The application of legislation in the French Overseas Territories of the Pacific

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This paper examines the difficulties which have arisen in ascertaining the legislation which is applicable to the Pacific Overseas Territories of France. Consideration is also given to the metropolitan law applicable to the Territories and to the law-making power of the Territories.

I INTRODUCTION

The proceedings of the first symposium on the law of French Polynesia organised in 1991 by the French University of the Pacific at its Papeete campus showed the uncertainties that exist in knowing which rules of law are applicable in French Polynesia[1] and the difficulties that this causes for those who use the law. The experience of French Polynesia is not unique; the same situation applies, in varying degrees, in all the French Overseas Territories.

All reasoning and legal interpretation is rendered tentative, and all decisions in court cases are subject to the chance of the discovery or non-discovery of the applicability of the particular piece of legislation. This system is doubtless unique within the French legal framework, which holds itself out to be one of the best developed and most workable in the world.[2] There has long been a desire to remedy this state of affairs. A

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1 R Calinaud "De quelques problèmes de répartition des compétences". B Leplat "L'article 16 de la loi du 13 juillet 1990 rendant applicable en Polynésie Française les lois du 17 juillet 1978 et du 11 juillet 1979". E Sylvestro "Informatique juridique et applicabilité des lois et règlements métropolitains en Polynésie Française" in *Première Table Ronde sur le Droit Territorial* (Université Française du Pacifique, Tahiti 1991). M Sapin "Rapport d'information au nom de la commission des lois de l'assemblée nationale en conclusion d'une mission d'information en Polynésie Française et en Nouvelle Calédonie" - Document Assemblée Nationale n° 1213 - 1er session ordinaire de 1989-1900 (93 p).

2 By way of example a Maritime Labour Code of 13 December 1926 though promulgated in the Territory of French Polynesia by order of 8 August 1927 was not applied until 9 March 1989 when the Court of Appeal of Papeete had for the first time to refer to it because one of the parties had "exhumed" the law (Court of Appeal Papeete, Social Chamber, 9 March 1989, number 148/21). The Court stated:

> Whereas the law 13 December 1926 concerning the Maritime Labour Code was promulgated in French Polynesia by order of 8 August 1927 and published in the Official Gazette of French Polynesia, it is therefore applicable in the Territory unless it has been subsequently abrogated which fact needs to be researched; whereas article 2 of the decree of 20 November 1959 which abrogated article 120 of the law of 13 December 1926 granted special jurisdiction for settling disputes

commission was even set up in 1988 to draw up a list of the legislation applicable in the overseas territories. "The ultimate aim was to provide a collection of the various texts and then to keep them up to date."[3] Given the size and the difficulty of the task computer technology was also involved.[4] However as of today the promised compilation is, sadly, still awaited and on the latest indications nothing can be expected in the near future. Even when this work is completed (there are more than 400,000 pieces of legislation to digest) it will be necessary to be sure that the list of texts covered is exhaustive and that their use in the courts will provide an acceptable point of reference.[5]

For example the Court of Appeal in Tahiti has drawn up a list of the main metropolitan laws which, according to it, apply in whole or in part in French Polynesia. The reading of this document shows that whole areas of the Civil Code and of the Commercial Code are involved.[6] The main reason for this is that the application of law in the Overseas Territories and in particular in French Polynesia and in New Caledonia follows "different rules depending on whether a statute or a regulation is involved".[7]

Secondly as "the corollary of the first explanation, the fact is that a certain number of reforms, which appear useful, meet with resistance either from France when initiated by the territorial authorities or from the territorial authorities when initiated by France".[8]

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relating to the work contracts of sailors, on the Judges of first instance courts of the metropol, and of the Overseas Departments, is not applicable in French Polynesia and therefore has not abrogated this article; whereas the statute of 12 July 1966 was neither promulgated nor published in the Territory and is therefore inapplicable and cannot have the effect of abrogating the statute of 1926.

3 E Sylvestro, above n 1, p 99; see decree number 89-704 of 28 September 1989 (JO 29/9/1989) which created the joint commission of the higher committee for codification which was entrusted with drawing up the list of texts of laws applicable in the overseas territories.

4 E Sylvestro, above n 1, pp 100-101.

5 The courts will in some cases have to cause real upsets in the case law and there is nothing to indicate that that will be done without difficulty. It can be confidently predicted that it will be necessary to wait on a case by case basis for each decision of the Court of Cassation or of the Council of State to know the true impact of the laws which are listed as a result.

6 A list of the statutes and other legal texts which apply or have been extended to French Polynesia would be desirable - Court of Appeal Papeete, August 1990.

7 P Schultz "Territoire d'Outre-Mer" Jurisclasseur Administratif fasc 132 n° 53; Circulaire n° 511 du 10/9/1931 du Ministre des Colonies à Messieurs les Gouverneurs Généraux et Gouverneurs des Colonies - JOEFO du 16/1//1931. Circular of 21 April 1988 concerning the applicability of statutory and regulatory texts overseas, for the consultation of the local assemblies overseas and approved by the Ministers responsible for the DOM (French Overseas Departments) and the TOM (French Overseas Territories.)

8 R Calinaud, above n 1, p 13. The observations of Calinaud apply to all the TOM.

II LEGISLATION AND DECREES APPLICABLE IN THE OVERSEAS TERRITORIES

Governed by the principle of legislative specialty, legislation and decrees of the Metropol (France) present themselves as the first source of law applicable in the Overseas Territories, and this is the case, even though the different statutes of the Territories have conferred on the Territories a regulation-making power of a sometimes very significant nature.[9]

A Legislation and French Decrees

The French Colonies which became Overseas Territories have for a long time possessed a legislative regime distinct from that of France and have been subject to the principle of specialty.[10]

1 The principle of legislative specialty

Although no constitutional provision speaks of it expressly in the context of the legislative regime of the Overseas Territories, the principle is that legislative specialty governs the application of metropolitan laws in the Territories.[11] The result is that a metropolitan text is not, in general, applicable ipso facto in the Overseas Territories. "Applying this principle, the rules of law applicable are found either in texts which are

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9 The statute of French Polynesia appears to be the most developed in this sense.

