

THE CONCEPT OF POLYNESIAN CITIZENSHIP

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This article is presented by the editors as a non-literal rendering into English of the main points in the preceding article. For a fuller account of Monsieur Flosse's views it is necessary to consult the French text. The footnotes and references are given in the French version only.

The concept of Polynesian citizenship has attracted considerable positive attention while evoking in some, a minority, a certain anxiety. It is for this reason that I have chosen to make some observations on the direction and approach that we have taken towards this matter.

After reviewing the origins of this concept I will review what are, for us in French Polynesia, the foundations of our constitutional rights to citizenship. In my view the establishment of Polynesian citizenship is a truly new concept in the history of Polynesia. Yet at the same time the rights attached to this citizenship are not so new. They represent, instead, the fulfilment – indeed, the consecration – of liberties that have received special protection from the French Republic since the 19th century and which are, as a result, now inscribed as a part of our culture.

I THE ORIGINS AND CHARACTER OF POLYNESIAN CITIZENSHIP

In the first part of this paper, I respond to three questions:

- first, I will state at which place, in the pyramid of our legal norms, this concept is situated;
- then, I will make explicit those rights that are attached to the possession of Polynesian citizenship;
- and finally, I will identify the conditions by which people are enabled to gain Polynesian citizenship.

What is the juridical value of the rights attached to Polynesian citizenship?

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Before discussing the nature of the rights associated with Polynesian citizenship, it is necessary to state precisely what place these rights will occupy within the French legal order.

To begin with, it is clear that if a right or a liberty is not given constitutional expression then it can scarcely be spoken of as a 'fundamental right'. In such circumstances it exists simply as a 'public liberty': that is to say, as a realm that can be defined (or restricted) by lawmakers (as expressly provided for in Article 34 of the French Constitution).

By contrast, however, by being included within the scope of Article 78 of the Constitution the rights attached to Polynesian citizenship are to be raised up to the ranks of 'fundamental rights and liberties', with all that that implies.

What are to be the rights of Polynesian citizens?

Polynesian citizenship, as I have already stated publicly, would institute two types of rights: the protection of employment and the protection of patrimony.

As to the first, it seems to me important to emphasise that what is envisaged is the protection of employment rights in a general way, through measures designed to favour the access of Polynesian citizens to employment. The term 'to favour' signifies taking measures 'in favour of'. That does not mean the exclusion of non-citizens from employment.

What is being permitted are measures - whether temporary or permanent - intended to give priority to Polynesian citizens over non-citizens. As these measures would be taken according to the 'law of the country' - according to the powers defined under the organic law - they would be able to be adapted to economic and social circumstances which are necessarily still evolving. The protection to Polynesian citizens would be in proportion to the danger presented to them. The purpose is to establish, from time to time, categories of employment that would be taken up by Polynesians rather than by non-citizens.

In general, the protection of Polynesian employment will give priority to Polynesians in certain circumstances, without excluding non-citizens altogether. Even so, from this point of view Polynesian citizenship can be seen as a political measure designed to achieve a degree of social change within the territory.

As for the protection of the patrimony (of which the first measures designed to control the transfer of property date back to 1845), the intent is to re-establish what has always been in our laws, but which was criticised by the Constitutional Council on 9 April 1996: namely, the principle that the alienation of property for the profit of those without any link to Polynesia can be regulated by Polynesian institutions.

Contrary to New Caledonian citizenship, our concept of Polynesian citizenship does not place restrictions on matters relating to electoral rights. Why is there this difference between the two? Why have we not reserved political rights exclusively to Polynesian citizens? Simply because the institutional future of our two 'countries' is very different.

Polynesians benefit from an autonomy fully guaranteed to them by the French Republic, which they have no desire to leave. What has been sought is simply the power to 'govern'.

On the other hand, the French State is preparing the people of New Caledonia for the eventuality of becoming an independent state in 15 or 20 years' time. The Noumea Accord (signed on 5 May 1998) explicitly provides that New Caledonian 'citizenship' will be transformed into a 'nationality' if the people taking part in a future referendum should choose independence. This is not the case for the inhabitants of French Polynesia, for they wish to remain part of France.

Finally, it is sufficient to note that the restriction of electoral rights has never been sought by Polynesians. However, the first two rights of Polynesian citizenship - of employment and control over land - correspond quite closely to the strongly held convictions of our citizens.

Who would be a 'Polynesian citizen'?

