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How Faroese and New Caledonian autonomy call into question the Danish and French State unitary character

Abstract

The unitary character of the Danish and French States is called into question by the special autonomy which, respectively, the Faroe Islands have within the Kingdom of Denmark and New Caledonia has within the French Republic. Indeed, these two entities are governed by organizational statutes marked by a strong exorbitance.[2] In that, the administrative decentralization is, first of all, singularly advanced: the transferred competences go beyond the limit of sovereign activities, while, these two local governments are marked by an own territorial and institutional organization, different from that characterizing the rest of the national respective territory. Even more, by the consecration of a legislative decentralization, for the benefit of real local governments (in the political sense of the term and not only administrative), the questioning of the unitary state character takes on a whole other twist: in addition to the transferred powers dissimilarity, it is by the institutional remoteness of these communities – compared to other local branches of common law – that the motley character of the French and Danish States is formed more clearly.

A federal essence emerges from these statutes, referring to quite relative concepts of territorial units. The singularity of the constitutional statutes, characterizing and governing the organization and competences of these two entities, actively participates in calling into question the unitary character of the two central States. The „unity" here presumed seems to be artificial in practice. Thus, by the exorbitant position of the two local entities subject to the study – attacking central state unitarianism – and by the questions present around a possible sharing of sovereignty within the French and Danish States, the impression of the need to redefine national institutional landscapes is given. An impression amplified by the relationship between these statutes to the French and Danish constitutions; not forced, the conformity of the two local statutes is however validated by some arrangements.

1 MA in Law from Panthéon-Assas University, Paris, France

2 In the sense of „particularity".

Úrtak
Grundað á heimastýrini í Føroyum og Ný Kaledonia setir greinin spurnartekin við siðbundnu fatanina, at Frakland og Danmark eru eindarríki. Sjálvstýrini hjá Føroyum og Ný Kaledonia eru grundað í rættiliga víðfevndum lógum, ið tilluta hesum fjarskotnu londum í útriðini av Danmark og Fraklandi so høgt stig av sjálvræði, sum einans statir vanliga hava. Serliga týðandi er tillutanin av lóggevandi valdi til hesi lond, har lóggávuvaldið verður býtt millum sentralt og lokalt stig. Ein í veruleikanum grundleggjandi samveldiskend skipan er úrslitið av hesum sjálvstýrislógum um lokalt vald til Føroyar og Ný Kaledonia. Henda skipan stendur í andsøgn við formligu fatanina hjá Fraklandi og Danmark av sínum londum sum eindarríki. Í veruleikanum eru hesi ríki eitt slag av samveldisríkjum. Hesin veruleiki kemur til sjóndar á tann hátt, at sjálvstýrislógirnar (ella heimastýrislógirnar) hjá hesum báðum fjarskotnu londum samsvara ikki ástøðiliga væl við grundlógina hjá miðveldunum, men kortini virka tær og samsvara við veruleikan.

Introduction

Local self-government has been increasingly valued in recent years; decentralizing reforms have spread and the European Union State members are today decentralized States, all embodying a principle of self-government. Reasons for such a decentralizing process are numerous, but those for which a central State grants more autonomy to some of its territorial entities, or organizes them under a different model are much more varied, as they appear to be fundamentally casuistic. Indeed, these are based on a different local situation with regard to religion, language, culture, history or geography.

Benefiting from a far greater autonomy than the ordinary local authorities of their central State, this observation is valid with regard to the two autonomous entities subject to this study: the Faroe Islands, an autonomous community constituting the Kingdom of Denmark since 1948 and New Caledonia, a *sui generis* local government of the French Republic since 1998. Geographical distance, cultural and linguistic particularity and recent history then materially explain their status.

As far as local self-government is concerned, the Faroe Islands and New Caledonia are therefore particular subjects of study, the degree of autonomy from which these entities benefit is singularly high. Indeed, the two archipelagos have, at first sight, an exorbitant administrative autonomy because of its material extent. The latter is reflected in multiple areas transferred from powers: in addition to local traditionally decentralized powers, taxation, some prerogatives in matters of diplomacy (in particular legation), inheritance and property rights, transfer of competences to the benefit of infra-local levels, the creation of administrative agencies; labor and civil law prerogatives (concerning the status and capacity of

persons and matrimonial property regimes) for New Caledonia; criminal law, the possibility of administering justice and creating courts for the Faroe Islands.[3] In addition to this first aspect, the two local entities have real legislative autonomy in the areas transferred to them. This legislative power is placed in favor of a political organization around an executive and legislative bodies.

It is therefore natural to wonder about the way in which the French and Danish constitutions deal with these two subjects, how this differentiated autonomy translates into organizational matters and what impact can such differentiation have on the unitary character of French States and Danish.

If the doctrine traditionally opposes unitary state and federal state by admitting that the latter is more favorable to local self-government than the former. This supposes then that this constitutional regime, in matters of local self-government, is not the same in the unitary states and in the federal states, in other words that the unitary character or not of the State determines significant differences as for the regime of the local authorities. As Professor Gérard Marcou of the Université Paris 1 Panthéon-Sorbonne rightly recalls,[4] like many other doctrinal positions, this supposition is unfounded, as is the intuition that a federal state would be more decentralized. Indeed, the nature of the relationship between the federal authority and the federated authorities says nothing about the status of local entities within the latter and, by adopting the position of Professor Bertrand Faure of the University of Nantes, the Unitary states are far from uniform in their constitutional organization.

The Faroe Islands and New Caledonia are two significant examples, so that, as far as the French local government is concerned, so much speculation has been expressed about the modification of the unitary character of the Republic following the adoption of the constitutional law of July 20th 1998 about the future of New Caledonia.[5] The latter would then have spread a federal essence on the institutions of the French Republic. Such an assessment can be launched with regard to the constitutional position of the Faroe Islands; on the implicit

3 Article 2 of Danish Law No. 578 of June 24, 2005 relating to the taking over of affairs and fields of activity by the public authorities of the Faroe Islands (abbreviated as Takeover Act) operates a list of fields of competence which may be transferred after negotiations between central and local governments. The administration of justice, including the creation of courts, is one of them.

4 MARCOU G., " Les collectivités locales dans les constitutions des États unitaires en Europe ", Les nouveaux cahiers du Conseil constitutionnel, le Conseil constitutionnel et les collectivités territoriales, n°42, 2014, p.64.

5 French Constitutional law n ° 98-610 of July 20, 1998.

reading of its Constitution and Article 1, the Kingdom of Denmark is a unitary state[6] while studying its territorial and constitutional organization, the question of the federal essence of its institutions can be rightly posed.

So, how does the analog autonomy granted to the Faroe Islands and New Caledonia call into question the unitary character of the French and Danish states?

From some doctrinal positions putting forward a federal spirit of the French State – transposable in this case to that of Denmark – to a more watered-down solution of „*States with regional autonomy*“[7] proposed by Professor Marcou or „*State composed*“ introduced by the Spanish Constitutional Court during a decision in 1983,[8] characterizing together federal states and states which, without being federal, have regions with legislative powers, it can at least be said that these two examples call into question the conception of the unity of their central state. The comparable administrative and political organization of the Faroe Islands and New Caledonia, by which similar autonomy is granted to them is manifested, will first of all be appreciated as it constitutes the material aspect of the response to be provided (I). It will then be a question of bringing out the federal essence emerging from such a constitutional position as well as its consequences on the unitary conception of their central state (II).

I. The exorbitance of organizational statutes imbued with sovereignty

Indeed, the constitutional statutes of the Faroe Islands and New Caledonia enshrine, in their respective legal systems, an exorbitant local organization from ordinary law in matters of local authorities. While, in both Denmark and France, the latter is limited to organizing administrative decentralization – the last reforms of local statutes date from the *NOTRe*[9] Act for France and the *Strukturreformen* („Structural Reform„) entered into force on January 1st, 2007 for Denmark – the statute put in place for the Faroe Islands and New Caledonia, in addition to

6 RAKITSKAYA I., MOLSHAKOV N., “ Democratization of Territorial Constitution: Current Trends and the Constitutional Experience of Denmark “, International Journal of Economics and Business Administration, 2019, Volume VII, n° special 1, p.166.

7 MARCOU G., „ Les collectivités locales dans les constitutions des États unitaires en Europe “, op.cit.

8 Decision, „ sentencia “, STC 76/1983 du 5 août 1983, in MARCOU G., „ Les collectivités locales dans les constitutions des États unitaires en Europe “, Ibid.

9 Loi n° 2015-991 of August, 7th 2015 „ portant nouvelle organisation territoriale de la République “. Known as „NOTRe Act“ (for Nouvelle Organisation Territoriale de la République – Republic’s new territorial organization) is the last voted law about local government in France; it mainly includes provisions regarding inter-municipal cooperation.

establishing a deeper administrative decentralization than ordinary (A), grants real political autonomy for the benefit of the two local authorities (B). By going much further than these attributions, the organizational statutes that interest us, not only take, but sometimes cross the path of sovereign activities.

A.) An extensive administrative decentralization

In application of the above, not only many areas of competences have been transferred to the Faroe Islands and New Caledonia (*1*), but, by the existence of sub-local entities (Faroese *Kommunur* and New Caledonian *Provinces*), these local authorities have their own territorial organization (*2*).

1. A delegation of competence exceeding the limit of sovereign activities

Sovereign activities are heard here like exclusive competence of the State, which found its existence. The power to make the law, issue money, levy taxes, administer justice, security and defense are traditionally presented as part of these functions. They cannot, in principle, be the subject of any delegation. *Id est*, a local authority cannot receive powers which the Constitution recognizes as organs of the State; it cannot therefore intervene in the field which the Constitution reserves for the Head of State or the judicial power, nor be endowed with powers reserved for Parliament. Furthermore, traditionally the only area in which a community can intervene is the regulatory area.