10 P Lampue "Les lois applicables dans les Territoires d'Outre-Mer" note Conseil Constitutionnel 25/1/1985, DS 1985, 361. On the applicability in particular in New Caledonia of statutes and regulations of France see the decision of the Council of state 16 December 1987, Revue Française de Droit Administratif 1988, para 34, conclusion Fornacciari.

11 On the history of the principle of legislative specialty see *Répertoire Général Alphabétique du Droit Français* (Ed Fuzier - Herman, Paris 1894) pp 324 and following; A Carpentier - G Frerejouan du Saint (Sirey, Paris, 1915) pp 630 and following; R Reau et J Rondepierre, *Petit Dictionnaire du Droit* (Dalloz, Paris, 1964) p 465; F Luchaire *Droit d'Outre Mer et de la Coopération* (PUF, 1965) pp 224 and following; P Lampue *Droit d'Outre Mer et de la Coopération* (Dalloz, 1969) pp 90 and following.
The case law does not seem to have settled the question of the constitutional value or the value as a simple general principle of law which is attached to the principle of legislative specialty.
The Constitutional Council for its part has not had the opportunity of commenting on the matter explicitly. As for the Council of State, it usually limits itself to confirming the application as law of a particular provision without commenting on the principle of specialty. Commentators generally consider that it does not have a constitutional value but it does have value as a general principle of law which arises from a body of legislation. JC Maestre et F Miclo - *La Constitution Française des Collectivités Territoriales* (1974 ed) p 1289.

specific to the territories or in French texts which make express mention of application to the Overseas Territories or which are extended to them by a later text".[12]

Article 74 of the French Constitution, which provides that the Overseas Territories have a special system of organisation which takes account of their own interests within the ensemble of interests of the State, allows this distinction between the legislation applicable in France and that applicable in the Overseas Territories to operate. The Constitutional Council and the Conseil D'Etat have, whenever it has been necessary to do so, reaffirmed the strength and extent of this very old rule by referring to the necessity of applying in the Overseas Territories legislation which is adapted "to the geographical, political and social conditions peculiar to the territory" without thereby creating for the benefit of the territorial organisations "the power of self-government, the French Parliament remaining the only body competent to define and modify the statutes of the Overseas Territories".[13]

The Constitution of 1958 made no modification to the earlier principles on this matter and the legislative specialty principle remains an important element of the statutes of the Territories.[14]

To this traditional view should be added a more recent one which has quite important consequences. By a development begun in the basic law (*loi-cadre*) of 1956 and confirmed by articles 72 and 74 of the 1958 Constitution, the principle of legislative specialty has become a tool of "political decentralisation" with the Overseas Territory remaining an organisation "which participates in the legislative function".[15] The more that the idea of particularising organisation is developed, the more extensive becomes the field of activity of the Overseas Territories. It is quite obvious that the Law of 1984 for the Territory of French Polynesia has developed in the context of this new idea.

The statute of 22 January 1988 for New Caledonia is equally covered by this new form of analysis. Indeed the process of self-determination provided for in the Law of

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12 This is a reference to an idea which was identified a long time ago - see in particular the Royal Letters of 1744 and 1766 which required sovereign councils not to register the decisions of the King except on a special order. P Lampue above n 11, p 100.

13 JY Faberon *Le Statut des Territoires d'Outre-Mer*, Les Petites Affiches, 9 August 1991 n° 95 p 7.
Decisions CC n° 83-160 - DC 19/7/1983 R p 43, and CC n° 83-165 - DC 20/1/1984 R p 30. Conseil d'Etat Sect 11 mars 1960 soc "Maïserie et aliments de bétail" RJP OM 1960 concl A Bernard note Lampue. B Genevois, *La jurisprudence du Conseil Constitutionnel: principes directeurs,* Ed STH 1988, n° 504, p 316. D Rousseau *Droit du contentieux constitutionnel*, DOMAT, Droit Public, 1990, p 201 and following.

14 P Lampue, above n 12.

15 F Luchaire, above n 11 pp 243 et 276. JY Faberon, above n 13, pp 10, 11 et 25. The author considers that French Polynesia benefits from "a complete internal autonomy" by comparison with that of New Caledonia which is described as "qualified". D Rousseau, above n 13, p 201.

1988 for the future of the Territory of New Caledonia corresponds with one of the aspects of decentralisation even though in this case it appears to be the final step.[16]

The Constitution of 1958 states in article 74 that "particular organisation [of the Overseas Territories] is defined and modified by legislation after consultation with the respective Territorial Assembly".

Only the laws which apply ipso jure are not covered by this procedure.[17] "The 7 year period of office of President Giscard D'Estaing was marked by the intention to free up the administrative relationship of the Overseas Territories to the Metropol ... during the 7 year period in the office of President Mitterand the Government has in the same context drawn up the new statutes of French Polynesia and New Caledonia in 1984. The administration relies on the decentralising aspects of the main principles of the basic law (*loi-cadre*) of 1956": That is what the Conseil d'Etat in General Assembly stated in a decision which held that "the changes made to a law applicable in an overseas territory are not applicable ipso jure in that territory if it affects the particular organisation of that territory".[18] It is not hard to see how delicate it can be and how much guesswork is involved in determining exactly whether a law "affects the particular organisation" of a territory. The case law of the Constitutional Council fluctuated at an early stage but today appears to be just as expansive in this regard as that of the Conseil d'Etat. Indeed the Constitutional Council has held "that the idea of "particular organisation" must in principle be understood to apply to the extension to the Overseas Territories of a piece of law which is not applicable there ipso jure". Viewed from this perspective, only very few texts will be beyond the requirement of consultation with the Territorial Assembly concerned. This approach significantly restricts the principle of the exclusive competence of the metropolitan legislature.

Beyond this difficulty of definition is the fact that the Constitutional Council seeks to involve territorial institutions as much as possible in the drafting of legislation if that legislation may concern an Overseas Territory. This practice shows the close

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16 Article 11 of law number 88-82 of 22 January 1988 relating to the status of the Territory of New Caledonia (JO, 26 January 1988, p 1231) states: "provisions of this statute have as their object the creation by a new organisation of public authority the conditions in which populations of New Caledonia, informed on the futures which are open to them for the re-establishment and maintenance of civil order and the economic social and cultural development of the territory can freely choose their future".

