INTERNATIONAL LAW PERSPECTIVES ON THE EVOLUTION IN STATUS OF THE FRENCH OVERSEAS TERRITORIES

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La Constitution française de la cinquième République (1958) avait prévu un dispostif pour faire évoluer vers l'indépendance ses anciennes possessions coloniales.

Les Territorires qui n'ont pas souhaité profiter de ce mécanisme dans les premiers mois de l'entrée en vigueur de la Loi Fondamentale, ne pouvaient plus en principe, accéder à la souveraineté.

Cependant, afin d'éviter un blocage institutionnel et des situations insurrectionnelles, le Conseil Constitutionnel a créé par une interprétation audacieuse de l'article 53 de la Constitution, la possibilité pour les "peuples d'outre-mer" de devenir des Etats indépendants.

Plus connue sous le nom de "doctrine Capitant", la possibilité pour un territoire d'outre-mer de faire sécession de la République constitute un moyen d'éviter des situations de blocage.

I INTRODUCTION

In spite of their quasi-constitutional status the French overseas territories can only make laws that have the value of regulations. That is to say rules which on the one hand are subject to a high level of control but which on the other hand deal with very large areas of activity.[1] This is a situation which, in the long run, risks obstructing the process of the creation of territorial laws.

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1 Y-L Sage "Legislation of French Overseas Territories" in Essays on French Laws in the Pacific, VUW Law Review Monograph 8, p 18.

Indeed since the constitutional revision of 25 June 1992 ordinary legislation of France has no power to make rules in the fields of competency of the overseas territories. Such intervention is possible only by way of an organic law. Now whenever a territory takes a decision it must in particular have regard to the general principles of law[2] (which is a source of law created or identified by the administrative courts). However by reason of the low level of general principles on the legislation scale, though they are above decrees in the hierarchy of norms, only the legislator can derogate from, nullify, or change these principles. On the other hand administrative authorities (such as the overseas territories) do not have such powers. Also as Douence has shown:[3]

> There is a risk of a certain paralysis of the territorial norm-making power if it is subject to the relatively high standards which the judge formulates in respect of administrative acts and if the national legislator no longer has the competence to derogate from the general principles of ordinary law or to organise the impact of the principles with constitutional value or even the regime of public freedoms…. It seems that the risk of blocking some judicial decisions, is not impossible absent an authority competent to deal with the principles in a satisfying manner.

Everything militates in favour of an evolution in status. If one believes the dominant body of academic thinking, the legislator, in giving French Polynesia a status of autonomy, has gone as far as it can in terms of the powers that can be granted to a territorial collectivity. To go beyond that, would be to leave the Republic - to cross the frontier into independence. This view is not new; it has been advanced by numerous jurists every time the law on territorial status has been changed.[4]

This opinion, which in truth is in conformity with Jacobine ideology and perfectly reflects the statements of representatives of the nation, shows a singular lack of imagination. Without going so far as to invent impossible theoretical models or models that are not reconcilable with French political culture, it is still perfectly possible to sketch the outline of formulae for status which, whether they fall within the present framework of the Constitution or not, could very well suit the overseas territories. Also, it is to be regretted that at the time of the colloquium which was dedicated to the discussion of the

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2 In abbreviation, PGDs. For an example of the need to respect the general principles of law, see Y-L Sage " Can foreigners invest freely in French Polynesia? Consequence of the French constitutional Council decision" (1997) 27 VUWLR.

3 "*Etat de droit et droit d'outre-mer*", *Le régime législatif de la Nouvelle Calédonie* (dir Jean-Yves Faberon, Dalloz, 1994) p 19 et s.

4 Lois statutaires de 1977, 1984, 1996; see eg Jean-Yves Faberon, " présentation " du colloque *L'avenir statutaire de la Nouvelle-Calédonie*. op cit, p 18.

future status of New Caledonia, no participant spoke of the formula of political autonomy.[5]

It goes without saying that there is no single solution but a range of possibilities which allow the introduction of varying degrees of political autonomy. Without claiming to be an exhaustive treatment of the subject of the evolution of status, this paper only deals with the models claimed by elected representatives of the overseas territories which arise in the context of international law.

II INSTITUTIONAL FORMULAE REGULATED BY INTERNATIONAL LAW

When the operation of the institutional structures of the overseas collectivities is based in international law, the assumption is the accession to independence of these entities, and that necessarily implies the creation of sovereign states. Also the process of self-determination which allows an overseas collectivity to become independent is a necessary precondition, even if the final goal consists in having restrictions, in favour of the French Republic, on the sovereign powers of the collectivity.

This study begins with a consideration of the right of secession. Following this process can have only one objective - the creation of an independent state. In that case it is possible to consider only that this formula is one of the examples of political autonomy. However there are many politicians in the overseas territories who will defend formulae where, in spite of the move of an overseas collectivity to the status of independent state, some forgoing of aspects of sovereignty would allow the collectivity to maintain close political links to the French Republic. For these reasons there are good grounds for qualifying the situations as political autonomy since theoretically the freedom for the state to decide to be linked to the French Republic is not total. This alienation of a part of sovereignty of the overseas state allows a partial political submission of that state to the French state. Political autonomy is greatest in this situation.

