

Tahitian courts in Tahiti and its dependencies : 1842-1945

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In this paper Dr. Sage traces the rise and fall of the native court system of Tahiti from the beginning of the French Protectorate in 1842 till the grant of French citizenship to all Tahitians in 1945.

The first significant contacts with the islands of French Polynesia were made by Europeans in the second half of the 18th century: Wallis and Bougainville were in Tahiti in 1767 and 1768. The first scientific expedition with an interest in Tahiti was undertaken in 1769 by Cook who stopped over in Tahiti to observe the passage of Venus on behalf of the Royal Society of London. It was in honour of that eminent society that Tahiti and its neighbouring islands were named the Society Isles.

The first missionaries were from the London Missionary Society. When they arrived in Tahiti in 1797 they were considered not as the bearers of a new religion but as likely supporters of Otou the son of Pomare in his struggles with other local chiefs. The aim of the missionaries from the London Missionary Society was "to free the inhabitants from superstition, to communicate to them the truths of the revelation and to improve their present conditions." In the circumstances they very soon got caught up in the politics of the Tahitian chiefs and set out to control the temporal affairs of the islands in a very strict fashion - using Christian morality as a simple policing regulation.

Gradually the missionaries and the European traders founded a dynasty¹. Pomare II openly embraced Christianity and began a significant wave of conversion. In 1815 Pomare II and his missionaries undertook a veritable crusade which, after an easy victory, allowed them to impose their influence easily. Political and economic life in the area was under the influence of the mission so the arrival in 1836 of two French missionaries, who came to convert the protestants to the faith of Rome, had the effect of an attack. The missionaries who were in charge in Tahiti were disturbed by this intrusion and asked Consul Pritchard to obtain from Queen Pomare IV an order for the arrest and expulsion of the Frenchmen. This was done on 12 December 1836. The two missionaries were taken by force and placed on a ship destined for the Gambier Islands. From there one of them returned to France and told King Louis Phillipe about the

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1 Pomare I (1743-1803), Pomare II (1774-1821), Pomare III (1820-1827), Pomare IV (1813-1877), and Pomare V (1839-1891).

happenings in Tahiti. The reaction was immediate. The French Government sent *La Venus* from Valparaiso under the command of Captain Du Petit-Thouars. His orders were to obtain "complete reparation for the insult made to France in the person of our compatriots". "L'Astrolabe" and "*La Zelee*" under the command of Dumont d'Urville were also sent to Tahiti to look in to the matter and to challenge Queen Pomare.

After the departure of the French, Pritchard tried to regain lost ground and encouraged the Queen to ask the Queen of England to make a protectorate of Tahiti. Pritchard even succeeded in having a local law voted which prohibited any religion contrary to protestantism. Nevertheless, Catholic priests were in the islands from 1840. Pritchard had great influence both in the legislative assembly and with the Queen and did not accept defeat and decided to go to London to "denounce the Catholic French peril".

The French Government had read reports from Du Petit-Thouars on the possibilities that certain islands of Oceania offered to French whalers and resolved to set up an establishment in Oceania. On 9 September 1842 Queen Pomare IV and the high chiefs on the island of Tahiti sought the protection of France and this was provisionally accepted by Du Petit-Thouars. Ratification by France followed on 25 March 1843.

After acceptance of the petition for protectorate status on 9 September 1842 Admirable Du Petit-Thouars,² noting "the total absence of laws and regulations which could serve as a base for society" found it necessary to establish in Tahiti a provisional government for matters concerning whites and external relations and for guaranteeing personal security, property and public order, and with the agreement of the Queen created a government council of three members - the French Consul, the Military Governor of Papeete and the Captain of the Port. The order proclaimed the equality of the whites and native peoples before the law and expressly guaranteed all property and stated that nobody could be forced to sell or exchange his property. Individual freedoms were guaranteed and they could not be limited except by a written order of the government council acting in unanimity.