17 See below page 22.

18 D Rousseau, above n 13, p 203 - advice of the Council of State on law number 88-1292 of 30 December 1988 which amended several provisions of the electoral code. JC Maestre, F Miclo, above n 11, p 1285. D Rousseau writes: "aware of this logic, the Council has however not hesitated from maintaining and defending an extensive interpretation" above n 13, p 204.

relationship which exists between the principle of legislative specialty and the requirement of consultation with the Territorial Assembly.[19]

It is for this reason that the Law of 1984 for French Polynesia provides for compulsory consultation with the Territorial Assembly (article 68), and with the Council of Ministers of the Territory (article 31) in certain specified areas which are in addition to the mandatory procedures spelled out by article 74 of the Constitution. The New Caledonia parallel is with the Executive Council (article 36) and the Congress (article 75) which have to be consulted according to a procedure similar to that applicable for French Polynesia.

The Territorial Assembly of Wallis and Futuna is, by Law 61-814 of 29 July 1961 which governs the status of the Territory, compulsorily to be consulted on all matters for which consultation is required by statutes and regulations of the Metropol.[20]

In the same way the legislation of the different territories allows the Territorial Assemblies, by majority vote, to request the French Government "to extend French statutes and regulations or to repeal, amend or complement statutory and regulatory provisions which apply in the Territory".[21]

Although this provision concerns only laws which have already been promulgated in France or in the Territories, it can be viewed as one aspect of the implementation of the notion of legislative specialty in its fullest sense (the will to adapt laws to the local needs and as an instrument of political decentralisation) to provide for each Territorial Assembly a power to adapt French laws as it wishes to the need of the Territory.

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19 See in particular DC 80-122 of 22 July 1980 and DC 89-269 of 22 January 1990. The Council of State returning to the case law (Order of advocates of French Polynesia and others CE Ass 27 January 1984 Rec p 21) has in a decision "Municipal elections Lifou-Kazo and others" 26 January 1990 considered that the provisions amending a law already promulgated in the Territory of New Caledonia which have not been extended to that Territory by express provision are not applicable without more, by reason of the principle of the particular organisation of the Territory. B Genevois, above n 13, no 584; P Schultz, above n 7, n 33.

20 Also particularly affected will be the proposals for new regulations which must be heard in the Council of Government and which affect the organisation of the territorial public services and the status of their employees, the work regime on transmissions, on private aerodromes, price fixing, the interior postal regime, and the control of the representation of economic interests in the Territory. It will be noted that expressly excluded from the process of consultation are the suppression, modification, and denomination and the geographical limits of the administrative areas of the Territory.

21 In French Polynesia article 69 of the Law of 1984, like article 76 of the Law of 22 January 1988 for New Caledonia, permits this procedure. The Standing Committee of the Territorial Assembly of French Polynesia has this power while in New Caledonia article 62 of the Law of 1988 expressly forbids it. The Territorial Assembly of Wallis and Futuna has, through the operation of article 43 of the Decree of 22 July 1957 (JO 23 July 1957, p 7552), a procedure similar to that granted to the Territorial Assembly of French Polynesia and the Congress of New Caledonia.

These provisions have a large field of application since they can apply not only to the laws which are subject to the principle of legislative specialty but also to those which are not.

2 *Exceptions to the principle of legislative specialty*

Two exceptions significantly limit the application of the principle of legislative specialty:

(a) "The desire to include the Overseas Territories in the field of application of a law may be clear, even though it is not formally expressed in the law, if that is obvious from the subject-matter of the law or regulation itself. There are some Government documents which necessarily have the role of regulating the territory of the State as a whole". What is involved here is the application of another principle, that of the unity of the State, which enables a primary group of laws called the "laws of sovereignty" in the broader sense, to be identified.[22]

Incontestably within this group are (and the list is not exhaustive) -

(i) Constitutional law statutes.[23]

(ii) Texts relating to governmental bodies which are common to the Metropol and to the Overseas Territories such as the Conseil d'Etat,[24] the Court of Cassation,[25] and the Tribunal des Conflits.[26]

(iii) Organic laws - that is to say those drawn up according to the rules of article 46 of the French Constitution.[27]

(iv) Legislation relating to members of the armed forces and the public service as a whole or which deals with aspects of the general status of public officers.[28]

(v) Laws relating to personal status.[29]

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22 P Lampue, above n 10, n° 110, p 100.

23 Civ 10/06/1912 DP 1913, 465, CE 21/05/1864, Coll, p 164.

24 Conseil d'Etat 03/07/1914 Recueil p 810 et 04/02/1944 p 95, TC 25/03/1957 Rec, p 813.

25 Cass Civile 15/11/1911 Recueil Penant 1912, 1, 39.

26 TC 17/06/1918 Rec Sirey 1922, 3 p 41.

27 An organic law is drawn up according to a more difficult and restricted procedure than that for an ordinary statute and is superior in the hierarchy of norms to an ordinary statute. See the decision of the Constitutional Council of 28 December 1985, DC 85-205. B Genevois, above n 13, n°264, p 153.

28 See by way of example, Conseil d'Etat 08/04/1911 Rec p 456, Conseil d'Etat 29/04/1987 Rec p 159.
V D De Bellescize "Etatisation de la fonction publique en Polynésie Française et à Saint Pièrre et Miquelon". Receuil Penant jan-fevrier. March 1, 1977.

29 For example the reform of the law of filiation, divorce, and parental authority.

(vi) General principles of law.[30]

(vii) International treaties, if that is the intention of the parties.[31]

(viii) Some laws can provide in advance that texts made subsequently which relate to the areas covered by the earlier laws will be applicable without promulgation or publication in the Overseas Territories.[32]

(b) The Constitutional Council has come to exclude from the field of application of the principle of legislative specialty on the one hand statutes which have only an indirect link with the organisation of an Overseas Territory[33] and on the other hand statutes which are made on the basis of legislation which is already applicable in an Overseas Territory and which are seen only as a measure of application of that earlier legislation.[34]

3 Promulgation and publication: the corollary of the principle of legislative specialty

Outside the laws of sovereignty and those which apply ipso jure, the application of laws follows the strict principle of legislative specialty (that is to say those laws whose function is to apply exclusively in Overseas Territories or those in which express mention is made of application to an Overseas Territory) and can only be done if various formalities relating to promulgation and publication are followed. There is a special regime however provided for New Caledonia.

