Liverpool Law Review (2021) 42:71–85
https://doi.org/10.1007/s10991-020-09263-y

Insularity and Law: Diversity and Changeability of Islands' Statuses—The Example of French Outermost Regions in French and EU Law Systems

Danielle Perrot[1]

Published online: 8 January 2021

Abstract

This article deals with the interactions between national and European legal corpuses about insular territories. French outermost regions (ORs) were first called "*départements d'outre-mer*" (overseas departments) at the dawn of the French Fourth Republic; they are distinct from other overseas entities. This denomination is used again in the initial EEC treaty in which French overseas departments and overseas countries and territories (OCTs) are distinct. Together with Spanish and Portuguese outermost regions, French overseas departments manage to change EU law in favour of ORs even if the legal differentiation has limits. Moreover, some recent amendments to the French Constitution allow for status variations and even mutations, which can also be found nowadays in EU law.

Keywords French overseas departments · Article 227(2) of the treaty of Rome · Article 349 of the TFEU · Outermost Regions (ORs): Guadeloupe, French Guiana, Martinique, Mayotte, La Réunion · Saint-Barthélemy · Saint-Martin · Article 73 of the French constitution

Text

At first glance, a legal overview on the case of the islands may seem simple; however, the subject may be more complicated. In this article we deal with islands that are located far from mainland Europe and near other continents, and therefore far from their respective main decision-making centres.

✉ Danielle Perrot
danielle.perrot@univ-antilles.fr

[1] Laboratoire Caribéen de Sciences Sociales, (LC2S, Ex-CRPLC) UMR-CNRS 8053, Université des Antilles, Schœlcher, Martinique

The United Nations Convention on the Law of the Sea provides a definition of islands: "An island is a naturally formed area of land, surrounded by water, which is above water at high tide."[1] This sentence seems pretty banal,[2] but French and European Union legal texts do not see the need to define the concept of "island" in itself.

Furthermore, the term under scrutiny and its variants—like "insularity" or "insular"—are not used very frequently.[3] In French and European Union (EU) law, these words are rarely employed in the highest legal texts defining the statuses of insular entities.

One example of this scarce use of the word "island" in the French Constitution is its introduction with the 2003 revision concerning the Wallis and Futuna Islands,[4] which are expressly named as such within the text.

Comparatively, the EU Treaties use twenty times the word "island" and its variants. However, the word is employed fifteen times just to refer to the official names of insular entities which have special statuses under EU law, and therefore to define the scope of its territorial application. In this situation, several islands do not immediately appear as such. For example, the Canary Islands are named as such, but denomination such as the Azores or Guadeloupe do not reveal their archipelagic specificity; or, the Cayman Islands and the Falkland Islands are named as such but other names like Saint-Pierre-and-Miquelon (and many others) do not show that they are islands.

Moreover, the TFEU mentions "insular regions"—among other regions[5]—when it comes to outlining EU public policies like trans-European networks and economic, social, and territorial cohesion.[6]

As infrequent as they are, these examples show how the framers of these legal texts were interested in the cases of numerous insular territories; however, they especially aimed to highlight difficulties of these territories rather than to show their advantages. As noticed as regards Article 349 TFEU about the outermost regions (ORs), the use of the word "insularity" holds that assumption: the word under

[1] See Art. 121(1) UN Convention on the Law of the Sea (UNCLOS). https://treaties.un.org/doc/Treaties/1994/11/19941116%2005-26%20AM/Ch_XXI_06p.pdf. Accessed on July 12, 2019.

[2] The banality needs to be studied on a case by case basis. The definition distinguishes between islands, rocks, and submarine elevations, because these do not give coastal States access to the same rights. See Arts. 121(3) and 76(6) UNCLOS.

[3] The expression « *régions insulaires*» in the French version of the TFEU is translated with "island … regions" into English: Art. 170(2) TFUE. *Cf.* also Art. 174, subparagraph 3, and declaration n° 33.

[4] Art. 72–3 of the French Constitution, introduced by the constitutional amendment law (loi constitutionnelle "relative à l'organisation décentralisée de la République" n° 2003–276 of March 28, 2003, *Journal officiel de la République française* (hereinafter *JORF*) n° 75, 29 March 2003, 5568. The text was maintained even after the broader amendments introduced into the Constitution by the loi constitutionnelle n° 2008–724 of July, 23 2008 "de modernisation des institutions de la Ve République", *JORF* n° 171, 24 July 2008, 11890, texte n° 2). "Please note: […] Only the French versions of texts appearing in the *Journal officiel de la République française* have legal force." Available at: https://www.legifrance.gouv.fr/Traductions/en-English, Accessed on July 22, 2019).

[5] It can be about landlocked, cross-border, mountainous regions, or the northernmost regions with very low population density.

[6] See *supra*, note 3.

scrutiny marks a factor exacerbating their "structural, social, and economic situation," and justifies special legal provisions.

Now, the legal principle of equality tends to incite a different approach for situations that are objectively different. From the get-go we can see that taking insularity, as an unbiased characteristic, into account can be a bed for legal diversification, even if it is far from the only one. It is even truer for overseas islands where the past and the way people feel about it also play a part in explaining, as seen further down.

The Union and French legal orders refer to outermost entities[7] with a broad *diversity* of clauses suitable to a specific time; and legal *variability* adds on to that thanks to revisions of the highest legal norms of both legal systems.

