

COMPARATIVE OBSERVATIONS ON THE TRANSFER OF THE PRINCIPLES OF GOOD GOVERNANCE TO FRENCH POLYNESIA AS ISSUED BY THE UNITED NATIONS DEVELOPMENT PROGRAM (1977) AND THE PACIFIC PLAN (2006-2015)

*Yves-Louis Sage**

Tout le monde¹ s'accorde à reconnaître que, depuis 2004 la situation politique de la Polynésie française est marquée par une instabilité

* Maître de Conférences (Hdr) at the University of French Polynesia, Teaching Fellow Dispute Resolution Centre Massey University (New Zealand), Director Legal and Economic Department University of French Polynesia, Member of the "Gouvernance et Développement Insulaire" Research laboratory (EA4240). The author would like to express his gratitude towards Prof A Angelo (Victoria University of Wellington) and Ass Prof A Moyrand (UPF) for their invaluable advice. The remaining errors are the author's alone.

1 This paper is an amended version (to the 30 March 2009) of a contribution to the Seminar on New Approaches to Governance and Self-Reliance in Pacific Island Societies, organised by East West Centre (Hawaii) and the French Government (21-22 January 2009). See also Sage "Observations sur la situation politique de la Polynésie Française..." (2009) 39 VUWLR 583.

chronique. Les réformes successives entreprises par le gouvernement en matière électorale pour tenter de moraliser la vie politique dans cette communauté d'outre-mer n'ont pas, si l'on en juge par la situation actuelle, répondu aux attentes de leurs concepteurs. En fait, n'ayant été que très rarement précédées de concertations véritables avec la population ou qu'elles se sont affranchies de l'avis contraire exprimé par l'Assemblée territoriale, ces réformes étaient donc d'avance promises à un échec certain. A l'inverse des résultats escomptés, elles ont fini par favoriser voire même à accentuer les travers auxquels elles étaient pourtant censées remédier. Cette situation aujourd'hui dénoncée par une vaste majorité des électeurs polynésiens apparaît aussi pour le juriste comme la résultante d'une transgression volontairement organisée et mise en œuvre par les principaux acteurs du jeu politique polynésien, des principes de bonne gouvernance dégagés par le Programme des Nations Unies pour le Développement de 1997 (PNUD 1997) ou encore par le Plan Pacifique 2006-15. Pourtant pour peu que les acteurs politiques veuillent s'en donner la peine des solutions existent.

The political situation in French Polynesia has, since 2004, been plagued by a chronic political instability. The vast majority of observers agree in explaining this situation by the 'political nomadism' of a minority of politicians who shift from one political party to another. It remains that from a legal perspective these events reveal also a broader dysfunction: A total disregard by almost all major political actors involved (French representatives included) of the rules of good governance as defined by the United Nations Development Program 1997 (PNUD 1997) and by the Pacific Plan 2006-2015 set up by the Pacific Islands Forum in 2005.

I OVERVIEW OF THE CURRENT POLITICAL SITUATION IN FRENCH POLYNESIA

In order to provide a return to the institutional stability in French Polynesia, which had been lacking since 2004,² law number 2007-223 of 22 February 2007 amended article 105 of the law of 27 February 2004.³ This new electoral system was designed to produce a clear majority within the Assembly.

Unfortunately and as widely anticipated, this amendment did not fulfil its aims⁴ and in 2007, the new French government, had a new set of bills endorsed by the French Parliament in order to introduce, among other amendments new rules in the voting system and call for a general election.

Under the electoral system introduced in December 2007⁵ – inspired by existing French regulations – a candidate must obtain more than 50 per cent of the vote in his or her constituency in order to earn an Assembly seat on the first round.

2 On the origin of the events, see A Moyrand and A Troianiello, *Aspects juridiques de la crise politique polynésienne* in RJP Vol 11, 2005 at 1-14; E-P Guiselin "Du premier au second Gouvernement Temaru: Une année de crise politique et institutionnelle" RJP Vol 12, 2006 1; B Gille "Libres propos sur les modèles politiques et économiques des relations franco-tahitiennes" RJP Vol 11, 2005 at 15.

3 <www.vie-publique.fr/actualite/panorama/texte-vote/loi-organique-loi-du-7-decembre-2007-tendant-renforcer-stabilite-institutions-transparence-vie-politique-polynesie-francaise.html>. On the 2004 statute, see A Angelo and Y-L Sage "The 2004 Status of French Polynesia" in *Autonomie en Polynésie française* RJP Hors Série Volume IV, 2005 (2005).

4 On the electoral system, see Y-L Sage, *La réforme du mode de scrutin pour l'élection des membres de l'Assemblée territoriale de la Polynésie Française par la loi du 22 février 2007: Commentaires à l'aune du droit électoral comparé*, in *Revue Juridique Polynésienne*, Vol 13, 2007.

5 Law n° 2007-1719, 7 December 2007, art 3-I, introducing new article 105 of the Organic Law of 27 February 2004.

If this is not the case, every candidate with at least 12.5 per cent of the vote – or the top two vote-getters in each constituency – qualify for the second round, where a simple plurality is then enough to win.

General elections were therefore held in French Polynesia in January and February 2008.

Three main political groupings contested the Assembly election: the UPLD independentist coalition (Union for Democracy) which former President, Oscar Temaru, leads; the Tahoera'a Huiraatira party which is led by a long-time political leader, Gaston Flosse, and the "To Tatou Ai'a" coalition ('Our Home'), which is led by Gaston Tong Sang.

Preliminary results gave Tong Sang's Polynesia, To Tatou Ai'a party 36 per cent of the vote, followed by Temaru's Union for Democracy with 33 per cent.

On January 31, Gaston Flosse took "personal responsibility" for his party's third place showing, and urged pro-French voters to unite.

The second round voting took place on 10 February 2007, To Tatou Ai'a secured 44.87% per cent of the vote and 27 of the 57 seats at stake, followed by the Union for Democracy with 38.26% and 20 seats, and the Tahoera with 16.88% and 10 seats.

