

CAN THE POLYNESIAN LANGUAGES BE USED IN THE PROCEEDINGS OF THE ASSEMBLY OF FRENCH POLYNESIA?

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In 2010 the European Court of Human Rights rejected a petition relating to the right to use a Polynesian language in the Assembly of French Polynesia. This article considers the relationship between the French Constitution and the Organic Law, relating to the status of French Polynesia, and the use of languages other than French in the proceedings of the Assembly of French Polynesia. The consequences of case law for the use of a Polynesian language in the Assembly of French Polynesia are also examined. The article concludes is that there is no right to use a Polynesian language in the French Polynesian Assembly, but that the use of Tahitian and other Polynesian languages is a long established practice of the Assembly and that their use in a number of limited cases does not render the proceedings in which they are used invalid.

L'usage des langues polynésiennes ne constitue pas en l'état du droit constitutionnel français un droit politique, il n'a pour fondements que des droits culturels et reste inscrit comme tel dans la loi organique statutaire. Pour qu'il en aille autrement, il faudrait au préalable réviser la Constitution française.

I INTRODUCTION

After being a colonial protectorate of France from 1842 to 1880, the former Kingdom of Tahiti was annexed by France by Act of 30 December 1880 and established as a colony. Then just before World War Two the colony was transformed into a territorial entity. More particularly, after being been an overseas territory from 1946 to 2003, French Polynesia was changed into an overseas community with a degree of autonomy as a result of the constitutional revision of 28 March 2003.

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Currently the status of French Polynesia is fixed by the Organic Law of 27 February 2004 as amended by Organic Law of 7 December 2007 which is based on article 74 of the Constitution.¹ Several languages are spoken in French Polynesia but Tahitian is by far the most commonly used.

Although many foreigners and French people have taken up residence in these islands (named French Polynesia as from 1957), the indigenous population has always remained a significant majority. Nevertheless, France has imposed – as is the case throughout the territory of the Republic and whatever the status of the public non-state entities concerned – that French is the exclusive official language² and must, in principle, be the only language used in public life. This situation is particular to France³ because there are other European states where regional languages have an "official" status either because several languages are declared official,⁴ or because, in addition to the national language, regional languages are equally recognised as having an official character.⁵

The fact that the French language has the status of an official language, and that its use is imposed in public life is one of the basic principles of the French state: the unity of language goes hand in hand with the unity of the state.

Indeed the principle of the unity of the French people demands that there can be only one official language in the state. Moreover, the notion of the indivisibility of the state, as well as that of equality before the law, is opposed to a situation where specific rights might be entrusted to groups of speakers of regional or minority languages within the areas in which those languages are used.⁶

1 See Alain Moyrand *Droit institutionnel de la Polynésie française* (L'Harmattan, Paris, 2007); B Gille "Du royaume Pomare au Pays d'Outre Mer: Gouvernances et institutions à Tahiti de 1767 à 2009" (2010) 16 RJP 69; Yves-Louis Sage and Tony Angelo "The status of autonomy of French Polynesia after the constitutional amendment of March 2003 and the organic law of 27 February 2004" (2004) 4 RJP 110.

2 Constitutional of the Fifth Republic, art 1(1) "La langue de la République est le français" [The language of the Republic is French] since the Constitutional Law 92-554 of 25 June 1992.

3 It is the same in Portugal where Portuguese is the sole official language: Constitution of Portugal, art 11 § 3.

4 The Constitution of Switzerland, art 4, states that "les langues nationales sont l'allemand, le français, l'italien et le romanche" [the national languages are German, French, Italian and Romansh].

5 Constitution of Spain, art 3.1 and 3.2.

6 Constitutional Council # 99-412 DC of 15 June 1999.

But there are exceptions to every principle. Indeed, although the law imposes the use of French in the public arena, it does not prescribe that its use be exclusive. Thus even outside the private sphere, the law provides space for regional languages to be used in the functioning of public services. Such is the case in communication matters since time slots are reserved on the radio and the television for the broadcast of news in Polynesian languages. Teaching of these languages is provided for in educational establishments, though this is a discretionary matter.

In the vein, the administrative courts have held it is possible to use Tahitian to identify services which relate to Polynesia⁷ and that the Code of Civil Procedure as applicable in Polynesia can provide for "the combined use of French and Polynesian languages" in civil cases.⁸ Moreover Parliament in the Organic Law on Status of 12 April 1996 recognised that "the Tahitian language and other Polynesian languages can be used".⁹ Consequently "the use of Polynesian languages is possible in the public life of Polynesians".¹⁰

All of these exceptions are in accord with the recognition of "cultural rights" understood as the rights of cultural communities.¹¹ In this regard it should be noted that the Organic Law on Status at present provides that:¹²

the Tahitian language is a fundamental aspect of cultural identity: it is the substance of social cohesion, the means of daily communication; it is recognised and must be preserved in the same way as the other Polynesian languages alongside the language of the French state in order to guarantee the cultural diversity which is the bounty of the French Polynesia.