It is even the same for the most integrated overseas territories in French and EU legal systems,[8] those whose statuses provide for the European and French rules that apply on principle, which in French is called "*droit commun*"—not the same as Common Law –.

At first, the French Fourth Republic recognised the "*départements d'outre-mer"* (overseas departments),[9] and EEC initial treaty (text of 1957) called them "*départements français d'outre-mer*" (French overseas departments); they would later be followed by other outermost regions, according to EU terminology.

From their beginning, both of these legal systems recognise the diversity of the overseas.

Diversity at the Root of Overseas Entities' Statuses

The current EU legal regime of the ORs[10] results from how the EEC Treaty of 1957 defined the "French overseas departments" status. This definition, taken from initial Art. 227(2),[11] refers to French domestic law;[12] but the 1946 French Constitution did not list them. This list was in the March 19th, 1946 law, known as law of "*départementalisation*"[13]; at the time there were four overseas departments. Among them, three were insular—Guadeloupe, Martinique in the Caribbean, and La Réunion in

[7] Faberon and Ziller (2007).

[8] In this essay we will mainly consider the most legally integrated overseas. For a broader view see: Perrot (2017a); Ziller (2017); Kochenov (2012); Kochenov (2011); Tesoka and Ziller (2008).

[9] Art. 73 of the Constitution of the Fourth Republic (October 27, 1946): "Le régime législatif des départements d'outre-mer est le même que celui des départements métropolitains, sauf exceptions déterminées par la loi." Available at:https://www.conseil-constitutionnel.fr/les-constitutions-dans-l-histoire/constitution-de-1946-ive-republique. Accessed on July 12, 2019 (not available in English).

[10] Vestris (2012).

[11] Treaty establishing the European Economic Community (1957). The French version is available at: https://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CELEX:11957E/TXT&from=FR (last access: July 22, 2019). Not available in English on the Eur-Lex website: https://eur-lex.europa.eu/eli/treaty/teec/sign. Accessed on July 22, 2019.

[12] Vestris, (2018); Perrot (2018).

[13] See the law (*Loi*) n° 46–451 "tendant au classement comme départements français de la Guadeloupe, de la Martinique, de la Réunion et de la Guyane française", *JORF*, 20 mars 1946, p. 2294. On the genesis of this law and its repercussions in the twenty first century, see Jos (2012).

the Indian Ocean—, and one was continental—French Guiana in the north of South America. They were (and still are) all very far from mainland Europe, from an eight-hours flight for the Caribbean to an eleven-hours flight for La Réunion.

These four entities were not the only French overseas entities first defined by the French Fourth Republic law, then by the nascent EEC law.

After World War II, France governed colonies mostly located in Africa but also in the Pacific as an example. It was then decided that these four "*vieilles colonies*", owned since the seventeenth century, would get a legal status closer to that of mainland France than to the status of territories conquered more recently. After age-old demands for equality—some even spoke about "*assimilation*"[14]—, the new legal system of these "*quatre vieilles*"—*i.e.* French Guiana, Guadeloupe, Martinique and La Réunion—was defined by the principle of "legislative identity": law voted in France automatically applied—which means without any special thought—, but the French Parliament could "adapt" them to the local circumstances of these new overseas departments. By contrast, colonies known as "*territoires d'outre-mer*" (overseas territories)[15] benefitted from the principle known as "the legislative speciality rule": a priori, mainland law did not apply there except when specifically prescribed. This was laid down in Arts 73 and 74 of the Constitution of the Fourth Republic (October 27, 1946), and subsequently in Arts 73 and 74 of the Constitution of the Fifth Republic (October 4, 1958).

It appears that geography, meaning insularity and distance in the most restraining way, was not as important as history (and social expectations) when defining the political choices of the Constituent Assembly elected in 1945.

At the end of the French Fourth Republic, French negotiators for the Treaty of Rome obtained that the four overseas departments be treated differently than the overseas countries of Belgium, Italy, the Netherlands, and other French overseas territories. These overseas entities were listed in the "overseas countries and territories" (OCTs) list annexed to the treaty of Rome; their legal status was qualified as "special arrangements for association"[16] to the EEC, and the Court of Justice of the European Communities (CJEC) will insist that the OCTs are outside of the territorial scope of the treaty.[17]

[14] As an example see:Césaire (1946): 659; Dimier (2005).

[15] For instance, Sénégal, Guinée, Côte d'Ivoire, Mauritanie, Niger, Tchad, Gabon, Togo, Comores, Madagascar, Terres australes et Antarctiques.

[16] See current Art. 355 (2) TFEU and Fourth Part of TFEU (Arts 198–204). Perrot (2014); M'Saïdié (2013).

[17] CJEC, Opinion of 4 October 1979, Opinion 1/78, *Rec*., p. 2871, ECLI:EU:C:1979:224, pt 62 ("The territories in question, since they remain outside the sphere of application of the EEC Treaty, are, as regards the Community, in the same situation of non-member countries"; "a similar position has already arisen with regard to the participation of the Faroe Islands"); CJEC, Opinion of 15 November 1994, Opinion 1/94, *Rec*., p. I-5267, ECLI:EU:C:1994:384, pt 17 ("As the Court held in Opinion 1/78, cited above (paragraph 62), the territories in question, in so far as they remain outside the ambit of the EEC Treaty, are, as regards the Community, in the same situation as non-member countries. Consequently, it is in their capacity as the States responsible for the international relations of their dependent territories which are outside the scope of Community law, and not as Member States of the Community, that the States responsible for those territories are called upon to participate in the agreement").

