

CLEARING THE PATH TO DECOLONISATION WITH PRAGMATISM AND AGILITY IN A GLOBAL PANDEMIC CONTEXT: THE CASE OF FRENCH POLYNESIA

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French Polynesia is on the decolonisation list of the United Nations. It is also in the current difficult position of having a government opposed to the decolonisation process. The COVID-19 pandemic has exposed some jurisdictional issues with France which Dr Lallemand-Moe explains. He argues that the opportunity has presented itself for "more integration for more decolonisation".

La Polynésie française figure sur la liste des Nations Unies des pays à décoloniser. Cette collectivité d'outre-mer se trouve par ailleurs dans la position délicate d'avoir un gouvernement local qui est opposé au processus de décolonisation. La pandémie de COVID-19 a été l'occasion de mettre en exergue l'existence de quelques problématiques liées à la détermination précise du champ des compétences respectives de la Polynésie française avec la France. L'auteur estime que le constat des difficultés rencontrées milite pour un renforcement du mouvement vers "plus d'intégration et pour plus de décolonisation".

I INTRODUCTION: COVID-19 AND NON-SELF-GOVERNING TERRITORIES (NSGTS) IN THE PACIFIC

The COVID-19 pandemic affected all the Non-Self-Governing Territories (NSGTs) and administering Powers in the world,¹ but apart from discussing the isolation measures taken in New Zealand and Australia,² not a lot of people talked

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1 On COVID-19: Kumar Ashok (and al) "Wuhan to World: The COVID-19 Pandemic" in (2021) 11 *Frontiers in Cellular and Infection Microbiology*.

2 Joanna M Manning "Feats, Flops, and Free Lessons from NZ's Response to the COVID-19 Pandemic" (2021) 29 *Medical Law Review*.

about the Pacific region, especially for non-sovereign territories. In 2022, the six NSGTs in this region (American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn, Tokelau) recorded roughly 162 245 COVID cases since 2020 and 1274 casualties with 515 396 people fully vaccinated.³

These numbers seem small in comparison to the global pandemic statistics but, of course, the populations in the NSGTs are far smaller than other more populated territories and, therefore, a few deaths due to the pandemic in these islands may appear equally gruesome even though the total number of cases is low.

The demographic, geographic and economic situations between the NSGTs are quite diverse, but we can nevertheless focus on French Polynesia's statistics with 68 425 cases and 642 deaths. It represents more than 40% of all the coronavirus disease cases and more than 50% of all casualties in the Pacific NSGTs. These numbers were caused by many different factors – in particular a tourism-oriented economy⁴ – but legal aspects must not be forgotten.

Indeed, even if COVID-19 slowed the world on different subjects and issues, it did not make the issues disappear, especially in Oceania. It is especially true for the decolonisation process, and the first event held outside New York by the United Nations since the beginning of the global pandemic was a C-24 regional seminar in Parish of St John, Dominica, 25-27 August 2021.⁵ Largely because of travel difficulties caused by the global pandemic, French Polynesia was the only NSGT from the Pacific region present at this event. Not well known on the international stage, this territory is unique in the decolonisation process at the United Nations, notably for being the only French territory in the NSGT list excluding New Caledonia, but also for following a different path from the latter.⁶

After recalling what the decolonisation process at the United Nations is (II), especially for French Polynesia (III), the issue of COVID-19 regarding decolonisation in French Polynesia is discussed (IV) and what solutions can be found for a more inclusive decolonisation process in this territory (V).

3 WHO official dashboard: (WHO Coronavirus (COVID-19) Dashboard | WHO Coronavirus (COVID-19) Dashboard with Vaccination Data).

4 C Heinzlef and D Serre "Did French Polynesia Cope with COVID-19? Intrinsic Vulnerabilities and Decreased Resilience" in Y Campbell and J Connell (eds) *COVID in the Islands: A comparative perspective on the Caribbean and the Pacific* (Palgrave Macmillan, Singapore, 2021).

5 United Nations Website <<https://www.un.org/dppa/decolonization/en/c24/regional-seminars/2021>>; Dominica News Online <<https://dominicanewsonline.com/news/homepage/un-special-committee-on-decolonization-meeting-in-dominica-welcomed-by-both-government-and-opposition/>>.

