Compulsory resignation regime for members of the Territorial Assembly of French Polynesia - decision of 11 June 1993 of the Administrative Tribunal of Papeete

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Introduction

French Overseas Territories enjoy a specific organisation[1] which is different from the normal set of institutional rules applicable in metropolitan France.

Although no constitutional provision speaks of it expressly in the context of the legislative regime of the Overseas Territories, the principle is that legislative speciality[2] governs the application of metropolitan laws in the Territories. The result is that a metropolitan text is not in general, applicable, ipso facto in the Overseas Territories. Article 74 of the French Constitution, which provides that the Overseas Territories have a special system of organisation which takes account of their own interests within the context of the interests of the State, allows this distinction.

In 1992, the Territory of French Polynesia experienced a somewhat confused institutional situation. The fortunes of political alliances led Mr. Vernaudon, member and President of the Territorial Assembly and who was angered by the association of Mr. Flosse[3] (his former political ally)with Mr. J. Juventin (his former rival) to make use of powers inherent in his position as President to refuse to call the Assembly to meeting. The

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1 Article 74 of the French Constitution on the rules governing the constitutional status and organisation of the territory of French Polynesia, see B. Gille & Y-L Sage, "The Territory of French Polynesia" *Essays on French Law in the Pacific*, VUW Law Review Monograph 8, p. 1 and following Y-L Sage, "Legislation of French Overseas Territories", *Essays on French Law in the Pacific*, p. 18.

2 On the principle of legislative speciality , see Y-L Sage, "Legislation of French Overseas Territories", *Essays on French Law in the Pacific*, above n 1, 17.

3 Since May 1995, Mr Vernaudon and Mr. Flosse are once again political allies and Mr. Juventin is a leader of the opposition.

High Commissioner[4], after having received the opinion of the Council of State of 8 January 1992, called a meeting of the Territorial Assembly. Immediately Mr. Vernaudon suspended the session and prohibited the entry of the councillors of the majority party. They were then constrained to meet in the Economic, Social and Cultural Council premises[5].

By the end of 1992, the majority was finally able to convene normally at the Territorial Assembly, but Vernaudon did not attend one of the meetings of the second ordinary session. By proclamation of 30 December 1992[6], the Territorial Assembly proclaimed Mr. Vernaudon as having resigned his position as member of the Territorial Assembly. The Territorial Assembly suspected this proclamation was ultra vires[7] and in an extraordinary session, issued the 15 January 1993[8] second decree dealing once again with the resignation of Mr. Vernaudon.

Acting as the guardian of the legality of documents which emanate from the Territorial authorities, and considering the above proclamations as departing from the normal application of the law, the High Commissioner[9] referred them to the Administrative Court of Papeete[10], requesting at the same time a stay of implementation. The Administrative Tribunal ruled in favour of the High Commissioner , by granting the requested stay[11] and nullifying the decree of 30 December 1992 and 15 January 1993[12].

In French Polynesia the regime governing the compulsory resignation of a member of the Territorial Assembly[13] can be listed among of the constitutional arrangments which are

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4 On the role of the High Commissioner in French Polynesia, see B. Gille & Y-L Sage, "The Territory of French Polynesia", *Essays on French Law in the Pacific*, above n 1, 11, 12. Y-L Sage, "Legislation of French Overseas Territories", *Essays on French Law in the Pacific*, above n 1, 23, 24.

5 Since Mr. Vernaudon refused to abide to the decision of the new majority and continued to act as the President of the Territorial Assembly, the Territory had two Presidents for a few months.

6 Decision n- 237 AT of 30 December 1992.

7 Due to the faulty drafting of the Decision.

8 Decision n- 93-2 AT of 15 January 1993.

9 See above n 2.

10 The Administrative Tribunal of Papeete is one of the lowest administrative courts in the French judicial system. Appeals against its decisions are lodged before the Administative Court of Appeal of Paris.

11 TA Papeete, 16 March 1993, Émile Vernaudon, État c/ Assemblée Territoriale de la Polynésie française.

12 TA Papeete, 11 June 1993, Émile Vernaudon, État c/ Assemblée Territoriale de la Polynésie française. This decision will be the only one considered in this paper.

