outre-mer et l’Etat unitaire, contribution à l’étude des articles 74,75,76 de la Constitution du 4 octobre 1958”, *Economica* 1998, PU Marseille.

²⁹² O. Gohin & M. Joyau, *op. cit.*, p. 1252.

THE STATUS OF AUTONOMY OF FRENCH POLYNESIA

On the light of the latest political events, one may question the ability of the new status to provide the much-needed political stability to the territory. So far for the observers and commentators, the current situation presents troubling similarities with what happened in France before 1958, during the IV Republic.

The 8th and 9th October 2004, two motions of no confidence against Mr Temaru's government (one from the *Te Ara* group, the other from the *Tahoeraa Huiraatira* group) were put for vote before the Territorial assembly:²⁹³

Assimilating the two motions of no confidence to a “mockery of the democracy principles”, Mr. Temaru campaigned for the dissolution of the Territorial assembly and for the need of new general elections²⁹⁴. Mr. Flosse in turn, emphasised the legality of the motion of no confidence process which according to him, reflected the majority of the Territorial assembly's vote.

The French government, sticking to the letter of the 2004 status, has steadily refused to accept Mr. Temaru's request²⁹⁵

²⁹³ Following the vote, two different dates for the president's election have been scheduled, one the 19th October as requested by the new majority and one the 25th October according to Mr. Geros, president of the Territorial assembly.

²⁹⁴ The 16th October 2004, twenty thousand demonstrators gathered in the streets of Papeete supporting the need for the Territorial assembly's dissolution. M. Joyau, “Democracy in Paradise”, RJP, Vol 10, 2004, p.525 – 531. Supporting the dissolution of the Territorial Assembly, see of Sémir Al Wardi's interview in “*Le Monde*” 19th October 2004.

²⁹⁵ The 20th October 2004, Mr. Geros, has unsuccessfully challenged the High Commissioner's behaviour during the crisis before the Tribunal of First Instance in Papeete. In its decision, the Tribunal has decided that the High Commissioner did not commit a wrong (*voie de fait*) in the exercise of the State's jurisdiction. On this rarely used procedure in French Polynesia, see for example, H. Lenoir & A. Moyrand, “Société Telefenua c/Le Président du Gouvernement du Territoire de la Polynésie française, Décision of the Tribunal de Première Instance de Papeete, ordonnance de référé 6 décembre 1993”, R.J.P Vol.2, 1996, p. 433-449.

In less than a week, each political party initiated numerous legal claims either before the Administrative Tribunal, the Tribunal of First Instance in Papeete or the Council of State in Paris. Finally, the Council of State, validating Mr Flosse's position, has rejected the 23rd October 2004 Mr Temaru's claims as to the legality of the vote of the motion of no confidence²⁹⁶.

If from a legal standpoint, the current political crisis appears to be over, one might still expect future difficulties linked to the very fragile majority group where the shift of one representative could trigger political instability²⁹⁷.

Further, as noted by one scholar, the role of the State has not in any sense been weakened. A central role has been retained in the law of 2004 for the High Commissioner of the Republic to control the legality of the actions of the local institutions of French Polynesia²⁹⁸ and in respect of the manner of exercise of power of international representation of French Polynesia²⁹⁹. More than ever, the High Commissioner will be the guarantor of the respect of the basic republican principles.

²⁹⁶ Commenting the Council of State decision, the Ministry of Overseas Territory has declared, "The law has prevailed. The State supports only one side: That of the law"(Le Monde, 24th October 2004). See note 84 above.

²⁹⁷ So far the new majority regroups only 29 representatives on the 57 members of the Territorial assembly which will still be presided by Mr. Geros, a member of the new minority group.

²⁹⁸ The French government being the ultimate referee in political crisis having the final decision as to the need to dissolve the Territorial assembly and to call for new general elections.

²⁹⁹ P. Jan, *op. cit.*, p.12. So far, the High Commissioner's intervention has been limited to properly assess and monitor the scope of the powers granted the the President of the Territorial assembly.