6 Regnault Jean-Marc "France et ONU: deux conceptions de la décolonisation des îles océaniques peu conciliables et que le temps ne rapproche pas" in *Outre-Mers*, 2018/1 (N° 398-399) 2018.

II THE UNITED NATIONS AND DECOLONISATION, A LONG PROCESS YET TO BE FINISHED

Under Chapter XI of the Charter of the United Nations,⁷ the NSGTs are defined as "territories whose people have not yet attained a full measure of self-government". In 2022, there are still 17 territories identified as NSGTs⁸ and more specifically six from the Pacific Region as aforementioned.

The decolonisation process in the United Nations derives from the principle of "equal rights and self-determination of peoples" in art 1(2) of the Charter of the United Nations, as well as from arts 73 and 74 under Chapter XI "Declaration regarding Non-Self-Governing Territories". The United Nations monitors progress towards self-determination in the Non-Self-Governing Territories.

In 1960, the General Assembly adopted the Declaration on the Granting of Independence to Colonial Countries and Peoples (General Assembly resolution 1514 (XV)), known also as the Declaration on Decolonization. Another important document is the General Assembly resolution 1541 (XV) of 1960 entitled "Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73 e of the Charter", which defines "self-government" by three possibilities: Emergence as a sovereign independent State; Free association with an independent State; or Integration with an independent State.

In 1961, the General Assembly, by its resolution 1654 (XVI), established the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence of Colonial Countries and Peoples (also known as the Special Committee on Decolonization or C-24), as its subsidiary organ, to monitor implementation of the 1960 Declaration on Declaration and to make recommendations on its application. The C-24 still monitor the 17 territories recognised as NSGTs, including French Polynesia which is the latest addition to this list.

7 United Nations Charter (full text) <<https://www.un.org/en/about-us/un-charter/full-text>> (United Nations website).

8 American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands/Malvinas, French Polynesia, Gibraltar, Guam, Montserrat, New Caledonia, Pitcairn, Saint Helena, Tokelau, Turks and Caicos Islands, United States Virgin Islands, Western Sahara.

III FRENCH POLYNESIA, THE LATEST MEMBER OF THE NSGTS UNITED NATIONS LIST

On 17 May 2013, by the General Assembly resolution 67/265, French Polynesia was re-inscribed as a Non-Self-Governing Territory as one of the 17 listed remaining on the agenda of the C-24 under the Chapter XI of the Charter of the United Nations.

Whether it is in the United Nations or even in its own regional ecosystem, French Polynesia is little known and goes sometimes unnoticed. This circumstance can be explained by three main reasons: it is the youngest member of the NSGTS list, it is a francophone territory (one of the few in the Pacific region), and the legal framework and autonomy system within the administering power (France) is complex even for local legal experts.⁹

Nevertheless, we can easily summarise the situation of French Polynesia toward the decolonisation process in a few sentences:

- The current French Polynesian Government and elected institutions want to be removed from the NSGTS list,¹⁰
- The French Polynesian Opposition wishes for the United Nations' help to influence the administering Power into accepting the basis of a self-determination process,¹¹
- France, the administering Power, refuses to participate in this debate.¹²

Since 2013, this status quo did not evolve whatsoever, and it is necessary to find new pragmatic and agile solutions to move forward from this stationary situation between France, French Polynesia, and the United Nations regarding the decolonisation process. One interesting aspect of French Polynesia is the complexity of its legal framework and autonomy, making the situation of this territory quite particular in the C-24 committee. The global pandemic highlighted this legal complexity and the difficult relationship between this territory and France.

9 Jennifer Corrin and Tony Angelo (eds) *Legal Systems of the Pacific* (Intersentia, 2021).

10 "French Polynesia government wants off decolonisation list" From Pacific Waves, 6 October 2016, RNZ.

11 "French Polynesia Petitioners Say 'Accommodationist' Territorial Government Provides Illusion of Self-determination, as President Hails Autonomy" United Nations Meetings Coverage and Press Releases, GA/SPD/633, 3 Oct 2017.

12 "Fritch sympathetic to France's decolonisation boycott" 4 October 2016, RNZ.