The real loser in terms of seats was Gaston Flosse's Tahoera'a Huiraatira party, which for the first time since 1993 had not won outright in the first round.

Surprisingly, an alliance was then assembled involving Gaston Flosse and Oscar Temaru and on February 23, 2008. Mr Flosse was sworn in as President. Mr Temaru was subsequently elected as Assembly Speaker on 1 March 2008.

The government comprised five Tahoera'a and 10 UPLD members. The To Tatou Ai'a coalition, which attracted more

preferred party support but which failed to achieve a simple majority was excluded.

Members of Tong Sang's coalition reacted strongly. Tong Sang led a demonstration of 10,000 in Papeete to protest the election of Mr Flosse, and lodged an appeal with the French State Council.

Reactions from Paris have been negative – the UMP (Union for a Popular Movement) the French governing party, with which Flosse had been affiliated, announced it would sever all ties with him considering that the way he managed to regain power was "against nature".

After the governing alliance was agreed by Flosse and Temaru, UPLD and nine of the 10 Tahoera'a members united to form a new grouping, sitting in the Assembly under the name of Union pour le Développement, la Stabilité et la Paix – UDSP (ie Union for Development Stability and Peace).

On 15 April 2008, a successful motion of no confidence in the Flosse/Temaru government led to the appointment of Gaston Tong Sang as President.

Mr Gaston Tong Sang's support fluctuated between 27 and 29 depending on the mood of one or two representatives who are always ready to shift their allegiance if their requests are not accepted.⁶

In addition to this climate of uncertainty, the most recent senatorial elections which took place in September 2008, provided a clear victory for Mr Gaston Flosse and Mr Richard Tuheiava, both members of the UDSP, against Mr Gaston Tong Sang and Mrs Beatrice Vernaudon.

6 See articles published in "La Dépêche de Tahiti" during 2008 or <www.tahititoday.com> for the same period.

On December 2008, one of the members of the majority coalition compelled Mr Gaston Tong Sang to announce that he had no real majority left.⁷ A few days later, following a meeting with Mr Flosse and Mr Temaru, he did not dismiss the possibility of the Territorial Assembly's dissolution and the prospect of new elections. However, this was quickly rejected by the opposition which considered that Mr Tong Sang had first of all resign.⁸

These three political leaders met on a regular basis in order to establish an acceptable compromise on the most urgent issues starting with the 2009 budget, which should have been voted prior to the end of December 2008.

All attempts having failed each party rejecting the responsibility for the failure on the other,⁹ on 23 January Mr Bouissou, head of the "Rautahi" party initiated direct negotiations with the UDSP which would regrouped 31 members (28 UDSP + 3 Rautahi).¹⁰

On 4 February 2009, a vote of non-confidence was initiated against Mr Tong Sang government.¹¹

On 7 February 2009, Mr Tong Sang and his government resigned.¹²

7 <www.tahitipress.pf> édition du 12 décembre 2008.

8 <www.tahitipress.pf> édition du 12 décembre 2008.

9 On these events refer to the comments and analysis published since the end of December 2007 on <www.tahitipress.pf> <www.ladepeche.pf> or on <<http://tahititoday.com>>, see also <www.ladepeche.pf/fenua/politique/3018-une-nouvelle-majorite-sur-les-rails.html>.

10 <www.ladepeche.pf/fenua/politique/3018-une-nouvelle-majorite-sur-les-rails.html>.

11 <www.lefigaro.fr/flash-actu/2009/02/05/01011-20090205FILWWW00318-motion-de-defiance-en-polynesie.php>.

12 <www.lemonde.fr/politique/article/2009/02/07/demission-du-president-polynesien-tong-sang_1152405_823448.html>.

On 11 February 2009, Mr Oscar Temaru was elected President of French Polynesia with 37 votes.¹³

On 12 February 2009, Mr Fritch was elected President of Territorial Assembly.¹⁴ In November 2009, Mr Gaston Tong Sang became President of French Polynesia for the third time.

II ANALYTICAL CONSIDERATIONS

In French Polynesia, the vast majority of voters explain the current chronic political instability which affects the local political situation, by the "political nomadism" of a minority of politicians who shift from one political party to another and appear to be more interested in searching the fulfilment of their personal interests.¹⁵

But the reality is a far more complex. In this unsettled context, the role and the positions of the French State, which since 2007 is once again a very active participant of the political life in French Polynesia, are not free from criticism, to the point that its interventions made it difficult to establish a clear distinction between the causes of the instability phenomenon.¹⁶

From a legal perspective, these events revealed a broader dysfunction: A total disregard of the rules of good governance by almost all major political actors involved, French representatives included.

This will be the subject of the brief following comments.

13 <www.assemblee.pf/seances/article.aspx?id=1546>.

14 <www.assemblee.pf/actualites/article.aspx?id=1544>.

15 This phenomenon is not new but has been amplified since 2004. On the subject, see Y-L Sage "La réforme du mode de scrutin pour l'élection des membres de l'Assemblée territoriale de la Polynésie Française par la loi du 22 février 2007: Commentaires à l'aune du droit électoral compare" (2004) RJP.

16 After M Sarkozy's election, the French government provided a strong support to Mr Tong Sang's majority.

As a preliminary note, one must bear in mind the difficulty that arises, while trying to define clearly the meaning of the term "governance".

One easily concurs on its origin;¹⁷ it comes from the Greek '*kybenan*' or '*kybernetes*' meaning "to lead, to steer, to drive".¹⁸ The consensus ends there.

Even a cursory look at the literature on the subject reveals that this concept was used for the first time by Plato in a metaphorical sense to describe the action of governing men, and it has over the centuries gradually evolved to the point of becoming according to French leading author, a vague portmanteau-term.¹⁹

This feeling of uneasiness is amplified when one tries to define the concept of good governance, which is also a multiform notion which interests the fields of economy, politics, law and more recently of sustainable development.²⁰

17 Marc Delplanque *Gouvernance globale, gouvernement du monde* (Editions Bénévent, 2004) at 102.

18 James N Rosenau *Along the Domestic Frontier, Exploring Governance in a Turbulent World* (Cambridge University Press, London, 1997) at 146.