Two solutions have been proposed. The first is found in article 88 of the Constitution and is best known as "associated statehood", although sometimes it is described as an "independence-association".[6] The other, more vague because it has never been defined and it is only sketched out in vague principles, has been proposed by the RPCR of New Caledonia under the rubric of "shared sovereignty". On the facts, little distinguishes shared sovereignty from associated statehood unless it is that shared sovereignty insists on the progressive transfer (over the long term) of sovereign powers. The weakness of the

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5 Or *" autonomie constitutionnelle "* according to François Luchaire, cf. *" L'autonomie de la Polynésie française devant le Conseil constitutionnel "*, *RDP* 1996, p 975.

6 Cf the proposal of M Edgar Pisani of 7 January 1985.

two solutions lies in the fact that they both imply the creation of a state and therefore the respect of the guarantees granted by the new state depends only on its goodwill. International treaties can be denounced at any time.

It may be objected that in an associated state the institutions are based on article 88 of the Constitution. But it is to be noted that this reference is totally redundant and therefore useless. As for the shared sovereignty solution it could be very well be included, with notably the transfers over time of sovereignty, in the Constitution. It is no less true however that the entity which enjoys this status could, because it will consider that it has the same rights as other states on the international stage, go beyond the provision contained in the French Constitution.

A A first stage - The accession of overseas territories to independence

The right of secession can take overseas territories to independence - that is to say to the transformation of their status from territorial collectivity to that of an independent state. These territorial modifications of the map of the Republic have been considered by the Constitutional Council as being compatible with the constitutional principle of the indivisibility of the state.

However the word "right" in conjunction with the term "secession" bears little relationship to reality even though a number of writers speak of it.[7] If it is true that overseas territories can evolve to a status of independence, that they can transform themselves into independent states or attach themselves to an already existing state, such an evolution in status is only the end of a process of self-determination which effectively leads to the secession of a part of the national territory. In other words the constitutional existence of this procedure does not mean that its operation is for the peoples concerned a right. No rules establish the conditions in which the government must arrange a consultation for self-determination or present a legislative proposal which is based on the consequences of that exercise of the right of self-determination. It is therefore a discretionary matter for the government of the Republic[8] which will be decided on the basis of political judgment.[9] And so the term "right" ought not to be understood as referring to a legal regime of secession.

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7 Eg Dominique Rousseau, *Droit du contentieux constitutionnel*, (Montchrestien, 4° édition 1995) where *"droit à sécession"* (p 211) and *"droit de sécession"* (p 212) are used without distinction.

8 See sub-part 3(b) below.

9 This will flow from the local political situation ie, "*si les rapports de force locaux l'y contraignent*" cf. Norbert Rouland, *Manuel de droit des minorités et des peuples autochtones*, (PUF, coll. droit fondamental, 1996).

1 The Creation of the Right of Secession

The legal regime of secession was created by the Constitutional Court on the basis of a doctrine advanced by the jurist Rene Capitant. There remains today controversy over the field of application of this "right".

(a) The Absence of Mention in the Constitution

Nowhere in the Constitution of 1958 is there mention of the possibility that entities within the state might secede from the Republic. The basic law on the contrary refers to the principles of indivisibility and the integrity of the state (article 2 and 5C) and it is clear that in the case of a threat to that integrity article 16 of the Constitution confers exceptional powers on the Head of State. Moreover an attack on territorial integrity is punished by the criminal law.

Nevertheless the Constitution of the Fifth Republic did temporarily open the right of secession to the overseas territories—

> First, at the referendum of 28 September 1958, the overseas territories were able to choose their political future:
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> Either to remain within the French Republic, or to become immediately independent (this was a true referendum on self-determination for the overseas territories). In order to benefit from the second possibility the electors of the overseas territories had to reject the Constitutional Amendment Bill. Guinea was the only territory to do that.
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> Finally by virtue of article 76 of the Constitution, the overseas territories had within the period of 4 months from the date of the promulgation of the Constitution (that is to say until 4 February 1959) the possibility of changing their status and becoming either an overseas department, or a member of the French Community. To do that it was necessary for there to be a decision taken by the territorial assembly of each of the overseas territories. Article 76 did not lead directly to independence but it opened the path to it, since member states could accede to independence by putting into operation procedures set out in article 86 of the Constitution (no overseas territory chose this option).

Outside of these two possibilities limited in time as they were, no portion of the territory could leave the national system. This interpretation has moreover been confirmed by one of the creators of the Constitution, Prime Minister Michel Debre. He declared, in response to a written question (on 28 April 1959)

> The Constitution has never provided the possibility for the departments to transform themselves into overseas territories and even less to become member states of the French Community or independent states. On the contrary the transformation of overseas territories

> into states of the Community could take place only within the four months which followed the entry into force of the Constitution. No change to states of the Community, and no secession from the Republic is then constitutionally possible for the departments or the territories which are at present part of the French Republic.