13 On the Territorial Assembly of French Polynesia, see B. Gille & Y-L Sage, "The Territory of French Polynesia", *Essays on French Law in the Pacific*, above n 1, 9, 10.

different from those of metropolitan France. Article 58-1 of the Law of 2 March 1982[14] repealed, for metropolitan France, article 19 paragraph 1 of the law of 10 August 1871[15] which stated that "when a member of the General Council does not attend one ordinary session without any legitimate excuse, he shall be declared by the General Council during the last meeting of the session, to have resigned". The law of 6 September 1984[16] organising the status of the Territory of French Polynesia has maintained the rule of 1871[17].

This rule was rarely used in metropolitan France and applied for the first time in French Polynesia in this case. Vernaudon's abrupt dismissal[18] confirms the concern expressed in the doctrinal writing that though compulsory resignation appears *prima facie* as an administrative sanction only, the way in which it is stated may transform it into a political sanction[19]. The lack of warning about the intended procedure initiated against Vernaudon, and the *a posteriori* regularisation of the first proclamation, clearly show the real aim of the decisions: to exclude a strong and disturbing opponent from the Territorial Assembly[20].

Normally applied, the procedure of compulsory resignation, offers effective guarantees for the elected member affected. Obviously they were neglected in Vernaudon's case. More importantly, these decisions of the Administrative Tribunal compel the observer of institutional life in French Polynesia, to wonder whether it is worth maintaining the compulsory resignation rule in the French Overseas Territories.

This paper will consider these two issues: Procedural guarantees in Section I, and Constitutional reforms in Section II.

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14 Law n 82-213 on the rights and liberties of the Communes, Departments and Regions. On the French system of local government, see L. Neville Brown & J.F. Garner, *French Administrative Law* (3 ed, Butterworths, London, 1983) 20-24.

15 On the General Councils.

16 A similar disposition already existed in the former law of 12 July 1977, organising the status of the Territory. On the 1977 status, see B. Gille & Y-L Sage, "The Territory of French Polynesia", *Essays on French Law in the Pacific*, above n 1.

17 Article 46 of the 1984 law states:" When one member of the Territorial Assembly will not attend one ordinary session, without any legitimate excuse accepted by the Territorial Assembly, he will be declared as one who has resign by the Assembly during it last session".

18 "The term "compulsory resignation" is an euphemism. One should speak rather of dismissal pure and simple " G. Peiser, Collectivités Territoriales (sous la direction de F-P. Benoît), *Encyclopédie Dalloz*, 1632, n 25.

19 R. Savy, note below TA Limoges, 15 January 1966, Sieur Brousse de Montpeyroux, AJDA, 1966, p. 302.

20 On the political background of these two cases, see B. Gille & Y-L Sage, "The Territory of French Polynesia", *Essays on French Law in the Pacific*, above n 1, note n° 37.

Section I : Failure to respect a member's rights.

Using the now well established principles governing French administrative law, the Administrative Tribunal of Papeete, ruled that the proclamation of the Territorial Assembly which declared Vernaudon as having resigned his membership of the Territorial Assembly, was illegal. The Tribunal considered that the due process rights of Vernaudon were not respected (§ 1) and that the necessary conditions for a valid regularisation were not fulfilled (§ 2).

§ 1 Infringements of the "due process" principle.

The facts reveal that Vernaudon did not participate in the budget session of the Territorial Assembly[21] and that during the last meeting of this session, two Councillors submitted a report inviting the Territorial Assembly to proclaim Vernaudon as having resigned. This motion was voted on. However the Territorial Assembly decision of 30 December 1992 excluding Vernaudon, was voted on even though he was not advised of the matter running against him and was therefore unable to justify himself[22] before the Assembly.

It was a clear case of a violation of Vernaudon's due process right[23], a principle fully recognised by the Council of State[24], and ranked as one of constitutional value[25]. The due process right is one of the Principes Généraux du Droit (General principles of the law). Since it represents one of the fundamental human rights which are mentioned in the Declaration of the Right of Man of 1789 and the Preamble to the 1946 Constitution[26] it must be be enforced by all French courts[27].

According to the case law, an administrative measure which constitutes either a sanction or, as in the current circumstances, an act decided in consideration of a specific person[28], is valid if the person concerned was in a position to explain his or her conduct

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21 One of the two ordinary sessions, as mentioned in the 1984 statute.

22 Assuming that Vernaudon would have been willing to do so.

23 The principle *audi alteram partem* (Les Droits de la Défense).

24 Council of State, Sect. 5 May 1944, Dame Veuve Trompier-Gravier, Rec. p. 133. For further analysis of this case, see L Neville Brown & JF Garner, above n 14, 141-142.