This is therefore found in both French and Danish law. In French law, the distribution of competences is schematically presented as follows: to the cities – „*commune*“ – are allocated proximity competences (primary schools, roads, transportations, waste, culture, sports equipment), to the departments – „*département*“ (intermediate level) – are allocated social competences (social aids, allocations, subventions and middle school – let's note that hospitals are State competence), while the economic planning and development powers fall to the region (and the high schools) – „*region*“. Danish law similarly follows this logic: the Structural Reform of 2007 operates, certainly, a new division of competences but remains classic in the distribution that it carries out; the municipalities („*kommuner*„) exercise powers in the field of education, social action, care and health, transport and management of public services in networks while the regions („*regioner*„) are in charge of major health services (hospital services, psychiatry, health insurance, general practitioners and specialists), social action, regional transport (rail) and economic development.[10]

The areas of competence assigned and the possibilities of action granted to

10 GUIGUE A., “ L'autonomie locale au Danemark “, Observatory on Local Autonomy, La gouvernance locale dans les Etats-membres de l'Union européenne, 2009, pp.20-21.

the Faroe Islands and New Caledonia then go much further, both in terms of the content of these transferred competences (*a*), than those which, although remaining under management of the central state, take advantage of an exorbitant local autonomy (*b*).

a. Advanced competences transfers

The Faroe Islands have been recognized as an integral part of the Kingdom of Denmark since the Constitution of 1849. The Danish law of March, 23rd 1948, Home rule Act, constitutes, with the Danish Constitution of June, 5th 1953 applying „*to all the territories of the Kingdom*" (Art. 1), the basis of relations between the Autonomous Community of Faroe Islands and the Danish central government.[11]

As the Faroese reader knows, in accordance with the 1948 Autonomy Law, competences are divided into two determinants, those being or being able to be transferred to the Faroese authorities (Art. 2 and 3), called „special Faroese affairs" (*færøske særanliggender*) and those not transferable, thus remaining „common affairs" (*fællesanliggender*) under the Danish central authorities (Art. 6). The competences being or that can be transferred are themselves classified according to two categories, summarily called „list A" and „list B". The first concerns those that can be immediately transferred, the second, includes those that can be transferred after further negotiations with the central state.

By this way, the areas remaining under central jurisdiction are listed. Thus, the Danish central authorities are responsible for their residual and exhaustively listed powers. The latter, in addition to those which have not been transferred but which can be transferred, are limited to the Constitution; the Supreme Court; the citizenship; foreign, security and defense policy; monetary and exchange rate policies, which remain common affairs, which cannot by Danish law be transferred (Art. 2 of the *Takeover Act*). Everything else falls under that of the authorities of the Faroe Islands; in a non-exhaustive manner, the supervision and organization of municipalities; economic development, regulation and business law; legal capacity; family and inheritance law; criminal law; health services; Social Protection; Taxation; the maritime domain; education of all levels and of all subjects; energy; *etc.* are immediately transferred. The transferable powers, listed by the 1948 Law and the *Takeover Act*, which have not yet been, are: the police; immigration and border protection; prison administration; judicial administration and the establishment of courts.

The local authorities still have a right of scrutiny over these „common affairs„; as

11 Simply called „Denmark" from now on.

explained respectively by Benoit Raoulx from the University of Caen in France and Jørgen Albæk Jensen from the University of Aarhus in Denmark, a post of adviser to the Danish Prime Minister for „common affairs" concerning the Faroe Islands, attached to the office of representation of the archipelago before the central government, was established in 1968.[12] The Autonomous Community must then be consulted before the introduction in Danish parliament of any law project deposit affecting it exclusively and must also be consulted before implementing regulations affecting it, although not exclusively intended for it. The Community must be consulted but its opinion does not bind the Danish authorities.[13]

About New Caledonia, the preamble to the Noumea Agreement provides that „*the sharing of powers between the State and New Caledonia will mean shared sovereignty*". Like the Faroe Islands and in compliance with the Noumea Agreement, the organic[14] legislator organized the distribution of powers in three categories: those transferred in the wake of the Agreement; those transferred during the second and third mandates of the *Congress* – ie between 2004 and 2014 – for several competences listed in the organic law; those to be transferred at the request of *Congress* from its third mandate, i.e from 2009.[15] Article 77 of the French Constitution reflects the irreversibility of the transfer of powers from the State to the institutions of New Caledonia.

It is expected that the New Caledonian institutions will exercise all of the powers considered to be non-sovereign. Only the accession to independence of the archipelago, if it was decided by referendum, would entail the transfer of the sovereign functions. The constitutional statutes providing for the position of the Faroe Islands in the Kingdom of Denmark therefore make no mention of such an exclusion. Although relatively exact, to date, in fact, some royal activities see their transfer to the local authorities possible subject to new negotiations. If these have not yet been transferred, the list of competences that cannot be transferred is much narrower.

12 RAOULX B., " Autonomie politique et changement social dans une société halieutique: le cas des îles Féroé ", Norois, n°146, 1990, p.135.

13 ALBÆK JENSEN J., " The position of Greenland and the Faroe Islands within the Danish Realm ", op.cit., p.173.

14 In French constitutional Law, two types of laws can be highlighted: „ordinary" laws intervene in the areas of the law, defined in the article 34 of the Constitution and are adopted after the parliamentary process; „organic" laws (article 46 of the Constitution) are generally intended to specify the organization and functioning of public authorities in application of articles of the Constitution. Thus, the parliamentary process is the same, but the covered subjects are differents.

15 Organic law of March 19th, 1999 relating to New Caledonia.

Thus, the 1999 organic law is the counterpart of the law on the autonomy of the Faroe Islands of 1948 in that it constitutes, with the Constitution of 1958, the foundation of relations between local New Caledonian authorities and French central authorities. It has the areas of competence of New Caledonia (Art. 22) and public establishments transferred to local authorities (Art. 23). These powers, which are not yet exhaustive, include: taxation; labor law; social protection, hygiene, public health (including hospitals) and border health control; customary civil status; foreign trade and the customs regime; the regulation and exercise of the rights to explore, exploit, manage and conserve natural, biological and non-biological resources; transport; insurance law; the law of economic concentration; the guiding principles of town planning law; energy; the regulation of port and airport equipment; primary education; tobacco trade regulation.

It also has the powers remaining in the hands of the French State (Art. 21), in more detail than what is provided by the various laws presented applying to the Faroe Islands. Twenty-eight points are then listed, divided into three parts. Pursuant to article 26 of the organic law, the powers mentioned in II and III of this article are intended to be transferred. A „*Lois du pays*"[16] will decide their purpose and the timetable for the transfer. Some of competences have been transferred in accordance with this procedure, like maritime and air traffic safety; civil law; commercial law.[17] Thus, under the Noumea Agreement and the 1999 Organic Law, the State is a withdrawing actor which is gradually transferring its powers to New Caledonian institutions. The situation of strong local autonomy legally confines it to the exercise of only sovereign powers: currency, security, justice, diplomacy (although, like the Faroe Islands and as will be treated in the next point, this is to be qualified) and defense. However, the State does not necessarily act alone in the exercise of its powers, just as, conversely, the New Caledonian institutions have recourse to it for the exercise of their own powers, the State is also bound to involve the New Caledonian authorities in the exercise of some of its powers.[18] The government of New Caledonia must therefore be informed and consulted on several points: like about regulations relating to the entry and stay of foreigners, or about secondary education programs.

These examples show that the exercise of the respective powers of the New

16 Literally „country's law", this specific term refers to laws voted by the New Caledonian Congress.

17 Sénat, Commission des lois, Rapport n°104, Nouvelle-Calédonie : continuer à avancer vers le destin commun, presented by Sophie JOISSAINS, Jean-Pierre SUEUR et Catherine TASCA, November, 19th, 2014, p.24.

18 Sénat, Commission des lois, Rapport n°104, op.cit., p.20.

Caledonian state and local authorities necessarily implies and close collaboration. These relations are reminiscent of the model of the associated State.

b. Participation to diplomatic activity and a different currency from the national territory: competences not transferred in the service of exorbitant autonomy

In fact, alongside the powers transferred by the two central States presented in the previous points, there are certain competences which, although remaining under the central jurisdiction, act in the direction of a more advanced differentiation. This is the case of money and diplomacy: two competences that have not been transferred – neither to the Faroe Islands, nor to New Caledonia – but which are all the same differentiated from the rest of the national territory. The participation of these two entities in diplomatic activity and their use of a different currency from that the rest of the national territory uses, helps to broaden the territorial differentiation they benefit. This is first of all the case of external missions: the special status and the commercial structure of the two local communities justify that they may not immediately have the same interests and views as their central State in international cooperation or in the conclusion bilateral or multilateral agreements with other states.

In this, a third law, of importance, voted by the Danish Parliament, for the benefit of the Faroe Islands should be noted: Law No. 579 of June 25th, 2005 known as *Foreign Policy Act*[19]. The latter is particularly important because it comes to have local prerogatives in matters of conclusion of international treaties and legation, sovereign domains by their essence. The act grants the government of the Faroe Islands the right to negotiate and conclude, on behalf of the Kingdom, international agreements with foreign states and international organizations on matters within its jurisdiction. It also regulates the membership of the local entity in international organizations authorizing it to become a member or associate member of full international organizations. Ultimately, although it was already possible by the 1948 *Home Rule Act* Art.8, the law seems to be positive towards some enhanced Faroese position concerning the diplomatic area, and more precisely about legation. The archipelago can send delegates to Danish diplomatic missions, representing its interests in areas falling within its competence. Representative offices have been opened at the European Union, in Moscow and London within the Danish Embassy and in Reykjavik by an antenna physically detached from the Embassy.