Now what was the practical reality? Quite different, since many and large portions of the national territory have seceded and have therefore left the Republic:

> First there was the case in 1962 of Algeria which was then a department. That status did not prevent it from acceding to independence (after a long war of national liberation) after a referendum (it was unconstitutional… but necessity makes law).
>
> Then, even after the passing of the four months from the entry into force of the Constitution in 1958, the French legislator invited the peoples of several territories on several occasions to decide on their future (the principle of self-determination) and some of them chose to leave the French Republic.[10] It is enough to mention the case of French Somalia of 12 March 1967, of the Comores in 22 December 1974, of Mayotte in 8 February 1976, of the Territory of the Afars and Issas[11] on 8 May 1977 and of New Caledonia on 13 September 1987.

How is this practice justified? What is the legal basis for the accession to independence of these territories?

(b) The Consecration of the Capitant Doctrine

Article 76 of the Constitution for a reason of timing was no longer able to be resorted to. Then article 53 of the Constitution was resorted to - "No cession, no exchange, no addition of territory is valid without the consent of the peoples concerned" (a consent given by way of referendum).

However this provision does not deal with the case of secession and that seems even to be excluded since article 53 paragraph 1 states that the exchanges or additions of territory must flow from a treaty. How could secession result from a treaty with a state which does not (yet) exist?

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10 For an exhaustive study, cf. Jean-François Dobelle, *" Référendum et droit à l'autodétermination "*, *Pouvoirs* no 77, 1996, p 54 ; cf. also Hugues Beringer, *" Les consultations d'autodétermination sous la V° République: le droit à l'épreuve des faits "*, *RJPIC* 1997, no 1, p 23- 36.

11 The former Côte française des Somalis became the republic of Djibouti.

It was therefore necessary to call on article 53C. This was done on the occasion of a particular problem which arose (that of French Somalia).[12]

Rene Capitant (one of the great lawyers of this century) established, in 1966,[13] the doctrine of the particular interpretation (the Capitant theory) which allows overseas territories to evolve to independence. The doctrine can be stated in the following manner:

> Overseas territories benefited from an original choice. (At the time of the adoption of the Constitution of the Fifth Republic - referendum of 28 September 1958);
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> The end of the time for exercise of the option[14] did not cause the right of free determination of the peoples to disappear (preamble paragraph 2C, and article 1 paragraph 1C); the end of that period brought with it the modification of the way in which the right could be exercised. Henceforth it could be exercised under article 53C;
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> Cession of territory does not exclude secession;
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> The treaty required by article 53 is constituted by the international document which amounts, on the part of France, to its recognition of the territory as a state;
>
> The procedure has two stages: a consultation with the people concerned; and approval by the French Parliament of a law which authorises the secession.

The Constitutional Court accepted this interpretation in its decision of 13 December 1975 (in connection with the accession to independence of the Comores):

> considering that the provisions of this article [53, last paragraph] must be interpreted as being applicable not only in the hypothesis where France will cede territory to a foreign state or acquire a territory from a foreign state but also where the territory will cease to belong to the Republic in order to become an independent state.

2 *The Field of Application of the Right of Secession*

Until now the right of secession has only been put in operation in overseas territories (apart from the case of the Algerian departments). Does this mean that this right can benefit only overseas territories or is it available to every part of the national territory (metropolitan, or department)?

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12 Theorists notably Jean-Claude Maestre, Louis Favoureu, L Philip, and Dominique Rousseau accepted that the constitutional court had "reformed the law" and that without that case-law support it would have been necessary to amend the Constitution.

13 Report of 30 November 1966 in the name of the Legislation Commission of the National Assembly.

14 Article 76 Constitution.

Writers are divided on this issue.

Certain authors believe that the right of secession applies only to overseas territories (Capitant, Favoreu). Notably one of the arguments advanced by Capitant, consists in saying that the right of free determination of peoples could only be used in 1958 (that is either on the day of the referendum or within the four months following the promulgation of the Constitution) for peoples overseas. Therefore its effect (even modified by a new reading of article 53C) is limited to the overseas territories.

Other authors reject this thesis. Their arguments are the following:

In the case of a change of category of a collectivity (or example, an overseas territory becoming a overseas department; an overseas department becoming an overseas territory) if the Capitant theory is applied the right of secession can no longer be used:

In the first case because the territory has become a department;

In the second because the new overseas territory no longer has the benefit of the original option.

If it is admitted that the term cession in article 53 paragraph 3 of the Constitution of 1958 can be interpreted as opening up the possibility for the legislator to reduce the national territory for the benefit of an existing state (cession in the strict sense) or to create (cession in the broad sense, that is to say secession), it is difficult to see why the notion of territory in article 53 relates in the first case to any part of the territory of the Republic and in the second case only to overseas territories. This is why certain writers[15] believe that secession can relate to any part of the national territory (whether overseas or metropolitan).