25 Constitutional Council, n 77-83 of 20 July, 1977, Rec. Const. p. 39.

26 "Or which may be deducted from them", L Neville Brown & JF Garner, above n 14, 136.

27 Council of State, 26 June 1959, Syndicat Général des Ingénieurs-Conseils; Rec. p.314; Dalloz 1959, p. 541.

28 One cannot consider the refusal to take part in an elected assembly as faulty behaviour. The case law clearly states that attendance at the meetings of the sessions of a local organisation, "is not a position, but the exercise only of a right granted to the elected person by virtue of his or her election" (Conclusions of D. Latournerie, before Council of State 6 November 1985, Maire de Viry-Chatillon, R.F.D.A. 1986, p. 391). The Constitutional

and to challenge freely the measure sought[29]. Therefore, by using this rationale the Administrative Tribunal of Papeete properly declared that " based on the nature and the importance of such measure, it cannot take place without a prior possibility granted to Vernaudon to present his explanation to allow the Territorial Assembly to consider its validity".

Considering the particular situation[30] of the case, however it was possible to argue that due to Vernaudon's previous behaviour, it was not necessary for him to be invited by the Territorial Assembly to provide reasons for his absence during the ordinary session. Indeed Vernaudon had publicly and repeatedly declared his unwillingness to sit among what he considered an "assembly composed mainly of criminals and indicted persons"[31]. Besides, following the same reasoning, all the members of Vernaudon's political party who were members of the Territorial Assembly, clearly declared that their absences from the same ordinary session were to be taken fundamentally as a political statement. The Administrative Tribunal of Limoges, in similar circumstances to Vernaudon's case (where a General Councillor refused for political reasons to participate in the work of a General Council) deemed that "it was unnecessary to invite the elected member to apologise as long as he had notified the President of the General Council of his desire to undertake political action outside the normal exercise of his mandate as council member"[32].

Analogous laws are helpful in this context. Where the compulsory resignation of a member of a Town Council[33] is concerned, article L.121-23 of the Code of the Communes states that as long as the absent councillor has publicly declared his or her decision to refuse to fulfil his or her office[34] and he or she has been officially warned by the Town Council about the consequences of the non-attendance, there is no need to invite the councillor to present an explanation to the Town Council. The Prefect[35], must then refers

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Council has decided that the right of defence must be applied to all "individual measures of a certain importance based on personal considerations", Constitutional Council. 77-92 of 18 January 1978, Rec. Cons. Const. p. 21.

29 J.M. Auby & R. Drago, *Traité de contentieux administratif* (6 ed, L.G.D.J.,Paris, 1984) I, p. 325, 210.

30 See above n 13.

31 Vernaudon was referring to those members of the Territorial Assembly who who had been either already convicted or indicted for corruption.

32 TA Limoges, 15 January 1966, Sieur Brousse de Montpeyroux, AJDA, 1966, p. 302.

33 A situation which is closely similar to absence from one ordinary session of a General Council.

34 The persistent abstention to fulfil the office is assumed to be to a refusal. J.Bourbon, J.M. Pontier, J.C. Ricci, *"Droit des collectivités territoriales"* (PUF, Themis, 1987) 379.

35 The representative of the French Government in a Department.

the matter to the Administrative Tribunal[36] which declares the absent member has resigned. Similar provisions exist for the members of a General Council[37].

Thus it may be noted that the judgment of the Administrative Tribunal of Papeete departs from what the facts of the case might have suggested.

However two main reasons justify the decision of the Papeete Administrative Tribunal, even though it confirms an extremely extensive and formalist conception of the defence rights.

First of all, the reference to article L.121-23 of the Code of the Communes is irrelevant unless the denial to perform the duty of an office can be compared[38] with the refusal to attend meetings in a local assembly. In the first situation there is an infringement of a legal requirement whereas in the second, the member of the assembly simply refrains from exercising his or her right[39].