Promulgation and publication are legal acts whose nature and consequences are different.

As far as promulgation is concerned two things need to be noted.

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30 On the principle of the right of those administered to see the dossier - B Leplat above n 1, p 70 and following. On the principle of equality in the public service CE Ass 27 February 1970. Sieur Said Ali Tourqui Rec, p 128. This matter is sometimes disputed, see T Tuot in conclusion CE Ass 9 February 1990 - 2 cases RFDA 1991 p 607.

31 The matter is not settled. F Luchaire, above n 11, p 226 - CE 10 December 1987, advice of CE 6 April 1949 and advice of CE of 10 December 1987. D Rousseau, above n 13, p 204. F Miclo, "Le Régime législatif des départements d'outre-mer et l'unité de la république".

32 For example law number 70-589 (9 July 1970) on the civil status at common law in the TOM (JOPF 10 July 1970, p 6459): Article 3 of the statute states "the legal provisions relating to the matters mentioned in article 1 above and subsequent to the entry in force of this law as well as the criminal provisions which relate to it are applicable without more, in the overseas territories unless there is express provision to the contrary in the statute".

33 CC 27/07/1982 n 82-142 DC.

34 CC 25/01/1987 n 85-187 on the state of emergency in New Caledonia.

Strictly speaking article 10 of the French Constitution confers on the President of the Republic alone the power to promulgate statutes within 15 days following the transmission to the Government of a law which has been adopted by Parliament. History and the French colonial legislation linked with the principle of legislative specialty however permit reference to be made to this principle to establish the process which renders executory statutes and decrees which have to be applied in French Polynesia. From this point of view the power of promulgation may seem to be a limited form of the power of control a posteriori which arises from the need to apply metropolitan legislation in Overseas Territories. The principle of legislative specialty justifies the existence of this power.[35] An order of the High Commissioner is the formality which perfects the promulgation of statutes and decrees and gives them an official date.

The second point of note is that in the Overseas Territories and in French Polynesia in particular the power to "promulgate statutes and decrees" given to the High Commissioner in no way indicates that the High Commissioner gives any force of law to the texts. Indeed "that force has been given the text in question by the authority of the Parliament or Government which made it".[36] Therefore promulgation is only "to mark the commencement date for the execution of this text by the local authorities".[37] It true however that the power of the High Commissioner is not reduced simply to stating that a text must be applicable in a particular Overseas Territory. Promulgation by the High Commissioner, implies that he is the sole judge of what is the right moment to promulgate the law. Article 91 of the Law of 1984 for French Polynesia, for example, like the provisions in the statutes for New Caledonia and for Wallis and Futuna, imposes no duty on the High Commissioner "who promulgates the statutes and decrees in the Territory". It is therefore possible to imagine a situation where the High Commissioner proprio motu or acting on instruction from the central government can block or defer the application of a law in the Territory of French Polynesia.

Furthermore, Circular 511 of 10 September 1931 of the Minister of Colonies confirms this prerogative and provides that it is only "in exceptional cases that the Governor" could "by reason of local circumstances, and in his own deliberate judgement.... postpone more than two months" the application of the law without reference to the Minister for Colonies.

There is nothing in the Circulars of the French Prime Minister of 27 October 1992 or of 21 April 1988 which contradicts this analysis.

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35 F Luchaire, above n 11, p 278. Claude Rossillion *Le régime législatif de la France d'Outre-Mer* (Ed de l'Union Française, 1953) 182-184.
Promulgation allows, according to this author, to the remedying of any defects in the statutory or regulatory mechanisms of the metropol where the authors had not thought of the need for transitional measures, but it does create a serious inconvenience and makes it necessary to check in regard to each law whether it has in fact been promulgated.

36 P Lampue, above n 11.

37 P Lampue above n 36.

The problems relating to the promulgation in French Polynesia of Law 78-22 of 10 January 1978 (promulgated in the Territory by order of 1 June 1991 - JOPF 11 June 1991) concerning consumer information and protection in the field of certain credit transactions whose article 33 states that it is "applicable in the overseas territories subject to consultation with the Territorial Assembly" can be taken as illustrative.

In fact it is hard to believe that it took 14 years of consultation before this text was promulgated without any question being asked about the real reasons for the slowness or lack of action.

(a) Promulgation of statutes and decrees in overseas territories

(i) French Polynesia

In French Polynesia the duty of promulgation dates back to article 59 of the Decree of 28 December 1885. Article 91 of Law 84-820 of 6 September 1984 for French Polynesia states "the High Commissioner promulgates statutes and decrees in the Territory after having informed the Government of the Territory. The High Commissioner ensures their publication in the Official Journal of French Polynesia". The promulgation order only declares and confirms the existence of the statute or regulation and its applicability to the Territory. This is a natural consequence of the principle of legislative specialty.[38]

However it has already been noted that the basis for this principle was somewhat modified by the basic law (*loi-cadre*) of 23 June 1956 which made legislative specialty an aspect of political decentralisation by requiring consultation with territorial authorities before laws were promulgated.[39]

(ii) Wallis and Futuna

Article 4 of the Law of 29 July 1961 indicates that statutes, decrees and ministerial orders which have been declared applicable in Wallis and Futuna will apply "from their promulgation in the Territory. The power of promulgation belongs to the High Commissioner of the Republic in New Caledonia by virtue of article 72 of the Decree of 12 September 1874 concerning the Government of New Caledonia.

(iii) New Caledonia

The power of the High Commissioner to promulgate statutes and decrees as provided in Law number 84-821 of 6 September 1984[40] has been withdrawn by Ordinance 84-

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38 P Lampue above n 36.

