

# ADMINISTRATIVE REGIMES OF FRENCH OVERSEAS TERRITORIES: NEW CALEDONIA AND FRENCH POLYNESIA

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*The phrase "administrative regimes" concerns the legal and political forms of public infra-state communities. It is a very broad term which includes, among other things, the study of the institutions, their legitimacy, their electoral regimes, their fields of competence and the ways they are monitored and controlled either by courts or by the state.*

*This suggests a classification by reference to what have been called the classical legal structures or by reference to a new form of classification which could provide a more comprehensive understanding of these communities. The remarks in this paper are based on drawing a distinction between the administrative regimes of New Caledonia and French Polynesia on one hand and that of Wallis and Futuna on the other.<sup>1</sup>*

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1 The latter is still (since 1961) a simple territorial community; French Polynesia and New Caledonia are governed by a more autonomous regime.

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*Le concept de 'régime administratif' intéresse le cadre administratif juridique et politique des organes infra-étatiques. Il s'agit d'un terme général qui englobe, entre autres choses, l'étude de leurs institutions, les conditions de leur légitimité, leurs régimes électoraux, leurs champs de compétence et enfin la manière dont leur contrôle est opéré tant par les tribunaux que par l'Etat. Dans ces circonstances, on peut classer ces composantes selon une manière classique en s'attachant à l'étude fragmentée des différentes structures de ces organisations ou opter pour un mode de classement plus global, susceptible d'apporter une meilleure compréhension de ce phénomène qui sera alors appréhendé comme un ensemble. C'est cette dernière approche qui a été retenue par les auteurs pour comparer les deux régimes administratifs de la Nouvelle-Calédonie et de la Polynésie française d'une part et de Wallis et Futuna d'autre part.*

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## **I INTRODUCTION**

It is generally quite difficult (even for French academics) to fully understand the institutional reality of French Polynesia and New Caledonia. It is even more difficult to precisely define these two communities: Are they simple territorial communities such as the French communes or departments? Or are they political entities?<sup>2</sup>

It is true that a categorisation issue exists. One could explain the difficulties by bearing in mind that the French legislator is for example using the terms internal autonomy, local citizenship, shared sovereignty, overseas country. Yet, these expressions have no real legal meanings.

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2 So for example François Luchaire, having concluded that New Caledonia was no longer an "overseas territory", submitted that it was a «territoire unique en son genre. Elle n'apparaît dans la Constitution qu'avec son nom. Il n'est nul besoin d'en faire une catégorie juridique nouvelle» *Le statut constitutionnel de la Nouvelle-Calédonie* (Economica, 2000) at 14, n° 23.

Moreover, as France is still a centralised country (Jacobinism is still present), uniformity should prevail. Therefore, any type of political structure or organisation which departs from the classical scheme presents a challenge for theorists when they try to define it properly.

Caution is counselled – it is not appropriate to suggest a new grid of analysis. It makes more sense to use the already available concepts and criteria which provide more accurate and stable references. In order to do so, it is necessary to start with the well-known distinction between unitary state and federal state.

The federal structure cannot be used when describing French Polynesia and New Caledonia. It could simply be said that the French political culture is against the principle and moreover that these territories do not have constitutions.<sup>3</sup>

The "unitary state" legal structure remains.

This type of state could be either decentralised and justify the existence of territorial communities or it could be regional and justify the existence of autonomous communities. For the former the expression regional state or autonomous state (by reference of the Spanish institutional system) is used. However this cannot be used for analysing the institutional features of the Pacific French overseas territories. In order to categorise the instructional structure of these territories, one has to list the theoretical concepts used and suggest another form of classification.

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3 André Roux et Guy Scoffoni «Autonomie régionale et formes de l'Etat» *Mélanges Louis Favoreu*, Dalloz 2007, at 904; Nicolas Clinchamps «Les collectivités d'outre-mer et la Nouvelle-Calédonie: le fédéralisme en question» *Pouvoirs* n° 113, 2005, at 73.