19 Pascal Lamy "La gouvernance, utopie ou chimère?" (2005-02) t 402: n° 2, at 153-162; Annick Osmont "La 'gouvernance': concept mou, politique ferme dans La gouvernance" in *Les Annales de la recherche urbaine*, n° 80-81, déc 1998, at 18-26. For a comparative study (Japon, Bangladesh, Botswana, Ghana, Inde, Singapour et Philippines) voir "Governance, local government reforms and accountability", in *Régional development dialogue*, vol 18, n° 2, automnes 1997; Jean-Pierre Raffarin *Pour une nouvelle gouvernance* (L'Archipel, Paris, 2002) 159.

20 Ali Kazancigil and Jean-François Prud'homme, *La gouvernance: un concept et ses applications*, sous la dir Guy Hermet, Paris: Karthala, 2005. For an exemple of the relationship between the fields of economy, politics, law in French Polynesia française, see A Moyrand and B Poirine "Insularity and Governance: The Case of French Polynesia" Springer Netherlands, volume 1, number 2/june, 2001. Sir Kenneth Keith "Governance, Sovereignty and Globalisation" (1998) 4 RJP.

Therefore it is not surprising to find numerous and different definitions of the concept depending on the sector in which it will be used.

These circumstances oblige the reader to rely on some preconceived ideas in order to attempt to suggest a line of analysis, which hopefully will be sufficiently reliable.²¹

The first set of ideas is of a conceptual nature. To provide a guideline to our reasoning it is useful to consider alternately some principles from the United Nations Development Program 1997 (PNUD 1997) and from the Pacific Plan 2006-15 set up by the Pacific Forum in 2005. These two references have some relevance as French Polynesia was in 2006 granted, along with New Caledonia, the status of Associate member of the Forum.

The second set of ideas which is also of conceptual nature, is to accept as a prerequisite, that as far as the 'Good Governance' principles are concerned, these two documents provide sufficient basis for establishing a mutual recognition of their existence and of their subject matter.

Thirdly, from a preconceived editorial perspective, comments will be limited to the political and the institutional spheres and through some selected examples.

III SOME PRINCIPLES OF GOOD GOVERNANCE

A As Stated by the UNDP 1997

For the purpose of our discussion, the various components of the concept of good governance as listed by the UNDP 1997, have been regrouped into five main categories.²²

21 Considered as preliminary choices only but not as preconceived ideas and recognising the obvious limits of the rationale.

1 *Legitimacy and voice*

According to this principle, citizens can through their votes freely participate in the process of formulating and implementing policies by legitimate institutions, which represent them.

This principle is the logical consequence of the rights of freedom of association and expression and the translation of the citizens' ability to provide constructive participation to the democratic process.

All different interests must be considered in order to reach the greatest consensus on what will be deemed to be the public interest.

2 *Direction/strategic vision*

A principle based on the government's ability to provide coherent inputs and directions to its actions associated to responsibility.

This long-term goal has to be achieved through the opening up to the diversity of ideas incorporating historical, cultural and social contexts, conditions needed for an acceptable sustainable development.

3 *Performance and adaptability*

This principle represents the capacity of institutions and the rules of law to adapt according to the needs of the majority. It also represents all the mechanisms required to achieve results corresponding to the

22 Classification borrowed from John Graham, Bruce Amos, Tim Plumtre, "Principes de bonne gouvernance au 21^e siècle", in Précis de politique No 15-août 2003. Other classifications are possible but they basically follow a similar pattern. See for example the five categories used by the European Commission openness, participation, accountability, effectiveness and coherence in Commission européenne *Livre blanc sur la gouvernance* Bruxelles, 2001 <<http://eur-lex.europa.eu>>.

Jutta Hergenhan "Quelle gouvernance pour l'Union européenne après le sommet de Nice?" dans Eurocities, n°13, printemps 2001 <www.notre-europe.asso.fr/notejh2-fr.htm, 18.09.2001>.

aims and needs of the population while ensuring a better use of available resources. In other words, leaders must be effective and successful; they must achieve anticipated results based on clear objectives and on the assessment of their intended effects²³.

4 Transparency Accountability

Government's members, actors of the private and the public sector must be held liable before the population and its institutions.

This notion also includes a clear definition of the role of each person or body involved in the political process and in the law making process and in its implementation.

5 Fairness and supremacy of the rule of law

Everyone is entitled to have the opportunity to improve or maintain their way of life, the rule of law being recognized and respected.

B Pacific Forum Key Principles of Good Governance²⁴

The Pacific Forum²⁵ can be described as a political response in 1971 by five newly independent Pacific island leaders²⁶ to mutual concerns and to their dissatisfaction with the constraints on political

23 Above n 22.

24 See Annex to the letter dated 21 August 2003 from the Permanent Representative of New Zealand to the United Nations addressed to the Secretary-General after the Thirty-Fourth Pacific Islands Forum (Auckland, New Zealand 14-16 August 2003).

25 Mara, Ratu Sir Kamisese "The Pacific Way: a Memoir (1997) University of Hawai'i Press 170-171. See also Joint Final Communiqué, South Pacific Forum, Wellington, 5-7 August 1971, at <www.forumsec.org/_resources/article/files/1971%20Communiqué2.pdf>.