39 See Circular, above n 7, no 81.

40 Concerning the status of the Territory - Official Journal 7 September 1984, page 2840, article 119.

992 of 20 September 1985.[41] The High Commissioner does however retain the power to publish laws, decrees and ministerial orders which apply in the Territory of New Caledonia and this in itself is a limited form of promulgation which fulfils the first function of promulgation, that is to say publication marks the date of commencement of the text for the territorial authorities.

(b) Publication

Faithful to the spirit of formality of the enrolment of Royal Ordinances by the governing council in each colony, the publication in the Official Journals of the Overseas Territory which, except in the case of New Caledonia follows promulgation confers a mandatory character on the statute or decree for the whole of the Territory concerned.

It is only on publication that the law becomes applicable and that interested persons and the Government can take advantage of it. Publication is a formality whose usefulness has been questioned, but its retention can only be explained by practical considerations relating to the geographical and other particular circumstances of the Overseas Territories. The dies a quo period does not begin to run until the day before the day of publication in the Official Journal in each territory.

It is necessary to note here again that texts which apply ipso jure (in particular sovereignty laws), are simply published for information purposes and the periods relating to the coming into force of the statute or decree are those that apply in metropolitan France (in Paris two days after the date of publication of the statute, ie one clear day after publication and for the provinces the date of application is delayed until two days after the date of arrival of the Official Journal in the chief town of the district).

This well established principle has been used by the Court of Cassation in a case where the law of 21 December 1976 which amended articles 815 and following of the Civil Code (which were applicable ipso jure in French Polynesia) did not need to be specifically published in the Official Journal of French Polynesia.[42]

Introduced in the Territories by old texts (28 December 1885 for French Polynesia, and 12 December 1874 for New Caledonia) publication is not a legal act and is not the subject of any statutory or regulatory provision. No sanction is provided for non-publication subject only to the comments made about promulgation. Various Circulars from Ministers have however insisted, as far as they can, that the period before promulgation should be as short as possible.[43]

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41 Official Journal 21 September 1985, p 10934.

42 Cass Civ, 16 November 1983 - Bull. Civ.I, N 274.

43 Circular no 511 of 10/9/1931 from the Minister of Colonies to Governors General and Governors of Colonies, and Circular of 27/10/1952.

A delay in publication which was considered abnormal might however incur liability in the State if special loss is caused to an individual as a result.[44]

III THE REGULATION MAKING POWER OF THE FRENCH OVERSEAS TERRITORIES

At the time of the presentation of the Law of 1984 for French Polynesia the Secretary of State responsible for Overseas Departments and Territories indicated that the status of the Territory of French Polynesia, went "to the limits of constitutional logic for the particularised organisation of Overseas Territories".

That law was in fact only the end product of a development traced through the different statutes for the Territory of French Polynesia since 1958 and which involved a sharing of responsibility for the setting in place of laws applicable in the Territory. As a result a body of rules has been built up for the Territory alongside the metropolitan legislation in areas where the Territory received either full power to make the rules or the power to do so subject to legislating in conformity with the general principles of law.

The legal nature of this power, which was given to the Territorial Assemblies in French Polynesia and in Wallis and Futuna, and to the Congress in New Caledonia, is found in articles 34 and 37 of the Constitution of 1958 which together with article 74 permit derogations from the lawmaking system provided by article 34.[45]

The Constitutional Council on two occasions in 1965 and 1982 has established the framework for the sharing of legislative competence with regard to statutes and regulations in Overseas Territories.[46] The decision 65/34L of 2 July 1965 states "that the organisation of the Overseas Territory can depart from the legislative system provided in article 34 of the Constitution". As the result of the derogations made either by laws subsequent to the Constitution or by laws prior to it (article 76) subject areas for which the Territorial Assembly has been given authority fall within the regulation-making power of the Territory.[47]

Decision 82-155 of 30 December 1982 certainly related back to the principle established in 1965 but particularised the fact that in respect of a system which departed from that of article 34 of the Constitution the metropolitan legislature could always cancel the derogation granted and then legislate in the place of the Territorial Assembly.[48]

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44 F Luchaire above n 11 p 278.

45 JY Faberon, above n 13, p 8, CE 7/3/1973 Bouche Rec p 193.

46 Décisions n 65-34 L du 2/7/1965 Rec p 75, D, 1967, p 613 note L Hamon n 82-155 DC du 30/12/1982 Rec p 88 RDP 1983, 333 note Favoreu Rev Ad, 142 note De Villiers.

47 P Schultz, above n 7.

48 D Rousseau, above n 13, p 202. B Genevois, above n 13, n° 501, p 315. P Schultz, above n 7, n° 35-4.

After analysing the recent case law of the Constitutional Council, the President Mr Favoreu noted that "the legislature has full power to set up and amend the statutes of the Overseas Territories and there is nothing that can restrict that authority."[49]

A *The Field of Application of the Territorial Regulatory Power*

1 *French Polynesia*

"Since the legislation of 12 July 1977 ... the powers of the Central Authorities ... are defined in a restrictive way and consequently every power that is not listed is devolved to the territorial authorities".[50]

Article 3 of the 1977 law specifies the fields of competence of the State. If the authority in a Territory is one that is based in the general law it is to be noted that the framework in which it is exercised will vary according to the degree of autonomy that the French legislature has granted to the Territory.[51]

(a) *Regulation making autonomy of territorial institutions*

The Territory of French Polynesia has autonomy to make laws in those fields which are not in the control of the State. The only limit placed on the territorial authorities is to respect general and fundamental principles of French law.

This is referred to in article 3 of the Law of 1984 where it is stated that the State retains authority for the fundamental principles of commercial obligations, and the general principles of labour law, among other things. And it is further stated that the list is not an exhaustive one.[52] The Conseil D'Etat in a decision of 9 November 1988

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49 L Favoreu, "Chambre Constitutionnelle" 1986 Rev Droit Public 1986, p 467. "La compétence législative en matière d'organisation des Territoires d'Outre-Mer et l'indivisibilité de la République" in P Schultz, above n 7, n° 60.
"The only limit on the liberty of the French legislator not to legislate directly in respect of all the matters which by virtue of article 34 of the constitution are within its competence is the risk of depriving article 79 of all meaning." B Genevois, above n 13, n° 501, p 315.