It should be noted that the original stipulations concerning the French overseas departments regarded Algeria, which fell out of the purview of French and EEC law in 1962 following its independence.

Without going into details on the complexity and at times incongruous nature of the clauses concerning French overseas departments,[18] we see that the CJEC did not interpret them until 1978. Going against the opinion given before by the EEC Council, composed of Member States' ministers, the CJEC declared that the application of EEC law to French overseas departments had not been selective; on the contrary, the totality of common EEC law applied to them; this is what jurists call the principle of integration. However, to take into account their different situations, "in addition it [the treaty] made available the widest powers for the adoption of special provisions commensurate to the specific requirements of those parts of the French territories."[19]

The wording is nonetheless misleading. At those times it seemed, especially to overseas representatives, that differentiation was possible for EEC law as the whole as long as the correct procedure—the Council ruling unanimously[20]—was followed. In fact, even if the EEC Treaty forbade without exception the use of "charges having equivalent effect" to custom duties, it would be legitimate to exempt the French overseas departments where since the seventeenth century a tax called "*octroi de mer*" (or dock dues) existed. It only applied to goods imported in the French overseas departments, not for local goods.

In the 1990s, furthermore, the CJEC specified that such exemption was forbidden.[21] This was anticipated in the French and EU law concerning the dock dues.[22] A similar tax from the Canary Islands called the "*arbitrio*" had to be also amended to comply with the full EEC law in the Canary Islands after Spain joined the EEC.[23] This also weakened other discriminatory taxes created to help ORs' local

[18] Jos and Perrot (1994).

[19] CJEC, Judgment of the Court of 10 October 1978, *Hansen*, Case 148/77, *Rec*., p. 1787, ECLI:EU:C:1978:173, pt 10, subparagraph 2, in the French version, (Available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=D9E82FC8C6830F943CAFE3DA3A9A2A90?text=&docid=89812&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=5836624.[Accessed on July 22, 2019]) and pt 11, subparagraph 2, in the English version (Available at: https://curia.europa.eu/juris/showPdf.jsf;jsessionid=D9E82FC8C6830F943CAFE3DA3A9A2A90?text=&docid=89812&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=5836624 [Accessed on July 22, 2019]).

[20] According to Art. 227(2) of the EEC Treaty, the Commission made a proposal and Parliament gave its opinion.

[21] CJEC, Judgment of 16 July 1992, *Administration des douanes et droits indirects v Léopold Legros and others*, Case C-163/90, *Rec*., p. I-4625, ECLI:EU:C:1992:326; CJEC, Judgment of 9 August 1994, *René Lancry SA v Direction Générale des Douanes*, Joined cases C-363/93, C-407/93, C-408/93, C-409/93, C-410/93 and C-411/93, *Rec*., p. I-3957, ECLI:EU:C:1994:31.

[22] 89/688/EEC Council Decision of 22 December 1989 concerning the dock dues in the French overseas departments, *Official Journal of the European Communities (*hereinafter*: OJ)* L 399, 30.12.1989, p. 46. Loi n°92–676 du 17 juillet 1992 "relative à l'octroi de mer et portant mise en œuvre de la décision du conseil des ministres des communautés européennes" n° 89–688 du 22 décembre 1989, *JORF* n°166 du 19 juillet 1992, p. 9697. See Jos and Perrot (2000).

[23] Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties, Arts 25 and 155 (and Protocol 2),*OJ* L 302, 15.11.1985; Council Regu-

production, for example alcohols taxation (like rum from French overseas departments or other alcohols from Madeira and the Azores).[24]

There are in primary law—or Treaty law—legal norms which are so precise and unreserved that not even the Council or Member States can infringe or circumvent them. However, when primary law allows for the freedom to adopt secondary law relative to time and space, then what is possible in EEC mainland Europe is also possible in French overseas departments. As an example, one can refer to the EEC Treaty about agriculture and fisheries[25]: primary law deals with goals to reach and proper procedure to follow while its implementation—*i.e.* secondary law—vary from time period, to regions, to goods.

The limits to the ability of EU actors (Institutions, Member States, and territorial communities) to divert from primary law for the benefit of ORs become more understandable for overseas people and they try at the beginning of the 1990s to remove these limits to evolve their statuses.

The Revision of ORs' Status in EU Law: Increased Legal Distinction While Still Within Boundaries

The beginning of the 1990s marked the start of a new wave of European primary law revisions, and ORs' representatives took note of the new opportunities created by these reviews.

However, towards the end of the negotiations leading to the Maastricht Treaty of 1992, the presidents of the seven ORs—the four French regions, the Canary Islands, the Azores and Madeira—only obtained a declaration number 26 attached to the treaty[26] that recognised their distinctive characteristics. This left unchanging clauses in the primary law and thus the impossibility to amend or change them through the legislative way to help ORs.

Footnote 23 (continued)
lation (EEC) n° 1911/91 of 26 June 1991 on the application of the provisions of Community law to the Canary Islands, *OJ*L 171, 29.6.1991, p. 1.