26 Fiji, Tonga, Western Samoa, Cook and Nauru. See notably, Y-L Sage "Facteurs d'émergence et d'évolution du droit dans les petits Etats insulaires anglophones du Pacifique Sud" in Stephen Levine, Anna Powles and Yves-Louis Sage (eds) *Contemporary Challenges in the Pacific: Towards A New Consensus* Volume 1, 2001.

discussion in the existing regional organization established by the Pacific colonial powers (the South Pacific Commission, SPC).²⁷

The then Prime Minister of Fiji Ratu Sir Kamisese Mara, wished along with all the participants of the first meeting of the Pacific Forum to set up the basis of the future development in the Pacific region based on shared common values. This method was called the "Pacific Way"²⁸ and since then has been used quite extensively in the Pacific region (including outside its original context).²⁹

The Pacific Way, which could be perceived as one feasible way of implementing the principles of good governance tailored to the specific institutional and social features of the small island states in the South Pacific, expresses both a reference to a traditional way of life in the South Pacific and also a quest for respect and recognition of these values from the rest of the international community.³⁰

Broadly presented,³¹ the key features of the Pacific Way are:

27 South Pacific Commission, see <www.unohrrls.org/UserFiles/File/SIDS_documents/A-58-304-SIDS.pdf>.

28 For some scholars Sir Henry Cook, a former Prime Minister invented the concept; Sme other scholars argue that the term comes from the title of a book published in Fiji in 1976. See, *Ratu Sir Kamisese Mara*, Haas, Michael (ed) (Praeger Publishers, 1989).

29 For an example of its possible application in French Polynesia, see Y-L Sage "La méthode de codification à droit constant: Sa mise en œuvre dans l'élaboration du nouveau code de commerce et ses conséquences sur le droit applicable en Polynésie française" in 8 RJP, 153 et s.

30 On the implementation of the concept in Fiji and in the Solomon Islands in the light of their respective current crisis, see Gerard A Finin and Terence A Wesley-Smith Coups "Conflicts, and Crises: The New Pacific Way?" East-West Center Working Papers, Pacific Island Development Series, No 13 June 2000.

31 See notably Crocombe, (1976), *The Pacific Way- An Emerging Identity*, Lofu Pasifica Productions, Suva. *The Pacific Way: Where 'Non-Traditional' is the Norm* p 427-448, in *International Negotiation Brill Academic Publishers* 1382-340X (Print) 1571-8069 (Online) Volume 5 Number 5/3 March, 2000 November 11, 2004.

- A flexible structure favouring oral communication and promoting compromise
- The involvement of a significant portion of the population in the decision-making process, promoting the integration of the common interest through strong family ties and networks strengthening a sense of cooperation and mutual assistance
- A strong influence of the Christian religion
- The widespread and mutual feeling of the existence of collective ownership on land
- A way of life emphasising the value of social and family networks in order to achieve a certain quality of life.

As far as the rules of good governance are concerned, the Forum has gradually drawn up in the context of specific programmes, their scope and the details of their implementation

Actually, the idea of defining the concept of good governance is not new, and has been raised in several occasions:³²

- In 1995 within the framework of the '26th Pacific Forum' included in the '1995' Vision Statement of the 'Forum monitoring Economic Action Plan eight principles of good governance'³³
- Reaffirmed' in the "1997 Aitutaki Declaration"³⁴

32 On the implementation of the principle of good governance in the Commonwealth countries, see Sam Agere "Promoting Good Governance, Principles, Practices and Perspectives" 1, London, Commonwealth Secretariat, Management and Training Services Division, 2000.

33 <www.spc.int/piocean/crop/forum_vision.htm>.

34 Point 10. <www.pacii.org/pits/en/treaty_database/1997/11.html>.

- Integrated into the 2000 "Biketawa Declaration" signed in Kiribati³⁵
- And once again mentioned in 2003 during the 34th Pacific Forum³⁶

More importantly, in 2005 in Port Moresby, taking into account the already achieved results in this field, the Forum members included among the four objectives of the "Pacific Plan 2006-15", the need to respect the rules of good governance.³⁷

This agreement establishes a close connection between the concept of transparency in the political and institutional areas on one hand and the obligations imposed to the political regional leaders who are expected to be fully accountable for their actions on the other hand.³⁸

Moreover, the "Pacific Plan" expressly and clearly states that the recommended rules of good governance make sense only if they are implemented in relation with a balanced management of the

35 Signed in Kiribati, it follows the 1994 Honiara Declaration. <www.forumsec.org.fj/_resources/article/files/Biketawa%20Declaration,%2028%20October%202000.pdf>.

36 See n° 24 above.

37 On the Pacific Plan, see notably: *Models of Regional Governance for the Pacific: Sovereignty and the Future Architecture of Pacific Regionalism* Kennedy Graham (ed) (Canterbury University Press, Christchurch, 2008) and more specifically Anthony Angelo "The UN Charter and Regional Security: Is the PIF a regional organization?" (at 61 et s.), Shennia Spillane "The Pacific Plan 2006-15: Legal Implications for Regionalism" (at 72 et s.) Graham Hassall "Good Governance & Political Development in the Pacific: Can regional concepts and institutions deliver security?" (at 161 and seq.) See <www.Forumsec.org.fj/pages.cfm/about-us/the-pacific-plan/>.

38 Pacific Islands Forum Secretariat: www.forumsec.org/index.cfm.

available resources, a prerequisite for the recognition of an economic sustainable development.³⁹

Equally importantly, members of the Forum committed themselves to implement a strategy seeking to promote shared democracy, human rights and the establishment of fair electoral systems.⁴⁰

To support the implementation of these principles during the 2006/2015 period, the Forum has provided means for specific evaluation and supervision measures, the collected indicators being transmitted to the World Bank, the University of South Pacific and various NGO's.⁴¹

The Forum members also adopted in November 2006, the "Kalibobo Roadmap on the Pacific Plan" (reaffirmed the same year in the "Nadi decisions on the Pacific Plan")⁴² which provides the framework for measures and initiatives in eight specific strategic areas including the development, the improvement and the implementation of the principles of political good governance or the development of

39 Pacific Islands Forum Secretariat, *The Pacific Plan for Strengthening Regional Cooperation and Integration*, 2006, at 3.

40 Pacific Islands Forum Secretariat, *The Pacific Plan for Strengthening Regional Cooperation and Integration*, October 2006, at 6.

41 With the Commonwealth Local Government Forum, the UNDP Pacific Sub-regional Centre; the University of the South Pacific's Institute of Advanced Studies in Development and Governance.