Two very different approaches can be taken towards this issue.

One involves the concept of an 'indigenous people'. From this point of view, the beneficiaries of rights would be only those who are descended from the people who were living in the country at the time of the arrival of the new immigrants. This is an ethnic approach, one which comes very close to racism. It can create problems in the case of intermarriage as, for example, in Fiji, where it becomes necessary at times to determine who is a 'Fijian Fijian' - a *real* Fijian - for the purposes of receiving particular benefits reserved for ethnic Fijians. In our case, in French Polynesia, it would be even more difficult, as so much intermarriage has taken place over the years.

A second approach uses a quite different concept, one to which I am attached and propose to defend. In this case, the criteria for eligibility for citizenship is determined by place of birth or by length of residence.

This second conception is preferable, for Polynesian citizenship is not an idea designed to promote exclusion. On the contrary, rather than encouraging ethnic antagonisms or tensions, this citizenship aspires to be both generous and open.

Of course, those who have been born in French Polynesia – or whose parents have been born here – must be citizens as of right. But it should also be possible to acquire this citizenship.

Two judicial criteria arise out of the organic law to determine the conditions for acquiring Polynesian citizenship. Before reviewing them, I will state, at the outset, that Polynesian citizenship must be entirely voluntary. Citizenship would not be imposed.

The first criterion for being able to gain Polynesian citizenship is that one must be of French nationality. As a result, no foreigner – including those who live in the other member states of the European Community – would be able to acquire the rights conferred by Polynesian citizenship.

A second criterion has to do with length of residence. I note that the future project for an organic law for New Caledonia introduces a length of residence of 10 years (cf. Articles 3 and 189) in order to participate in the election of members of provincial assemblies or to take part in a referendum.

In French Polynesia, the Territorial Assembly has established a 10-year period of residence for other purposes – for obtaining the right of acquiring a pharmaceutical office or for joining the sharemarket or for students seeking to pursue their university studies in metropolitan France.

Other documents, much more numerous, establish a 5-year period for the exercise of certain professions, such as civil servants, or for participation in elections in certain professions, as for the chamber of agriculture for example.

But over the past decades these regulations have been deferred owing to criticism from the Administrative Court, which has declared them illegal on the grounds that they do not have a sufficient legal basis.

In the future, however, this will change, since the duration will be written into the organic law by virtue of a constitutional revision. Then will it be five years of residence or ten? This question deserves to be further considered and debated by the institutions of French Polynesia.

These criteria, it will be noted, leave no room for subjectivity. We wish to see the principle of equality rigorously applied: 'the same rights for those who fulfil the same conditions'.

Let us now examine the basis and origins of Polynesian citizenship.

II THE BASIS OF POLYNESIAN CITIZENSHIP

Polynesian citizenship is superimposed over French nationality. It does not constitute a break with the evolution of French public rights and, more particularly, with the rights of the overseas territories. On the contrary, over a long period the authorities of the French State have given substance to the rights of Polynesian citizens.

A *The differentiation between citizens in the French nation*

It is necessary to reflect for a moment on the notion of citizenship. One idea suggests itself: the concept of citizenship has been introduced into French public rights from the moment of the French Revolution of 1789, from which it has since undergone major changes.

In its origins, as the Declaration of the Rights of Man and of the Citizen makes plain, citizens are those who participate in the formation of society and the body politic. Man is no longer merely a 'subject' who submits to monarchical power; he is a citizen who participates in democratic life and who enjoys certain rights and liberties, and also obligations. Citizens have the right to vote, but must also pay taxes and participate in defence of the city. That is why, for a long time in French history, citizenship has been reserved only to 'men'.

In spite of its generous proclamations, figuring notably in the Declaration of the Rights of Man and of the Citizen, the rights of the citizen were, for a very long time, reserved only to a minority: those who qualified were 'active' citizens, to be distinguished from the more numerous 'passive' citizens. As for those in overseas territories, it was necessary to wait until the end of the 19th century before indigenous people could even begin to benefit from the rights of citizenship.

With the vote for the 'Lamine-Gueye' law (7 May 1946) a major innovation was introduced into French citizenship. By its terms it was decreed that all people living in the overseas territories were to have citizenship rights identical to those of French nationals residing in metropolitan France. At the same time, however, the exercise of citizenship rights was to be subject to regulation according to particular statutes and ordinances.