## ***II CLASSIFICATION CRITERIA FOR SUB-STATE PUBLIC COMMUNITIES***

### ***A Criticisms of the traditional institutional definitions***

Two terms are generally used by the French doctrine and both of them are supposed to define the infra-state public communities; Yet, neither is satisfactory for fully understanding the reality of this specific type of institutional organization and how it operates.

#### ***1 Autonomy***

It is generally said that 1971, with the statute for French Polynesia, and the institutions attached to it, marks the beginning of the concept of autonomy in overseas territories –

In 1977 the term "autonomy of management" is used;

In 1984, French Polynesia gained internal autonomy;

In 1996, the new statute mentioned that this community has "autonomy", but without providing a list of the components of the concept.

Therefore it remains quite difficult to build a true institutional model. Actually the term autonomy is of no help when it comes to study the concept itself. All territorial communities have autonomy to a certain degree. Even French Polynesia, which enjoys a quite extensive degree of decentralisation, has in principle only a certain amount of autonomy.

The term autonomy is also used in article 74 of the French Constitution for defining the overseas communities (which still belong to the territorial communities category) but only for establishing that specific institutional arrangements have been granted to them.

## 2 *Shared sovereignty*<sup>4</sup>

This concept has been used in the 2008 Matignon Accord<sup>5</sup> and it has been introduced into the French Constitution by article 77, yet French scholars have been uncomfortable with this concept. They even called it a UFO.<sup>6</sup>

Some academics have suggested categorising New Caledonia as a country with shared sovereignty and this notion is still used by French doctrinal writers and the administrative case law. It is a term that must be used with caution; the main criticism is that it defies logic.

J Y Faberon,<sup>7</sup> for example suggests using this terminology in relation to New Caledonia arguing that as French constitutional history is deeply influenced by the concept of legislative sovereignty, to be able to make law means to exercise sovereignty and as the New

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4 On the concept of shared sovereignty, see Sage Y-L "Democracy and Self-Determination: New Conceptual Approaches Shared sovereignty, autonomy models, and other options" in Kennedy Graham (ed) *Models of Regional Governance For The Pacific* 2008, Canterbury School of Law & National Centre for Research on Europe in collaboration with the University of South Pacific, Pacific Institute of Advanced Studies in Development and Governance

5 In fact this expression had been used by a New Caledonian independentist leader on 10 January 1997. M R Wamytan (Dominique Turpin, "L'indépendance-association" *L'avenir statutaire de la Nouvelle-Calédonie. L'évolution de la France avec ses collectivités périphériques* (Dir Jean-Yves Faberon) La Documentation française 1997, at 246). It has been taken up by the state for ideological purposes: The Kanak movements were led to believe that New Caledonia was a quasi-state.

6 Cf Olivier Beaud «Fédéralisme et souveraineté. Notes pour une théorie constitutionnelle de la Fédération» *RDJ* 1998, at 83-122; «Le souverain» *Pouvoirs*, n° 67, 1993, at 33-45.

7 Jean-Yves Faberon «L'accord de Nouméa du 21 avril 1988: la Nouvelle-Calédonie, pays à souveraineté partagée» *Regards sur l'actualité*, n° 241, mai 1998, at 19-31; «La Nouvelle-Calédonie, "pays à souveraineté partagée"», *RDJ* 1998, at 645-648; Jeanne Sage, *Du partage des compétences au partage de souveraineté: des territoires d'outre-mer aux «pays d'outre-mer»*, PUAM 2001.

Caledonia Congress is entitled to vote regional laws, it is therefore sharing sovereignty with the French Parliament.

However one has to push the reasoning to its logical conclusion: As long as the deliberative assembly of a community can vote laws, it implies that it has also shared sovereignty. This is the case for the autonomous communities of Spain or Italy and even for federal states. By doing so, the result is to classify federated entities in a federal state in the same category as simple regional entities which, unlike federal states, do not have a constitution or their own jurisdictions.