IV COVID-19 LEGAL ISSUES IN FRENCH POLYNESIA: A COMPLEX BALANCE BETWEEN THE NSGT AND THE ADMINISTERING POWER

French Polynesia is one of the most autonomous territories within the French Republic unitary system. However, in international law, this legal framework is more understood as the peak of a self-administration system but not a total self-governing autonomy.¹³ In French Constitutional law it is sometimes called a "full administrative autonomy" as opposed to "full political autonomy".¹⁴

Full political autonomy denotes self-governance of a demographically distinct territorial unit within the state. The extent of autonomy granted will normally be established in the constitution. This statute will then often be legally entrenched as a special law to ensure the permanence of this arrangement. Full political autonomy implies original decision-making power in relation to devolved competences, far superior to simple decentralisation mechanisms. French Polynesia can be described as being close to the border of this full political autonomy with just a few steps more to go.

Nevertheless, this intricate relationship with France is quite original inside the decentralisation structure of the French Republic and mainly organised by art 74 of the French Constitution and the statutory organic law of 27 February 2004.¹⁵

The COVID-19 pandemic crisis has emphasised the jurisdictional complexity between the French State and the local government of French Polynesia. The territory of French Polynesia has authority in many areas, especially over public health issues. This topic is managed by the French Polynesian Ministry of Health, in charge of prevention and several local administrations under his leadership.

However, the ongoing pandemic revealed quite rapidly a shifting of control in favour of the French State, on COVID-19 related matters. It can be explained by the fact that the administering power retains jurisdiction over topics like civil liberties. Quarantine and curfew measures are some of the most efficient measures against the pandemic, but they are strongly related to civil liberties. Therefore, the French State took leadership of this issue and adopted several decrees regulating the COVID-19 situation in French Polynesia. In parallel, the territory also adopted local regulations. This has created – to this day – some confusion within the COVID-19 local legal framework in French Polynesia between regulations adopted by the French State, the

13 Marc Weller "Settling Self-determination Conflicts: Recent Developments" (2009) 20 *European Journal of International Law*.

14 Alain Moyrand *Droit des institutions de la Polynésie française* (L'Harmattan, 2007).

15 Loi organique n° 2004-192 du 27 février 2004 portant statut d'autonomie de la Polynésie française.

representative of France in French Polynesia and those from French Polynesia itself. It was sometimes very difficult to know what was relevant for the citizens. One of the best examples is the international travelling regulations where there is a lot of confusion about the tests and documentation required to enter French Polynesia.¹⁶

The final observation is that French Polynesia's full administrative autonomy appeared to slightly recede in the context of preventing the spread of the coronavirus disease. The French State jurisdiction on this issue was partially confirmed by several court decisions.¹⁷

This backtrack was also a little bit confirmed by the French Secretary for Overseas Territories, Mr Sébastien Lecornu, who said in 2022 that the Autonomy system of French Polynesia must be changed to indicate that it was the State's "sovereign" responsibility to respond quickly in health or environmental issues.¹⁸ The Polynesian legal framework issues emphasised by the global pandemic may cause further problems for the decolonisation process at the United Nations. Nevertheless, there are some solutions to this deadlock.

V MORE INTEGRATION FOR MORE DECOLONISATION: A PRAGMATIC SOLUTION FOR FRENCH POLYNESIA? (AND POSSIBLY OTHER NSGTS)

With a local government largely endorsed by the last elections for the French Polynesian Assembly (presently 38 seats out of 57, with only 8 seats for the independence party and 11 for other factions), but directly opposed to the presence of French Polynesia on the NSGTs list, pragmatic and agile solutions must be found to acknowledge the democratic choices made in the territory by Polynesian people, but also to preserve the C-24 mandate to uphold the United Nations Charter principles. Likewise, the issues highlighted by the political opposition must not be forgotten (nuclear testing compensation,¹⁹ self-determination process, natural resources sovereignty, etc).

In this complex balancing of goals, recognising and accepting these differences with an underlying awareness of the need to find unity and consensus is the clear

16 Conditions d'entrée sur le territoire : le gouvernement apporte des précisions, 31 Dec 2021, Polynésie la 1^{re}.

17 The most recent court decision: Tribunal Administratif de la Polynésie française, ordonnance de référé-liberté *M Miagoux et autres c/ Polynésie française*, n° 2100373, 4 août 2021.

18 Is it necessary to review the autonomy statute? Sébastien Lecornu said that it is. Radio 1 and Outremer360, 7 Feb 2022.