Thus this citizenship was nothing more than a French civil statute; the new citizens kept their personal and local status. As a specialist on this subject, Professor Francois Borella, has well noted, 'citizenship was becoming multicultural'.

From this point, a citizen's rights could be said to differ according to whether they were living in metropolitan France or in the overseas territories. Even within the overseas territories it became evident that the rights of citizens varied from one territory to the other.

What is important to remember is that, historically, there has not been a uniformity in the concept of citizenship. Instead, this concept has taken in the social, economic and political realities of the people of the overseas territories in order to determine the rights of the original citizens of these overseas regions. Of course this was in order to confer upon them fewer political rights than were enjoyed by the citizens of metropolitan France. Therefore there was a form of negative discrimination, yet this disparity of rights was also able to inspire among the indigenous people a desire to protect their customs and legitimate interests.

B The genesis of 'Polynesian citizenship'

A genuine differentiation in the contents of the rights of citizenship was manifested very early in the regulations made concerning the protection of local employment and land tenure.

1 The protection of employment

One can see the legal premises for a protection of local employment in matters of public function in the preambles to the Constitutions of 1946 and 1958. The freedom of self-determination and of self-administration, as stated in these preambles, finds its concrete expression in Article 3 of the Deferre law of 23 June 1956 which was intended to facilitate access for civil servants of local origin to all echelons of the administrative hierarchy.

Numerous documents give expression to the concept of 'territorial preference'. Without pretending in any way to be exhaustive, one can mention above all else the ordinance of 2 November 1945 which stated that in certain colonies, the establishment of our indigenous people in the exercise of certain professions would be subordinated to conditions 'of economic and social utility': these would have the purpose of 'preventing the establishment ... of non-indigenous people, French or foreigners, who ... would be susceptible to the exercise of the professions which could be assured by the indigenous people or which would prevent the social evolution of the country'.

Later on, by the decree of 19 July 1982, the State made the residence of five years as a condition for the hiring of any primary school teachers.

The statutes of 1984 and of 1996 were not criticised on this point by the Constitutional Council, which made it compulsory for Ministers to satisfy the condition of at least a five years' residency in French Polynesia. It is equally necessary to cite the law of 23 October 1952 relative to the formation of the Territorial Assembly which imposes a residence requirement of a minimum of two years for eligibility.

Moreover, the European right which gives us, however, the greatest degree of satisfaction with respect to our own plans, legitimates the organisation of a measure of protection for the category of Pacific Overseas Territories of which French Polynesia is a

part. In effect, Article 232 of the decision of association of 25 July 1991 states the possibility of limiting the right of establishment of Europeans in the overseas territories but on condition that this limitation applies also to French people from metropolitan France. Until now it has not been possible to institute such protection in relation to employment, for that would have been contrary to the French Constitution. The right of citizenship relative to the protection of employment which will now figure in the Constitution will permit us to take measures that have for a long time seemed appropriate to us.

Finally, we have – as mentioned earlier – the rule of five years, which is very often included in the deliberations of the Territorial Assembly in order to give priority to Polynesians in access to public employment and to certain professional activities.

Without doubt 'the oceanisation of the laws' can appear to some as a sort of caste system. In fact, this measure is requested by the near-unanimity of Polynesian society, for it is aimed at providing protection for the local job market at large since a collectivity of 220,000 inhabitants could realistically fear being threatened, or swamped, even to a small extent, by the hundreds of millions of Europeans confronted, in their own homes, by poor employment prospects.

2 *The protection of land tenure*

The link, even the affectionate attachment, which unites the Polynesian to his land is very strong and very great because it constitutes for him and for his family the affirmation of belonging to a place, to a community; the land is thus a fundamental element of Polynesian identity. Therefore it is not astonishing that, from 1845, legal provisions destined to protect Polynesian lands would have been considered.

The modern regime regulating the land transfers operations all over the territory was established in 1934. The decree of 25 June 1934 already gave to the Governor the power of regulating land transfers in French Polynesia. It stated that any transfer of land would not be able to take place without the authorisation of the Governor regardless of who would be the future owner: foreigner or French. It is exactly what we wish, and it is what has already been done.

This regime of exception – for it conflicts with the rules of common right contained in the civil code – was destined to protect the Polynesians against sales made at a price which does not reflect the real value of the land. But it was also made in order to limit the sales of land to foreigners and, finally, the measure sought to restrain the 'fever of financial speculation'.