A new agreement was signed on 5 August 1847 between France and Queen Pomare VI to regulate the protectorate. By article 1 "the islands of Tahiti, Moorea, and their dependencies form a single free and independent state under the name Society Islands. This state is placed under the immediate and exclusive protection of His Majesty the King of the French, his heirs and successors."³

- 2 On the 9 September 1842, two documents were signed by Queen Pomare and Admiral Du Petit-Thouars. The first, called the "Protectorate Act", is the request made by Queen Pomare. The second, an agreement between the Queen and the French Representative temporarily organized the authorities on the basis of a division of stately competences. See Appendix 1.
- 3 The Leeward Islands, by virtue of an agreement signed in London on 19 June 1847 between England and France, were not included in the protectorate treaty.

I. THE EVOLUTION OF TAHITIAN JUDICIAL INSTITUTIONS

A. From 1842 to 1843

1. *Jurisdiction ratione personae*

The Tahitian state in 1842 exercised its judicial power through the district judges and the senior judges or *Toohitu*. The setting up of the Protectorate did not necessitate any major modifications to the judicial system. The limits on jurisdiction, the number and structure of the courts and existing law were scarcely affected.

The principle of jurisdiction *ratione personae* followed clearly from the directions of the Convention concluded on 9 September 1842 between Queen Pomare and Rear-Admiral Du Petit-Thouars. They agreed that civil justice would be administered in Tahiti:

1. By tribunals composed entirely of natives appointed by the Queen, for cases between natives, according to established custom.
2. By the same tribunals to which will be added, in numbers equal to the native jurors, for the formation of mixed tribunals, white jurors appointed by the Government Council which will choose them from three lists of equal numbers of candidates presented by each of the foreign consuls, for matters between whites and natives.

The Government Council acted as a court of appeal but, except on the specific request of the Queen, did not deal with litigation between natives.

The only recognized civil courts were those of the Kingdom of Tahiti, since the "whites" were required to present their cases to the "local tribunals" sitting with jurors appointed in this case by the Government Council. Foreign residents, other than the French, remained for the time being under the jurisdiction of their state of origin. The formation of a truly international tribunal was envisaged for litigation between foreigners. The Convention of 9 September 1842, stipulating simply that "all judgments will be made according to the already existing laws of the land" indicates that those laws were equally applicable to foreigners.

2. *Litigation concerning land*

All litigation dealing with land was within the exclusive jurisdiction of the native tribunals. The principles applied as much to Tahitians and to the French as they did to foreigners. The Protectorate Act stipulated: "All disputes relative to the right of ownership or to the owners of the land will come under the special jurisdiction of local tribunals".

The Convention of 9 September 1842 specified that whenever necessary :

... disputes which might arise on this subject, in accordance with the stipulations made by the Queen [in the Protectorate Act], will fall under the exclusive domain of native tribunals [that is to say tribunals made up entirely of locals appointed by the Queen].

While declaring that Queen Pomare had retained "exclusive powers of administration and jurisdiction over the natives" and that "everything concerning the foreign residents" was transferred to France, the signatories of the Protectorate or at least the French representative, should have thought about the fate of mixed litigation - that is to say, litigation involving both native Tahitians and the French or other persons foreign to the region - regarding ownership of real estate. Which principle would be invoked? That which transferred to France all matters involving foreigners, or that which stipulated local jurisdiction over the native population? Would the exclusive right of the Tahitian tribunals to deal with questions of property be considered as something founded *ratione materiae* and, consequently, justify the intervention of the local tribunals, whoever the parties might be? An analysis of the directions contained in the Protectorate Act and in the Convention of 9 September 1842 indicate that the authority of the native tribunals extended to all persons living in the islands, provided that they were land owners or that the litigation concerned the right of at least one of the parties to own land.

The intention of the signatories of the Protectorate Act seems to be clarified in a letter of 20 September 1842 - a letter from Admiral Du Petit-Thuars to the members of the provisional Government, "having the weight of an order" and dealing particularly with the jurisdiction of the Government Council in its role as a court of appeal.

Your tribunal cannot be called upon to deal with affairs between foreigners and natives - affairs concerning disputed real estate - unless Queen Pomare, who has retained exclusive jurisdiction over such matters, makes a personal request to the provisional Government for such a decision.