The constitutional case law is ambiguous on this point and does not enable the matter to be resolved one way or another. Indeed having affirmed in its decision of 30 December, 1975, that the notion of territory in article 53 paragraph 3C is not synonymous with overseas territory and therefore authorises or permits secession of any part of the national territory,[16] the Constitutional Council took care to state in its decision of 2 June 1987 that the process of self-determination refers to principles of free-determination by peoples and the free manifestation of their will 'specifically provided for the overseas territories by the paragraph 2 of the preamble'. And again in its decision of 9 May 1991, the Constitutional Council recalled 'that the Constitution of 1958 distinguishes the French people from the

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15 François Luchaire; Dominique Rousseau; Léo Hamon.

16 "Though Mayotte is a territory within the meaning of article 53 final para of the Constitution, the word 'territory' does not have the same legal meaning in that article as in the expression 'overseas territory' used in the Constitution."

peoples overseas to whom the right of free determination is recognised'. This is why certain writers, of whom Louis Favoreu is one, reasoning a contrario that the right of secession applies only to overseas territories. Finally, for Andre Roux who bases himself on the decision of 1991, the right of secession concerns overseas territories and overseas departments because "in omitting to state that in article 1 of the Constitution there is reference to "the peoples of overseas territories", and in mentioning only "overseas peoples", the Constitutional Council obviously implied that the peoples of the overseas departments would benefit equally from this right but that it is not available to the metropolitan collectivities".[17]

Whatever the doctrinal debates on the extent of the territorial extent of the right of secession, it is to be noted that it has never been doubted that the overseas territories could benefit from the process.

3 Conditions for exercise of the right of secession

The principle of secession, as it is interpreted by the Constitutional Council, is both bold and generous. But looking more closely it is to be noted that its application requires the use of a procedure which is under the control of the state.

The use of this procedure shows that a certain number of conditions must be fulfilled for the process to be valid. At least four conditions are provided.

(a) The beginning of the procedure for secession is by the national authority

Only the authorities of the Republic, the government or the parliament, are competent to begin the procedure for secession. This interpretation of the law is a result of the case law of the Constitutional Council and in particular of its decision of 2 June 1987. And so peoples of the overseas territories cannot initiate such procedures and if they do they are likely to be subject of penal prosecution. However at a less formal level there is nothing to prevent citizens or local representatives from demanding this right from the authorities of the Republic. This is a matter of custom and properly so because the question of leaving the fold of the Republic presumes that the national authorities have set in motion this secession procedure.

(b) Public International Law is not Applicable

The question of the application of international law to the process of secession arises to the extent that resolution 1514 (XV) of 14 December 1960 of the United Nations lists specific provisions so that colonised peoples can free themselves from all control by a foreign state. France is no longer a colonial power, therefore the procedure of secession can

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17 *Droit constitutionnel local*, (Economica 1995) p 85.

take place only on the basis of rules of French internal law. This is what the Constitutional Council has affirmed on several occasions (decisions of 30 December 1975 and 2 June 1987).

The fact that the procedure for secession takes place within the framework of the Constitution does not prevent, if such is the will of the authorities of the Republic, international observers from being present when the local peoples are consulted. Thus on a discretionary basis France acceded to requests of the United Nations and accepted the presence of observers in Mayotte in 1976 and in Djibouti in 1977. But "the consultation is under the exclusive control of France and is conducted in accordance solely with the rules of law of France".[18]

(c) Consultation with the Interested Peoples

When inhabitants of a part of the Republic wish to leave the national fold they should be consulted. In relation to this three questions arise—

What is the population which is to be consulted?

Is the consultation obligatory?

How is the electoral body of the population interested to be determined?

(i) The peoples concerned

A priori the identifying of the people to be consulted does not pose particular difficulties since a particular objective is to be taken into account: The population of the territory. The problem is, however that the notion of "territory" contained in article 53 paragraph 3 of the Constitution is not synonymous with overseas territory and therefore in a collectivity within the state it is possible to distinguish several territories. This interpretation is reinforced by the fact that in article 53 paragraph 3 itself the Constitution speaks of "peoples interested" in the plural, which leads to the view that at a referendum several peoples can be consulted.[19] If at the time of a vote of self-determination one of the interested peoples does not consent to secession it would not "leave the French Republic" (Constitutional Council, 30 December 1975).

Everybody looks to the precedent of Mayotte. At the time of the consultation of the peoples of the Comores on 22 December 1974 a very large majority in the islands voted for independence except Mayotte where 65% of that population voted to maintain its relationship with the French Republic. In its decision of 30 December 1975, the Constitutional Council held that since the Island of Mayotte was a territory, and its

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18 Jean-François Dobelle, *" Référendum et droit à l'autodétermination "*, *Pouvoirs* n° 77, 1996, p 55.

19 However the plural (populations intéressées) is probably explained by the fact that there are several causes for consultation: cession, exchange, incorporation, secession....

population had clearly manifested its refusal to leave the French Republic, Mayotte remained a French collectivity. On the other hand the rest of the archipelago attained independence in conformity with the view expressed by its population. It would seem that this "regionalisation" of the referendum within a single overseas territory can be supported only on the condition "that there is between the different parts of a territory a significant element for distinction".[20] In the case of the Comores this objective element of distinction was constituted by its insularity.

This practice of the French Republic somewhat contradicts the principles of public international law since in effect it has always been agreed that the voting on self-determination must be carried out in the framework of the colonial frontiers. That could however be reconsidered at the time of the future consultations for the peoples of the overseas territories.