[24] These questions are now dealt with EU Council decisions:
About the dock dues and *arbitrio*: Council Decision n° 940/2014/EU of 17 December 2014 concerning the dock dues in the French outermost regions, *OJ* L 367, 23.12.2014, p. 1; Council Decision n° 377/2014/EU of 12 June 2014 on the AIEM tax applicable in the Canary Islands, *OJ* L 182, 21.6.2014, p. 4.
For alcohols: Council Decision n°189/2014/EU of 20 February 2014 authorising France to apply a reduced rate of certain indirect taxes on 'traditional' rum produced in Guadeloupe, French Guiana, Martinique and Réunion and repealing Decision 2007/659/EC, *OJ* L 59, 28.2.2014, p. 1; Council Decision n° 376/2014/EU of 12 June 2014 authorising Portugal to apply a reduced rate of excise duty in the autonomous region of Madeira on locally produced and consumed rum and liqueurs and in the autonomous region of the Azores on locally produced and consumed liqueurs and eaux-de-vie, *OJ* L 182, 21.6.2014, p. 1.

[25] See current Art 38 ff. TFEU.

[26] Declaration on the outermost regions of the Community, *OJ* C 191, 29.7.1992, p. 104.

There was, in the Maastricht treaty, a *rendez-vous* clause, which organised a meeting for reviewing the treaties in 1996;[27] with this in mind, the presidents of the seven ORs reinforced their common stand to obtain the removal of what they saw as an impediment. The subject was not to leave the EC but to allow adapted derogations to those obstructing clauses.

Their efforts bore fruit with the modification of the initial article about the French overseas departments which became Art. 299(2) TEC derived from Amsterdam treaty signed in 1997.[28] This new modification also concerns the Azores, Madeira and the Canary Islands. Most of it is reused with minor changes in the Lisbon treaty, signed in 2007;[29] interestingly, Art. 349 TFEU names each French entity instead of referring to them by their French legal status.[30]

[27] Art. N(2) of the Treaty on European Union (1992): "A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with the objectives set out in Articles A and B", *OJ* C 191, 29.7.1992.

[28] Art. 299(2) of the Treaty establishing the European Community (Amsterdam consolidated version), *OJ* C 340, 10.11.1997, p. 173: "The provisions of this Treaty shall apply to the French overseas departments, the Azores, Madeira and the Canary Islands.

However, taking account of the structural social and economic situation of the French overseas departments, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, acting by a qualified majority on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the present Treaty to those regions, including common policies.

The Council shall, when adopting the relevant measures referred to in the second subparagraph, take into account areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Community programmes.

The Council shall adopt the measures referred to in the second subparagraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Community legal order, including the internal market and common policies."

[29] Rubio (2008): 65; Perrot (2009).

[30] Art. 349 of the Consolidated Version of the Treaty on the Functioning of the European Union, (*OJ* C 326, 26.10.2012):"Taking account of the structural social and economic situation of Guadeloupe, French Guiana, Martinique, Réunion, Saint-Barthélemy, Saint-Martin, the Azores, Madeira and the Canary Islands, which is compounded by their remoteness, insularity, small size, difficult topography and climate, economic dependence on a few products, the permanence and combination of which severely restrain their development, the Council, on a proposal from the Commission and after consulting the European Parliament, shall adopt specific measures aimed, in particular, at laying down the conditions of application of the Treaties to those regions, including common policies. Where the specific measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act on a proposal from the Commission and after consulting the European Parliament.

The measures referred to in the first paragraph concern in particular areas such as customs and trade policies, fiscal policy, free zones, agriculture and fisheries policies, conditions for supply of raw materials and essential consumer goods, State aids and conditions of access to structural funds and to horizontal Union programmes.

The Council shall adopt the measures referred to in the first paragraph taking into account the special characteristics and constraints of the outermost regions without undermining the integrity and the coherence of the Union legal order, including the internal market and common policies.".

Since the Amsterdam treaty the EC/EU Council has leave to take into account ORs' "structural, social and economic situation", their "characteristics and constraints", as well as the compounding factors "which severely restrain their development". It is a simple procedure: a proposal by the Commission is followed by the opinion of the European Parliament; then, a Council ruling with qualified majority (instead of the previous unanimity). The way is open for further legal differentiation.

However, the corresponding article ends with the warning that "undermining the integrity and the coherence of the [EC/UE] legal order" is not permitted.[31] This enigmatic sentence shows that some differentiations are allowed but do not specify which ones.

As long as these differentiations are about, as before, the creation of secondary law that do not undermine primary law,[32] there is no contradiction with the common legal order. The European Institutions can adopt dispositions specific to ORs in general or to some of them, or create the possibility to modify already existing secondary law. This is the modulation technique: a piece of secondary law modifying the purview of another piece of secondary law of the same level,[33] without infringement of the hierarchy of legal norms.

But when implementing the ORs specific clause, the Council infringes on other clauses of primary law, like when allowing discriminatory taxes, the Council is not totally free. 1998 CJEC rulings about the dock dues[34] make clear that the accepted derogation must not be unreasonable. It must be limited in time: no permanent derogation is allowed. It must be limited in scope: local authorities in charge of applying the exception must have limited purview and the difference with common norms must stay minimal. The Council must also provide for a monitoring procedure, usually overseen by the Commission.

In short, the guiding rules for Council approved exceptions go towards preserving the possibility of a return to "orthodox" legal order. This way the principle of legal integration is retained even if differentiation is admitted under conditions.

Modifications to French Constitutional law can be added to EU law evolving with amendments to primary law concerning the ORs; those modifications allow for highlighting the diversity of statuses among French overseas regions.

[31] Perrot (2006).

[32] The French legal terms are « *mise en œuvre*» which means implementation, but not « *mise en cause*» which means undermining.

