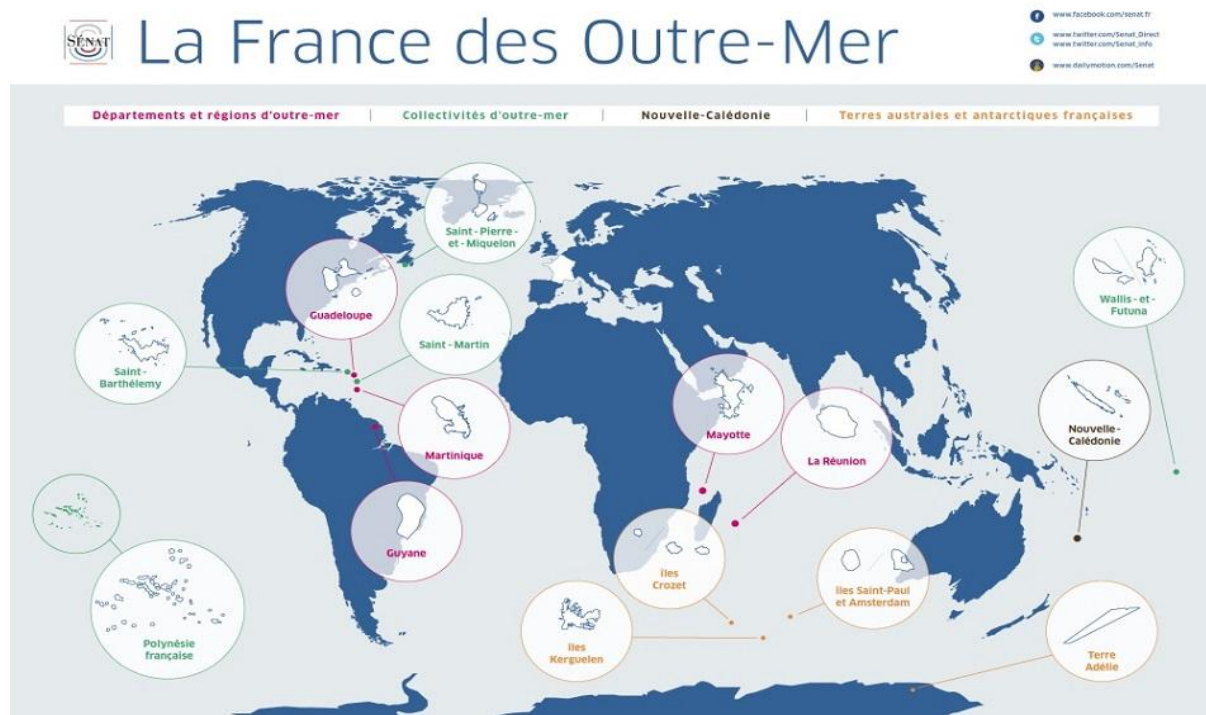


French Overseas Territories Constitutional Issues

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French overseas territories are made up of twelve territorial units, spread across the planet, eleven of them being inhabited. They make the [French Exclusive Economic Zone \(EEZ\)](#) the second largest in the world, after the United States of America.



New Caledonia, French Polynesia and Wallis-et-Futuna are located in the Pacific Ocean and their legal status is one of significant autonomy. The French Southern and Antarctic Territories (TAAF) are the only uninhabited overseas territory. In the Indian Ocean, La Réunion and Mayotte are among the least autonomous overseas authorities in the Republic. Finally, the Atlantic Ocean and the Caribbean Sea form a kaleidoscope of territories with very different statuses: French Guyana is the only continental ultramarine territory, while Martinique, Guadeloupe, Saint-Martin and Saint-Barthelemy are included in the arc of the Lesser Antilles, the last two enjoying greater autonomy since 2007. Further North, along the Canadian coast, Saint-Pierre-et-Miquelon is unique in that it is the only non-tropical overseas territory, enjoying limited autonomy.

French overseas territories are characterized by growing statutory diversity, revealing historical and socio-cultural heterogeneity which has been reflected in their statutory evolution.