In the case of New Caledonia it has been suggested that there exist several territories which make it possible to distinguish several interested peoples. This is the opinion of Olivia Gohin[21] who believes that each province of New Caledonia constitutes an interested population. Also in the case of consultation of interested populations, in relation to the results of the self-determination vote, it is possible that part of the overseas territory does not obtain independence. However in the case of New Caledonia unless it is possible to find some objective element of distinction (such as the insularity of the main island), it is difficult to accept that there exist "interested peoples" even if it is clear that there exist different peoples (Kanack, Caldoche, and Wallisien …). Indeed France has traditionally maintained the principle of the unity of the people (which is in conformity with the interpretation of the Constitutional Council in its decision of 9 May 1991) who live in the same territory even if this people is composed of different ethnic groups. Such was the case at the time of the consultation in 1967 in French Somalia, where the Afars as distinct from the Issas voted by a majority in favour of maintaining their territorial relationship with the French Republic (and the same was the case in respect of the consultation in 1977 in the territory of the Afars and Issas, and of New Caledonia in 1987).

The same view could be advanced in respect of French Polynesia. There exists, in addition to insularity, some features which make it possible to distinguish the population of the 5 archipelagoes which make up this territory: Language, culture, etc. Also the precedent of Mayotte could be repeated in French Polynesia particularly in respect of the Marquesas where the populations have always shown a strong Francophile sentiment.

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20 François Luchaire, *Le statut constitutionnel de la France d'outre-mer*, op cit, p 57.

21 *"L'indépendance des Comores et le précédent de Mayotte"*, *L'avenir statutaire de la Nouvelle-Calédonie*, op cit, p 76.

(ii) The Obligatory Nature of Consultation

Consultation with the interested peoples as a precondition of independence, is considered as "an obligatory matter preliminary" to the passing of a law which would authorise the ratification of a treaty leading to cession of a territory. This obligatory character of the consultation flows from article 53 paragraph 3 of the Constitution.[22] This consultation is preceded by a vote on a ordinary law which organises the vote.

It should be noted that the Constitution provides no detail on this consultation and more particularly whether it is necessary to consult the people by way of a referendum (local) or whether it is possible to proceed by way of information received from the representatives of the population who sit in the territorial assembly (it is necessary in this case obviously for the consultation to be organised on the territory of a collectivity within the state). Some writers believe that "nothing prevents a regional assembly from validly deciding on this matter since it is representative of the interested people".[23] This was the case (strongly disputed it is true), in regard to the cession to India of the French enclaves of Karikal, Mahe, Pondichery and Yanaon.[24] But apart from that isolated precedent, France has always used direct consultation with the people.

According to the Capitant theory, consultation organised within the framework of a procedure for secession forms part of the category of obligatory advice. It is therefore not really a question of a referendum (local) since consultation does not involve a decision. Yet it is necessary that Parliament intervenes after the vote in order to formalise the consequences of the vote, that is to say to promulgate the decision on secession.

Finally in its decision of 2 June 1987 the Constitutional Council had occasion to state, in a case concerning the question put to voters, that the question must respect the constitutional demands of loyalty and clarity and in every case the question "must not be ambiguous". On this point the Constitutional Council has considered, in connection with New Caledonia that consultation could not relate to "the maintenance within the Republic with a status whose essential elements would have been brought to their knowledge" for that would "in the mind of the voting people give rise to the erroneous idea that the elements of the status are already fixed, when the determination of this status will result from article 74 of the Constitution by a law made after consultation with the territorial assembly".

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22 Cf. CE ass 27 juin 1958, George et Teivassigamany : decision on application of art 27 Constitution 1946 whose text is identical to that of art 53, al 3 Constitution of 1958.

23 Olivier Gohin, *" L'indépendance des Comores et le précédent de Mayotte ", L'avenir statutaire de la Nouvelle-Calédonie*, op cit, p 77.

24 Cf. David Ruzie, *Clunet* 1976, p 397-398.

(iii) Identification of the Electoral Body

Once the population or populations have been defined, there remains sometimes the difficult question of the identification of the body which can participate in the consultation envisaged by article 53 paragraph 3 of the Constitution. If no difficulty arises the common law would apply: All the inscribed voters on the electoral rolls for at least the last 6 months[25] in the territory would be considered as having the right to participate in the consultation.[26]

Sometimes the identification of the people entitled to participate in a consultation before the cession of territory can be the subject of a different formula, if the legislator has concern to ensure the true character of the self-determination votes. To do this it is useful to remove from the list of voters the "non-locals" (that is to say metropolitan residents living in the area for just a short time) of these territories and in that case the law requires residence of several years.[27]

This was the case for the consultation for the peoples of French Somalia in 1967[28] and 1976 where a condition of residence of 3 years was required. In the same way this condition of 3 years residence was required for the consultation which took place in New Caledonia on 13 September 1987. The Constitutional Council having considered this provision, did not declare it to be against the Constitution. It is to be noted that a condition of 10 years[29] was required by the Matignon Agreements and that a referendum accepted this in 1988.[30] Though the extension to 10 years residence has been approved by a referendum law, the Constitutional Council has not yet had to pronounce on the constitutionality of this condition.