Secondly, the test stated in the decision of the Administrative Tribunal of Limoges does not apply to the facts of Vernaudon's case. The Administrative Tribunal of Limoges held that it was purposeless for the General Council to consider the legitimacy of the explanations offered by the dismissed member. This view was based on the defendant's letter in which he knowingly wrote that as far as the dismissal was concerned, he would not take the initiative for any specific action and that he would, "abide by the general conviction on this subject"[40]. Consequently the Limoges decision may be regarded as based on its particular facts, and cannot therefore be characterised as a real precedent[41]. Vernaudon never wrote in such terms. His constant position was only to deny the authority of his opponents as representatives -despite the fact that they were the majority- claiming that as long as some members of Territorial Assembly were either condemned or indicted in criminal cases, they had to resign. Vernaudon was in fact denying that the Territorial Assembly had any legal power to act.

§ 2 : Absence of a valid regularisation by the Territorial Assembly.

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36 Which must provide a decision within a month.

37 If upon formal notice, the General Councillor fails to abide. Law of 7 June 1873 amended by the decree of 17 March 1970. J. Bourbon, J. M. Pontier, J.C. Ricci, *"Droit des collectivités territoriales"*, above n 34, 551-552.

38 Even assimilated to.

39 See above n 22.

40 TA Limoges, 15 January 1966, Sieur Brousse de Montpeyroux, AJDA, 1966, p. 302.

41 R. Savy, see note under TA Limoges.

Two weeks after the first dismissal was voted, and in order to provide Vernaudon with a possibility to present his explanations, the Territorial Assembly invited him to attend the last ordinary meeting of 1992. He did not ignore the invitation; he appeared, endorsed his previous declarations, requested once again the resignation of the "corrupt Members", then left the Assembly. He did not participate to the remaining debates of the session. Therefore the Territorial Assembly felt that Vernaudon's reasons could not constitute a legitimate excuse and passed a second resolution to proclaim him as having resigned.

At first glance, this *a posteriori* regularisation appears valid because the Territorial Assembly was not concerned only with correcting the procedural flaw affecting the previous proclamation, but more importantly "elaborated a second proclamation, which for the future conferred on the original proclamation the effect it should have had from the beginning"[42]. As a result, the second proclamation must be disassociated from the previous one and judged accordingly. Well established case law holds that a second decision which takes place after a new investigation cannot be challenged for defects affecting only the previous decision[43].

However, in Vernaudon's case, it is far from certain that the second proclamation could be used as a substitute of the original one. Based on the defective and clumsy wording of the second proclamation of 1993[44], the hesitancy was possible and one could analyse the second proclamation as a mere confirmative act, with the conspicuous intention of giving a retrospective, but illegitimate scope to the first one. Moreover, since the second proclamation did not rescind the first one, the obvious intention of the Members of the Territorial Assembly was simply to amend it. This omission did not however affect the legality of the second proclamation[45].

Despite the clumsy wording of the proclamation of 15 January 1993, the Administrative Tribunal of Papeete decided to consider it as separate and legally distinct from the proclamation of 30 December 1992. Accordingly, the defects of the first proclamation could not control and affect the validity of the second one. Nevertheless, the Tribunal decided to

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42 J. J. Israel, "La régularisation en droit administratif français. Étude sur le régime de l'acte administratif unilatéral", L.G.D. J., 1981, p. 66.

43 See for instance, Council of State 3 February 1950, Sieur Dolleans, Rec., p.75.

44 Art 1 of the Decision n- 93-2 AT of 15 January 1993: "The Assembly can only reiterate the declaration about the compulsory resignation from office as Member of the Territorial Assembly proclaimed against Mr. Vernaudon by Decision n- 237 AT of 30 December 1992 which will be notified to him."

45 The Administrative Court in a similar situation had already considered the first proclamation as null and void since it generated unlawful effects until the existence of the second one. Council of State 2 December 1942, Sieur Benazet, Rec. p. 337. Council of State 20 February 1952, Sieur Villaret, Rec.p. 116.

repeal the proclamation of 15 January 1993, since it did not comply with the statute governing French Polynesia.

Indeed, the effect of an act which regularises a previous faulty one is contingent upon the validity of the second act itself[46]. In Vernaudon's case, though the proclamation of 15 January 1993 did not repeat the defect of the proclamation of 30 December 1992, it was voted during an extraordinary session of the Territorial Assembly. This is a situation which is not considered by the specific wording of article 46 of the Law of 6 September 1984[47], which states that a compulsory resignation can take place only during the last meeting of an ordinary session.