Since 1984, this regime of protection has been weakened, following the adoption of certain statutes and the criticism of the constitutional judge. Why? Because from this date the law has given to the territorial authorities competence in matters of land transfers.

Therefore, charged to control these transfers, the elected Polynesians must respect property rights, fundamental rights inscribed in Article 17 of the Declaration of the Rights of Man and of the Citizen. However, it does not seem to me that we must be less well placed than the authorities of the State to protect our land tenure. Why should the Governor be able to protect local land rights in French Polynesia and the elected Polynesian not be able to do so?

The protection of Polynesian land rights seems to me an important and legitimate goal to pursue and it is why I have sought to have them written into the Constitution.

For to our eyes it does not mean that access to the ownership of Polynesian land would be forbidden to non-citizens. It is only designed to prevent land speculation, and above all the non-productive utilisation of the land, or even the acquisition for principal residence by a metropolitan French person established in French Polynesia. As such, citizenship can be viewed as a means of political economy.

III CONCLUSION

In summary, I would say that New Caledonian citizenship, which establishes a form of electoral discrimination, enshrines political rights. On the other hand, Polynesian citizenship has essentially social (protection of work) and economic (protection of patrimony) goals, and is not a fundamentally political measure.

However, the recognition of a 'specific' citizenship within the overseas territories and countries does not constitute a new type of French right which would have jeopardised the national legal edifice: as we have shown, since 1958 the content of the rights of citizenship has been varying from one overseas territory to the next, and therefore as far as metropolitan France and the Constitution of 4 October 1958 are concerned, it has enshrined particular provisions to the 'citizenship of the Community' (Article 77, paragraphs 2 and 3).

Finally, one can recall that federal states – for example the United States, Switzerland, and Austria – and unitary states that give to certain of their possessions a degree of political (and not only administrative) autonomy – for example, Spain – admit that these communities entitled to have a 'local' citizenship based on their territory of origin.

But it is not in order just to follow a trend that the Polynesians wish to benefit from a distinctive type of citizenship. Sometimes I hear said: 'President Flosse wants to copy the people of New Caledonia and that is why he claims to the State the recognition of a citizenship'.

This is totally false. I did not wait for the signature to the Noumea Accords, on May 5th, to ask for the consecration of those rights which we would wish to be associated with the concept Polynesian citizenship. Indeed, during preceding electoral campaigns the Tahoeraa Huiraatira party has always defended the protection of work (see, for example,

'A Better Management for French Polynesia', 1982) and the protection of Polynesian land tenure.

So in 1991 in my 'letter to all Polynesians' entitled 'a project for our country', I indicated expressly that I wished to remedy the problem of alienation of land to non-residents and in order to do this, I would propose to put in place a regime of preliminary authorisation for the acquisition of land by foreigners.

We know that this mechanism has been criticised in the statutory law of 12 April 1996 by the Constitutional Council and that is why, in order to fully guarantee these rights, we have asked that they be written into the French Constitution.

Seven years ago a jurist of the French Polynesian administration wrote that the rights of protection of work and land tenure would provide the framework of a local citizenship.

Today we ask that these rights be fully guaranteed, that is to say respected and protected, and it cannot be more strongly guaranteed than by their inscription into the Constitution.

Certainly, but why have these ranked under the banner of citizenship? Very simply, because these liberties, which have their origins in the history and the culture of Polynesians, constitute a strong element of their identity.

From this standpoint the recognition of Polynesian citizenship is vested with a particular meaning and moral dimension. Polynesian citizenship symbolises in the eyes of those obtaining it the recognition by France, and by the rest of the world, of this Polynesian identity.

Therefore everyone in this country would be fully associated over the years with the profound change carried out by the establishment of autonomy. Every man and woman of French Polynesia would be in a position to appreciate that the accession to what one could call 'constitutional autonomy' goes far beyond the easily understandable expansion of the powers of local institutions. Polynesian citizenship – even if its scope and legal effects are voluntarily limited to the exercise of social and economic rights – has legal effects that are perceptible to each and have an effect on the personality and dignity of all the entire community of men and women in Polynesia.

However, this citizenship is open and fraternal. It protects the Polynesians since it is limited to situations where concrete necessities require that this be done. It will never have the purpose of exclusion. It is a citizenship *within* French nationality, for Polynesia is Polynesian, but French also, and it intends to remain within this framework of a common destiny.