If Polynesian languages can be used in the public sphere, can it also be accepted that the members of the Assembly of French Polynesia in full sessions use these languages in the course of the debates?

7 CAA Paris 14 October 1999, No 97 PA 00883.

8 *High Commission of the Republic in French Polynesia v Assembly of French Polynesia*; Territory of French Polynesia, No 02-90. TA Papeete, 29 April 2003.

9 Organic Law on Status of 12 April 1996, art 115.

10 *High Commission of the Republic in French Polynesia v Assembly of French Polynesia*, above n 8.

11 Olivia Bui-Xuan "Unité et droits des groups" in Félicien Lemaire (ed) *De l'unité de l'Etat* (Editions Cujas, Paris, 2010) at 43–52.

12 The Organic Law on Status, art 57 at [2].

A priori, the question must be answered in the negative since (following the decision of Constitutional Council)¹³ the Organic Law on Status says:¹⁴

French is the official language of French Polynesia. Its usage is obligatory for all public law entities and private law entities in the exercise of any public service activity as well as in their relationships with administrative departments and public service providers.

However the Council of State gave support to the possible use of the language under existing law, but the use of Polynesian languages did not give "a right" to use them in the debates of the Assembly of Polynesia and any such use is not without limits.

II THE USE OF POLYNESIAN LANGUAGES IN THE PROCEEDINGS OF THE ASSEMBLY OF FRENCH POLYNESIA

As a result of art 2 of the Constitution, and of art 57 of the Organic Law on the Status of French Polynesia, the use of French is obligatory in the operation of government institutions in French Polynesia. Consequently the formal acts of government institutions (resolutions, local legislation and orders for example) must be drawn up in French. Equally discussions which are part of the relevant procedure when decisions are made must take place in French. It is for this reason that the Council of State condemned a provision of the Standing Orders of the Assembly¹⁵ which said that during discussions the participation of representatives in the Assembly "could take place in French or in Tahitian or in one of the other Polynesian languages".¹⁶

The use of a language other than French by elected representatives therefore seems to be prohibited by the administrative courts. This case was taken before the European Court of Human Rights by one of the members of the Polynesian Assembly. The European Court unanimously rejected the petition in a judgment of 21 September 2010.¹⁷ The court stated that no article of the European Convention was expressly concerned with "language freedom" as such, and that therefore the

13 No 96-373 of 9 April 1996.

14 The Organic Law on Status, art 57 at [1].

15 Article 15-1.

16 *High Commissioner for the Republic in French Polynesia and M Edouard Fritch* 26 March 2006 CE, (No 282335 and No 283916), JCL No 6/06, at 441.

17 *Levy v France* (2010) No 39426106, CDH, 5th section, 21 September 2010.

court "did not have to make a decision on the working language of a national parliament" because "this matter, is dictated by considerations of a historical and political nature which are particular" to each state and "as a matter of principle relates to the field of exclusive competence of the State".¹⁸

Despite this case law, it remains possible that the elected representatives in the Assembly use Polynesian languages in the proceedings of the French Polynesian Assembly. Moreover, this is what has happened regularly since Polynesia ceased to be a colony. Speakers in the Assembly regularly use Polynesian languages and the High Commissioner of the Republic, who has responsibility for controlling the legality of the decisions taken by French Polynesia, has never commented on this situation nor referred decisions of the Assembly to the administrative courts on the basis that they were taken during discussions conducted in a language other than French.

Further, a number of the representatives, and particularly those from the distant island groups, express themselves better in their own language than in French and that is why spontaneously they resort to Polynesian languages when they participate orally in the debates of the Assembly of French Polynesia. Although the administrative courts have annulled some provisions of the Standing Orders of the Assembly, they have not condemned this current practice. Indeed in the case in question, the Commissioner of the Government expressed the view:¹⁹

that in the event that the court had cause to examine the legality of a decision of the Assembly of French Polynesia, the fact alone that some speakers had used Tahitian and not French in the debates – which moreover seems to be the current practice – would not be sufficient for it to be held that the decision was taken in a procedurally irregular manner.

This somewhat "brave" suggestion which could not be accepted if the same practice occurred in a metropolitan territorial government entity (even in one which was strongly marked by cultural rights) is based on a practice which has existed in French Polynesia for several decades. It is therefore:²⁰

in the interests of realism and taking account of the case in relation to decisions taken by the deliberative bodies of territorial entities, that the use of languages other

18 Ibid.

19 *High Commissioner for the Republic in French Polynesia and M Edouard Fritch*, above n 16.

20 CE 22 February 2007, *M Edouard Fritch and others*, req no 299649, and *Societe Civil Immobilière Caroline* req no 300312).

than French in the Assembly of French Polynesia can, in certain circumstances, be categorised as a irregularity of a non-substantive nature.