[33] The CJEU acknowledged the validity of the special legislative procedure seen in Art. 349 (TFEU) to modify for Mayotte provisions previously in use, even when they were adopted according to ordinary legislative procedure, which gives to Parliament a co-legislator role: CJEU, Judgment of the Court (Grand Chamber) of 15 December 2015, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-132/14 to C-136/14, ECLI:EU:C:2015:813, pt 79. Simon (2016); Perrot (2017b).

[34] CJEC, Judgment of the Court of 19 February 1998, *Paul Chevassus-Marche v Conseil régional de la Réunion*, Case C-212/96, *Rec*., p. I-743, ECLI:EU:C:1998:68; CJEC, Judgment of the Court of 30 April 1998, *Sodiprem SARL and Others* (C-37/96) *and Roger Albert SA* (C-38/96) v *Direction générale des douanes*, Joined cases C-37/96 and C-38/96, *Rec*., p. I-2039, ECLI:EU:C:1998:179.

Revision of Article 73 of the French Constitution: Heightening of Status Diversity

Since 2003, Art. 73 of the French Constitution uses the terms "characteristics and constraints"[35] from EC law as revised by the Amsterdam Treaty concerning overseas regions. This allows for "adaptations" to law and regulations.

At the same time, the collectivities in question can receive from Parliament or Central Government the purview to create those adaptations;[36] most of them have the ability to adopt their own regulations but only on a limited scope and "to take into account their specificities".[37] Contrary to French Guiana, Guadeloupe, Martinique, Mayotte and Saint-Martin, La Réunion does not have this possibility.[38] This shows the diversity in statuses laid down in Art. 73 of the Constitution.

Regarding changeability, the 2003 constitutional amendments opened the door for a status modification allowing the change from department and region in the same geographical location to a single territorial community,[39] which happened in French Guiana and Martinique after a 2011 law.[40] It could only happen after a constitutional revision, as in 1982 the Constitutional Council had censored a similar law, for the only adaptations allowed were "those necessary because of the special situation of the overseas departments" and the proposed piece of law went beyond what was allowed by the Constitution of the time.[41]

[35] "In the overseas departments and regions, statutes and regulations shall be automatically applicable. They may be adapted in the light of the specific characteristics and constraints of such communities." French Constitution, article 73, subparagraph 1, from the Loi constitutionnelle n° 2003–276 du 28 mars 2003 quoted previously (text maintained after the review by the Loi constitutionnelle n° 2008–724 quoted previously), Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958, Accessed on July 19, 2019.

[36] "Those adaptations may be decided on by the communities in areas in which their powers are exercised if the relevant communities have been empowered to that end by statute or by regulation, whichever is the case", French Constitution, article 73, subparagraph 2, Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958, Accessed on July 19, 2019.

[37] "By way of derogation from the first paragraph hereof and in order to take account of their specific features, communities to which this article applies may be empowered by statute or by regulation, whichever is the case, to determine themselves the rules applicable in their territory in a limited number of matters that fall to be determined by statute or by regulation", French Constitution, article 73, subparagraph 3, Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958, Accessed on July 19, 2019.

[38] "The two foregoing paragraphs shall not apply in the department and region of La Réunion", French Constitution, article 73, subparagraph 5, Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958.Accessed on July 19, 2019.

[39] "The setting up by statute of a territorial community to replace an overseas department and region or a single Deliberative Assembly for the two communities shall not be carried out unless the consent of the voters registered there has first been sought as provided by the second paragraph of article 72–4." French Constitution, article 73, subparagraph 7, Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958. Accessed on July 19, 2019.

[40] Loi n° 2011–884 du 27 juillet 2011 "relative aux collectivités territoriales de Guyane et de Martinique", *JORF* n° 173, 28 juillet 2011, 12,821.

[41] Conseil constitutionnel, Décision n°82–147 DC du 2 décembre 1982 (Loi portant adaptation de la loi n° 82–213 du 2 mars 1982 relative aux droits et libertés des communes, des départements et des régions à la Guadeloupe, à la Guyane, à la Martinique et à la Réunion); Available at: https://www.conseil-constitutionnel.fr/decision/1982/82147DC.htm, (last access, July 19, 2019), text not available in English.

Nowadays, the French constitutional revisions of 2003 and 2008 allow, through the legislative path, for status changes of overseas entities. At the EU level, the Treaty of Lisbon signed in 2007 allows the European Council to similarly change their European statuses. They create a more complex patchwork of French and European overseas statuses.

Mutability of Statuses and Increasing Complexity

On the French side of things, the 2003 constitutional amendments allow an "Institutional Act", passed by Parliament, to alter the status of overseas communities.[42]

Two island municipalities of the archipelago of Guadeloupe—Saint-Barthélemy and Saint-Martin—became in 2007 their own communities and therefore separated from the rest of Guadeloupe. Moreover, instead of still being classified under the scope of Art. 73 of the Constitution, they became "*collectivités d'outre-mer*" (overseas collectivities)[43] under Art. 74—like French Polynesia or Wallis and Futuna Islands.

However, when the Treaty of Lisbon was elaborated, it kept for those two islands the European status of OR and the signed text of the 2007 Treaty named them among the entities under the purview of the then new Art. 349 TFEU.[44] Now, most of the French regions that used to be overseas departments, under article 73 of the Constitution and the principle of legislative identity—adaptation notwithstanding—are also ORs and are thus integrated into EU legal system. But the two French ORs of Saint-Barthélemy and Saint-Martin are not under the purview of article 73 of the Constitution and are "*collectivités d'outre-mer*" or overseas collectivities under article 74.