If the real intention of the signatories of the 1842 Convention was to limit the jurisdiction of Tahitian courts, this rule regarding the division of jurisdiction *ratione personae* did not, in the event, survive the upheavals of Tahitian history, and more particularly, the annexation declared in 1843.⁴

B. From 1843 to 1845

The sharing between the Tahitian Kingdom and France of state power in respect of the territory itself and the inhabitants of the Kingdom was bound to bring about some change in the organisation of civil authority. The temporary nature of the acceptance of the Protectorate by Admiral Du Petit-Thuars⁵, the troubles of the years 1843-1846, and

4 The Pritchard affair, the conflict between Queen Pomare and the French representative about the Tahitian flag, and the difficulties with England, were all events which influenced the social administrative and judicial organisation of the Kingdom of Tahiti in various ways.

5 See the preamble to the 1842 Agreement *infra* Appendix 1.

the political decisions which they necessitated all contributed to the air of uncertainty which surrounded successive changes made to the political and administrative institutions of Tahiti up until the time of Queen Pomare's submission and her return to Tahiti.

From 1 December 1843 decree number 3 emanating from Commander Bruat in his position as Governor of the French Oceanic Establishments - a decree which aimed to ensure the administration of justice in the Society Islands - had the effect of blocking all intervention from the native courts in mixed litigation concerning land. From then on, those courts would decide in civil litigation between Tahitians, and exercise jurisdiction over native delinquents who had committed minor offences which threatened neither the safety of the colony, nor the physical or material well-being of non-natives⁶.

C. From 1845 to 1865

1. *The partial revival of native court power*

Despite the fact that it would have been a logical move to make, the re-establishment of the Protectorate in 1845 did not go hand in hand with a re-establishment of the criteria of jurisdictional competence suspended in 1842.

Joint decree number 49 of 13 April 1845 - a decree emanating from the King's Commissioner and the Regent of the Kingdom of Tahiti - agreed to apply to the Society Islands the French Ordinance of 28 April 1843⁷, which dealt with the administration of justice and the special powers of the Governor of the Marquesas Islands. Later, on the same day, a second joint decree was issued amending the Ordinance to comply with the special conditions of the political regime existing in the Society Islands. This text allowed, in its second article, for a court of first instance and an appeal council which would have jurisdiction particularly "in civil cases which do not come under the competence of the Justice of the Peace, and which are other than between inhabitants, who will be judged according to local custom..." This implicitly, but clearly, deprived the Tahitian courts of jurisdiction in mixed litigation about land.

⁶ These matters were then under military jurisdiction.

⁷ Du Petit-Thouars on 1 May 1842 took possession of the island Tahuata and of the south east group of the Marquesas. The King and local chiefs readily agreed to this annexation because they feared reprisals from the United States because of bad treatment given to some ship-wrecked American whalers by the local population. The royal decree of 28 April 1843 in making the first provisions for the government of the archipelago officially confirmed this taking of possession on behalf of France: "At the opening of the session of 1843, 9 January the King said: "By taking possession of the Marquesas, I have guaranteed to our sailors in these distant places a support and a refuge whose need has been felt for a long time." *Lois Annotées*, A.A. Carette (2nd series 1831-1848, Paris, 1875). On 23 July 1843 legislation voted "The opening of an extraordinary credit for the expenses of the French establishments in Oceania": 5,400,000 Francs were set aside for the general expenses of the French establishments in Oceania.

However, joint decree number 61 of 13 October 1845 provided for cooperation between the two judicial systems - a cooperation which allowed the native tribunals to give judgment on the property rights of Tahitians while reserving, in all cases, the judgment in matters involving non-natives to French tribunals. This decree, the general principles of which were repeated in the decree of 15 October 1851, aimed at controlling the sale, renting or gift of lands and relied on Law XII of the Tahitian Code of 1845 which stated that no native could sell, rent or give his land or his house to a Frenchman or any other foreigner, without complying with the decrees of the Governor, the King's Commissioner, who thus received authority to deal with the matter⁸.