### ***B Operative Institutional Categories***

The term of autonomy permits drawing a distinction between entities belonging to a standard unitary state and those belonging to a unitary state of regional nature. For the former autonomy is of administrative nature; for the latter it is of political nature.

#### *1 Administrative autonomy and political autonomy*

Until World War II the term autonomy was used when studying the federal states because one of their laws is the principle of autonomy. This concept was not used to characterise the situation of the territorial communities in unitary states.

At the end of the World War II, Italy then Spain, Portugal and more recently the United Kingdom have granted to some of their territorial communities, whose status are defined by laws and not a constitution, the power to vote regional laws in limited areas.

This explains why theorists invented the notion of political autonomy when characterising the unitary states. If these unitary states do not authorise the territorial communities to pass law they enjoy classic administrative autonomy.

## 2 *Territorial communities and autonomous collectivities*

### (a) Territorial communities

In principle in classic unitary states, sub-state communities are territorial communities: They have a population, a territory and are administered by elected representatives.

Basic laws confer on these elected people an administrative power. They may pass regulations or by-laws, but not statutes; Their institutions are of an administrative nature.

In other words, the power to pass statutes is always superior to the power to pass regulations and remains subject to a strict control from the state.

In case of conflicts between a territorial community and the state, the latter always prevails.

### (b) Autonomous communities

These communities which have a power of a political and not only administrative nature are not organised by the Constitution but by the law (generally an organic law). Several features distinguish them:

- 1 The sharing of powers and competences is set up by the Constitution. Accordingly, autonomous communities have an exclusive right of decision which cannot be challenged by the Constitution;
- 2 The autonomous communities have legislative power;
- 3 Their institutions are not only of an administrative nature but of political nature:<sup>8</sup> It means that the institutional organisation

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<sup>8</sup> Sometimes in certain areas the state can lay down basic principles (which in the laws are described as "basic laws") and the autonomous communities put local legislation into effect with respect to superior legislative principles (an example is provided by Spain).

and operational functions are established by reference to the mechanisms used in constitutional law and not in administrative law;<sup>9</sup>

- 4 Their status is by application of the self-organisation principle, not granted to them but more or less defined by their deliberative assemblies.

How are the French territories classified?

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9 "La loi autonome a exactement la même force juridique que la loi étatique. Il n'y a entre elles aucun rapport de hiérarchie. Leurs rapports sont résolus, non par l'application du principe de hiérarchie, mais par l'application du principe de compétence: prévaut la loi – étatique ou autonome- qui est compétente pour régir telle matière donnée, la loi incompétente étant inconstitutionnelle car méconnaissant la répartition des compétences définie par le bloc de constitutionnalité», Pierre Bon «L'Espagne: l'Etat des autonomies», *L'Etat autonome: forme nouvelle ou transitoire en Europe?* (dir Christian Bidegaray) Economica 1994, at 123. [The Law on autonomy has exactly the same legal force as a state law. There is no hierarchical relationship between them. Their relationships are settled not by the application of a hierarchical principle but by the application of the principle of authority or jurisdiction: priority is given to the legislation – be it of the state or of the autonomous community – which has the authority to regulate a specified matter; the legislation is ultra vires to the extent that it does not respect the sharing of authority is defined by the limits of constitutionality.]



### **III LEGAL NATURE OF THE INSTITUTIONAL SYSTEMS OF NEW CALEDONIA AND FRENCH POLYNESIA**<sup>10</sup>

Although New Caledonia enjoys unchallenged political autonomy, this is not the case as far as French Polynesia is concerned.

#### ***A A Recognised Political Autonomy: New Caledonia***

Until 1998 New Caledonia was a territorial community. After the Noumea Accord in May 1998, a major institutional evolution took place.