50 R Calinaud above n1, p 10. There are 19 powers listed, R Calinaud, above n 1, p 14. Article 2 of the statute of 1984 states "the authorities of the Territory are competent in all matters which have not been reserved to the state by virtue of article 3".

51 "As the general principles of law have higher value than those of a regulation, one must deduce logically that they are also at a higher level than a statute in the hierarchy of legal documents". C Leclercq and A Chaminade *Droit Administratif* (2nd ed, LITEC, 1987) 7. On the application of general principles to commercial obligations in French Polynesia see M Alter, Y-L Sage, "Les Cessions d'action des sociétés commerciales dans le cadre de l'article 26 alinéas 14, 15 loi du 12 juillet 1990" in *Première Table Ronde sur le Droit Territorial* (Université Française du Pacifique, Tahiti, 1991) p 57.

52 See B Gille and Y-L Sage, "The Territory of French Polynesia" in this volume.

spoke of this limitation when it annulled an order made by the Territorial Government which amounted to a violation of the principle of freedom of trade and industry and gave a clear monopoly to one importer.[53]

It is the same for decisions of the Territorial Assembly in that "if the decisions of the Assemblies of the Overseas Territories are administrative acts which can affect the areas which are within the legislative competence of the Metropol, those Assemblies are subject (in the exercise of their decision-making power) to general principles of law of a constitutional and legislative value".[54]

(b) Restricted regulation making power

Here the freedom of the territorial authorities is more limited. Indeed, it is always open to the French Legislature to make a law which sets the framework in which the Territorial Assembly is given only the power to do what is necessary for the application of a law. This was the case for Law 86-845 of 17 July 1986 relating to general principles of labour law and the organisation and functioning of the labour inspectorate and labour law courts in French Polynesia. Within the framework provided by general principles of law the Territorial Assembly took the decisions necessary to put a law in place for the Territory of French Polynesia.[55]

2 New Caledonia

The Law of 9 November 1988 which divided the Territory of New Caledonia into three provinces and created a new category of territorial organisation states, in article 7, that "each Province has authority in all areas which are not reserved by the present law to the State or to the Territory, or by legislation in force in the districts".[56]

It should be noted that though "the Territory of New Caledonia is characterised by the co-existence of a decentralised assembly, the Congress, and by a decentralised executive, the High Commissioner",[57] this in no way contradicts the general law powers given to the Provinces and to the Territory, and the power of the State operates only in those areas which have been expressly listed in the Law.

Thus article 24 for the Provinces and article 56 for the Congress confer a general power on these two territorial bodies.

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53 Conseil d'Etat 09/11/1988, Territoire de la Polynésie Française, Cie Tahitienne maritime, Recueil Conseil d'Etat p 406.

54 P Schultz, above n 7, n° 121.

55 Délibérations n 91-001 à 034 AT, 16 January 12991 JOPF 1991 p 40 - 180.

56 See also P Schultz above n 7, fasc 133. Alain Christnacht *La Nouvelle Caledonie* - Notes et etudes documentaires no 4839 - 1990.

57 JY Faberon above n 13, p 17. Arrêtés du 15 decembre 1989 no 89-56 CC, 89-57 CC and no 89-63 - J O de la Nouvelle Caledonie - 2 January 1990 - p 5 - 7.

Although "the Law of 9 November 1988 presents the Provinces as endowed with authority as a matter of principle, as far as the Provincial Assembly is concerned there is no express use of an empowering clause which states that the Assembly governs the Province."[58]

However it seems that the affirmation of the principle found in article 7 of the Law, and which relates to the Provinces, applies fully to the body which is charged with representing them - that is to say the Assembly of each Province.

Subject to these observations, the limits of the law making authority of the Provinces and of the Territory of New Caledonia are the same as for French Polynesia.

3 Wallis and Futuna

Articles 7 and 12 of Law 61-814 of 29 July 1961 establish the field of competence of the territorial authorities and of the State.

The result is that the general legal power is granted to organs of the Central Government that is to say to the High Commissioner of New Caledonia and to the Chief Administrator of the Territory as set up by article 68 of Law 71.1061 of 29 December 1971 as modified by article 8 of the Law of 29 July 1961.[59]

Wallis and Futuna is much less decentralised than French Polynesia or New Caledonia. It has even been suggested that it is a question of "deconcentration" rather than of autonomy of the kind granted to the other overseas territories.[60] Therefore the regulation making power of the Territorial Assembly of Wallis and Futuna is much more limited than that of other Overseas Territories in the Pacific as the State is directly or indirectly competent to control all of its power.

B Possibilities of Extending the Regulatory Power of the Territorial Institutions of the Overseas Territories

The status of the Overseas Territories is "variable in time and space" and this is particularly so for French Polynesia.[61]

Article 1 paragraph 2 of the Law of 1984 confirms that French Polynesia is "an Overseas Territory granted internal autonomy within the Republic and its particular organisation and development is defined by this Statute".

New Caledonia, whatever may be the uncertainties of its future status, is nonetheless subject to the statutory development which has successfully come close to autonomy in

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58 JY Faberon above n 13, p 16.

59 P Schultz above n 7 fasc 132, n° 135 and following.

60 JY Faberon above n 13, p 34.

61 Rapport Capitant - Document Assemblée Nationale n 2199 1er session 1966-67. JO Document Assemblée Nationale 1966 p 1005 and following.

1957, moved away from it during the period 1963 to 1976, and then from 1976 to 1984 provided internal autonomy, and finally after the events of the 1980s granted an autonomy under strict control.[62]

The Territory of Wallis and Futuna has, in a very small way it is true, also known this process of development. The law of 29 July 1961 has so far been amended twice.[63]

Reference should be made again here to the principle of legislative specialty which establishes, in the more general framework of the principle of specificity for the Overseas Territories, the variable content of the statutes which regulate these territories, the French legislature alone deciding the amount of autonomy to grant to a Territory.[64] This development is possible only by the progressive transfer of power from the State to the Overseas Territories.

But how far can this evolution go?