A Tahitian law of 29 August 1854 spelled out the duties of the judges when they presided in a district in which land belonging to a Tahitian was claimed by a foreigner or a Frenchman.

In applying these principles concerning the distribution of competences, all texts on judicial organization necessitated - up until 1865, when the transfer of jurisdiction from the Tahitian state to France was more or less concluded - limiting the right of jurisdiction of the Tahitian tribunals to such litigation or offences as dealt solely with Tahitians. Similarly recognised was the competence of the French tribunals of the

- 8 Tahitian Code 1848-Bulletin officiel 1848 p.61. Law XII of the Code of 1848 is the same in substance as article XII of the Code of 1845. Under this law no sale of land, lease of land or gift of land between natives and Frenchmen or between natives and non-French foreigners could take place unless ten days before the transaction the Director of Lands and Registration had been advised and notices advertising the transaction had been put up in public places. The district judge had to sign the notice and advise the district chief. If after the ten days there had been no notice of claim and if the judge raised no objection the judge would sign the contract and include in it a statement that the native transferor was the true owner of the land subject of the contract. If in the ten day period there was a title claim, or if the district judge had doubts about the title of the vendor, the matter required (in accordance with the Tahitian law XVI of 1842) a decision of the district judge assisted by the Imiroa with right of appeal to the Toohitu. That judgment would indicate who the owner was and who had the right to dispose of the land. The district judge referred the judgment to the Director of Registrations. If the judgment procedure was not followed the transfer of the land was final only after four years during which period the land was considered as lent. During that period the district judge - and on appeal the Toohitu - would hear claims by any interested person about title to the land. If any such claim was judged to be well founded the claimant could demand the return of his property. The judgment would be sent to the Director of Registrations who would advise the Frenchman or other foreigner party to the contract that it would be annulled as made by a non-owner. The claimant then brought the matter before the native courts. If the claim was brought during the last three years of the four year period the claimant could only take the place of the vendor but could not have the contract cancelled.

Disputes on boundaries between natives and frenchmen or other foreigners went before a judge of the peace or district judge who took the advice of the *hui-raatira* of the district. The judgment of these two judges was subject to appeal in accordance with the decree of 15 April 1845.

Protectorate in all instances where civil or criminal interests of non-whites were at issue.

2. *The application of Tahitian laws in native courts*

Under the regime established in 1842, Tahitian legislation alone could be applied by courts in Tahiti, the Government Council included⁹. All judgments had to be "made according to the four already existing laws of the land".

From 1843 onwards, it was usual for Tahitian tribunals to apply Tahitian laws, local ordinances and those police decrees that were applicable to subjects of the Protectorate. For their part, the French tribunals applied French laws, decrees made by the local French representative and, from time to time as required, Tahitian laws¹⁰.

This pattern continued until the end of the Protectorate, except for the period from 1860 to 1865 when French laws were merely supplementary to Tahitian laws and local decrees.¹¹

3. *Return to the strict separation of jurisdictions*

The theoretical norms discussed above and the division of jurisdiction between the Tahitian tribunals and the French tribunals (which decided in the name of the Government of the Protectorate and also, from 1865 onwards, in the name of the Emperor) were not always observed on a day to day basis. Therefore, a joint decree from the Queen and the Imperial Commissioner, dated 4 March 1859, served as a reminder of the principles in question. This decree aimed at putting an end to the previously tolerated practice of allowing native tribunals to judge mixed disputes when the non-native parties requested such a judgment. Intending to alleviate the circumstances whereby a non-native could, even unwittingly, bring pressure to bear upon a Tahitian judge, the decree announced that, as of 1 July 1859, French or foreign residents could not, under any circumstances, bring before the native tribunals of the Protectorate States either their disputes with natives or the natives whom they wished to prosecute for offences detrimental to their personal well-being. In the future, such cases had to be brought before mixed French tribunals where, in the case of a split vote, the vote of the chairman of the tribunal would be decisive. These mixed tribunals were to be made up of one half French or other resident judges and the other half Tahitian judges.