<www.clgf.org.uk/index.cfm/pageid/47/What+is+CLGF>

<www.usp.ac.fj/index.php?id=piasdg_programmes>

<regionalcentrepacific.undp.org.fj/HTML%20docs/Overview%20page.html>

<www.humanrightsinitiative.org/about/g_bodies.htm>

42 See *The Pacific Plan for Strengthening Regional Cooperation and integration* <www.forumsec.org.fj/UserFiles/File/A_Pacific_Plan.pdf?phpMyAdmin=a2498005399765db990bdeaf994e9d1>.

participative democracy and the establishment of democratic electoral systems.

Among the nine principles set up by the "Pacific Plan 2006-15", only six will be the focus of our attention.⁴³

1 The respect for the law and system of government

It includes mainly the upholding of democratic processes and institutions, compliance with the letter and spirit of the laws which are made for the benefit of the public; the disclosure of fraud, corruption and mal-administration, of which the leader has become aware.

2 Respect for people on whose behalf leaders exercise power

This principle, whose scope is quite broad includes the proper use of official powers and duties, honesty in dealing with the people and Parliament, any misleading information corrected at the earliest practical opportunity, publicising information on legal wrongdoing, ethical lapses and false or misleading statements, giving priority to official duties over private interests; public and private conduct that does not lead to a conflict of interest. And finally ensuring that public facilities are used only for public purposes, and not for personal purposes unless authorised by legislation or by a public decision of Cabinet.

3 Economy and efficiency

Ensuring that public resources are not wasted, abused, or used improperly or extravagantly.

⁴³ The following principles are not considered: Respect for freedom of religion, National peace and security, Respect for members of the public.

4 Respect for office

Exercise authority and interact with people in a manner that is open, transparent, accountable, participatory and decisive but fair and equitable; Seek to strengthen the integrity of a leader's office and its effectiveness.

5 Respect for cultural values, customs, traditions and indigenous rights and observation of traditional protocols in the exercise of power

6 Diligence

Exercise of proper diligence, care, and attention; Always seeking to achieve high standards of public administration.

IV THE IMPLEMENTATION OF THESE PRINCIPLES BY THE POLITICAL ACTORS IN THE FRENCH POLYNESIA: SELECTED EXAMPLES

A By the French State in its Relationships with French Polynesia

The constitutional reform of 28 March 2003 and the organic law of 27 February 2004 reforms produced a major change for the law affecting French overseas territories.⁴⁴

More precisely, a distinction is currently made between—

The "overseas departments" (DOM) and the "overseas regions" (ROM); and

44 See A Moyrand, *Droit institutionnel de la Polynésie française*, l'Harmattan, 2007; P Jan "L'outre-mer français ou la mise en évidence les différents modèles étatiques, l'autonomie en Polynésie française" in RJP, Hors-série 4, 2004. O Gohin et M Joyau "L'évolution institutionnelle de la Polynésie française" AJDA 2004, 1242-1252. For an English version of the French Constitution, <www.assemblee-nationale.fr/english/8ab.asp>.

The "overseas communities" (COM) – Saint Pierre and Miquelon, French Polynesia, Wallis and Futuna, Saint Barthelemy, are listed in article 72-3 (paragraph 2) of the Constitution.⁴⁵

The overseas communities have three common characteristics:⁴⁶

- Their deliberative assemblies can exercise powers, which in France are matters of legislative power;⁴⁷
- They have a common legal regime vis-à-vis the European Union;⁴⁸
- They have a status unique to them, which is set out in the organic law of each.⁴⁹

45 Article 72-3 of the French Constitution: "The Republic shall recognise the overseas populations within the French people in a common ideal of liberty, equality and fraternity. Guadeloupe, Guyane, Martinique, Réunion, Mayotte, Saint-Barthélemy, Saint-Martin, Saint-Pierre-et-Miquelon, the Wallis and Futuna Islands and French Polynesia shall be governed by article 73 as regards overseas departments and regions and for the territorial communities set up under the final paragraph of article 73, and by article 74 for the other communities. The status of New Caledonia shall be governed by title XIII. The legislative system and special organisation of the French Southern and Antarctic Territories and Clipperton shall be determined by statute". Mayotte by becoming on 29 March 2009, the 101st French Departements is no longer a French overseas community, see <www.vie-publique.fr/actualite/alaune/mayotte-101a-me-da-partement-franapais.html>.

46 O Gohin, *L'Outre-mer dans la réforme Constitutionnelle de la décentralisation*, RFDA 2003, 678.

47 A Trioianello "La loi du Pays expression de l'autonomie polynésienne" RJP vol Hors série 4, 2003.

48 C-E Gudin "Le statut communautaire de la Polynésie Française in *Le Pacifique et l'Europe: Quelques réflexions à l'occasion du 50^e anniversaire de l'Union Européenne*" (2007) RJP Hors série 7, Editor T Angelo; J Ziller, *The European union and the Territorial scope of European territories*, Ibid.

49 As far as French Polynesia is concerned see Jean Eric Schoettl "Un nouveau statut pour la Polynésie française après la révision Constitutionnelle de mars 2003" in RJP, hors série 4, 2004.