A Participation in diplomatic activity reinforced by the signing of the Fámjin Declaration between the local and central governments devoting explicit and

19 Lov om Færøernes landsstyres indgåelse af folkeretlige aftaler nr 579 af 24/06/2006.

full participation of the Faroe Islands in the Kingdom's foreign and security policy. The latter must then be invited to international negotiations on matters of interest to them or having an impact on them. Local authorities must also be consulted before the ratification of any international agreement resulting from the negotiations in which they have been involved and, more generally, of any agreement concerning them. The rest of this consultation falls under related jurisdiction for the central authorities.

Like the Faroe Islands, participations of New Caledonia in the diplomatic area appears to partially enter into international relations with, however, the same required condition: authorization and State control. Indeed, only it has international personality.

New Caledonian institutions can thus intervene in the field of diplomacy area, in order to promote regional cooperation. In application of the organic law of March 19, 1999, the President of the Government of New Caledonia may be authorized by the *Congress* to negotiate and sign international agreements with one or more States, territories or regional organizations of the Pacific and with organizations regional bodies depending on the specialized agencies of the United Nations, in compliance with the international commitments taken by central State. The government of New Caledonia also can be member of the French delegation participating in negotiations on subjects falling within the competence of the French State.

Pursuant to the organic law, New Caledonia may have representation nearby Pacific States or territories. It thus voluntarily wished to have delegated staff to neighboring States and offices were opened in New Zealand, Australia, Vanuatu, Papua New Guinea and Fiji Islands. This decision was formalized in an agreement signed with the State in January 2012: a delegate from New Caledonia, enjoying the protection and facilities of diplomatic registered staff, is placed under the French ambassador authority, accredited to the authorities of these five States. In addition, New Caledonia may, with the agreement of the central authorities, be member, associate member or observer of international organizations. By this way New Caledonia is member of the Pacific Community[20] and joined the Pacific Islands Forum[21].

The use of a different currency than that used on the continent is also a non-

20 An international development aid organization bringing together all of the Pacific States, which has its headquarters in Noumea, New Caledonia.

21 An international organization with a regional vocation of cooperation, in particular, economic.

transferred competence contributing to a larger differentiation. Indeed, both the Pacific Franc, used in New Caledonia, French Polynesia and Wallis and Futuna, as well as the Faroese Crown (*føroysk Króna*) are not managed by the administration of local authorities: the first is managed by the *Institut d'Emission d'Outre-mer*, a French central bank (*Banque de France*) division, which acts as a central bank for communities whose currency is the Pacific Franc. The Crown is managed by the Danish central bank (*Danmarks Nationalbank*), at the same time as the Danish Crown. If the Faroe Islands have a „governmental bank" (*Landsbanki Føroya*), it is only a government financial institution which manages the liquidity and credit facilities of the territory while ensuring financial stability.

2. A singular infra-local organization

The internal administrative organization, infra-local, is also specific to the two territorial entities studied. However, it is perhaps on this point that the statutes of the two entities differ most from each other; the internal administrative organization of the Faroe Islands is considered by Danish law as a „special affair" falling within the competence of the latter (*a*), while that of the New Caledonian provinces is still a matter for the French State (*b*).

a. In the Faroe Islands, a differentiated internal organization

There are two sub-local levels to note in the Faroe Islands, one dismemberment from the Danish central administration and the other „decentralized". The one of least interest in this study dealing with local self-government is the county (*sýsla*): three in number, it constitutes a central State police subdivision.[22] The level, however, loses its relevance; while it was established at a time when transport connections were lacking between the various islands of the archipelago, 85% of the population is today connected to the capital and the High Commission,[23] and the archipelago's surface does not *a priori* require such territorial subdivisions from central administration.

The municipalities, decentralized level or rather, in this case, „sub-localized", are more interesting in that their organization and competences are a *Løgting* competence. The main laws in matters of municipal organization are the Faroese

22 French law distinguishes central State administration local dismemberments – called „déconcentré" level – from local government administration – called „décentralisé (decentralized)" level. To illustrate it in Denmark; the kommuner is a „decentralized" level while politikreds or former statsforvaltning are „déconcentré" levels.

23 The main role in practice of the sýslamaður (sheriff), in addition to its prerogatives in matters of judicial police, is to be found in the regulation of the traditional and annual cetacean hunting in force in the archipelago (Grindadráp). The sýslamaður defines which spotted group of pilot whales can be killed and in which fjord.

law n°87 of May 17th, 2000 establishing municipal councils[24] and that n°20 of April 7th, 2014,[25] latest regulation of municipal powers dated. The Faroese municipalities (*kommunur*) are to be appreciated in the sense of „*commune*“ – municipality – in French law, with the factual difference that all of them are made up of different settlements (*bygd*) amalgamated, thus constituting what French law calls „*Commune nouvelle*“[26] – „new town“. Indeed, like the French local authorities law, Faroese law has the possibility for municipalities to amalgamate with each other.[27]

Thus, as stated, the organization, rules of competence, functioning and acts review are Faroese authorities competences.[28] In a very similar distribution to that in France, the mayor (*borgarstjóri*) summons the members, prepares and animates the sessions of the municipal council (*kommunustýri*), which deliberates within the framework of its powers. The mayor (*maire* in French) then implements the decisions taken by the municipal council (*conseil municipal* in French).[29] The only notable difference with the French system is the presence of standing committees (*millumtinganevnd*) within the municipal council,[30] composed by municipal council members elected by their peers. In a municipal operating system borrowed from that of Denmark and in a perspective close to that surrounding the institution of French parliamentary commissions, the deliberations of the municipal council are prepared and controlled in committees thus exercising preparatory and advisory functions for the municipal council: they discuss the projects presented by the mayor and submit recommendations to the deliberative body.

In both Faroe Islands and New Caledonia, municipalities competences are proximity competences such as: roads and public lighting; drinking water supply; sanitation; libraries; urban planning; construction and management of sports grounds and sports halls; the management and operation of the public urban transport service; primary education; waste management.

24 Løgtingslóg no. 87 frá 17/05/2000 um kommunustýri (loi connue sous l’appellation de „ Kommunustýrislógin „).

25 Løgtingslóg no. 20 frá 7/04/2014 um kommunalt samstarv um heimatænastu, eldrarøkt v.m.

26 A „Commune nouvelle“ in French local authority law is a city constituted by several others towns amalgamated.

27 Løgtingslóg nr. 77 frá 8/05/2001 Um Sjálvbodnar Kommunusamanleggingar.

28 „ List A “, Home rule Act of the Faroe Islands.

29 2019 Report (Beretning 2019), Danish High-Commissionner for the Faroe Islands (Rigsombudsmanden på Færøerne), p.35

30 Løgtingslóg no. 57 frá 30/04/018 um broyting í løgtingslóg um kommunustýri.

b. New Caledonian Provinces: sui generis institutions

New Caledonia is made up, apart from the municipal level, of three *Provinces*. A differentiation in the territorial organization which dates from 1988 and the Matignon Agreements between the French State and the New Caledonian political parties, loyalists and separatists. This administrative division acts as a consensus of the sharing of power between loyalists and separatists; the latter had come to power in the North and the Loyalty Islands, while the loyalists ruled Noumea and the South Province.[31] The specificity of New Caledonian institutions is then expressed; the provincial level is unparalleled in the French Republic.

But whose organization remains, in contrast to Faroese municipalities, under the jurisdiction of the State. This is what the Constitutional Council stated in its decisions of March, 15th 1999[32]: the assemblies of provinces are among the institutions of New Caledonia and their rules of organization and operation fall under the State competence. The Constitutional Council will also take care to confirm the *sui generis* character of the Provinces; the latter, although constituting local authorities, are not governed by article 72-2 – on ordinary local governments – but title XIII of the Constitution, specially dedicated to them.[33] The Provinces of New Caledonia are therefore local authorities, self-governed by councils elected by direct universal suffrage.[34] Consequently, and as the Council will specify it in *QPC*,[35] the principle of self-government, like the provisions of title XII, are extended to the provinces of New Caledonia by the organic law.[36] The Matignon agreements, then the Noumea agreement, gave these *Provinces* notable powers. They thus have ordinary law jurisdiction; article 20 of the organic law provides that each *province* is competent in all matters which are not devolved to the State

31 PITOISET A., Les trois provinces de la Nouvelle-Calédonie, Maison de la Nouvelle-Calédonie, 2011, p.6.

32 Conseil constitutionnel, 15 mars 1999, n°99-409 DC et 99-410 DC, Loi relative à la Nouvelle-Calédonie et Loi organique relative à la Nouvelle-Calédonie

33 Conseil constitutionnel, 29 juillet 2004, n° 2004-500 DC, Loi organique relative à l'autonomie financière des collectivités territoriales.

34 Article 3, organic law n°99-209 du 19 mars 1999.

35 „Question prioritaire de constitutionalité“ is a means of reviewing the constitutionality of laws after they come into force – thus completing the a priori review operated once the law has been voted but before its entry into force.

36 Conseil constitutionnel, 25 avril 2014, n°2014-392 QPC, Province Sud de la Nouvelle-Calédonie ; The principle of self-government applies to all French local governments, ordinary or exorbitant. This principle is mentioned by the article 72 of the Constitution. In New-Caledonia, it applies to municipalities (considered by law as ordinary municipalities ans thus regulated in the same way as the others) and it also applies to Provinces by operation of organic law.

or to New Caledonia or the municipalities. The provinces thus exercise first-rate powers for New Caledonia, whether – for example – in matters of primary public education, environment, or even social action (free medical aid, social aid for childhood, medico-social centers).

Not to be mistaken with regard to the institutional composition of the *Provinces* – an elected deliberative assembly, itself electing from among its members, an executive represented by the president of the assembly – the assimilation ends here. Elected by proportional representation at the highest average, the members number of each provincial assembly varies according to the number of inhabitants populating the territory. The real differentiation appears with the electorate; according to the organic law, only citizens of New Caledonia can vote and be eligible for these elections, as well as people of French nationality who, notably,[37] justify a ten-year uninterrupted residence at the date of the election.