- 9 Article 6 paragraph 3 of the decree provided that "the Governor is authorised to make all orders and regulations necessary for the operation of the administration and in the interests of good order and the security of the colony." This provision as a matter of principle allowed the Governor to impose on everybody including the native population legislation of metropolitan inspiration.
- 10 Article 5 stated : "The courts of first instance and the appeal council will apply the French civil legislation as modified by royal ordinances or by local orders or by the customs of the country."
- 11 Decree 30 August 1860, article XI : "The ministere public in his report to the court must always demand the application of the Tahitian legislation and the local decrees and only in the case of the silence of these laws on the matter may french laws be invoked and applied".

Therefore, although reduced, the judicial power of the Tahitian State continued to exist. All tribunals were tribunals of the Protectorate and among them were some made up solely of natives or including natives in their composition¹². However, this sovereign character of the Tahitian Kingdom virtually disappeared in 1865.

D. From 1865 to 1880 : the transfer to French courts of jurisdiction assigned to Tahitian courts

A joint Ordinance issued by the Queen and the Imperial Commissioner on 14 December 1865 concerning the judicial organization of the Protectorate¹³ - an Ordinance ratified by a law of the Tahitian Legislative Assembly on 28 March 1866 - reduced the domain of Tahitian courts considerably.

According to this Ordinance, all disputes other than those between natives of the Protectorate and concerning their right to the ownership of property (article 5), were deemed to be the province of the French tribunals of the Protectorate and were judged according to French laws. The same transfer occurred in the criminal area and related equally to serious and petty offences. Even when dealing with property questions, the Tahitian tribunals had to apply French law in all cases which involved rights acquired after the publication of the Ordinance¹⁴. The Queen reserved the right to pardon those of her subjects who were sentenced for offences committed against other Tahitians. (In

- 12 Decision of the Queen and the Governor relating to disputes between European residents and the native population - Bulletin officiel 1859 p.272 "Considering that the custom, which has been observed until now of allowing disputes between resident French and others and the subjects of the protectorate to be judged by native judges whenever these residents requested it can no longer continue... Considering that it is necessary to avoid in these mixed disputes the superiority that a resident can even unknown to him exercise over a poorly informed local judge... Decide French or other foreign residents cannot in any case bring disputes with native peoples nor sue a native for any tort committed against them before the judges of the native courts of the States of the Protectorate. The suits must always be brought before the French courts which in such cases will have added to them as judges subjects of the States of the Protectorate".
- 13 "Pomare IV Queen of the Society Islands and their dependencies and the Imperial Commissioner - Whereas the Tahitian laws in force and the organisation of the special courts responsible for applying them no longer fully respond to the needs of the country nor to the degree of development to which the subjects of the protectorate have reached, we are of the opinion that (1) it is necessary to give to judicial acts a character of stability which will reassure all interests (2) title to land because it at present relies on customs foreign to French law must in the interests of justice in the circumstances be settled exclusively by Tahitians (3) as far as other matters of private rights are concerned as well as criminal matters it is urgent that a more complete legislation be put in place and that there be a better informed judicial system providing always that the Tahitian element be represented when a subject of the protectorate is a party to the action whether as a suitor or as a defendant."
- 14 "The Tahitian cases were consistent in the recognition of the validity of private rights over the lagoons established by titles prior to the promulgation of the Civil Code of 1866 and denied the possibility of establishing such rights after that".

practice, this right was only ever exercised with the consent of the Commissioner who represented the foreign power and who, along with the Queen, signed the orders for reduction in sentence). It was specified that the French tribunals had to include a Tahitian assessor in cases dealing with natives.

In ratifying this Ordinance, the Legislative Assembly was obliged, as a necessary consequence, to repeal all pre-existing Tahitian laws except the law on districts (which concerned the native administrative organization and taxes), the laws on land, and the laws on common grazing rights.

A decree from the Commander of the French Oceanic Establishments, the Imperial Commissioner, dated 27 December 1865, expressed the same principles for the benefit of the French courts. It also specified the way in which the principles should be applied and indicated that justice was carried out "in the name of the Emperor and of the Government of the Protectorate".