Each has its unique status reflecting the respective local interest as defined by article 74 of the French Constitution).⁵⁰

Constitution of 4 October 1958, Article 74

The overseas territorial units to which this article applies shall have a status reflecting their respective local interests within the Republic. This status shall be determined by an institutional Act adopted after the opinion of the decision-making assembly has been received and specifying:

The conditions in which statutes and regulations shall apply there; The powers of the territorial unit; subject to those already exercised by it, the transfer of central government powers may not relate to the matters listed in the fourth paragraph of article 73, as specified and amplified by the institutional Act therein referred to; The rules governing the organisation and operation of the institutions of the territorial unit and the electoral system for its decision-making assembly; The conditions in which its institutions are consulted on Government or Private Members' Bills and draft Ordinances or draft Decrees containing provisions relating specifically to the community and to the ratification or approval of international undertakings entered into in matters within its powers. The institutional Act may also, for such territorial units as enjoy autonomy, determine the conditions in which: The Conseil d'Etat shall exercise specific judicial review of certain categories of acts adopted by the decision-making assembly in matters, which are within its powers in the areas reserved for statute; The decision-making assembly may amend a statute promulgated after the entry into force of the territorial unit's new status, where the Constitutional Council, acting notably on a referral from the authorities of the territorial unit, has confirmed that

50 A Boyer "Le statut constitutionnel des territoires d'outre-mer et l'État unitaire. Contribution à l'étude des articles 74, 75, 76 de la Constitution du 4 octobre 1958" Thèse Aix-Marseille, 1991.

the statute governs matters that are within the powers of the relevant unit; Measures justified by local needs may be taken by the territorial unit in favour of its population as regards access to employment, the right of establishment for the exercise of a professional activity or the protection of the land; The unit may, subject to review by the central government, participate in exercise of the powers that it retains, in full respect for the guaranties given throughout national territory for the exercise of public liberties. The other rules governing the specific organisation of the territorial units to which this article applies shall be determined and amended by statute after consultation with their decision-making assembly.

New Caledonia has a *sui generis* status.⁵¹

At first glance, these characteristics seem to fit with the legitimacy and voice principle as stated by the UNDP 1997 and with the respect of the rule of law and the systems of government (more precisely the compliance with the letter and spirit of the laws) and the respect of cultural values as stated in the "Pacific Plan".

Indeed, the possibility of granting a different status to each society overseas community reflects the French institutions ability to provide for the population of these territories a specific status which could take into account their goals and needs.

In addition, a separate individual status of each of the communities appears to be the appropriate mechanism able to take into account the diversity of each historical social and cultural contexts.

The first paragraph of Article 74 of the French Constitution supports the rationale, as it expressly states that the status of each local

51 CE sect 13 décembre 2006, Genelle, *RFDA* 2007, 18-26, conclusions Stéphane Verclytte and David Marrani "Principle of indivisibility of the French Republic and the People's Right to Self-Determination: The 'New Caledonia Test'" (2006) 2 *Journal of Academic Legal Studies* 16-29.

overseas community should take "*into account the interests of each of them in the Republic*".

Moreover as to how the overseas communities' interests will be established Article 74 (2) of the French Constitution states that this issue is constitutionally granted to each local assembly,⁵² reinforcing their right to see the respective specific interest of each overseas community concerned taken into account. As a consequence this is not in principle left to the French government.

One could add that the obligation under Article 74 (2), not only compels the consultation with the territorial assemblies prior to the introduction of a new status for an Overseas Community but also implies an obligation on the French legislator to incorporate the assembly's opinion. Failing to do so, would amount to treating the consultation process as a simple academic exercise and would ultimately undermine the true purpose of Article 74.

Therefore from the principles of good governance perspective, one could reasonably argue that the first two paragraphs of article 74 provide, for each overseas communities' benefit, a right to institutional difference.

However, considering the practical implementation of Article 74, it rapidly appears that compliance with good governance principles is no longer a certainty.

Actually nothing in Article 74's wording guarantees that when voting on the organic laws of each overseas community, the French Parliament will be bound by the opinion of the local bodies.

Moreover, assuming that the local interests have to be considered, it remains to decide how to transpose them into the organic laws.

52 The Territorial Assembly in French Polynesia.

Are they supposed to be identical and if not is it possible to argue that there is a violation of the territorial assembly's rights?

If one recognises to the French parliament the right to amend the territorial assembly's' opinion, is there a risk that the local interests would be betrayed? Finally, is there a minimum acceptable threshold which indicates that the local interests of the concerned overseas community have been taken into account?

The answer to these questions could be crucial if one had to decide whether or not the good governance principles have been followed.⁵³

Bearing in mind that there is no real precedent, if one considers the sequence of events of the December 2007's voting process, one could easily conclude that the French legislator took some liberties with these principles.

It will be sufficient to say that the Bill submitted on 4 October 2007 to the territorial assembly of French Polynesia was vigorously rejected by 80% of its representatives, Mr Tong Sang's political party being the only one approving it without restriction or reservations.⁵⁴

This very large opposition was a clear indication of the inappropriateness of the suggested new status for French Polynesia

It is to be noted that although the Territorial Assembly rejected the submitted draft, it also suggested numerous amendments and alternatives.

53 On the duty to provide the example imposed to the French State as far as the good governance principles are concerned, see Pierre Calame et André Talmant, *L'Etat au cœur, le meccano de la gouvernance*, at 19, Paris, Desclée de Brouwer, 1997.

54 The Bill's provisions gave rise to 54 separate debates and votes from the Territorial Assembly, 29 were in favour, and 25 negative, by at the end the overall Bill was rejected by 44 votes against 13.

Under these circumstances the reasonable and logical reaction expected in December 2007 from the French Parliament was to take into account the consequences of this overwhelmingly negative vote and accordingly amend the government's Bill.

Actually this has not been the case, as only a few minors amendments were discussed and voted.

Moreover, one must note that when it submitted the Bill, the sole reference made by the French government to Article 74 was to its procedural aspect.

By doing this, the French government avoided the necessary debate on the Bill's compliance with the spirit of the paragraphs 2 and 3 of Article 74 and the rules of good governance.

But assuming that this issue had been raised in the Parliament,⁵⁵ it had no chances to prosper as the Sarkozy's government was supported by a large majority in the Parliament.

Under these circumstances, it was left to the Constitutional Council to decide whether the letter and the spirit of article 74 of the Constitution were respected.

In its decision (n° 2007-559 DC of 6 December 2007) the Council decided on the purely procedural aspects in a review of the December law with respect to Article 74, by stating that:

On the procedure:⁵⁶

55 On the debates see <www.assemblee-nationale.fr/13/cra/2007-2008/062.asp>. The two members of the National Assembly and the member of the French Senate representing French Polynesia failed to raise the issue.