4 The Final Intervention of Parliament

After consultation with the interested peoples Parliament must intervene to authorise or review secession. Two situations must be distinguished:

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25 Article L 11-1° of the electoral code requires residence of 6 months in the constituency in order to be able to vote.

26 Eg the Comores 1975.

27 It is sometimes necessary, given the importance of the issue, to exclude as voters some whose links with the territory are inadequate.

28 Territoire des Afars et des Issas.

29 This condition related to the consultation which had to take place in New Caledonia in 1998. Only those who were resident in New Caledonia from 6 November 1988 could vote.

30 Law of 9 November 1988.

(a) Rejection of independence

On several occasions interested peoples consulted by local referendum have refused to leave the Republic

French Somalia	19 March 1967
Mayotte	22 December 1974
Mayotte	8 February 1976
New Caledonia	13 September 1987

The question which arises is, does the legislator have to follow the advice given by the population concerned?

Until now Parliament has always followed that advice. But could it, against the will of the people, grant independence? It is possible to view that as being unconstitutional because the law would remove peoples from the Republic without their consent. To support this affirmation it is only necessary to cite the Constitutional Council decision of 13 December 1975: "Considering that this island [Mayotte] cannot leave the French Republic without the consent of its own population".

(b) The Acceptance of Independence

On two occasions interested peoples consulted by the local referendum have wished to have independence:

The Comores	22 December 1974
The Territory of Afars and Issas	8 May 1977

Here again it is possible to ask whether the legislator is obliged to follow the advice given by the populations concerned in favour of independence.

In 1977 the legislator followed the advice of 8 May 1977.

For the Comores the question was more complex. Certainly on 22 December 1974 all of the Comores archipelago voted in favour of independence. However one of the islands (Mayotte) rejected this independence by a large majority. On the basis of this the legislator decided to grant independence to the archipelago with the exception of Mayotte. The Constitutional Council recognised the constitutionality of this procedure.[31]

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31 CC 30 décembre 1975**:** *cons. que cette île [Mayotte] ne saurait sortir de la République française sans le consentement de sa propre population.*

It is possible therefore to consider that the Constitutional Council has implicitly accepted the thesis according to which the legislator is bound by the result of the consultation since it appears to bind the legislator to the position adopted by the interested peoples. This is a debatable conclusion.[32] From the time when the legislator decides to consult the population concerned (having made the decision about the criterion of residence), to define the territorial limits of the portion that may accede to independence, it could very well interrupt the process or even not follow the result of the local referendum. In fact the only obligation on the legislator is to receive the consent of the interested people. However any eventual refusal by Parliament to grant independence to a territory which voted massively for that would be politically untenable.

III ILLUSORY FORMULAE: TO BE AND NOT TO BE

The heading of this paragraph should not mislead. It is not a question of passing judgment on the idea of associated statehood or shared sovereignty. These formulae have their supporters and a jurist who studies the possible evolutions of status which are available to overseas territories cannot scientifically show that there is a good or bad solution for the institutional future of sub-state entities (and it is exactly the same for other institutional forms relating to political autonomy).

The expression "illusory" means only that in the framework of the formulae which constitute the associated state or shared sovereignty, the links which bind the French state and new entities will be so fragile and tenuous that they could without any great difficulty, transform the nature of the power exercised by the latter. Thus what is seen is the passage from political autonomy to political sovereignty. Indeed in the case of a conflict between the French state and the associated entity, if the tension persisted and no solution satisfactory to both parties was found, they would inevitably terminate the arrangement.

The absence of guarantees (reciprocal) as to the life of the legal and political links between the two entities (in this case the French state and the former overseas territory) constitutes the principal weakness of these formulae. If they encourage partisans of independence they risk on the other hand frightening those who wish to maintain strong and durable links with the protector state. For the rest this is a very well-known position: History teaches that all political experiments, formerly known as "independence in interdependence"[33] which seek to maintain strong cooperation between two entities enjoying a share of political sovereignty are doomed to failure.[34] And how could it be

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32 And for the contrary, cf. Alain Boyer, thèse, op cit, p 238-239.

33 According to Edgar Faure.

otherwise when in a single institution one wishes to resolve an equation whose terms are antithetical: to be and not to be?

A The Associated State

Article 88 of the Constitution of the Fifth Republic provides that "The Republic can conclude agreements with states who wish to be linked to it to develop their civilizations". On the basis of this provision political groups and sometimes theorists[35] see this as a political solution for the future of overseas territories.

1 The Notion of Associated Statehood

This article 88 of the French Constitution was created to attempt to maintain links with some of the former French colonial possessions, Cambodia, Laos, Tunisia, Morocco, Cameroon and Togo. Nevertheless these provisions have never been used. They are not spent however since at the time of the constitutional revision of 4 August 1995 France, when it tidied up the constitutional law by removing for example all references to the community, maintained the possibility of association of the Republic with other sovereign entities.