This a quite innovative system and scholars have difficulty to explain it properly. Most of the time they use concepts or definitions which have no real legal meaning and this illustrates the difficulties faced by the current theories.<sup>11</sup>

However, similar systems already exist in Europe and a quick comparative study could be of some valuable help. In doing so, it would be noticed that the New Caledonia statute invests a real power to vote laws and equally important to vote what is called the Law of the Country, which is subject only to Constitutional Council review.

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10 Cf Jean-Yves Faberon, «Nouvelle-Calédonie et Polynésie française: des autonomies différentes», RFDC n° 38, 2006, at 711: L'article 72 de la Constitution énumérant les catégories de collectivités territoriales de la République ajoute: "Toute autre collectivité territoriale est créée par la loi, le cas échéant en lieu et place d'une ou plusieurs collectivités mentionnées au présent alinéa". Cela concerne la Nouvelle-Calédonie. [Article 72 of the Constitution which lists the categories of territorial communities of the Republic adds: "Every other territorial community created by statute to replace one or more of the communities mentioned in the present paragraph". This relates to New Caledonia.]

11 Cf Moyrand «Comment remédier à la dissymétrie en Polynésie française?» (1998) 4 RJP at 633-675.

The political nature of the institutions is also reinforced along with the self-organisation principle. All things considered, most of the features which characterise autonomous states are met as far as New Caledonia is concerned.

### ***B An Unfinished Political Autonomy: French Polynesia***<sup>12</sup>

Article 1 of the 2004 Statute<sup>13</sup> on French Polynesia states that this community is an Overseas Country. This title has no real legal meaning; it is simply a label.

1) From a formal perspective French Polynesia has the benefit of administrative autonomy. Articles 72 and 74 of the French Constitution indicate clearly that French Polynesia is an overseas community. Accordingly all regulations voted by the territorial assembly (the country laws included) are administrative acts, subject to review by the Council of State.

2) From an operational perspective:<sup>14</sup> French Polynesia has the benefit of political autonomy.

The entire institutional system is based on the mechanisms used in constitutional law; French Polynesia's institutions are of a political nature and are governed by the principle of separation of powers. French Polynesia has its own flag and hymn.

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12 On this concept see Moyrand "De l'autonomie administrative à l'autonomie politique" *Le statut du territoire de Polynésie Française. 1984-1994 – Bilan de dix ans d'application: 1984-1994* (dir Jean-Yves Faberon) PUAM et Economica, 1996, at 143-167; Alain Boyer, *Le statut constitutionnel des territoires d'outre-mer. Contribution à l'étude des articles 74, 745, 76 de la Constitution du 4 octobre 1958*, Economica-PUAM 1998.

13 On the first version of the 2004 status, see A H Angelo and Sage Y-L "The status of autonomy of French Polynesia after the constitutional amendment of March 2003 and the organic law of 27 February" (2004) RJP Vol HS 4.

14 J Peres "Application des lois et règlements en Polynésie française" (2005) 11 RJP; J Peres "Application des Lois et Règlements en Polynésie Française-Répartition Des Compétences" (2002) 8 RJP.

French Polynesia has the right to vote country laws. Even if these laws are of administrative nature, their constitutionality could be reviewed following a similar procedure for laws emanating from the French Parliament or the New Caledonia country laws. This control is made by the Council of State, the Constitutional Council intervention being limited, by application of the judicial self-restraint principle.<sup>15</sup>

Thus when a country law is challenged and the principle of equality is an issue, the Conseil d'Etat has contented itself to exercise a restrained form of control.<sup>16</sup> Indeed after having on the one hand stated that the law of the country<sup>17</sup> challenged created differences of treatment between the Windward Islands and the other archipelagoes of French Polynesia (because only in the latter could the communities benefit from the provision of employment assistance), and on the other hand having decided that the differences of treatment were justified by "the more serious difficulties encountered in terms of employment by the people of archipelagoes than those in the Windward Islands where the principal opportunities of employment in the country were", the High Authority concluded that these differences "were not manifestly disproportionate". Usually, the court would state that the disputed provisions did not offend the principle of equality. In proceeding in the way it did the Conseil d'Etat shows that the control of the law of the country is of the same nature as the control of the constitutionality of a parliamentary law.<sup>18</sup> In fact

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15 Cf par exemple Guillaume Drago *Contentieux constitutionnel français* PUF 1998, at 307; Noëlle Lenoir "Le métier de juge constitutionnel" *Le Débat* n° 114, mars-avril 2001, at 186.