From the EU perspective, the Treaty of Lisbon also provides for the need of EU overseas entities to change their EU-law status; Art. 355 (6) TFEU sets forth the procedure, which is applicable, among others, to French overseas entities.[45]

[42] Art. 72–4 of the French Constitution: "No change of status as provided for by articles 73 and 74 with respect to the whole or part of any one of the communities to which the second paragraph of article 72–3 applies, shall take place without the prior consent of voters in the relevant community or part of a community being sought in the manner provided for by the paragraph below. Such change of status shall be made by an Institutional Act." Available at: https://www.conseil-constitutionnel.fr/en/constitution-of-4-october-1958. Accessed on July 19, 2019.

[43] Loi organique n° 2007–223 du 21 février 2007 "portant dispositions statutaires et institutionnelles relatives à l'outre-mer" and Loi n° 2007–224 du 21 février 2007 "portant dispositions statutaires et institutionnelles relatives à l'outre-mer", *JORF* n° 45, 22 février 2007, p.3121 and p. 3220.

[44] Art. 2, point 293, b) of the Treaty of Lisbon. Available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:C:2007:306:TOC. Accessed on July 24, 2019.

[45] Art. 355(6) TFEU: "The European Council may, on the initiative of the Member State concerned, adopt a decision amending the status, with regard to the Union, of a Danish, French or Netherlands country or territory referred to in paragraphs 1 and 2. The European Council shall act unanimously after consulting the Commission." Thus, the overseas entities of Spain, Portugal (and the United Kingdom before leaving the EU) fall outside the scope of this article.

As soon as they separated from Guadeloupe, the authorities of Saint-Barthélemy asked to change status from OR to OCT. After following the correct process, the change was accepted by the European Council in 2010,[46] and became effective in 2012. Consequently, Saint-Barthélemy holds simultaneously the French status of overseas collectivity (under Art. 74 of the French Constitution) and the EU status of OCT, like French Polynesia or Saint-Pierre-et-Miquelon. Saint-Martin remains the sole example of being both overseas collectivity (under Art. 74 of the French Constitution) and OR (under Art. 349 TFEU).[47]

However, the authorities of Mayotte chose the reverse path when compared to Saint-Barthélemy. Mayotte fell under the scope of Art. 74 of the French Constitution before the revision of 2003; and, as such, it had a status close to the overseas territories' one at that time. It was also on the EU OCTs list. Looking for a legal status as close as possible to the French "*droit commun*" and to EU law, Mayotte's representatives first obtain the overseas department status under French law[48] before becoming OR after a European Council ruling of 2012, and effective in 2014.[49]

To this day, the only applications of Art. 355 (6) TFEU were to change an OR into an OCT, and an OCT into an OR. However, this article does not oversee only this permutation[50]; it textually deals with "a decision amending the status, with regard to the Union" which offers a broader playground for legal imagination. Case-by-case solutions can be created for the overseas entities of France and the EU, that would heighten further the diversity of legal categories established and would show how changeable the status of each entity might be over time.

It is however doubtful whether the EU would increase the diversity of statuses since it is already complex. For the time being we know that, without changing primary law, it is possible to plan special measures for one of the ORs while they are not used for the others. This adaptability of secondary law can be seen in the case of Mayotte: a few days before its OR status came into force the EU Council allowed for modulation of large parts of EU law in such fields as fishing, environment, or social security.[51] The CJEU acknowledges the validity of different contents or delays in

[46] 2010/718/EU: European Council Decision of 29 October 2010 amending the status with regard to the European Union of the island of Saint-Barthélemy, *OJ* L 325, 9.12.2010, p. 4.

[47] Perrot (2015); Grard (2017).

[48] Loi organique n° 2010–1486 du 7 décembre 2010 "relative au Département de Mayotte" and Loi n° 2010–1487 du 7 décembre 2010 "relative au Département de Mayotte", *JORF* n° 284, 8 décembre 2010, p. 21,458 and p. 21,459. M'Saïdié (2016).

[49] 2012/419/EU: European Council Decision of 11 July 2012 amending the status of Mayotte with regard to the European Union, *OJ* L 204, 31.7.2012, p. 131. Rakotondrahaso (2014).

[50] Perrot (2017c).

[51] Council Regulation (EU) n°1385/2013 of 17 December 2013 amending Council Regulations (EC) n°850/98 and (EC) n°1224/2009, and Regulations (EC) n°1069/2009, (EU) n°1379/2013 and (EU) n°1380/2013 of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union, *OJ* L 354, 28.12.2013, 86. (This regulation modifies five previous regulations about fisheries and fishery products); Council Directive 2013/64/EU of 17 December 2013 amending Council Directives 91/271/EEC and 1999/74/EC, and Directives 2000/60/EC, 2006/7/EC, 2006/25/EC and 2011/24/EU of the European Parliament and of the Council, following the amendment of the status of Mayotte with regard to the European Union, *OJ* L 353, 28.12.2013, 8. (This directive modifies six directives about water policies, the urban waste water treatment, the quality of bathing water, the protection of laying hens, health and safety in relation to artificial optical radiation,

time decided by the EU Council provided the "structural, social, and economic situation" can differ from OR to OR.[52]

The terms of law diversity and changeability characterise the statuses of insular overseas entities. More than geographical reasons, there are also the weight of the past[53] and the hope for a better future.