It might also be added that this is in conformity with the old law adage "necessity makes law".

Although the courts have not systematically condemned speakers in the Assembly who use the Polynesian languages within the chamber of the Assembly, the cases relating to the operation of public services have been consistent.

Thus when a user of a public service uses a language other than French, a public servant, although not under an obligation to do so, may answer in that language if it is known to him. The public servant has no obligation to respond in the regional language that has been used but does have the right to do so. Thus for example the Council of State has considered that within the context of the operation of the postal services, the postman is not obliged to deliver a letter when the address is written in Breton;²¹ the court did not say that it was prohibited to distribute the postal package and therefore there was the option to do so. This is the way that most of the public services operate in French Polynesia. Following the same logic, in almost all of the tests for the Polynesian public service candidates can choose a Polynesian language option.

III THE USE OF POLYNESIAN LANGUAGES IN THE FRENCH POLYNESIAN ASSEMBLY DEBATES

The law recognises the possibility that the Polynesian representatives may use a language other than French in discussions which take place in the Assembly, but what is the nature and extent of this right?

For the Polynesian political elite – without exception – the possibility of using Polynesian languages is not simply a cultural right but it is a political right from which the firm control of power confers an official status, or at least a parallel official status, with that of French.

This control is of longstanding because the Territorial Assembly adopted a decision which proclaimed that Tahitian was an official language of French Polynesia on 28 November 1980, under the Governor's signature in his role as head of the executive of the Territory. Although this decision was never annulled, it is nonetheless contrary to the law in the sense that it can be considered to have been impliedly repealed by art 2 of the Constitution of the French Republic.

²¹ CE 15 April 1992, *Le Duigou*, No 100042 and No 103408, Rec T at 1183; *Dalloz* 1992, pp 517-519, note Roland Debbasch.

There is technically speaking no right to use Polynesian languages in public life in general and particularly not in the discussions in the Assembly of French Polynesia. On the other hand, it is not possible to compel the speakers, public officers, or the representatives, to use a Polynesian language.

The constitutional case law is clear on this matter and states "individuals cannot depend in their relationships with government entities and public services on a right to use a language other than French, nor be compelled to use such a language".²²

Therefore the right provides no obligation to the use of the regional languages. It only gives interested parties the possibility of using these languages including in the public law sphere.

This amounts simply to a toleration of the situation by the law on this matter and is why the limits of this use in relation to Assembly proceedings is subject to strict limits. Indeed although the use of Polynesian languages is tolerated within the Assembly this does not create a right for representatives to choose between the use of French or a Polynesian language. This is why the Council of State annulled the provision which appeared in the Standing Orders of the Assembly. It can be seen that the Court would probably not have annulled the provision if the decision had limited itself to stating that it was possible to participate in a debate in a Polynesian language. This is what Mrs Mitjaille suggests in her conclusions in the judgment of the Council of State of 29 March 2006.²³

Therefore, if the Assembly wishes to include the possibility that members of the Assembly use one of the Polynesian languages in its Standing Orders, it must make it clear that the principle is the use of French.

Following the reasoning of the Administrative Court concerning the use of Polynesian languages in the context of civil procedure, it can also be noted that in a particular case that "the cumulative use of French and Polynesian languages need not be regarded as tainting the procedure with illegality".²⁴ However the use of Polynesian languages cannot extend to all debates. It seems that the use is proscribed at the moment when the government presents the text of a Bill to the

22 Constitutional Council No 99-412 DC, 15 June 1999.

23 *High Commissioner for the Republic in French Polynesia and M Edouard Fritch*, above n 16, at 444.

24 *High Commissioner for the Republic in French Polynesia v Assembly of French Polynesia; Territory of French Polynesia*, above n 8.

Assembly and also in the reading of the report presented by the representative to the Assembly.²⁵

Moreover, and this point of law has been decided by the Council of State, if the speaker responsible for supporting the text of the Bill speaks exclusively in Tahitian and refuses to speak in French when representatives request explanations because they do not have sufficient understanding of Tahitian, that would render the legislation that results from these discussions illegal. The Council of State has declared two laws of French Polynesia illegal and ineffective for this reason.²⁶

IV CONCLUSION

The ability to use Polynesian languages in public life and particularly in discussions in the French Polynesian Assembly is a reality and (in practice at least) does not give rise to dispute.

Certainly, the Administrative Courts have annulled two pieces of legislation of French Polynesia because the minister responsible for the Bills refused to give explanations of them in French to a member of the Assembly who formally requested that explanation. But that was a question of the member of government defending a principle on which he was intransigent.

However the use of Polynesian languages is not a political right and this is a matter of great discontent for the Polynesian political elite; the current usage has its basis only in cultural rights and as such has its place in the Organic Law. To change this situation, it would be necessary to amend the Constitution of the French Republic.

²⁵ See *High Commissioner for the Republic in French Polynesia and M Edouard Fritch*, above n 16.

²⁶ *Ibid.*