The formula of associated statehood does not relate to a political regime of a particular type. Indeed an associated state can have any form: Parliamentary regime, presidential regime etc and can also be of a unitary or federal type. All these matters relate only to the associated state and not to the French state and are sovereignly defined in the Constitution of France. Also the notion of the associated state describes only the association link which unites the French Republic with a state entity.[36]

In the framework of the evolution and status of the overseas territories, this institutional solution presents the advantage of not definitively cutting off relations with a collectivity within the state while at the same time giving that entity full sovereignty. Simply put, the former overseas territory can agree to restrictions of sovereignty in certain fields such as defence, currency and so on.

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34 This may be compared with the failure of confederations during the last 25 years: The Senegambia Confederation (treaty of 17 December 1981) was "frozen" in August 1989; the Arab-African Union (uniting Libya and Morocco (treaty of Oujda of 13 August 1984) was rejected by Morocco on 29 August 1986.

35 Cf. Charles Cadoux, *"L'accès de la Polynésie française à l'autonomie interne. Point d'aboutissement ou nouvelle base de départ?", RDP* 1989, p 397.

36 It is to be noted that art 88 gives finality to association agreements. The links between the two states are aimed at the development of the "civilisation" of the associated state. Today the easier expression is "social and economic development". Cf Guy Sem, *Introduction au statut juridique de la Polynésie française*, DDOM, 1996, p 100.

Some writers have stated that it is not necessary for the entity which wishes to associate with the Republic to be independent[37] because the formula in article 88C is "particularly supple".[38] A priori this view is open to criticism because the association of one state to another presupposes that each entity is sovereign and independent.[39] The association agreement can provide (and it is of that that everybody thinks) restrictions on sovereignty in certain fields of a part of a former overseas territory which has become independent. Nevertheless it is a sovereign matter that this partial cession of sovereignty is agreed to.

In reality the opinion of Francois Luchaire according to which article 88 could relate to a treaty of association between the French Republic and a "state" which is not independent is well based if, as here, it is admitted that there is some "flexibility" in the framework for the procedure of transformation of an overseas territory into an associated state.

2 *The Process of Transformation of a Overseas Territory into Associated State*

The most simple formalisation of an agreement of association is a signed agreement between the two states: The French Republic and a state which wishes to associate itself to France. This solution presents, at least in theory, some risks because nothing obliges an independent state to sign such an agreement.

In order to give comfort to those who would be disturbed that the new state might refuse to sign a treaty of association, Edgar Pisani, for the French government proposed, in respect of New Caledonia in 1985, a solution which would enable avoiding the prior accession to independence of the overseas territory. To do this it is enough to invert the procedure for creation of an associated state: Firstly the association agreement must be signed between the overseas territory and the French state and then independence is proclaimed.[40] This solution has been approved by some writers. It is the view of Francois Luchaire: "The same argument has been used in connection with article 53 of the Constitution which provides for cession of territory; indeed cession supposes the existence of a state which is seceding; now the Constitutional Council has assimulated to secession,

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37 Dominique Turpin believes that association agreements could involve non-sovereign states, cf. " L'indépendance-association ", *L'avenir statutaire de la Nouvelle-Calédonie,* La Documentation française 1997, p 247

38 François Luchaire, commentary on article 88 of the Constitution, *La Constitution de la République française*, (dir François Luchaire et Gérard Conac), (Economica 1987) p 1322.

39 How then can it be maintained, as does Dominique Turpin, that independence of the state is a pre-condition of an association agreement and also that the associated state is not fully sovereign? Op cit 248.

40 Cf Dominique Turpin, op cit p 244.

the secession which is at the origin of a new state (constitutional Council 13 December 1975); the same reasoning can be utilised for article 88".[41]

Can this be the same for a guarantee which provides for the perpetuity of the agreement? Certainly not because even if it is supposed that the procedure followed is that suggested by Francois Luchaire, nothing obliges the associated state to honour the association agreement. More precisely, the former overseas territory can denounce the international arrangement, all the more so because the new state could argue that the agreement was imposed on it by the former "colonial power". Also it appears that the solution suggested by Edgar Pisani which inverts the moment of signature of the association agreement, is of little interest.

3 The Weakness of the Associated Statehood Formula

The principal weakness of the solution, which consists in transforming overseas territories into associated states, arises from the absence of guarantee as to the continuity of the association agreement. Indeed the reference to article 88 of the Constitution is supererogatory to the extent that the conclusion of the association agreement derives from international law. This doubtless explains why article 88 has never been utilised when overseas territories of France have gained independence. As Christian Philip rightly says "France has no need for a specific article in its Constitution in order to reach such agreements. Article 88 relates legally only to allowing these agreements to derogate from other articles of the Constitution, in particular to have associated states participate in the organs of the Republic".[42]

All writers agree in underlining the fact that the constitutional provisions of article 88c "add nothing to the freedom that independent states have to make treaties as they wish between each other. And it cannot be used to impose upon the secession of an overseas territory a restrictive condition".[43]

Regulated by the principles and rules of international law, relations between France and the associated state would be subject to the risks which result from the right of each party to exercise sovereignty over its territory. Also it is not impossible that the choice of this institutional solution would be adopted to "camouflage independence" since it is a

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41 Commentaire de l'article 88: *La Constitution de la r´epublique française*, ed François Luchaire et Gérard Conac, (Economica, 2nd édition, 1987) 1323.