19 Tillman Ruff "The humanitarian impact and implications of nuclear test explosions in the Pacific region" *International Review of the Red Cross*, 97(899) 2015.

pathway to follow: The Pacific way. A silver lining, previously mentioned by experts at past United Nations C-24 regional seminars for other NSGTs,²⁰ is strengthening the autonomy of NSGTs inside the legal framework of the administering powers.

In summary, more integration for more decolonisation. This sentence may appear odd or even incomprehensible, but the example of French Polynesia explains it.

If we recognise French Polynesia as a special territory directly inside the French Constitution, the administrative autonomy will be able to progress to a political autonomy, mainly because of the legal protection gained by this process. New legal tools would potentially be available (like territory's jurisdictions full protection, new legislative system, self-determination process, etc), but only applied if the democratically elected local assembly and government want to use it.

It would be a progression for the decolonisation agenda but furthermore it would respect the democratic will of Polynesians, depending on the elected local institutions and regardless of the political party that will be in office in the future.

VI CONCLUSION: LESS OPPOSITION AND MORE COLLABORATION

Naturally, only the local government and the French State can decide and implement the evolution of French Polynesia's autonomy.

Although at this time – excluding the interview of Mr Lecornu aforementioned – there is no apparent official inclination from French Polynesia and France to substantially modify the legal status of French Polynesia, and subsequently change the French Constitution for that intent, United Nations and C-24 can be pivotal actors in this issue. They can support the aforementioned NSGT and administering power toward this specific goal, especially in clarifying the notion of "decolonisation" that can be locally and internationally the source of divisive interpretations,²¹ regardless of political orientations.

To strive for a more autonomous – and thus decolonised – French Polynesia within the French Republic at first, would be a more constructive approach than to continue to oppose the will of the current French Polynesian government with its political opposition. It is especially true at the United Nations General Assembly, with all the petitioners pushing for a more antagonistic self-determination process

20 Peter Clegg *Establishing a pragmatic path to greater autonomy and decolonization*, CRS/2019/DP.2.

21 Al Wardi Sémir "La Polynésie française est-elle une colonie?" *Outre-Mers*, 2018/1 (N° 398-399) 2018.

that is realistically doomed to fail without the approval of the administering power, which consequently constantly refuses to participate in the debate.

This stalemate is profitable for nobody.

New Caledonia's third referendum regarding its self-determination was held on 12 December 2021. It was done in a difficult context. Though New Caledonian citizens voted overwhelmingly (more than 95%) to remain part of France in a third referendum, it must be emphasised that the vote was also crushingly boycotted by indigenous Kanaks and pro-independence groups. This opposition wanted the referendum postponed to September 2022 because it said a fair campaign was impossible with high coronavirus infection numbers. Moreover, a Kanak traditional mourning period was underway. Consequently, half of New Caledonia's population did not participate (mostly Kanaks). This situation fragilised the legitimacy of the third referendum's results,²² but the French President was quick to answer, saying that "France is better because New Caledonia decided to stay in it",²³ leaving aside all forms of contestation.

The referendum's results, which were in favour of remaining within the French Republic, will modify the legal framework of the French State. Thus, the French Constitution will need to be modified in order to update arts 76 and 77 regarding the status of New Caledonia. The French Secretary for Overseas Territories, Mr Sébastien Lecornu, stated in February 2021 that "If, by three times, New Caledonia confirmed its wish to remain French, it would then be appropriate to give it a new status within the Republic".²⁴

With a French constitutional modification process that can be quite long and complicated, the New Caledonian agenda may create a small opening for French Polynesia to be recognised as a singular entity within the most important legal text of the French Republic. It is not the first time French Polynesia has tried this approach. After the failed attempt in 2000, it may be an appropriate time to attempt once more the creation of a "one for all" solution that will hopefully satisfy all Polynesians involved in this international process, as well as the United Nations and the French State.

22 Kowasch (et al) "The third independence referendum in New Caledonia – a fallback to colonialism?" in 2022 *Pacific Geographies: research, notes, current issues from the Asia-Pacific region*, 57.

23 "La Nouvelle-Calédonie restera française: Emmanuel Macron acte la victoire du non au 3e référendum" BFMTV, 12 Dec 2021.

24 *Sébastien Lecornu appelle, dans une tribune, à chercher «une nouvelle solution consensuelle» pour la Calédonie*, Feb 28 2021 <<https://la1ere.francetvinfo.fr/>>.