From 1946, only territories with no desire for independence are included within the French Republic. The 1946 Constitution established a dichotomy by opposing the “Overseas Departments (DOM)”, governed by the principle of legislative identity and the “Overseas

Territories (TOM)”, enjoying greater autonomy. This distinction will be maintained in articles 73 (DOM) and 74 (TOM) of the [1958 French Constitution](#), currently in force.

According to this dichotomy, on the one hand, the territories of article 73 of the Constitution (“DOM”) are Outermost Regions ([OMRs](#)) of the European Union, governed by the principle of legislative identity and whose normative power is limited to a subsidiary and regulatory power of execution. On the other hand, the territories under article 74 of the Constitution (now called overseas territorial communities “COM” since the constitutional review of 2003) - are Overseas Countries and Territories ([OCTs](#)) of the European Union, endowed with a greater power of decision, though it can vary over a rather wide range from one territory to another.

Overall, it appears that the French State is struggling to overcome a very conservative view of its unitary nature. Entangled in a stereotypical perception of homogeneity which underlies equality of citizens, the French Republic is struggling to cope with the demands of territories increasingly claiming autonomy. Indeed, the unitary French State resists, in a caricatural way with regard to comparative law, to take into account both singular and heterogeneous frameworks of the overseas territories.

In this regard, however, another distinction should be made between the two categories of territories, in addition to a special mention for New Caledonia.

With regard to the least autonomous local authorities (those of article 73 of the Constitution), the [Assises de l’Outre-Mer in 2018-19](#) and the “[Blue Book](#)” which resulted from it, illustrate the unease of the overseas populations about the governance of their territory, taking note of the insufficiency of public policies put in place and the inadequacy of the modes of governance. Nevertheless, despite debates on “real equality”, despite countless parliamentary reports, despite reiterated demands of the local authorities, despite announcements of French Government on the necessary differentiation between territories, from the triple point of view of their respective status, the exercise of normative powers and local public action, speeches most of the time reach a dead end.

As the 75th anniversary of overseas departmentalization will be celebrated in March 2021, local authorities within the scope of article 73 of the Constitution have seen very few changes in their governance in three quarters of a century.

Of course, a major change is that the overseas departments have become overseas regions, but it has been more of an element of complexity than a progress. Indeed, when regions were created in the 1980s at the national level, it was decided to extend it to DOM. DOM then became “DROM” (Département et Région d’Outre-Mer), leading to the coexistence of two different local authorities having the same territorial jurisdiction but with their own institutions and powers. This double level of administration add to municipalities, intercommunal level and above, French state. It took French Guyana and Martinique nearly 30 years to get rid of this double level of administration (2015) and to have one level of decentralization while remaining territories with very little autonomy. Saint-Pierre-et-Miquelon reluctantly tasted this status of assimilated territory (1976) and quickly returned to article 74 of the Constitution (1985). Saint-Martin and Saint-Barthélemy opted against

assimilation thanks to a referendum allowing them to become autonomous local authorities (2007) and Mayotte, which has joined article 73 of the Constitution only in 2011 is already seeing the drawbacks, as the assimilation underlies by the new status [is hardly compatible with the cultural specificities of Mayotte population](#) that was [not anticipated by local politics](#).

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Regarding territories of article 74 of the Constitution, the French State more readily accepts that statutory differentiation and tailor-made statuses are occurring.

A special mention must be made about New Caledonia. It is a territory in the process of emancipation that enjoys a specific constitutional status allowing a strong autonomy, with broad legislative powers in important fields such as commercial and labor law and a very broad fiscal autonomy. The current process will end after a third self-determination referendum which should take place in 2022 (the first two having concluded to the rejection of independence (56% of No in 2018, 53% in [2020](#)) and which will lead either to the definition of a new status of reinforced autonomy or the birth of a new State, depending on the result of the third consultation.