The reading of article 46 as conceived by the administrative judge can be challenged however. From a formal standpoint, the meeting of 15 January 1993 was one part of an extraordinary session of the Territorial Assembly[48], but if one wished to provide for the compulsory resignation situation, that is, full preservation of the right of the member of the assembly, it could be argued that it would be necessary to wait until the member had not attended all the ordinary session meetings and then to invite him to participate at a final meeting. In that case it would become irrelevant to know whether or not the final meeting was part of an ordinary or an extraordinary session. In the present case, this difficulty could have been eluded by following the reasoning suggested by the *Commissaire du Gouvernement*[49]: "If one considers that the meeting of 15 January 1993 constitutes the continuation of the last meeting of the ordinary session of 1992, Vernaudon cannot be considered as absent from the meeting of the session because he was then sitting in the Assembly." Since the member of the Assembly concerned had been summoned to justify his absence from the previous meetings and since he showed up at the last one, there was no need to consider the lawfulness of the excuses because he has *ipso facto* participated in this last session.

In concrete terms, there are only two ways for the Territorial Assembly to declare that one of its members had resigned according to article 46 of the 1984 statute. Either the member having been summoned fails to come, or the absent member states in writing to the

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46 Council of State 11 October 1967, Ministre de l'Agriculture c/ Sieur Navel, Rec.p. 361. P.Louis-Lucas , "Le retrait des actes administratifs individuels", D., 1952, Chron. 107.

47 See above n 1.

48 The ordinary session ended on 30 December 1992 and the extraordinary session was opened on 9 January 1993. As requested by law, the decision of 15 January 1993 failed to mention the opening decision of the extraordinary session, it just refered to a decision of 20 October 1992 concerning the opening meeting of the ordinary session only.

49 On the role of the *Commissaire du Gouvernement*, see L Neville Brown & JF Garner, *French Administrative Law* above n 14, 64-65, 72-74.

Assembly the reasons for the absences. In the latter case only if the Assembly is not satisfied[50] by the justification, will it be entitled to revoke the membership. Nevertheless the court can still intervene since it always has the right to control the validity of any compulsory resignation[51]. However such control, even if in principle it is proper[52], can generate some new difficulties. That is why[53], it may be asked whether consideration should not be given to repeal of the compulsory resignation principle in the statute of French Polynesia.

Section II: Is the compulsory resignation principle appropriate in French Polynesia?

A society based on the Rule of law[54] postulates that all authorities, the citizens' representatives included, must abide by the provisions of legal norms. Therefore if a member of the Territorial Assembly of French Polynesia does not respect the 1984 statute, he must be penalised. Without challenging this principle, it remains that considered in an objective perspective, the compulsory resignation mechanism is inappropriate since it represents a sanction that is anachronistic (§ 1) and open to question (§ 2).

§ 1 The compulsory resignation provision is anachronistic

In principle the purpose of a compulsory resignation measure is to sanction the lack of assiduity in attending the Assembly's meetings. The reasons which triggered the absence are irrelevant. The Assembly only needs to ascertain the member's absence from one ordinary session in order to pronounce the resignation. But one may wonder whether that was the purpose sought by the legislator[55]. If from a legal perspective one may find arguments to support the rationale of the rule, the parliamentary records reveal that the legislator was fully aware of the measure's inadequacy in the Polynesian context.

The main and fundamental legal argument which could be used to justify the adequacy of such measure is the notion of the "specific organisation" of the Territory of French Polynesia[56], taking in account the "particular interests" of this territorial organisation.

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50 Or not convinced.

51 The judge did it for the first time in the case of Sieur Brousse de Montepeyroux, see above n 17.

52 G Peiser, above n 18.

53 And for further reasons analysed below.

54 Called the "*État de Droit* "(state governed by law) or "*principe de légalité* ", in the French legal tradition. For further details, see L. Neville Brown & J. F. Garner, above n 14, 133-134.

55 One must remember that though article 58-1 of the Law of 2 March 1982 repealed article 19 paragraph 1 of the law of 10 August 1871, this specific procedure was maintained in French Polynesia.

56 Y-L Sage, "Legislation of French Overseas Territories", *Essays on French Law in the Pacific* above n 1, 19.

Since two years after the repealing of this measure in the French metropolitan law, the legislator expressly mentioned it in the statute of 1984, one may assume that its inclusion was based on territorial specificity.

It appears reasonable to provide that the absenteeism of an elected member of the Territorial Assembly should be sanctioned more rigorously in an Overseas Territory.