Besides a deep administrative decentralization and a differentiation in the territorial organization, the *sui generis* character of these two local communities – Faroe Islands and New-Caledonia – is appreciated mainly with regard to the political autonomy devoted to it.

B. The consecration of a political autonomy

Whether it is with respect to the legislative component of the transferred competences to the Faroese and New Caledonian authorities (*1*), the political form of the institutions of the latter (*2*), the questioning of the unitary state character here takes a completely different turn: in addition to the transferred competences dissimilarity, it is by the institutional remoteness of these communities – compared to other local branches of common law – that the motley character of the French and Danish States is formed more clearly.

1. A legislative decentralization

Thus, it is with regard to the legislative power of the local authorities subject to the study that their institutional differentiation is noticed. Although it should be noted that a political form of local institutions is not specific to the two communities studied (Greenland has similar institutions within the Kingdom of Denmark, just like French Polynesia which also has institutions with political form), they are placed in contrast to French and Danish ordinary local authorities who do not have any legislative power (a). The Faroe Islands and New Caledonia can legislate in matters within their competence, in total contrast with ordinary local authorities (b).

37 More details in the Point 2.2.1, Nouméa Agreement.

a. The impossibility for French and Danish ordinary local governments to legislate

On the question of local legislative power, the French and Danish states have a very similar answer: local governments – French „*collectivités territoriales*“ and Danish „*kommuner*“ and „*regioner*“[38] – do not have an autonomous normative power. The issue here is to assess a power that would be directly exercised under the Constitution, on an equal footing with that of Parliament. In both States the principle of self-government must be exercised while respecting the central legislator powers; local governments must act within the limits of applicable law, but not instead of the legislator. In the two States, the question of the exercise of the legislative power by local government is quickly defused by pointing out that, in a unitary State, the legislative power cannot be divided.[39]

In France, in addition to the indivisibility of the Republic enshrined in article 1 of the Constitution, its article 3 sets out the uniqueness of sovereignty belonging to the people as a whole and not to a section of it. Here is reproduced the article 3 of the Declaration of the rights of the man and the citizen of 1789, according to which „*the principle of all sovereignty resides essentially in the Nation. No body, no individual may exercise authority which does not expressly emanate from it*“. Except in cases expressly provided for in the constitutional text, the delegation of legislative power is therefore prohibited. Decentralization cannot go so far as to call into question the indivisibility of the Republic.[40] The Constitutional Council refusal to assign legislative powers to local authorities is then recurrent; for example, in its decision n ° 91-290 of May 9th, 1991,[41] the Constitutional Council had admitted the conformity to the Constitution of the competences recognized to the Assembly and the Executive Council of Corsica,[42] on condition that they were not „*granted competences falling within the scope of the law*“. There is no

38 Sénat, Etude de législation comparée n°286, “ Le pouvoir normatif des collectivités territoriales dans les Etats unitaires “, Recueil des notes de synthèse de juillet à octobre 2018, décembre 2018, p.42.

39 BROSSET E., “ L’impossibilité pour les collectivités territoriales françaises d’exercer le pouvoir législatif à l’épreuve de la révision constitutionnelle sur l’organisation décentralisée de la République “, Revue française de droit constitutionnel, n°60, 2004, p. 695.

40 CHRISTNACHT A., „ Droit des outre-mer : définitions, principes, orientations “, Jurisclasseur administratif, fascicule 130-10, LexisNexis, 2018, p.35.

41 Conseil constitutionnel, 9 mai 1991, n°91-290 DC, Loi portant statut de la collectivité territoriale de Corse.

42 A certain differentiation is granted to Corsica but the interpretation which the Constitutional Council makes of it completely empties these provisions of their meaning.

doubt that „*the local government cannot be endowed with competences which the Constitution reserves to the Parliament*“.[43] In terms of normative powers, those granted to ordinary local governments are regulatory,[44] residual and subsidiary.

The links between legislative power and local governments, whether in France or in Denmark, would be unambiguous: the legislative power would determine the status of local governments, but in no case would the latter exercise any legislative power. However, the legislative prerogatives granted to the Faroe Islands and New Caledonia, whatever the given qualification come to be seen as further evidence of the „*shift in the center of gravity in terms of self-government and, at the same time, to a transformation of the French state form which would no longer be decentralized but „federal“ or at least „autonomous“ or „a-centralized*“.[45] This changeover has already begun, for France, with the 2003 constitutional revision; the *sui generis* status of New Caledonia only accentuates in this sense.[46]

b. The operated division of legislative power: the case of the Løgtingslógir and the Lois du pays

Indeed, the main purpose of the adoption of the Home Rule Act for the Faroe Islands in 1948, was to transfer competences and thus responsibilities, hitherto incumbent on the Danish authorities, to the Faroese authorities. As a result of this, the functioning of *Løgting* underwent a radical change:[47] it becomes an independent legislative body, with exclusive legislative power on matters within its competence.

Article 4 of the Home rule Act expressly provides that local government has

43 BROSSET E., “ L’impossibilité pour les collectivités territoriales françaises d’exercer le pouvoir législatif à l’épreuve de la révision constitutionnelle sur l’organisation décentralisée de la République “, op.cit., p.698.

44 Only acts passed by Parliament are „legislative“, normative acts taken by any other authority, central or local, are „regulatory“.

45 BROSSET E., “ L’impossibilité pour les collectivités territoriales françaises d’exercer le pouvoir législatif à l’épreuve de la révision constitutionnelle sur l’organisation décentralisée de la République “, op.cit., p.700.

46 See on this subject BROSSET E., “ L’impossibilité pour les collectivités territoriales françaises d’exercer le pouvoir législatif à l’épreuve de la révision constitutionnelle sur l’organisation décentralisée de la République “, op.cit.

47 ALBÆK JENSEN J., “ The position of Greenland and the Faroe Islands within the Danish Realm “, op.cit., p.173.

administrative and legislative power[48] with regard to „special cases", falling within its competence. As Professor Jørgen Albæk Jensen of the University of Aarhus in Denmark notes, this power distinguishes in particular the Faroese self-government regime other forms of local government in Denmark. It is not only exclusive but autonomous: the decisions of the *Løgting* on matters within its competence have the same legal effects as any Danish law[49] governing ordinary law and „common affairs". The latter, however, have no legitimacy or legal basis for intervening in „special cases".[50]

The absence of a legality review carried out by the Danish High Commissioner, on acts passed by the *Løgting*, is another proof of the singular autonomy enjoyed by Faroe Islands, in contrast to that representing the French State in Noumea. Indeed, the legality of acts passed by the municipalities towards Faroese law, is review by the Faroese Minister in charge of municipal affairs, while the control relating to the financial and budgetary situation of each municipality is carried out by the Minister in charge of finance, in a procedure comparable to French law with regard to the transfer of accounting and budgetary documents once their adoption has been ratified.[51] There is no Faroese government representative in the municipalities, or even in the *sýsla*; thus, instead of having this control carried out by a government's representative, it is carried out by the government itself. [52] Therefore, the High Commissioner (*Rigsombudsmanden*) does not carry out such a monitoring mission. It is not entirely foreign to the legislative process, however; he has a rightful place in *Løgting* where he takes part in debates and negotiations in matters of „common affairs" without, however, enjoying the right to vote.

The Faroese government autonomy in matters within its competence is thus paroxysmal; first, the scope its competences is singularly broad, then it also has legislative power, equal to that of the Danish legislature. In addition, its

48 Article, Home rule Act: " For de Omraader, der henhører under Hjemmestyret, har dette den lovgivende og administrative Myndighed. De af Lagtinget vedtagne og af Landsstyrets Formand stadfæstede Love benævnes Lagtingslove ".

49 ALBÆK JENSEN J., " The position of Greenland and the Faroe Islands within the Danish Realm ", op.cit., p.177.

50 SØLVARÁ H.A., „ Direct Democracy in the Faroe Islands. A comparative study of referendums in a Faroese context. / Beinleiðis fólkaræði í Føroyum. Ein samanberandi rannsókn av fólkaatkvøðum í einum føroyskum høpi ", Fróðskaparrit – Faroese Scientific Journal, Vol.63, 2017, p.54.

51 2019 Rapport, Danish High Commissioner for the Faroe Islands, op.cit., p.36.

52 The Ministry does not control the appropriateness of these acts, but only monitors compliance with the law. The municipalities self-government is thus guaranteed.

compliance with the Danish legislative *corpus* in respect of the Faroe Islands is unreviewed; the symbolic aspect of the absence of any central State presence is particularly strong.

The territorial and institutional differentiation enjoyed by New Caledonia is obviously characterized by the existence of the *Lois du Pays* voted by the *Congress of New Caledonia*, but also by the principle of legislative speciality, laid down in article 6-2 of the organic law 1999: acts passed, and laws voted by French parliament are applicable in New-Caledonia only when expressly mentioned. Legislative or regulatory specific texts specifically intended for the New-Caledonia may also intervene, as exception to the general and uniform nature of the law. Indeed, granting real legislative power to New Caledonia says a lot about the archipelago 's institutional position: that has necessitated a Constitution revision as it is in contradiction with the notion of sovereignty indivisibility.[53] That's an important concession made by the Republic: legislating is the first sign of sovereignty.[54]

While the singular nature of the New Caledonia's system of government, enshrined in Title XIII of the Constitution, is remarkable in that it allows local institutions to intervene in the field of the law, this legislative power is, however, less easy to demonstrate than in the case of the Faroe Islands. Indeed, in application of article 99 of the organic law of 1999, when acts adopted by the *Congress of New Caledonia* are adopted in matters falling within its jurisdiction, they are called *Lois du pays*. The Constitutional Council is competent to review these acts (article 77 of the Constitution) „*in the manner of a federal judge*" as Nicolas Clinchamps of the University Paris 13 says.[55] It examines whether the content of the *Lois du pays* are in conformity with the Constitution and whether they do not undermine organic law provisions relating to the distribution of competences in New Caledonia. *Lois du pays* may also be the subject of a QPC.[56] It reviews *Lois du pays* in the light of the Constitution and the Nouméa Agreement and its implementations, which takes on the role of an almost fundamental norm for

53 ADRIAN Jeanne, La Nouvelle-Calédonie à l'épreuve du partage de souveraineté, in LABORATOIRE DE RECHERCHE JURIDIQUE ET ECONOMIQUE, L'avenir institutionnel de la Nouvelle-Calédonie, Nouméa, Presses universitaires de la Nouvelle-Calédonie, 2017, p.174.