However regional differentiation is not specific to the overseas entities.

There are other examples of specificities under EU law like the impossibility for some EU citizens to use some legal rights in specific parts of the EU, such as the right to vote in local elections in the Åland Islands; it is restricted to those who have *thehembygdsrätt/kotiseutuoikeus* (regional citizenship). There is also the exemption from the principle of equality between men and women in the Mount Athos peninsula. Those are exceptions to EU law recognised in primary law[54] that are not used in EU overseas regions.

Footnote 51 (continued)
and patient rights in the field of cross-border healthcare); Council Directive 2013/62/EU of 17 December 2013 amending Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC, following the amendment of the status of Mayotte with regard to the European Union, *OJ* L 353, 28.12.2013, 7. (This directive modifies a previous directive about parental leave).

[52] CJEU, Judgment of the Court (Grand Chamber) of 15 December 2015, *European Parliament and European Commission v Council of the European Union*, Joined Cases C-132/14 to C-136/14, ECLI:EU:C:2015:813.

[53] As an example see Glissant (1997).

[54] For the Åland Islands see Art. 28 (and Protocol n° 2 and Declaration n° 32) to the "Act concerning the conditions of accession of the Kingdom of Norway, the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded", *OJ* C 241, 29.8.1994, (Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11994N/TXT. Accessed on July 29, 2019). For Mount Athos see "Act concerning the conditions of accession of the Hellenic Republic and the adjustments to the Treaties", Joint declaration (n° 4) concerning Mount Athos, *OJ* L 291, 19.11.1979; This text refers specifically to article 105 of the Greek Constitution (Regime of Aghion Oros [Mount Athos]), (Available at: https://www.hri.org/docs/syntagma/Accessed on July 29, 2019).

Appendix 1: Changeability of French Overseas Statuses, after the Lisbon Treaty (EU Law)

Initial version (came into force on December 1999)		Implementations of Art. 355 (6) TFUE
ORs	OCTs	
French Guiana	New Caledonia and Dependencies	2012
Guadeloupe	French Polynesia	*Saint-Barthélemy* became an OCT [2010/718/EU: European Council Decision]
Martinique	French Southern and Antarctic Territories	
La Réunion	Wallis and Futuna Islands	
Saint-Barthélemy	Saint Pierre-et Miquelon	
Saint-Martin	*Mayotte*	2014
		Mayotte became an OR [2012/419/EU: European Council Decision]

Appendix 2: Classification of the French Overseas entities in current French and EU Law

Legal integration		Legal non-integration	
French Law Art 73 of the French Constitution	UE Law: Outermost Regions (ORs) Arts 349 and 355 (1) of TFUE	French Law Art 74 of the French Constitution	UE Law: Overseas Countries and territories (OCTs) Art. 355 (2) and Annex II of TFUE
French Guiana (Territorial Community *since* 2015*)[a] Guadeloupe (Region and Department) Martinique (Territorial Community *since* 2015*)[b] La Réunion (Region and Department) Mayotte (Department *since* 2011*)[c]	(Among others)[d] French Guiana Guadeloupe Martinique La Réunion Saint-Martin Mayotte (*since* 2014)[e]	(Among others French Overseas Entities)[f] Saint-Martin (Collectivity *since* 2007*)[g] Saint-Barthélemy (Collectivity *since* 2007*)[h]	(Among others)[i] New Caledonia and Dependencies French Polynesia French Southern and Antarctic Territories Wallis and Futuna Islands Saint-Pierre-et Miquelon Saint-Barthélemy (*since* 2012)[j]

**I.e.* after the election of the corresponding ruling bodies.

[a]See Loi n° 2011–884 du 27 juillet 2011 quoted previously.

[b]See Loi n° 2011–884 du 27 juillet 2011 quoted previously.

[c]See Loi organique n° 2010–1486 and Loi n° 2010–1487 quoted previously.

[d]Outermost entities of Spain and Portugal: the Canaries Islands, the Azores, Madeira.

[e]See 2012/419/EU: European Council Decision quoted previously.

[f]I.e. French Polynesia, Wallis and Futuna Islands, Saint-Pierre-et Miquelon. NB New Caledonia and Dependencies are not under Art. 74, but under Arts. 76 and 77, in a different "Title XIII—Transitional

provisions pertaining to New Caledonia". Other French entities are not seen like "Territorial communities", but "Special-Status communities», as they have neither permanent population nor elected councils: French Southern and Antarctic Territories, Clipperton. See Arts. 72 ff of the French Constitution.

[g]See Loi organique n° 2007–223 and Loi n° 2007–224 du 21 février 2007 quoted previously.

[h]See Loi organique n° 2007–223 and Loi n° 2007–224 du 21 février 2007 quoted previously.

[i]Overseas entities of Denmark and the Netherlands (and the United Kingdom before *Brexit*).

[j]See 2010/718/EU: European Council Decision quoted previously.

References

Césaire, Aimé. *JORF Débats*, Assemblée constituante, n° 23, séance du 12 mars 1946, p. 659. Available at: https://4e.republique.jo-an.fr/page/1946_p659ac.pdf (Accessed on July 22, 2019).

Dimier, Véronique. 2005. De la France coloniale à l'outre-mer. *Pouvoirs* 113: 37–57.

Faberon, Jean-Yves, and Jacques Ziller. 2007. *Droit des collectivités d'outre-mer*. Paris: LGDJ, collection Manuels.