Three reasons can be given:

- First, these Territories enjoy powers which considerably exceed those granted to the metropolitan territorial organisations[57]. Thus such important responsibilities cannot be bestowed on public bodies without imposing stringent conditions on the members especially not to neglect their duties.

- Second[58], if a Territorial Councillor is declared to have resigned, a substitute is automatically provided without a need for a special election[59]. Since the absent member is not entitled to run again for this position[60], it may be said that the legislator's intention was to punish the former member.

- Third, and the most convincing, the compulsory resignation procedure could have a beneficial effect on the representatives of distant archipelagos who will feel more concern to represent the interests of their constituencies. The Territory of French Polynesia is made up of a multitude of islands spread over a surface as large as Europe[61], yet all the administrative powers are concentrated in the island of Tahiti[62].

Still if it appears legitimate to dismiss the elected members of Overseas Territories for their absence from an ordinary session on that account, some other reasons reveal that this sanction is ill-adapted to the local political life. It must be remembered that the compulsory resignation is pronounced by the Territorial Assembly at its discretion. As Savy pointed

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57 The territory of French Polynesia has autonomy to make laws in those fields which are not within the state's control. See Y-L Sage, "Legislation of French Overseas Territories", *Essays on French Law in the Pacific* above n 1, 27 and following.

58 Unlike the specific electoral regime of the General Councillors.

59 Article 3 of the law of 26 July 1957 (which is still in force) on the formation and the organisation of the Territorial Authorities in French Polynesia states that, "in the case of vacancy due to death, resignation or any other reasons, the candidates of the list which had obtained the vacant seat, will be proclaimed as elected following the order mentioned on the list".

60 Until the normal election cycle.

61 Y-L Sage, "Investment Law of French Polynesia", *Essays on French Law in the Pacific*, above n 1, 47.

62 Moreover, the council of the Archipelagos which was supposed to partly solve this discrepancy has never been established. On the Council of the Archipelagos, see B. Gille & Y-L Sage, "The Territory of French Polynesia", *Essays on French Law in the Pacific*, above n 1, 11.

out, one may fear that the Assembly "will not use this procedure against the elected members it does not want to get rid of, maintaining the severity of the rule for the political opponents of the majority"[63]. During the preliminary work on the 1984 Law[64], Senator Romani, who reported the law project to the French Senate, underlined the danger of conferring such a power on a local Assembly since it could generate abuses[65]. The Senators proclaimed that the compulsory resignation provision was "harmful" and was the product of a "time that is past"[66].

Besides, even if in 1871 when this provision was instituted in the French legal system, it made sense to penalise the members of an "Assembly of Notables of good standing[67], the current situation in French Polynesia is far from being comparable. Every observer of the institutional life in this Overseas Territory is impressed by the fact that disputes among individuals constitute the main, and perhaps only cause of political conflicts[68].

For this reason, one may regret that the proposal made by the Senator Millaud representing French Polynesia, which sought to remove the first paragraph of the article 46 of the 1984 statute, was not accepted[69]. Indeed, if it seems proper to sanction the unexcused failings of the members of the Territorial Assembly who do not participate in its sessions, an other way[70] to sanction the behaviour exists outside article 46. Article 57 (4) of the 1984 statute stipulates that the Territorial Assembly can enact rules[71] to provide that a member of the Assembly who is absent without any valid justification from a meeting of the Assembly, will not receive[72] his or her emoluments. So far, however, the rules of procedure of the Territorial Assembly do not provide any specific disposition dealing with this question.

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63 R. Savy, above n 19.

64 See above n 1.

65 J.O.R.F., Parliamentary Debates, Senate, 17 July 1984, p. 2192.

66 J.O.R.F., Parliamentary Debates, Senate, 17 July 1984, p. 2191.

67 R. Savy, above n 19.

68 A. Moyrand, "Le tribunal administratif de Papeete et l'équilibre institutionel de la Polynésie Française", in *Revue Juridique Polynesienne* n°1, June 1994.

69 By the rest of the French Parliamentary Assemblies.

70 Actually the only one.

71 In its internal rules of procedure .

72 Totally or partly.

§ 2: The raison d'être of the compulsory resignation provision

The decision to dismiss a Territorial Councillor punishes non-attendance at an ordinary session. The assessment of the behaviour remains problematical for two reasons.