Does not the total transfer of power in all fields to the Overseas Territories contradict the principle of the indivisibility of the French Republic? The Constitutional Council has held that the principle of the unity of the State expressed by the indivisibility of the Republic does not exclude the possibility that an Overseas Territory might achieve independence, which is seen as the final step in a transfer of all State power.[65] In any case it remains possible that the principle of specificity, if applied to its fullest extent could quite well lead to relationships with the Metropol of a quasi-federal nature.

1 The principle of specificity as the basis for the extension of law-making power to territorial institutions

Article 74 of the French Constitution allows the legislature, in taking acccount of the particular interests of each Overseas Territory, to make original laws which are applicable to each of them.[66] This rule appears to be the natural corollary of taking into account the specific character of each Territory and will happen with the adapting of metropolitan legislation to the Overseas Territories thanks to the principle of legislative specialty and by the effect of the transfer of authority from the central state to the territory.

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62 On the list of different texts of legislation which relate to the status of New Caledonia see JY Faberon, above n 13, p 11. It is to be noted that the Territory of New Caledonia is regulated by law number 88-1028 of 9 November 1988 which relates to the status provisions and those preparatory to the self-determination of New Caledonia in 1988. JO 10 November 1988, p 14087.

63 Law number 61-814 of 29 July 1961 which conferred on the islands of Wallis and Futuna the status of an Overseas Territory, was amended in 1973 and 1978.

64 Rapport Capitant above n 61.

65 Décision n 75-59 DC du 30/12/1975 Rec p 26 AJDA 1976 p 249 note c Franck.

66 See Conseil Constitutionnel Décision n 85-151 DC 12/1/1983. The Constitutional Council stated that it was not necessary to apply the same legislation, different legal norms being considered for each different territory.

Thus the taking into account of the specific character of each territory authorises delegation by the legislature of legislative power (article 34 of the Constitution) for the benefit of the Territorial Assembly concerned and thus provides a sphere of legislative specificity.

The Constitutional Council has approved this interpretation "taking into consideration that the application of article 72 and 74, as of article 76, in the field of law can be different in the overseas territories".[67]

Some scholars believe that article 76 as viewed by the Constitutional Council implies that the Overseas Territories can keep the authority granted to them by statutes prior to the present Constitution.[68] The only limit on the legislature would be its inability to restrict in advance how it will act in a matter within its competence; "the legislature which is subject only to the authority of the Constitution cannot preclude itself, either unilaterally or by convention, from changing the law in force."[69]

2 *The influence of regulatory specificity within the framework of the evolution of status of the Overseas Territories*

(a) French Polynesia

It has been said that the status of French Polynesia is a status of "final internal autonomy"[70] which extends to its limit the constitutional logic of the particular organisation of Overseas Territories."[71]

This would lead to the view that it is no longer possible, given the present state of the law, to further amend the statute of 1984. It is certainly true that the statute of the Territory of French Polynesia puts the territorial institutions in a more favourable position than other Overseas Territories. This may mean that the status of French Polynesia is the most advanced state that can be considered within the principle of specificity.

This line of argument does not withstand analysis. In the first place the role of specificity is a priori to apply only to a precise and often unique situation and therefore the legal system which applies will also be unique. Further the Constitutional Council allows the Legislature to provide original laws for each territory.[72]

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67 Conseil Constitutionnel 2/7/1965 n 65-34 L Rec 75.

68 P Schultz, above n 7, no 35-2°. B Genevois, above n 13, n° 500.

69 Conseil Const 19/7/1983, Décision n 83-160 DC. JC Maestre et F Miclo, above n 11 p 1287.

70 JY Faberon, above n 13, p 25. C Cadoux "L'accès de la Polynésie Française à l'autonomie interne, point d'aboutissement ou nouvelle base de départ?" Revue de Droit Public 1989, p 345.

71 JC Maestre et F Miclo, above n 11, p 1299.

72 CC no 83 160 DC 19/7/1983. R p 43.
CC no 83 165 DC 20/1/1984. R p 30.

In the second place the notion of specificity must be considered in the context of the developmental character of the status of the Overseas Territories and this developmental dynamic prevents statutory norms becoming fixed.

Here two concepts are in dramatic opposition. The elected representatives and the officials of the Territory in French Polynesia see the development of the status of the Territory only in the sense of an augmentation of their prerogatives by way of reduction of the powers of the Central State while the Central State believes, without anyone denying the claims of the Territorial authorities, that the evolution could also consist in a reduction of the powers of the Territory.[73]

Two examples can be given to illustrate this position. At the time of the discussion of the proposal for the law of 6 September 1984 there was a debate in the National Assembly about an amendment which sought to state specifically as a result of concerns of the State Territory Committee that the authority already given to French Polynesia could not be reduced by the current proposal. The French National Assembly did not accept this amendment for two reasons: First, that it was without legal effect as had earlier been held by the Council of State; Second, the rapporteur had indicated that on a number of points the statement would be wrong since, in looking at the various powers of the State dealt with, the proposal restricted some of the powers which the Territory had under the statute of 1977.[74]

More recently the law of 12 July 1990 which amended the law of 1984 reinforced the powers of the President of the Territory and the autonomy of the Territorial Assembly, and at the same time established a Chamber of Accounts.[75]

These last changes brought the majority and the opposition in the Territory into conflict and gave each the possibility of seeking a more or less definitive amendment to the Statute: proposals ranging from the repeal of the status of internal autonomy in order to return to a system of State control, to independence with all the qualities that the most fertile (rather than realistic) imaginations of the elected representatives in the Territory could think up.[76]

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73 See above n 52.

74 Rapport Romani, Commission des lois du Sénat n 415, Law of 6/9/1984 on the Status of French Polynesia, p 29.

75 P Schultz, above n 7, n° 71; Y Brard, "La présidentialisation du système institutionnel territorial", *Première Table Ronde sur le Droit Territorial* (Université Française du Pacifique, Tahiti, 1991) 4 - 9; D Dormoy, "Les compétences du Territoire dans les relations extérieures" *Première Table Ronde sur le Droit Territorial* (Université Française du Pacifique, 1991) 20 - 26.