In a decision of 2 June 1869¹⁵, the Court of Cassation decided that the setting up of tribunals such as those provided for in the local decrees of 1850 and 1865 was illegal. It considered that only a decree from the Head of State could create such tribunals. Several times during the course of the same period, the persons subject to trial by the French tribunals of the Protectorate asked that judicial functions entrusted, as indicated in the local texts on judicial organization (the only ones ever used), to senior civil servants or important residents, be performed by professional judges appointed by the Emperor. Making use of this request to cover up the illegality of the courts, this "wish" was granted by the decree of 18-August 1868, which dealt with the organization of the administration of justice in the French Oceanic Establishments and the States of the Protectorate of the Society Islands¹⁶.

15 Brander/Martinez Freres, D.P. 1869. I. 279.

16 This decree was made after a report by the Minister of the Navy : "Sir, an ordinance of Queen Pomare of 14 December 1865 gave French courts in the states of the Protectorate jurisdiction over criminal acts committed by Tahitians as well as jurisdiction over civil disputes in matters other than title to land. By virtue of this ordinance the commander of the French Establishments in Oceania ... decreed that : (1) Three justices of the peace be set up at Papeete Taravao and Anaa: (2) A first instance court with a judge and a registrar be set up: (3) A high court consisting of a president and two judges including for criminal matters four jurors appointed from local notables be set up. In any matter in which a native is a party the courts will include a native assessor appointed by the president of the court. The power to pardon Tahitians convicted of criminal acts against other Tahitians is reserved for Queen Pomare by ordinance of 14 December 1865. The judicial duties required by this decree of the Imperial Commissioner are actually performed by public officers and notables who live in the establishments. European and native parties before these courts have on several occasions expressed the wish that this organisation which is essentially a temporary one be a replaced by a definitive organisation and that the duties of judge be entrusted to professionals appointed by the Emperor. I think Sir that the time has come to take account of this wish and to set up a regular justice system in the establishments of Oceania and the States of the Protectorate. The decree that I have the honour of submitting for this purpose to your Majesty reproduces with the exception of the special permissions whose creation has not been

This decree spelled out the basic principles already discussed - notably, the principle of the competence of the French tribunals for all litigation and for all offences committed by all persons regardless of their nationality, except disputes between natives of the Protectorate States regarding the ownership of lands (a matter which remained within the exclusive competence of the Tahitian courts)¹⁷. Mixed jurisdictions were done away with. The presence of a Tahitian assessor appointed by the President of the Tribunal (a presence discussed again in article 5 of the decree of 1868) becomes a pure formality since the assessor was present for "the discussions and decisions with consultative powers". However, his opinion had to be mentioned in the judgment or the judgment could be invalidated on appeal. Every document of procedure dealing with a "native" had to be translated into Tahitian. French law was the only applicable law, except for litigation between "natives" concerning land.

E. From 1880 to 1945 : the disappearance of Tahitian courts

Nothing was changed in the rules until the end of the Protectorate. They were still upheld well after the Annexation, at least on the matter of the jurisdiction of the Tahitian courts regarding land - a practice which had to remain unchanged according to the stipulation made by Pomare V in 1880 at the time he ceded his sovereignty to France¹⁸. An agreement made on 29 December 1887 anticipated that these courts would disappear altogether at such time as all properties had been delimited and all disputes relating to them had been resolved. This agreement was approved by legislation on 10 March 1891, but due to the slowness of proceedings regarding the delimitation of lands, these courts were to remain for a long time : the decree of 21 November 1933 on the judicial organization of the French Oceanic Establishments still makes mention of them.

The decree of 5 April 1945 signalled the total disappearance of Tahitian courts.

II. TAHITIAN JUDICIAL ORGANIZATION

A. The establishment of the Protectorate in 1842

Only minor modifications were made to the Tahitian judicial organization as it existed at the time of the establishment of the Protectorate. Tahitian courts instigated by the English missionaries through a succession of codes were retained by France,

thought useful for Tahiti, most of the provisions of the decree relating to the organisation of the judicial system in New Caledonia and its dependencies."