16 CE sect 1<sup>er</sup> février 2006, Commune de Papara, M Bruno Sandras, op cit.

17 A Troianiello, La Loi du Pays, Expression de l'Autonomie Polynésienne (2004) RJP HS.

18 Alain Moyrand «Les lois du pays en Polynésie française: bilan d'un quinquennat» Journée d'étude: «La loi du pays en Polynésie française»; Université de la Polynésie française, 6 avril 2009.

this judicial attitude implies that the legislation of French Polynesia, just as a law of the Republic or a law of New Caledonia, benefits from a greater margin of appreciation than has been recognised by judges on matters of legality for administrative authorities.<sup>19</sup>

However, even if its possible to say that French Polynesia has a certain degree of political autonomy, it is also necessary to recognise that that autonomy is neither complete nor total.<sup>20</sup> Notably no power of self-organisation has been recognised for this community.

Finally, although at a formal level French Polynesia is a community which enjoys only administrative autonomy it is clear that, based on material criteria, this community enjoys a quasi-political autonomy, which is to say that it sits at a level somewhere between administrative autonomy and political autonomy.

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The identification of a category of public entity at a sub-state level of a kind to which French Polynesia and New Caledonia belong

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19 Ferdinand Mélin-Soucramanien *Le principe d'égalité dans la jurisprudence du Conseil constitutionnel PUAM – Economica*, 1997, at 47: «(...) le degré de «discretionnalité» accordé aux autorités réglementaires dans l'élaboration des normes qu'elles édictent est, par nature, moins important que celui qui est reconnu au législateur»; voir aussi Anne-Marie Le Pourhiet, «Le contrôle des faits en droit constitutionnel. Le cas des «spécificités territoriales»», *Mélanges Dimitri Georges Lavroff*, Dalloz 2005, at 230: «Il n'est néanmoins pas contestable que le contrôle de l'excès de pouvoir législatif expose davantage à la rencontre de l'opportunité politique que l'excès de pouvoir administratif. Il en résulte naturellement une retenue beaucoup plus fréquente et flagrante en matière de contrôle des lois (...).[The degree of discretion granted to regulatory authorities for the establishment of the rules which they make is, by its nature, less than that which is given to the State legislator. It is nevertheless not beyond dispute that the control of excess of legislative power is more exposed in the context of political opportunism than excess of administrative power. The natural result is a use which is more frequent and flagrant in relation to the control of legislation.]

20 M Joyau "Existe-t-il un Pouvoir Politique en Polynésie Française" *RJP Vol HS* (2002).

is the necessary pre-condition for studying the organisation and functioning of the institutional system. Indeed, this research provides the general characteristics of the legal category in which these institutions operate. Thereafter, it is possible to emphasise the particularities of each community: citizenship; a right to self-determination; the power to conduct international relations.<sup>21</sup> It is because it has neglected to follow these steps that doctrinal writing has very often failed to determine whether for example New Caledonia is or is not a territorial collectivity. And it is also why, it is rare that writers enquire about the legal nature of the French state ... because if New Caledonia intuitively enjoys political autonomy it is because the French state has transformed itself into a partially autonomous state as is the case in Portugal where political regionalism is limited to the archipelagos of the Azores and Madeira.

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21 A Angelo and A Moyrand "International law perspectives on the evolution in status of the French overseas territories" Vol 5 (1999). M Joyau "The External Relations of the Territory of French Polynesia" Vol 9 (2003).