Glissant, Édouard. 1997. *Traité du Tout-Monde*. Paris: Gallimard.

Grard, Loïc. 2017. L'outre-mer 'autrement' dans les traités fondateurs de l'Union européenne. 4 avril 2017, Available at https://blogdroiteuropeen.com/2017/04/04/loutre-mer-autrement-dans-les-traites-fondateurs-de-lunion-europeenne-par-loic-grard/#comments, Accessed on April 6, 2017).

Jos, Emmanuel (textes essentiels présentés et commentés par). 2012. *Contribution à l'histoire juridico-politique de l'outre-mer français : Guadeloupe, Guyane, Martinique, Mayotte et La Réunion: vers des statuts sur mesure*.Paris: L'Harmattan, collection GRALE.

Jos, Emmanuel, Perrot, Danielle (dir.). 1994. *L'Outre-Mer et l'Europe Communautaire—Quelle insertion ?Pour quel développement?*. Paris: Économica, collection Collectivités territoriales.

Jos, Emmanuel, Perrot, Danielle. 2000.*Les Départements français d'Outre-Mer et le droit de l'Union européenne — Les Grands Textes*.Paris: La Documentation française, Collection des Travaux de la Commission pour l'Étude des Communautés Européennes [CEDECE].

Kochenov, Dimitry (ed.). 2011. *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories Sui Generis*. Alphen aan den Rijn [The Nederlands]: Kluwer Law International BV.

Kochenov, Dimitry. 2012. The Application of EU Law in the EU's Overseas Regions, Countries, and Territories after the Entry into Force of the Treaty of Lisbon. *Michigan State International Law Review.* 20 (3): 669.

M'Saïdié, Thomas. 2013. *Les pays et territoires d'outre-mer dans l'Union européenne*, 2013. Bruxelles: Bruylant, collection Droit de l'Union européenne - Thèses.

M'Saïdié, Thomas. 2016. L'apport du statut de département dans le processus d'intégration de Mayotte à l'Union européenne. *Revue de l'Union européenne.* 594: 48.

Perrot, Danielle. 2006. 'Intégrité et cohérence de l'ordre juridique communautaire'.In: *Le Droit de l'Union européenne en principes :Liber amicorum en l'honneur de Jean Raux*. Rennes: Apogée.

Perrot, Danielle. 2009. Les Régions ultrapériphériques françaises selon le traité de Lisbonne. *Revue trimestrielle de droit européen* 4: 717.

Perrot, Danielle. 2014. Le 'régime spécial d'association des PTOM' : entre extériorité et intériorité. in *L'Etat tiers en droit de l'Union européenne*. Bosse-Platière, Isabelle, Rappoport, Cécile (dir.). Bruxelles: Bruylant, collection Droit de l'Union européenne - Colloques, 2014.

Perrot, Danielle. 2017a. Les 60 ans du traité de Rome – L'Europe hors d'Europe, les RUP et les PTOM de l'Union européenne. *Revue de l'Union européenne*. 613 : 635.

Perrot, Danielle. 2017b. La première interprétation de l'article 349 TFUE par la CJUE,–clarifications et interrogations sur le statut des régions ultrapériphériques. *Revue de l'Union européenne*. 604: 40.

Perrot, Danielle. 2017c. Libres propos sur une 'passerelle' atypique, l'article 355 paragraphe 6 du TFUE. In:*Abécédaire de droit de l'Union européenne. En l'honneur de Catherine Flaesch-Mougin.* Rennes: Presses Universitaires de Rennes.

Perrot, Danielle. 2018. Les régions ultrapériphériques françaises–une approche juridique. In *Olhares Cruzados sobre as regiões ultraperiféricas da União Europeia/CrossedViews on the Outermost Regions of European Union*. Valente, Isabel Maria Freitas (org.). Editora da Universidade Federal

de Campina Grande, Imprensa da Universidade de Coimbra, Coleção: Euro-atlântico: Espaço de Diálogos.

Rakotondrahaso, Faneva Tsiadino. 2014. *Le statut de Mayotte vis-à-vis de l'Union européenne*. Aix-en-Provence: Presses Universitaires d'Aix-Marseille, Collection Droit d'Outre-mer.

Rubio, Nathalie. 2008. La consolidation du régime des régions ultrapériphériques par le traité de Lisbonne. *Gazette du Palais* 171: 65.

Simon, Denys. 2016. Champs d'application—Statut de Mayotte, commentaire 39, *Europe*, 2.

Tesoka, Laurent, Ziller, Jacques (dir.), 2008. *Union européenne et outre-mers, unis dans leur diversité—Actes du colloque organisé à Florence les 12 et 13 avril 2007.*Aix-en-Provence: Presses Universitaires d'Aix-Marseille.

Vestris, Isabelle. 2012. *Le statut des régions ultrapériphériques de l'Union européenne*. Bruxelles: Bruylant, Collection Droit de l'Union européenne, Thèses 25.

Vestris, Isabelle. 2018. Statuts internes, statut de régions ultrapériphériques : une interaction relative. In *1946–2016—70 ans de départementalisation ultramarine : entre unité constitutionnelle et diversité législative dans la République*, Blanc, Didier and Cafarelli, François (dir.). Aix-en-Provence: Presses Universitaires d'Aix-Marseille, Collection Droit d'Outre-mer.

Ziller, Jacques. 2017. Les 'outre-mer de l'Union européenne' un panorama juridique. *Revue de l'Union européenne.* 610: 408–417.