54 BODIN J., Les six livres de la République, 1576.

55 CLINCHAMPS N., „ Le Conseil constitutionnel face à l'autonomie de la Nouvelle-Calédonie ", dans La Constitution et l'outre-mer, Les nouveaux cahiers du Conseil constitutionnel, n°35, 2012, p.62.

56 Conseil constitutionnel, 3 décembre 2009, n°2009-595 DC, Loi organique relative à l'application de l'article 61-1 de la Constitution.

New Caledonia, alongside the French Constitution.This pushes the assimilation of the *Lois du pays* to national laws. There is a legislative power of its own and this constitutes an attack on the unity of normative power.[57]

They do not appear to be purely regulatory acts because, in addition to their name (*Lois*-law), the competence of the Constitutional Council is provided for by the Constitution.[58] The Constitutional Council has considered them as legislative provisions.[59] However, they are not classic legislative acts, insofar as they are subjected to strong constraints on the part of the State: they must be submitted for prior opinion of the *Conseil d'Etat*[60] (this does not bind the competence of the *Congress*[61]), the High Commissioner may request a new deliberation, they must be promulgated by Constitutional Council, with the countersignature of the president of the *government*. The debate is closed by the organic legislator: in its article 107, the organic law of 1999 expressly provides that the *Lois du Pays* have the force of law. This only concerns New-Caledonia; *Lois du Pays* of French Polynesia remain regulatory acts[62] – but still constitute an attack on the indivisibility of sovereignty.[63]

The legality review of the *Lois du pays* is entrusted to the High Commissioner in application of article 204 of the organic law. Thus, while the absence of legality review over laws voted by the Parliament of Faroe Islands is a convincing sign of the exorbitant nature of their constitutional position and of the autonomy that is consequently attached to it, the existence, *a contrario*, of such a review

57 VERPEAUX M., „ L'unité et la diversité dans la République ", Les Nouveaux Cahiers du Conseil constitutionnel, n° 42, 2014, p. 14.

58 JUSSIAUME A., „ Droit constitutionnel local ", op.cit., p.40.

59 Conseil constitutionnel, 3 décembre 2009, n°2009-595 DC, Loi organique relative à l'application de l'article 61-1 de la Constitution.

60 „Conseil d'Etat" is the summit jurisdiction of the administrative order and the State council structure. The French jurisdictional organization is divided between the judiciary (ordinary) and the administrative order. The summit jurisdiction of the judiciary order is the „Cour de Cassation".
I know Denmark doesn't have this division.

61 Conseil constitutionnel, 27 février 2015, n°2014-5 LP, Loi du pays portant création de centimes additionnels sur la taxe sur les jeux, spectacles et divertissements au profit des provinces.

62 Conseil constitutionnel, 12 février 2004, n°2004-490 DC, Loi organique portant statut d'autonomie de la Polynésie française.

63 GRÜNDLER T., „ La République française, une et indivisible ? ", Revue du Droit Public, LGDJ, 2007, p.457.

in New Caledonia is a sign of a stronger French presence and influence in New Caledonia than the Danish presence in the Faroe Islands.

2) A transfer of political power to local governments

The transfer of legislative power over matters within the jurisdiction of the Faroe Islands and New Caledonia logically goes hand in hand with a political dimension of local institutions. The possibility of legislating in the hands of political entities gives rise to what the Nouméa Accord calls – about New-Caledonia but this can be extended to Faroe Islands within the Kingdom of Denmark – a „*shared sovereignty*“[64] between the *sui generis* local government and its central State[65]: local and central popular sovereignty coexist within the same State. A very dissimilar organization to that of other ordinary local governments with which no comparison is possible.

The internal political form of Faroe Islands is to be found in the Faroese law of July 26, 1994[66] which both organizes and recalls the institutional distribution in a quite classical form of a parliamentary system which it is not worth going into at any length. That's is the Faroese frame of government.

The organization of the Danish *regioner* – local level to which the Faroe Islands could have been assimilated – is after all quite classic, joining on this point the organization of the French regions or departments; a regional council deliberating within the scope of its powers, at the head of which is a president (*formand*) elected by its members. The only notable difference remaining, again here, the existence of committees.[67] The form of the institutions can be compared (a deliberative assembly and a president of assembly) but, by the political dimension by being attached, the bottom is drastically distinct from it and the exorbitant character of the position of the archipelago within the Kingdom is brand. Thus, the legislative power is shared between the *Løgting* – unicameral Parliament built on the bases of the *Thing* of the societies of Northern Europe in which the freemen of a community met in order to legislate, to elect heads of clans or to judge according to the laws in force – and the Prime Minister (*Løgmaður*). The government (*Landsstýri*ð), composed of the Prime Minister and at least

64 Nouméa Agreement, signed on May, 5th 1998.

65 CLINCHAMPS N., „ Le Conseil constitutionnel face à l'autonomie de la Nouvelle-Calédonie ", op.cit., p.62.

66 Løgtingslóg no. 103 frá 26/07/1994 um Stýrisskipan Føroya í sermálum (better known as „ Parliamentary Act „).

67 GUIGUE A., " L'autonomie locale au Danemark ", op.cit., p.16.

two ministers,[68] has executive power. The judiciary, as indicated in advance and although possibly transferable,[69] belongs to the Danish judicial system.

The current organisation of New Caledonian institutions is the result of two founding acts: the Matignon Accords and the Nouméa Accord, signed in 1998. The institutional name of the Faroe Islands is not debated in Denmark – an „Autonomous Community“ (*selvstyrende Folkesamfund*) is expressly designated by the Home Rule Act – but that of New Caledonia is more hesitant. Overseas territories are divided into two categories: „overseas departments and regions“ – *DROM* (article 73 of the Constitution) and other overseas collectivities – *COM* (article 74 of the Constitution). This list does not include New Caledonia. The Council of State has thus affirmed that New Caledonia is not governed by title XII of the Constitution relating to ordinary local governments but by title XIII which is specifically devoted to New-Caledonia,[70] sign of the exceptional nature of its position.[71] The Constitutional Council case law reflects these hesitations.[72] Some decisions seem to take the side of attaching New Caledonia to the territorial communities; in 2009, for example.[73] While other decisions suggest that the Constitutional Council is siding with a specificity that places New Caledonia outside the sphere of ordinary local government; in a 2003 decision, it implicitly excluded New Caledonia from provisions concerning ordinary local government.[74]

It is therefore through the existence of a specific title to New Caledonia, symbol of its autonomy, that it can be qualified as *sui generis*.

The *New Caledonian Government* is a specific form of governance based on proportional representation of the political groups elected to the *Congress of New Caledonia*. Because of this pluralist and collegial composition, inherited –

68 Article 27 de la loi danoise n°103 du 26 juillet 1994 sur le gouvernement des Iles Féroé.

69 V.Supra, Lov om de færøske myndigheders overtagelse af sager og sagsområder nr 578 af 24/06/2005.

70 Conseil d’Etat, 13 décembre 2006, req. n°279923, Genelle.

71 FABERON J-Y., „ Nouvelle-Calédonie et Polynésie française : des autonomies différentes “, Revue française de droit constitutionnel, n° 68, 2006, p. 692.

72 On this subject : MAGNON X., „ Le droit constitutionnel des collectivités “ territoriales “ d’exception : la Nouvelle-Calédonie et Mayotte devant le Conseil constitutionnel “, Revue française de droit constitutionnel, n° 81, 2010, p. 130-132.

73 Conseil constitutionnel, 30 juillet 2009, n° 2009-587 DC, Loi organique relative à l’évolution institutionnelle de la Nouvelle-Calédonie et à la départementalisation de Mayotte.

74 Conseil constitutionnel, 30 juillet 2003, n° 2003-482 DC, Loi organique relative au référendum local.

as Professor Jean-Yves Faberon of the University of Montpellier notes[75] – from the Oceanian palaver (the „Kanak palaver“ is mentioned by the author[76]), the government favours consensus-building in its operations, failing which majority democracy applies. In the event of a crisis, the minority cannot impose itself on the majority, and in the event of a fault, the central state arbitrates. The government is elected by *Congress* and remains in office until the expiry of the latter's term of office. Before electing the *Government*, *Congress* shall determine the number of its members. The members of the *Government* shall elect their President and Vice-President. The *Congress*, New Caledonia's deliberative assembly, is formed by a meeting of some of the elected members of the three provincial assemblies. It shares the initiative for texts with the *Government*, which it elects and controls

The Matignon Agreement also created a customary advisory council, which became the *customary Senate* with the agreement of Noumea. It is composed of 16 members from New Caledonia's eight customary areas appointed by the customary councils of the areas in accordance with customary practice. The *Customary Senate* issues advisory opinions on *Lois du Pays* draft relating to New Caledonia's identity symbols, customary civil status, the customary land regime, the customary palaver regime, the boundaries of customary areas and the procedures for electing the *Customary Senate* and customary councils. It is obligatorily consulted on draft bills or proposals for deliberations relating to Kanak identity.[77]

The manifestation of such a fundamentally *sui generis* administrative and legislative autonomy granted to the Faroese and New Caledonian authorities, in the sense that it singularly characterizes them within their central State, has a profound effect on the character and unitary conception of the latter. It thus calls them into question, or at least, puts them into perspective, by the federal essence that it brings out of the constitutional positions of the two local governments.