56 For the full text of the Constitutional Council decision, see <www.conseil-Constitutionnel.fr/conseil-Constitutionnel/francais/les-decisions/depuis-1958/decisions-par-date/2007/2007-559-dc/decision-n-2007-559-dc-du-06-decembre-2007.1171.html>.

Considering that pursuant to article 74 of the Constitution, the project of organic law has been submitted to the Territorial assembly of French Polynesia for its advice prior to the decision of the Council of State ... therefore the law has been voted consistent with the procedural rules enunciated by the Constitution.

There is another reason for regretting that the debate on the scope of Article 74 of the Constitution did not take place; it concerns the kind of society that could be expected for French Polynesia.

The negative vote of the Territorial assembly hides, under its apparent unity, a more complex ideological reality characterised by a fundamental difference between the autonomist and the independentist theses.⁵⁷

From an autonomist perspective, the task of taking into account the local interests of a specific overseas community finds its natural limits when such interests could fundamentally jeopardise those of the French Republic. This rationale fits with the wording of the first paragraph of Article 74, which indicates that each specific status should reflect the "respective local interests within the Republic".

From an independentist perspective, such limitations are not acceptable because article 74 of the French Constitution does not limit the scope of the local interests and accordingly the French legislator or the French government cannot prevent their incorporation into the status, even if that could lead to independence.

B Implementation of these principles by the government of French Polynesia

If the compliance with the principles of good governance by the government and the French legislators in their relations with the

57 On the same issue, see Anne-Christine Trémon, «Logiques «autonomiste» et «indépendantiste» en Polynésie française» *Cultures & Conflits*, Articles inédits, 25 mars 2005. <www.conflits.org/index1709.html>.

French Polynesia is open to criticism, one must also, *aequitatis ratione*, point out that in this domain the government of French Polynesia is also a source of concern.

One must recall that for the January 2007 electoral system reform, the Polynesian voters were basically deprived (by almost all of their representatives of the territorial assembly this time) of the power to express their preference for an electoral system.⁵⁸

These facts illustrate a clear lack of respect by the local representatives of the UNDP's principles of legitimacy and Voice; of Direction/Strategic Vision; of Transparency Accountability and, as far as the Pacific Plan is the concerned, the principles of respect for the law and legal system, of economy and efficiency, of the respect for office and of diligence.

Furthermore one of the key measures of the law of 7 December 2007 was the introduction into the statute of French Polynesia of a new Article 157-3 providing for a special procedure to be followed for the appointment of directors or of the board's members of local public entities.

For obvious good reasons, the purpose was to favour and to promote efficiency rather than political affiliation.

However, some time later, on July 27th 2008, the then Secretary of State for Overseas Territories declared that responsibility for the political instability in French Polynesia was mainly the result of the personal ambitions of local political leaders. He added that considering what happened after the two previous electoral reforms, any further amendment to the electoral system would, in this context

58 Y-L Sage "La réforme du mode de scrutin pour l'élection des membres de l'Assemblée territoriale de la Polynésie Française par la loi du 22 février 2007: Commentaires à l'aune du droit électoral compare", *op cit*.

be a futile exercise as it would be immediately jeopardised by the local politicians' practices.⁵⁹

Two lessons could be drawn from this statement apart from its political and polemical connotation:

Firstly, it shows recognition at the highest level of the French officials of the failure of the 7th December 2007 amendment.

Secondly, it highlights the local politicians' obvious lack of respect for their voters, as they are always willing to favour their personal interests.

One could also challenge the real efficiency of Article 157-3, because if this procedure were followed, a negative vote from the Territorial Assembly would have no consequence on the original choice of the government, as it is not binding.

However a procedure exists and it must be followed.

Experience quickly proved that the local government was also interpreting this provision in a way which was significantly reducing its real scope.

If one looks at the preliminary discussions which took place when this provision was voted,⁶⁰ there is no doubt that Article 157-3 was deemed to be applicable to all prospective appointments for positions involving the management of entities directly or indirectly controlled by French Polynesia.

The local government, sticking to the wording of article 157-3 has decided that this provision had to be implemented only for appointments to the positions listed into the provision itself and had

59 See "Les Nouvelles de Tahiti" 27 July 2008.

60 <www.assemblee-nationale.fr/13/dossiers/polynesie_institutions.asp>.

therefore excluded those outside even if they were of managerial nature.

This has been the case for the appointments of the last two chairmen of the Polynesian Board of the Post and Telecommunications office.

The Territorial Auditing Chamber in its latest reports has also explained the chronic financial and managerial difficulties afflicting the territorial entities involved in commercial activities (but not only) and more generally the lack of good governance because of the uncertainties linked to the vagaries of constant political changes added to interventionist practices of local politicians who generally lack the necessary competence required for these functions.⁶¹

There is no doubt that at least four of the UNDP 1997 principles of good governance are not respected along with almost all of those issued from the Pacific Plan and the two objectives of the law of 7 December 2007 aimed at improving the transparency of the political life in French Polynesia were certainly not achieved.

V FINAL COMMENTS AND A FEW SUGGESTIONS

This brief analysis made from the good governance principles perspective on the political and institutional instability in French Polynesia does not provide an optimistic picture.

It nevertheless provides the opportunity to recall that as far as institutional and political good governance principles are concerned, rules do exist and that when properly applied they could provide solutions.

Even if it is stating the obvious, it must emphasised that governance in political and institutional matters cannot be confused with government itself, as it is mainly a matter of respect for ethical values and not a question of laws or regulations.

61 <www.ccomptes.fr/fr/CTC02/RapportActivite.html>.

As far as French Polynesia is concerned, the ethical dimension is clearly lacking, as most of the individuals involved in the local political life (at the state or local levels) bear some responsibility for the current political and institutional crisis.⁶²

By the same token, it will never be possible to accept the preconceived idea of the supremacy of the French norms (legal or institutional) justifying the attitude of the French government or legislators which are both bound to adapt these norms to the specific situation of each overseas community.⁶³

In this respect, the experience of the Pacific states after their accession to independence when they had to find a workable compromise between the former "imported laws" and their own new rules, could be very useful.⁶⁴

In conclusion, a few practical suggestions can be made with a view to restoring in French Polynesia, the concept of good governance, in the political and institutional areas.