76 See *La Dépêche de Tahiti* for the period February to May 1991.

(b) New Caledonia

The troubled period of the 1980s led to the setting-up for the Territory of New Caledonia of a special statute whose transitional character is undoubted. The law is called "the Law of 9 November 1988 providing provisions preparatory to self-determination in New Caledonia."[77]

Two points can be made about this.

The first relates to the virtual impossibility given the present state of the law for the territorial institutions to have their field of authority extended. The High Commissioner, who is the executive power of the Territory, represents the French State also. This double representation tends to limit the effect that the New Caledonian territorial institutions can have to extend their prerogative by using the principle of the specificity for the Territory since the final authority is always the representative of the Central Government.

The second point flows from the transitional nature of the Statute itself which requires the French State and the territorial institutions to wait until 31 December 1998 to find out if New Caledonia will stay within the French Republic or decide to become independent.

(c) Wallis and Futuna

The Territory of Wallis and Futuna has no Government Council. The head of the Territory is simply assisted by a Territorial Council over which he presides.[78] Therefore the Territorial Assembly alone has a capacity to legislate within its sphere of competence. The Senior Administrator who is in charge of the promulgation of the decisions of the Territorial Assembly can furthermore strictly control the legislative autonomy of the Territory which, in the present state of the law appears to be very limited.

IV CONCLUSION

Two conclusions result from the above discussion.

In the first place the difficulties which flow from the uncertain nature of the applicable rule in the Overseas Territories has much to do with the complexity of a system which tries to harmonise the recognition of the specific character of the Territory, when it is fully applied, with the necessity of ensuring throughout the French Republic the application of a common rule.

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77 Leo Hamon, "La loi sur l'evolution de la Nouvelle-Caledonie devant le conseil constitutionnel" - note sous Conseil Constit 8 and 23 August 1985. Act Jur DA 1985 605.

78 JY Faberon above n 13, p 34.

It is also the case that the principle of legislative specialty just as that of the specificity of the Overseas Territories leads to the establishment of a single law with double effect; in respect of the Metropol, and in respect of the Overseas Territories where each Territory can have its own particular regime.

However these principles, used to the extreme, have in fact drastically changed the spirit which motivated their establishment finally to confer, as far as French Polynesia is concerned, on the Territorial Assembly and on the Territorial Government a quasi-legislative power which, if it does not permit the Territory to legislate stricto sensu, at least permits the Territory in all except extreme situations to oppose the extension of metropolitan legislation to a Territory. The representative of the State can only highlight this fact by the delaying, sometimes indefinitely, promulgation of statutes and decrees. It is therefore not surprising that the system has generated a confused legal situation in which the art of a fortune teller is necessary to work out which are the applicable laws. When by way of exception urgency demands the promulgation of an old metropolitan text the situation can present surprises. For example the law of 21 June 1865 on syndicates was promulgated in French Polynesia in an emergency situation in 19 May 1988 when in the course of procedural manoevring before the courts one of the parties placed reliance on the absence of the promulgation of this text which was believed to have regulated land subdivisions in the Territory.[79]

Even though the law was promulgated this was not done effectively because today the syndicates for allotments of immovables established by the Law of 1865 still have a rather dubious legal existence; none of the amending texts made after 1902 have been promulgated.

It should not be a matter of surprise therefore than such a situation is a great temptation for practitioners to make reference to the rules which appear to be most favourable to the case in hand without being too worried about the applicability of the texts in the Territory.

It is especially true, since according to a well known rule of procedure, parties do not have to prove the law which has to be applied.

The Chairman of the Law Committee of the National Assembly stated on his return from French Polynesia and New Caledonia that "the Judges... no longer refrain from making the rules as is necessary in the case law when the legislation is inadequate. This type of action appears particularly necessary in those areas relating to the authority of the Territory where the Territorial Assembly has failed to act".[80]

To say the least these ideas are surprising. They contradict the specificity of each of the territories concerned as well as the authority of the territorial assemblies and are reminiscent of Jacobine times.

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79 Loi du 21 juin 1865 sur les associations syndicales, promulgated in French Polynesia JOPF 16 June 1988.

80 See M Sapin, above n 1.

Secondly the accepted developmental character of each Overseas Territory through the French Constitution would operate as a natural corollary of the recognition of the specificity - legislative specialty being therefore only one of its components.

This specificity of each Territory has been raised to the level of principle. From this perspective the desire of territorial authorities alone to decide what metropolitan laws are of interest to be applied in the Territories and, in a more general way the political evolution they foresee, takes on a whole new aspect.

Where the powers granted to the Territorial Assemblies are greatest, and that is in fact the case in French Polynesia, it appears inconceivable that there should be any return to a status where there would be a restrictive interpretation of the respect for the principle of specificity.

The developmental character of each statute of the Overseas Territory is to be read in the context of the dynamic of the process of emancipation and the field of competence of each territorial institution cannot but increase. Only dramatic events such as those that took place in New Caledonia could slow this tendency.

It should also be noted here that far from supressing autonomy for the New Caledonian territorial institutions, the law of 1988 provided a status which is transitional and which can lead to independence pure and simple.

This process of emancipation, which has begun more or less broadly in each Overseas Territory, does not however envisage that the Territorial Assemblies could decide to have independence within the framework of the rights which have been granted to them.[81]

But if it is true that the French Constitution does not stricto sensu allow the Overseas Territories to achieve independence the Constitutional Council according to one line of reasoning which is the subject of much discussion, in recognising the constitutionality of a process of self-determination, makes it possible to envisage an evolution which could lead to independence.[82]

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81 JY Faberon, above n 13, p 11-13.

82 From these two constitutional principles contained in article 53 of the French Constitution (the right of peoples to make provisions for themselves, and the principle of evolution applicable to the status of the Overseas Territories "by virtue of which the degree of autonomy which these Territories enjoy must increase relative to the end of the evolution") on the basis of the analysis which was made by Capitant in 1966, the Constitutional Council stated that it was possible to have a process of seccession from the French Republic by an Overseas Territory, on condition that a statute of the Republic was passed and that the people concerned had given their consent - Decision of the Constitutional Council 30 December 1975, Official Gazette, 3 January 1976, page 181-183; Actualite Juridique Droit Administratif 1976, p 249 note C Franck; Dalloz 1976 p 537 note L Hamon.