II. The federal essence of the constitutional status of the Faroe Islands and New Caledonia or relative conceptions of the unitary state

The singularity of the constitutional statutes characterizing and governing the organization and competences of these two local authorities then actively participates in calling into question the unitary character of States. The „unity“ here presumed seems artificial in practice. By the exorbitant position of the two

75 In PITOISET A., Les institutions de la Nouvelle-Calédonie, Maison de la Nouvelle-Calédonie, 2011, p.25.

76 MOKADDEM H., “ Conflits et négociations en Océanie. Analyse d'un cas singulier : l'accord de Nouméa de 1998 “, Négociations, n° 20, 2013, p. 140.

77 PITOISET A., Les institutions de la Nouvelle-Calédonie, op.cit., p.28.

local authorities, attacking central state Unitarianism, the questions surrounding a possible shared sovereignty within the French and Danish States, call for the need to redefine the national institutional landscapes (B). the impression is amplified by the relationship of these statutes to the French and Danish constitutions; although not forced, the conformity of the local statutes is nevertheless validated by some arrangements (A).

A. A constitutional position beyond the ordinary law with an accommodated conformity

Indeed: if the Home Rule Act seems to conform to the Danish Constitution by means of a few lapses by the national summit jurisdiction (*1*), the conformity to the French Constitution of the organic law carrying statute of New Caledonia has been legally imposed from above (*2*).

1. The Danish law on the autonomy of the Faroe Islands conforms to the Constitution

Article 1 of the Danish Constitution does not guarantee that the rule of law should be the same in all the Kingdom; to quote Professor Jørgen Albæk Jensen's analysis,[78] its purpose is only to establish that the Constitution, in itself is applicable throughout the Kingdom. By syllogism, it does not prevent certain competences transferred to certain local authorities from being different from those transferred to ordinary local governments. The position of the Faroe Islands seems, thus, entirely justified. Even if Article 1 does not in itself prevent a far-reaching transfer of competences to local governments, certain conditions must be met in order not to fall into unconstitutionality.[79] Firstly, the purpose of the transfer must be limited and specified – which prohibits transfers of too broad or imprecise competences – and, secondly, it must not be final – the Danish legislator may reserve it.

With regard to the limitation and precision of the transfer's purpose and as mentioned by Professor Albæk Jensen, the Danish constitutional tradition, in practice, is to accept rather broad and vague descriptions in the content of the transferred competences. Thus, as the successively transferred areas of competence are expressly enumerated by laws and considering the special situation of the

78 ALBÆK JENSEN J., “ The position of Greenland and the Faroe Islands within the Danish Realm “, op.cit., p.175.

79 Ibid.

archipelago, mentioned in the preamble to the Autonomy Act of 1948,[80] it would seem that there are no problems of constitutional conformity. The question of the transfers revocability is more sensitive. What the legislator does, he can undo, but it poses serious political problems: it would be an unacceptable result from the point of view of the Faroese people. However, the singularity of the purpose makes it necessary to read this legislative tradition from another angle. Moreover, it follows from the preamble to the Autonomy Act that such transfers of competences are the result of various negotiations between Denmark and Faroe Islands, giving a *quasi*-contractual character to the procedure used for it.[81] The major part of the Danish constitutionalist doctrine agrees that such a negative modification and *a fortiori*, its revocation, would be conditional on the consent of the local voters.

The last potential problem is about the transfer of tax power: this could be seen as a violation of the Danish Constitution, which states that tax is consensual at the national level and cannot be split.[82] This position seems to be accepted by the fact that the Danish Constitution dates from 1953, while the Home Rule Act dates from 1948; as Professor Albæk Jensen points out, „*if the 'founding fathers' of the 1953 Constitution had considered this transfer to be unconstitutional in the light of the provisions they intended to enshrine, they would certainly have included an article in the Constitution explicitly allowing for such a possibility*". If the Constitution (Article 43), exists in these terms, it tolerates the Danish rule of law towards the Faroe Islands. This underline, again, the special nature of the Faroese position, compared to other forms of local government.

The Danish Supreme Court (*Højesteret*) thus seems to liberate the Danish legislator by accepting a broad appreciation of the territorial unity. „*Denmark is a unitary state in terms of its territorial constitution, but its overall unitary nature is not an obstacle for the establishment of autonomous territories within the state*".[83]

80 „We Frederik the Ninth by the Grace of God King of Denmark, the Wends and Goths, Duke of Slesvig, Holstein, Stormarn, Ditmarschen, Lauenburg and Oldenburg, Do hereby make known to all men: In acknowledgement of the special position held by the Faroe Islands within the Kingdom in national, historical and geographical respects the Rigsdag has passed the following Act on the constitutional position of the Faroe Islands within the Kingdom, in conformity with the approval of the Løgting, to which WE have given OUR consent".

81 ALBÆK JENSEN J., „The position of Greenland and the Faroe Islands within the Danish Realm ", op.cit., p.177.

82 Ibid., p.176.

83 RAKITSKAYA I., MOLSHAKOV N., „Democratization of Territorial Constitution: Current Trends and the Constitutional Experience of Denmark ", op.cit., p.166.

While such an exorbitant status does not pose a problem of conformity with the Constitution of a unitary State, apart from the need for some largesse on the part of the supreme courts in assessing it, it is legitimate to assume that it is not fundamentally so.

2. The constitutional circumvention of New Caledonia's autonomy

The autonomy of New Caledonia „*is legally imposed from above*".[84] The Nouméa Agreement, deals with clearly unconstitutional provisions – such as local employment preference and restrictions on the electorate in provincial elections. The risk of censorship by the Constitutional Council was therefore averted by revising the Constitution beforehand. The principle according to wich „the constituent power is sovereign"[85] then applies here. This means it is free to repeal, amend or supplement provisions of constitutional value in the form it deems appropriate; for the Constitutional Council, there is therefore nothing to prevent the constituent power from introducing into the text of the Constitution new provisions which derogate from a rule or principle of constitutional value. The decision of March 15th, 1999 confirms this.

New Caledonians must therefore take control of their future and the Constitutional Council cannot stand in the way of this. The Constitutional Council, which is merely a „*switchman*" – as Dean Georges Vedel says[86] – is thus well placed as a spectator of certain aspects of New Caledonia's autonomy.

In addition to this constitutional circumvention, there is also a procedural circumvention. Indeed, the *Lois du pays* are subject to a constitutional review by the Constitutional Council. However, the obstacles to the Constitutional Council's referral have been multiplied, the latter being left aside, „spectator" of this autonomy[87] ; first, the New Caledonian legislative procedure provides for prior control by imposing the opinion of the Council of State before the deliberation of the *Lois du pays* drafts. This opinion is similar to a first constitutionality review.[88] Then, this control can only be envisaged after a second deliberation by the *Congress*: it is only after this that the Constitutional Council can be seized.

84 CLINCHAMPS N., „Le Conseil constitutionnel face à l'autonomie de la Nouvelle-Calédonie", op.cit., p.68.

85 Conseil constitutionnel, 2 septembre 1992, n° 92-312 DC, Traité sur l'Union européenne.

86 VEDEL G., „Le Conseil constitutionnel, gardien du droit positif et défenseur de la transcendance des droits de l'homme", Pouvoirs, PUF, n° 13, 1991, p. 211.

87 CLINCHAMPS N., „Le Conseil constitutionnel face à l'autonomie de la Nouvelle-Calédonie", op.cit., p.67.

88 GOHIN O., „Note sous Cons. const.,décision du 27 janvier 2000, n° 2000-1 LP, Loi du pays en Nouvelle-Calédonie", AJDA, Dalloz, 2000, p. 256.

The constraints linked to the definition of the referral authorities accentuate all the more such a phenomenon of circumvention; the High Commissioner's abstention reflects caution in the judge's control, while the referral, set at eighteen of its members, of a Congress split up by proportional representation seems too restrictive for use.

A comparable analysis to that carried out with regard to the constitutional conformity of the Faroese status can be advanced here; if the Constitution of a unitary state is to be revised in order to guarantee the conformity of a *sui generis* status and if, in addition to this constitutional circumvention, such a distance from the judge is established, this status is not in essence to be considered as a form of unity and is placed outside it. That is also the case of the France, accustomed to brandishing the Constitution as a limit not to be exceeded in statutory discussions with its local authorities.[89] It is by this „extra-unitary" aspect that peripheral and federated nations come. About France, and as Thierry Michalon's writes,[90] this forms an „*Extranational Republic*".

When form defuses substance, the question then arises as to whether such territorial differentiation conforms to the unitary conception of the State, as do the consequences of the form of States possessing such statutes. The unitary State, as characterized by the legislative power unity and exclusivity – particular legislative regimes could apply to certain parts of the territory but on condition that they remain within the competence of the national power and not of a regional legislature[91] – is indeed, here, exceeded: while such a condition would be met by the principle of legislative specialty applying in New Caledonia, it is overridden by the consecration of the *Lois du pays*. As for the Faroe Islands, already positioned in contradiction, just by the *Løgtingslógir*; this explains why Professor Ronald Watts, explicitly appreciated them as a federated state.[92]

B. The form of the State versus political autonomy: constitutional statutes calling for a redefinition of national institutional landscapes

The answer to such questions then belongs to the doctrine. Indeed, there are

89 AL WARDI S., „ Changer la politique : le concept de „ pays associé " comme solution ? ", Journal de la Société des Océanistes, n° 147, 2018, p.309.