In Overseas France, for the past fifteen years, we have witnessed, as Senator Maus said, “*the bursting of the uniformities imagined in 1946 and 1958*”, which lead to a statutory mosaic as follows:

Local Authority	Constitutional Status	European Status	Autonomy
Guadeloupe	Art.73C - DROM	OMR	Legislative identity
Guyane	Art.73C - Local Authority with original status	OMR	Legislative identity
La Réunion	Art.73C – DROM	OMR	Legislative identity
Martinique	Art.73C - Local Authority with original status	OMR	Legislative identity
Mayotte	Art.73C – Collectivité départementale	OMR	Legislative identity
Polynésie française	Art.74C – COM	OCT	Strong Autonomy
Saint-Barthélemy	Art.74C – Autonomous COM	OCT	Average Autonomy
Saint-Martin	Art.74C – Autonomous COM	OMR	Average Autonomy
Saint-Pierre-et-Miquelon	Art.74C – COM	OCT	Weak Autonomy
Wallis-et-Futuna	Art.74C – COM	OCT	Average Autonomy
Nouvelle-Calédonie	Titre XIII C – <i>sui generis</i> local authority	OCT	Very strong Autonomy
TAAF	Art.72-3C – <i>sui generis</i> local authority	OCT	Uninhabited

This kaleidoscope of governance and autonomy arrangements questions the State's persistence in refusing to acknowledge the end of the bipolarity of French overseas constitutional law, and the obsolescence of overseas constitutional statuses.

While there is no unanimous proposal, local actors, scholars, and most overseas territories experts seem to agree that time is ripe to eliminate on the assumption of eliminating the dichotomy between articles 73 and 74 of the Constitution. The proposals seem to express an almost [unanimous demand](#) for the disappearance of article 73, which has become obsolete, incapable of satisfying almost all the local entities where it is applied.

The constitutional framework of the French overseas territories must therefore evolve as it becomes urgent to limit what is now felt by many overseas representatives as frustration linked to the infantilizing nature of the action of the State overseas. Indeed, the paternalistic positioning of the successive national governments is generating the feeling among local politics that the State is not confident about their ability to manage properly their territories.

In this regard, the management of the COVID19 health crisis is an example of the State's inability to transcribe into facts and regulations a discourse advocating territorial differentiation and the empowerment of local actors. Instead, the State excessively empowers the representative of the central government in the respective overseas territory by means of devolving powers and by doing so it, at last, nips any decentralizing impetus in the bud. Like a parent jealous of its prerogatives and its authority over its offspring, the State, despite its self-proclaimed reformist and liberal nature, seems incapable of moving towards a posture based on trust and partnership, and it systematically falls back into a relationship of authority and paternalism.

It is the very nature of the relationship between the French Republic and its overseas territories that needs to evolve. In this regard, comparative law allows us to see how other unitary States manage to disentangle themselves from their nature to develop a real partnership with their overseas communities. One can for example evoke the Dutch constitutional architecture: the State sets aside its unitary nature whenever necessary and openly negotiates the autonomy needs of its overseas territories. Thus, while the BES islands (Saba, St Eustatius and Bonaire) are governed as if they were Dutch municipalities, the three other territories (Curaçao, Sint Maarten and Aruba) are excluded from the scope of the Constitution. So are Their relations with the Crown being governed by a supra Constitutional text - the Charter for the Kingdom of the Netherlands – that allows significant autonomy to these territories.

Reconciling the founding principles of the French Republic and the expectations expressed locally, requires the mobilization of new means of governance, such as adaptive and polycentric governance. Only autonomy tools in line with the spirit of adaptive and polycentric governance can at last improve decision-making processes, develop the potential of local "capabilities" and help to design tailor-made public policies. The objective is to promote the ability of overseas territories to truly seize their opportunities and manage their specificities (constraints and assets) towards a sustainable development. In this regard,

developing the “capabilities” of overseas territories, in an apprehension [resulting from Amartya Sen’s approach](#), should be interesting. It would allow to answer the demand of differentiation of most overseas authorities while giving them the means to ensure their sustainable development.

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The necessary tools for local authorities to become the master of their respective own destiny are, in the end, well known: enlarging the scope of autonomy in important sectors, adapting institutions and granting financial autonomy, of course.

Nevertheless, it seems that the French Government is not yet ready to take such a plunge. Against this background, some local authorities (Martinique, French Guiana, Saint-Martin, Saint-Barthélemy, Guadeloupe and even Corsica) recently decided to work together in order to speak with “one voice” and put more pressure on the Government regarding their demands, tired of not being properly listened to up to date.