42 "*La Nouvelle-Calédonie et le concept d'Etat associé*", *La Nouvelle-Calédonie, le Droit et la République* (Pédone 1985) 128.

43 Thierry Michalon, "*Pour la Nouvelle-Calédonie, l'hypothèse f´dérale*", *L'avenir statutaire de la Nouvelle-Calédonie*, La Documentation française 1997, p 230.

question "of giving the impression that [the associated state] will remain more or less with a French constitutional status. But that is false".[44]

B Shared Sovereignty

There are few indications about the concept of shared sovereignty and it was used it seems for the first time by Maurice Duverger in an article in *Le monde* on 26 February 1985. Since then this concept has been picked up both by certain New Caledonian political groups and by doctrinal writers. Thus Francois Luchaire and Dominique Turpin who referred to this concept in their respective contributions to the colloquium on "The future status of New Caledonia" held in March 1997 took pains to emphasise that the concept of "associate statehood" and of "shared sovereignty" were not irreconcilable and even that fundamentally they were not so different.

The task of creating an institutional form which would allow the operation of shared sovereignty is based on the idea that if one can progressively endow an entity with sovereign competencies, this process must not depend as a pre-condition, as is the case for an associated state, on the accession to independence of the entity. Independence will be acquired only at the end of a period spread over several years. In the course of this time there will be a gradual transfer of sovereign powers from the Republic to the overseas collectivity. Also as rightly emphasised by Dominique Turbin these two formulae are both "very close and very different".[45]

Indeed what makes associate statehood analogous to shared sovereignty is that in both cases overseas collectivities have some sovereign powers:

- In the first hypothesis it is the collectivity itself which agrees not to exercise all of its sovereignty since it voluntarily transfers (by contract) a part to France;
- In the second case the restriction on the exercise of sovereign powers is imposed unilaterally (in the Constitution) by the French Republic.

Inversely the distinction between the two concepts operates at the level of the time when the sovereign state is constituted:

- In the framework of associated statehood, independence is granted from the time of the exercise of restricted powers of sovereignty;

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44 Christian Philip, op cit, p 129.

45 Op Cit, p 243.

- As far as shared sovereignty is concerned, independence will be acquired only at the end of the transfer of the last competence provided by a timetable provided in the French Constitution.

The conclusion of this analysis appears to be that since independence (eventually in association with France) could only be granted at the end of a long period (the figure of 24 years has been suggested by the RPCR) it is not necessary to refer to international law to provide a basis for this evolution of status. Also the institutional form of this collectivity would be defined by the French Constitution and could moreover take on the form of the Pacific Community.[46]

Consequently the choice of classification of this evolutionary status within the institutional formulae of international law may be questioned. Yet it seems that the writing of shared sovereignty into the Constitution would not in itself deny - in spite of the contrary will of national political organs - the role of international law. This results from an analysis of the foundations of shared sovereignty.

What the supporters of shared sovereignty seek, is to obtain a guarantee that not withstanding exercise of powers of sovereignty according to a programme in the Constitution the creation of an independent state (associated or not) cannot happen except at the end of a long process. And during this period, the end of which will be marked by the advent of a fully sovereign state, it is necessary to accept that the Metropole will retain (provisionally) certain of the powers of sovereignty which belong to the overseas collectivity and inversely the overseas collectivity will "provisionally" not have certain powers which, however, at the end of the time will belong to it totally.

This limitation on sovereignty imposed by the Metropole as a condition of independence will not fail to be seen and denounced as a situation of "assistantship".[47] Thus before the complete handing over of the powers of sovereignty it is not impossible that the authorities of the overseas collectivity will claim the full exercise of the powers and the refusal of the Republic to do that would only exacerbate anti - colonial feelings. Indeed from the moment where the protecting state accepts that in the end its protected state will achieve full sovereignty, it is accepting the potential of recourse to principles and rules of international law: The right of the people to freely self-determine; the right of each state to the exercise of full self sovereignty over its territories. Secessionists could without

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46 The only difference from the institutional form discussed above is that the member states would have access to sovereign powers.

47 Cf the declaration of FLNKS aftger its Congrès of December 1995: "Only independence can provide perspectives of longterm development for the country and inversely transitional status supported through assistantship statehood can only delay, and sharpen, democratic and anticolonial aspirations" cited by Turpin, op cit, 245.

difficulty denounce this limitation of sovereignty, imposed by the French Republic on an entity which enjoys shared sovereignty, as a condition of independence. And it is clearly possible to have in the timetable of progressive transfer of powers of sovereignty provisions which will be challenged by reference to higher norms to which the international community is not insensitive.

It is necessary however to bear in mind that if a plan of "shared sovereignty" is adopted it will be because it will have been accepted by all parties and that its writing into the Constitution of the Fifth Republic gives more guarantees that a situation where the overseas territory becomes to an associated state.