The first difficulty is linked to the possible meanings of the term "session". One may consider it either in a narrow or in a broad sense.

The restrictive interpretation, used by the Territorial Assembly in Vernaudon's case, implies that mere non-attendance at any session of the Territorial Assembly, justifies the dismissal. This analysis affords the advantage of being straight forward: One noticeable dereliction of duty is sufficient for the dismissal of an elected member. Moreover the proof is easily established; one has only to look at the minutes of the Territorial Assembly.

According to the broad approach, it is necessary to consider whether the elected member failed to participate at all the activities and meetings of the Territorial Assembly. This approach[73] seems preferable. In fact relative to the Vernaudon case, during the budgetary session only four meetings took place within a two months period. Therefore, is it not too severe and extreme to punish an elected member for a single non-attendance? "One must accept that the elected member can demonstrate that during the session, he actually participated in some other activities of the Territorial Assembly, such as attendance of the meetings of committees or sub-committees of the Assembly"[74]. The most important test for an Administrative Tribunal remains the evidence that the member of the Assembly has "himself participated and collaborated in the work"[75] of the Assembly. The duty of an elected member is not limited to the work of the Territorial Assembly, since he or she represents the necessary link between the voters and the Administration. The member of the Assembly may believe, with good reason, that the duties towards the voters are at least as important as attendance at the sessions of the Territorial Assembly and it may even be that the meeting schedules conflict[76]. So it is reasonable to consider that compulsory resignation should only be pronounced when the member has totally neglected his or her electoral duties. Nevertheless it remains odd, and to some extent contradictory, that an elected member will on one hand, refuse to attend the session of a deliberative body he or she asked to be elected to, and on the other hand, spend all his or her time listening to the complaints of the voters.

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73 Suggested by M. Lenoir the "*Commissaire du Gouvernement*" in his conclusions before the Administrative Tribunal of Papeete, 1 June 1993.

74 Conclusions of M. Lenoir before the Administrative Tribunal of Papeete the 1 June 1993.

75 Council of State, sect. 22 november 1963, Sieur Vidal, Rec. p. 564 (about the compulsory resignation of a Town Councillor).

76 It is especially true for a member of the Territorial Assembly who represents the population of remote islands.

The easiest possible justification, is as Vernaudon alleged, to argue that the behaviour be analysed as a political statement.

At this stage of the reasoning, one must deal with the second difficulty related to the assessment of the legitimacy of the justifications raised by the absent member. Could refusal to attend a meeting or a session based on political motives, be acceptable? The Territorial Assembly judged Vernaudon's motives unacceptable. This is not surprising since, as Savy pointed out[77], "the Assembly is the only body invested with the right to declare whether or not the non-attendance of an elected member could be excused, the Assembly will be unwilling to treat its political opponents impartially". In these circumstances, it remains possible for the sanctioned member to contest the legality of the decision before the Administrative Tribunal which , as when its deals with the control of "the reasons for a mayor's suspension or dismissal[78], assesses the materiality of the facts, and whether they support the decision. But the Administrative Tribunal will refuse to control the correctness of the decision of the Assembly. Legal writers have already argued that the refusal to attend a meeting of an Assembly, "can be justified by legitimate motives, of which the voter is the sole judge"[79].

Conclusion

Many reasons lead us to conclude that, following the French metropolitan legislation, the compulsory resignation process, as stated in article 46 of the law of 6 September 1984, should be repealed when amendments of the statute of French Polynesia are next considered[80]. It seems particularly offensive[81] to confer on a majority of a political assembly, the power to dismiss any political opponent so easily. One should leave to the voter the right to appreciate the behaviour of any elected member. Judgment on the political appropriateness of the acts of the members of the Territorial Assembly must be exercised by the voters. Any rules about what could be acceptable non-attendance at the Assembly will always conflict with the free exercise of democractic rights by the people.

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77 R. Savy, above n 19 (about the compulsory resignation of a General Councillor).

78 J. Singer, A.J.D.A. , 1963, p. 670-674.

79 Note J.C., under TA of Versailles, 22 March 1985, Commune de Viry-Chatillon v M. Bourdenet, A.J.D.A. 1985, p. 379.

80 Flosse, President of the local Government and Member of the French National Assembly, is currently seeking the amendment, by the French Parliament, of some articles of the 1984 statute, including article 46.

81 Since for example, French administrative law does not know the American procedure of "recall".