90 MICHALON T., „La République française, une fédération qui s'ignore", Revue de droit public, 1982, p. 663.

91 MARCOU G., „Les collectivités locales dans les constitutions des États unitaires en Europe ", Les nouveaux cahiers du Conseil constitutionnel, le Conseil constitutionnel et les collectivités territoriales, n°42, 2014, p. 64.

92 WATTS R., Comparing Federal Systems, McGill – Queen's University Press, 1999, p.11.

many writings on this subject, both in Scandinavia – where the position of Greenland *vis-à-vis* Denmark and the Åland Islands *vis-à-vis* Finland – raise similar constitutional questions – and in France. Thus, while the Danish speakers doctrine, when studying the statutes particularly distant from the Faroe Islands and Greenland, legitimately advances the reality of a unitary state according to federal principles (*1*), the French constitutionalist doctrine stings the State of to be a federation that ignores itself (*2*).

Reading the definition of federalism by Professor Carl Joachim Friedrich, „*there is only federalism if a series of political communities coexist and interact with each other as autonomous entities united in a common order with its own autonomy*“,[93] the debate, in the light of the effectiveness of the Faroese and New Caledonian statutes, remains open.

1. Denmark, the illusion of a unitary state?

As Professor Uffe Østergaard points out, highlighting the multinational character of the Danish State, the name „Denmark“ refers to a composite State. Indeed, the Danish King in 1660 became the sovereign of the kingdoms of Denmark and Norway, the duchies of Sleswig and Holstein. This was a complex constitutional situation; as Duke of Holstein, the King was formally subordinate to the German Emperor. In addition to these four main areas, the composite state included the three North Atlantic territories (Iceland, the Faroe Islands and Greenland). Uffe Østergaard then spoke of a „*multinational state*“[94] since the separation from Norway and the creation of present-day Denmark. In his view, neither the 1849 Constitution nor the 1953 version of the Constitution provided a good definition of the relations between the different parts of the Kingdom, rejecting and denying any suggestion of federation, referring only to the present unitary state.

With reference to Article 1 of its fundamental norm („*this Constitution applies to all parts of the Danish Kingdom*„), Denmark is constitutionally a unit. Curiously, however, the autonomous Statute of the two Danish transatlantic entities have never allowed a constitutional questioning of the unitary character. Now, if the concordance between the unity of the Kingdom and the Faroe Islands Home Rule Act was already no longer obvious when the latter came into force, it is even less since the introduction in 1979 of the Greenland Home Rule Act[95] and, *a fortiori*, since the Danish law n° 578 of June 24th, 2005 provides, in its preamble, that it is

93 FRIEDRICH C.J., Tendances du Fédéralisme en théorie et en pratique, trad. fr. PHILIPPART A. et L., Institut belge de science politique, 1971, p. 19.

94 ØSTERGAARD U., “ The State of Denmark – Territory and Nation “, Comparare. European history review, vol.2, 2002, p.200.

95 Lov om Grønlands Hjemmestyre nr. 56 af 21/02/1979.

the result of an agreement between Faroese and Danish governments „*as equal partners*“. Like France, Denmark has a deep centralizing tradition. While such a tradition comes from the Jacobin group in France, it comes from the heritage of the Orla Lehmann's thought, statesman and figure of the development of parliamentary democracy in Denmark. This took place in the 19th century, during the debates of the constituent assembly on the possible regionalization or federalization of the national institutional organization, preparing the 1849 Constitution.[96]

However, the term „unitary nation“ is not a realistic characterization of the relationship between the parts of the Kingdom: unitary character implies a shared identity, and this is exactly what is missing; Denmark comprises three national parts, separated by fundamental differences of language, culture and traditions. However, if a federation is institutionally recognized by the co-existence of a larger federal power and smaller federated powers with greater autonomy than other local segments within unitary States, both bound by asymmetrical constitutional agreements, the situation of Faroe Islands can be likened to this.[97] Despite the principle of unity, various authors consider Denmark as a federation or as having a special and singular constitutional construction.

Frederik Harhoff, Professor Emeritus, SDU (University of Southern Denmark), considers that the Faroese Home Rule Act, coupled with the Greenland Home Rule Act, creates „*the illusion of a unitary state*“. He goes further than the alone federalist idea: he envisages the existence of a Commonwealth on the British model; a three separate and autonomous components community, each with its own competences, at the top of which is continental Denmark with a residual competence.[98] Whatever the official solution to the Danish state character classification and terminology problems, Faroese, like Greenlanders, are not minorities within the State, but, autonomous nations and peoples in their own right, with their own State potential.[99]

The transfer of exclusive legislative power over the transferred competences by means of a *quasi*-contract between „*equivalent*“ parties,[100] entrusted to political

96 ØSTERGAARD U., “ The State of Denmark – Territory and Nation “, op.cit., p.209.

97 ACKREN Maria, SUNDBERG Jan, Unitary states following federal principles: Faroe Islands, Greenland, and Åland Islands compared, in EUROPEAN CONSORTIUM FOR POLITICAL RESEARCH, Self-Determination in the Artic – Regional Autonomy and Ethnic Tensions, ECPR general conference, Montréal, 2015.

98 LOUKACHEVA N., Arctic Promise: Legal and Political Autonomy of Greenland and Nunavut, University of Toronto press, 2007, p.44.

99 ØSTERGAARD U., “ The State of Denmark – Territory and Nation “, op.cit, p.215.

100 V.Supra note 93.

institutions elected by direct universal suffrage from a party system entirely different from the Danish one, leaving in the hands of the central State only residual sovereign competences, call for a redefinition of the constitutional organization of Denmark, determined, like France, to consider itself unitary. The conventional process surrounding the transfer of competences then says a great deal about the institutional relationship between the archipelago and the continent. This territorial diversity is negotiated when uniformity was imposed, Faroe Islands is then an interlocutor of the central State and no longer a dismemberment of it. Legislative power is attached to the Autonomous Community itself and not to a decentralization orchestrated by the central State. It is not „entrusted" by the Danish State but transferred by it, which cannot – as seen above and as an exception to legislative theory – take it away from itself.

Although they did not take part in the creation of a federation and thus do not benefit from normative power *ex nihilo*, nothing prevents participation in a federation *a posteriori* to its creation.[101] The constitutional asymmetry and differentiation they enjoy seem no longer to guarantee a Danish State „unity", but a „union" – like the American motto *„e pluribus unum"*[102] – and the Faroe Islands thus take a *de facto* federated form. In this, the joint contributions of Professors Jan Sundberg of the University of Helsinki and Maria Ackrén of the University of Greenland are noteworthy.[103] Questioning the institutional situation of the Kingdom and comparing, moreover, the situation of Denmark and Finland, the authors argue that the latter are unitary States *„fulfilling the role of federations with regard to the relations maintained with their autonomous regions*". A federation which would take up the current components of the Kingdom: Denmark, the Faroe Islands and Greenland.

2. France, a federation that ignores itself?

The purpose of the Noumea Agreement, enshrined in the Constitution and detailed by organic law, is to grant the New Caledonian territory a status of its own, so that title XIII of the Constitution can be seen as another Constitution,

101 See in this the case of Alaska; territory bought from Russia, which became organized territory of the United States but was not incorporated into the latter before becoming its 49th state in 1959.

102 " Out of many, one ".

103 ACKREN Maria, SUNDBERG Jan, Unitary states following federal principles: Faroe Islands, Greenland, and Åland Islands compared, in EUROPEAN CONSORTIUM FOR POLITICAL RESEARCH, Self-Determination in the Artic – Regional Autonomy and Ethnic Tensions, ECPR general conference, Montréal, 2015.

or rather a „*Constitution-bis*“,[104] welcomed into the 1958 Constitution „*like Matryoshka doll*“,[105] to use the expression of the Professor Guy Carcassonne.

On these questions, the Thierry Michalon's point of view is interesting. The main thrust of his work is to show that the French Republic is a „*federation that ignores itself*“ because of the autonomy granted to certain overseas local governments, contrary to a legal doctrine proclaiming „*the definitive and intangible nature of the State's territory delimitation and the consistency of its population*“.[106] For him, the unity and indivisibility of the Republic are therefore more an ideological slogan than a practical reality and are contradicted by the development of overseas law (relating to „*DROM*“ and „*COM*„).[107] By the statute of overseas territories,[108] the law has already translated an implicit difference of nature recognition. It has appeared in another form in New Caledonia and French Polynesia, where it grants a degree of self-government going beyond simple administrative decentralization: power of self-organization, specific laws and decrees published in the local official journal, organs territorial inspired by those of a State, massive transfers of competences to the territorial authorities, fiscal autonomy, possibility of adopting distinctive signs, head of the executive associated with the international relations of the Republic as well as the possibility of enjoying a procedure self-determination.[109]

According to Jean-Marie Woehrling, the federal organization is not then a „*chimera*“, moreover, it already constitutes „*a reality that we are living in a more or less conscious way*“.[110] Professor Félicien Lemaire indicates that the constitutional

104 DIEMERT S., “ L'ancrage constitutionnel de la France d'outre-mer “, in FABERON J-Y., L'outre-mer français. La nouvelle donne institutionnelle, La Documentation française, 2004, p. 79.

105 CARCASSONNE G., La Constitution, Seuil, collection “ Points “, 10e édition, 2011, p. 369.

106 MICHALON T., L'outre-mer français. Évolution institutionnelle et affirmations identitaires, L'Harmattan, collection Grale, p.12 In CARTERON B., “ L'outre-mer français. Évolution institutionnelle et affirmations identitaires de Thierry Michalon “, Journal de la Société des Océanistes, n°129, 2009, p.330.