62 Mr Philippe Seguin, the late President of the Auditing Court (Cour des Comptes) interviewed by 'La Depeche de Tahiti' on the Polynesian political crisis, declared on 3 January 2009 that responsibility is not instinctive; one has to acquire it through work, experience and a clear conscience of what it is due to the citizens and the collectivity, <www.ladepeche.pf/fenua/35-fenua-politique/2585-les-polynesiens-ont-droit-a-la-meme-qualite-de-gestion-publique-que-celle-appliquee-en-metropole.html>.

63 As to the consequences of directly transposing French legal principles into the electoral law in French Polynesia, see Emmanuel-Pie Guiselin "Les élections polynésiennes du 23 mai 2004" RJP volume 4 (Hors Série sous la direction de P Gourdon) 147, or "Les élections à l'assemblée de la Polynésie française" RJP volume 10, 505; Y-L Sage, La réforme du mode de scrutin pour l'élection des membres de l'Assemblée territoriale de la Polynésie Française par la loi du 22 février 2007: Commentaires à l'aune du droit électoral comparé, op cit 32-33 et 41.

64 The common law. On the issue to the revaluation of the Oceanic cultures and identities to be seen as an obstacle to imported democracy and its requirements see, B Rigo "Exigences démocratiques et persistance des logiques océaniques" in the current volume.

The first would be to accord to Article 74 of the French Constitution its natural scope which would take into account its genuine spirit.

It makes sense, from the practical implementation point of view of the principles of institutional good governance, to argue that the interaction of paragraphs 1 and 2 of Article 74 recognises for all French overseas communities' benefit, the existence of an institutional positive discrimination or for a non-discriminatory institutional regime which has to be enforced and respected by the French legislators.

It should be noted that some characteristics of this regime, such as the principle of legislative specialty, or the "Laws of the Country" or the recognition of the protection of local employment and for local land ownership, are already in place in the 2004 organic law of French Polynesia.⁶⁵

Despite the fact that the wording of paragraph 2 of Article 74 of the French Constitution does not provide for an opinion of the territorial assemblies to be binding on the French Parliament, the spirit of this provision commands a more comprehensive approach.

The second suggestion would be the recognition by the local politicians, that there is definitely a close relationship between their performance and the final evaluation of the results.

In other words, the local politicians must accept and implement a genuine "culture of evaluation" of the use of public money, a culture which is lacking in French Polynesia today.⁶⁶

65 See Yves Brard "Nouvelle-Calédonie et Polynésie françaises: les "lois du pays" de la spécialité législative au partage du pouvoir législative" RJP vol 1 Hors Série 47, sur les lois du Pays, or Antonino Troianiello "La loi du pays expression de l'autonomie polynésienne" RJP vol 4 hors série 179; René Calinaud "Autonomie Juridique et droit foncier", *ibidem* 201.

66 The term is borrowed from Xavier Cabannes, in "Les collectivités et la tentation de la LOLF: nécessité, effet de mode ou piège?" Colloque organisé par le

As to the objections against certain local politicians, the third suggestion is to amend the current electoral system which so far, has been unable to provide a stable majority.⁶⁷

If the system of proportional representation reflects the principle of legitimacy and representation, we know that it is also a breeding ground for political instability, the majorities being frequently obtained through coalitions controlled by a small minority of sometimes unscrupulous elected representatives. Comparative study of different available electoral systems provides some transposable solutions.

A fourth suggestion which could relatively easily put an end to anomalies found in the management of the local public entities would be to introduce and to implement in these institutions, the formula inspired by the French "Société Anonyme" managerial structure which organises the division of the functions of the Board of Directors between two bodies: the "Directoire" ("Directorate") which manages the company, and the "Conseil de Surveillance" ("Supervisory Board") which appoints the members and Chairman of the Directoire and supervises them.

This system would provide a clear separation of management and supervisory functions, the choice of qualified but non-shareholder officers. The position of the members of the "Directoire" to be

Laboratoire Collectivités Territoriales de la Faculté de Droit, d'Economie et de Gestion de l'Université d'Orléans le 12 décembre 2008 (Publication des actes à paraître). The rationale fits with the UNDP 1997 principles and the Pacific Plan 2006-15 (See comments supra).

67 Y-L Sage, La réforme du mode de scrutin pour l'élection des membres de l'Assemblée territoriale de la Polynésie Française par la loi du 22 février 2007: Commentaires à l'aune du droit électoral comparé, op cit.

safeguarded in that, although they are appointed by the Board, they may be removed only by the general meeting of shareholders.⁶⁸

In order to prevent the award of the senior management positions on criteria other than efficiency and professionalism, it is suggested that the provisions of Article 157-3 of the 2004 statute, should be amended and the territorial assembly's opinion become binding.

Furthermore, the rules of good governance in French Polynesia can no longer accept French State passivity or its one-sided intervention. French state control under Article 166 of the 2004 statute must be used equably and systematically.

68 Article L 225-57 à L 225-93 Code of Commerce and D 96 to D 119. See notably, Le Cannu P, *La société anonyme à directoire*, thèse Bordeaux 1979. Godard L. (1998), *Les déterminants du choix entre un conseil d'administration et un conseil de surveillance*, *Marchés financiers et gouvernement de l'entreprise*, Actes des journées internationales des IAE, at 147-162. Caussin, *La société à Directoire*, JCP. 1977, ed.CI, 12451. Chassery, *Les attributions du conseil de surveillance*, *Rev.tr.dr.com.*1976, 449. H Labord, *Directoire et conseil de surveillance*. Paris, Dunod, 1969. Langlade, *Le pouvoir de fournir des sûretés dans les sociétés commerciales*, *Rev.tr.dr.com* 1979, at 355.