107 MICHALON T., L'outre-mer français. Évolution institutionnelle et affirmations identitaires, op.cit., p.30 In CARTERON B., Ibid.

108 Martinique, Guadeloupe, Saint-Barthelemy, Saint-Martin, Saint-Pierre-et-Miquelon, Réunion Island, etc.

109 CARTERON B., “ L'outre-mer français. Évolution institutionnelle et affirmations identitaires de Thierry Michalon “, op.cit., p.330.

110 WOEHRLING J-M., “ L'organisation fédérale nous est-elle étrangère ? “, Pouvoirs locaux, n° 51, 2001, p. 109.

derogation introduced by the status of New Caledonia in the attribution of a legislative power *„testifies to the need to reconsider the implications of the State sovereignty; the reference in article 77 of the Constitution to the fact the organic law determines „the powers of the State which will be transferred, in a definitive manner, to the institutions of New Caledonia" confirms in this regard that the legislature is conceding legislative sovereignty".*[111]

The use of the, *a priori* oxymoronic, expression of „shared sovereignty" no longer seems to be totally aberrant: although its evocation does not pose any real problem in political science, the same is not true in legal terms where it is considered that sovereignty is one and can only have one holder.[112] Although the concept of shared sovereignty would not, in theory, be applicable in the domestic legal order, its assessment differs in practice, where a multiplication of legal production centers can be observed; an evolution in the approach to sovereignty is not to be denied, *„since it is true that sovereignty is more than ever before the subject of adjustments and that the State no longer seems to be, as univocally as in the past, the sole dispenser of law"*.[113] In this sense, to quote Jeanne Adrian, *„the law is no longer always „the expression of the general will", as article 6 of the Declaration of the Rights of Man and of the Citizen proclaims, but it is also sometimes „the expression of the will of the citizens of New Caledonia*".[114]

While the recognition of a „composed state" seems to prevail in the Carine Gindre David's opinion, rejecting any application, even factual, of any shared sovereignty[115] – the intervention of an organic law and the omnipresence of the State throughout the adoption procedure are as many clues in favor of a vision of a normative power fully compatible with the unitary nature of the State – the fact that the consecration of a legislative power to New Caledonian authorities is troubling. However, if France has not barred any recourse to the „*federal fountain*", even if it has hitherto prohibited itself from devoting its access to the federation, the legislative power in New Caledonia constitutes a federalist technique and a factual shift then takes place. Indeed, if it can be accepted, under some conditions, that a legislative power declined in various places of

111 LEMAIRE, F., „ Propos sur la notion de „souveraineté partagée" ou sur l'apparence de remise en cause du paradigme de la souveraineté ", RFDC, n° 92, 2012, p. 841.

112 GINDRE DAVID C., „ La loi du pays calédonienne, témoin de la mutation de l'État unitaire français ", Annuaire des collectivités locales, Tome 27, 2007, p. 652.

113 Ibid., p.838.

114 ADRIAN Jeanne, La Nouvelle-Calédonie à l'épreuve du partage de souveraineté, op.cit., p.174.

115 GINDRE DAVID C., „ La loi du pays calédonienne, témoin de la mutation de l'État unitaire français ", op.cit., p.652.

exercise may not call into question the unity of a State, citizens are then the key to answer, because thus differs, a legislative power at the various places of exercise but at the various subjected populations. The application of French law uniform nature, already tainted by the introduction of the principle of legislative specialty, is all the more so with the „*Lois du Pays*“, which only apply to New Caledonian territory.

In total contradiction with the French institutional tradition, uniformity became purely theoretical as the institutional arrangements are so numerous in practice; from a lesser scale in view of their effects produced for Corsica, to a stronger institutional importance for French Polynesia, differentiation reaches its peak with the provisions relating to New Caledonia. As Professor Florence Faberon notes, its local territorial organization further accentuates the *de facto* federal model with which New Caledonia is marked. If the Matignon Accord instituted internal federalism – the *provinces* are represented in *Congress*, a revealing vocabulary as Florence Faberon points out,[116] the latter constituting the addition of the assemblies of the three provinces – the Nouméa Accord then instituted a more external federalism between the unitary French Republic and New Caledonia.

The Agreement’s dynamic is federal. The question of the distribution of competences, essential in a federal context, is central to it; the Agreement allows a gradual transfer of all managerial competences while the State retains only sovereign competences, marking a real cooperation between national authorities, local separatists and loyalists. Although concluded as a reaction to a bellicose[117] context in the territory of the archipelago, such a status was not imposed by the central State and an analysis close to that made for the Faroe Islands can be made here. Moreover, the institution of a citizenship of New Caledonia shows a remarkable progress in terms of federalism and many federated States do not go that far; there is, for example, no proper citizenship of the United States member states or of the Canada provinces and it can even happen, as Florence

116 FABERON F., “ Le fédéralisme, solution française de décolonisation : le cas de la Nouvelle-Calédonie “, op.cit., p.67.

117 Ethnic tensions reached their peak in 1988 with a succession of violent events on the island of Ouvéa in New Caledonia, which started on April 22th, 1988. First with the attack on the gendarmerie (military police) of the town of Fayaoué by the FLNKS (group of Kanak separatist) during which 4 gendarmes were killed, including 2 executed. The rest of the gendarmes were taken to a crane where the FLNKS kept them hostage until May 5th, when an assault was launched by the French army. 6 French soldiers and 19 Kanak separatists were killed. It is the first time in history since the proclamation of the new Constitution (1958) that the army is deployed, to fight, on the French territory.

Faberon notes, that independent States do not have their own citizenship. This is the case of the Cook Islands, an associated State with New Zealand, whose nationals have New Zealand citizenship.[118] Such a position does not form a federal State in the orthodox sense but „a *quasi*-federated entity" to use the expression of Professor Valérie Goesel-Le Bihan.[119] Indeed, it certainly lacks the capacity for self-organization, failing, for example, the Faroe Islands.

Conclusion

This study showed how similar the autonomy granted to the Faroe Islands by the Kingdom of Denmark and to New Caledonia by the French Republic are: they respectively grant, to the benefit of political institutions, legislative power in very broad areas of transferred competences and sovereign prerogatives in international law. Administrative decentralization, traditionally implemented in the French and Danish states, is then overtaken by real legislative decentralization. These statutes of autonomy – initiated by the Home Rule Act of March, 23rd 1948 and the constitutional law n°89-610 of July 20th, 1998 – thus profoundly challenge the unitary character of the two States by attacking, through their factual result, their centralizing dogmas. In the sense of this study, such statuses go further than a simple asymmetrical development of unitary States. Such institutional asymmetry can be characterized when different territorial authorities are not granted the same level of autonomy, which differentiates the unitary State from the federal State, characterized by a symmetrical organization of the autonomy of the different federated states.

The Faroe Islands could then be similar in that the position of Greenland, although similar, differs somewhat. It could also very well be similar, in fact only, to an associated state that has delegated the management of its currency, defense and diplomacy to Denmark. Statutory differences are too great to continue to consider Denmark as a unitary state and the Faroe Islands, not being independent, cannot constitute an associated state. More specifically, the Faroese status resembles to an asymmetrical form of federalism.[120] As defined by Professors François Rocher and Philippe Cousineau-Morin, asymmetrical

118 FABERON F., " Le fédéralisme, solution française de décolonisation : le cas de la Nouvelle-Calédonie ", op.cit., p.70.

119 GOESEL-LE BIHAN V., „ La Nouvelle-Calédonie et l'Accord de Nouméa, un processus inédit de décolonisation ", Annuaire français de droit international, 1998, p.48.

120 See in this the writings of Charles Tarlton, one of the first authors to have conceptualized the notion of asymmetry. TARLTON C., " Symmetry and Asymmetry as Elements of Federalism: a Theoretical Speculation ", The Journal of Politics, vol. 27, no 4, 1965, p. 861-874.

federalism reflects „*the absence of an uniform treatment, the degree of the federated entities autonomy and powers, or the heterogeneity of the relations of the federated states among themselves and with the federal government*".[121] It is thus opposed to the symmetrical model, which then reflects uniformity among the federated states within a federal system. Various federal states have adopted this model, such as Belgium or Russia.[122] Although Thierry Michalon envisaged an „ignored" federal form of France, his thinking concerned „only" the overseas territories of his time,[123] without suspecting what would become of New Caledonia. The purely *sui generis* nature of New Caledonia is a convincing indication here: it has no similarity with the other territorial communities, nor with the metropolitan ones, not even with their overseas territories. New Caledonia's constitutional position distends the content of the State unit far too much for it to remain. It is therefore much easier to imagine a federation with two units – the Republic and New Caledonia – in its asymmetrical dimension; the two components do not have the same prerogatives and positions.

The traditional dichotomy between a unitary and federal State could then have been overcome by proposing the more watered-down solutions, namely the composite State on the Spanish model (*Estado Compuesto*) or the State with regional autonomies highlighted by Professor Marcou[124]. An in-depth study on this subject would have been an opportunity to discuss at greater length the exact form that the French and Danish States are taking by introducing such disparate statutes into their constitutions and territorial organization.

121 ROCHER F., COUSINEAU-MORIN P., Fédéralisme asymétrique et reconnaissance des nations internes au Canada, Évolution récente dans l'espace québécois ou comment abdiquer l'asymétrie sur l'autel du principe de l'égalité des provinces, in SEYMOUR M., LAFOREST G. (dir.), Le fédéralisme multinational : Un modèle viable ?, Bruxelles, Peter Lang, 2011, p. 276.

122 See on this subject PARENT C., „ Le concept d'État fédéral multinational. Essai sur l'union des peuples ", Peter Lang, collection Diversitas, 2011, p. 281 et pp. 68-69.

123 New Caledonian statute had not come into force.

124 MARCOU G., „ Les collectivités locales dans les constitutions des États unitaires en Europe ", op.cit., p.64.