17 Decree 18 August 1868 article 4: "The jurisdiction of these courts extends to all the inhabitants of the French Establishment of Oceania and the States of the Protectorate without distinction as to origin or nationality. However, disputes between the natives of the States of the Protectorate relating to title to land are under a special jurisdiction established by order of Her Majesty Queen Pomare on 14 December 1865". See also the French decisions reported in D.P. 1885 - I - 287, and in D.P. 1892 - I - 329.

18 See Appendix 2.

partly because they corresponded quite well to the needs of the society of that era and partly because they fitted in with the pragmatic approach of the new colonisers. Moreover, the explicit recognition of Tahitian courts by the agreement of 9 September 1842 guaranteed their survival, even if in a slightly modified form.

At this time the territory of Tahiti and Moorea was divided into districts. There were a total of twenty-two for Tahiti and ten for Moorea. These districts were grouped into eight large constituencies. Each district had two judges, and each of the seven main constituencies provided a senior judge, the convocation of which formed the Toohitu Court¹⁹. The district judges were appointed by the Queen and the Toohitu, the latter being appointed solely by the Queen. In property matters, the district judge was assisted by *imiroa* (low-ranking police officers).

The Toohitu were appeal judges. Any two of them could give a binding judgment, but to enable them all to fulfil their office, the person lodging the appeal had to inform all seven Toohitu of the fact that he had made use of his right of appeal.

This organization continued with little modification throughout the period of Annexation. Decree 3 of 1 December 1843 made by Governor Bruat made provision for civil tribunals and courts-martial and maintained the native courts, simply anticipating the appointment by the Governor of a judge and a senior judge (respectively for a district and a Toohitu constituency).

B. Judicial organization according to the Tahitian Code of 1845

The re-establishment of the Protectorate brought about substantial modifications to the judicial organization as it had been established in previous Tahitian codes. The Code of 1845 altered the ways in which judges were appointed and the extent of their powers. Thereafter, district judges and senior judges were appointed by the Regent (on behalf of the Queen) and by the Commissioner of the King of the French.

The district judge decided at the first instance and could have his decisions appealed against. The appeal was brought before the Regent who directed two Toohitu and two district judges (other than the judge whose decision has been appealed against) to make a fresh decision. This appeal decision could again be brought before the Regent who would then refer it to three Toohitu. The Toohitu sat four times a year (in January, April, July and October) on the summons of the Regent.

The "major crimes - assassinations, rebellion against the Government, evil intent towards the Regent or any other powerful person in Tahiti", fell under the exclusive jurisdiction of the Toohitu so long as there were no Frenchmen or foreigners involved. No special rules applied to their sessions and they could sit outside the quarterly sessions.

19 See Newbury *Tahiti Nui : Change and survival in French Polynesia 1767-1945* (University Press of Hawaii, 1980) 126-128.

A joint decree signed by Commissioner Bruat and the Regent Paraita, dated 13 October 1845, validated by the agreement of 5 August 1847, and inserted in the code of 1848, instituted what could be described as an appeal jurisdiction consisting of the King's Commissioner and the Regent. When an irregularity occurred in any judgment made by the Toohitu, the parties concerned could use this appeal jurisdiction which could quash the decision and send the whole proceedings back to the Toohitu.

C. Judicial organization according to the Convention of 5 August 1847

Under the title "Judicial Power", articles 14 to 20 of the agreement of 5 August 1847 describe the judicial organization. According to article 14, senior judges or Toohitu and district judges form the judiciary. Article 15 specifies that they are all appointed and dismissed by the Queen and the King's Commissioner, and paid by the French Government. The same article goes on to say that the judges and senior judges are convened by the authorities which appointed them and at "such times as the law sees fit".

The *mutoi* (native police corps) were appointed by the chief and judge of each district, subject to the approval of the Queen and the King's Commissioner. The appointment of *imitoa* (low-ranking police officers) proceeded along the same lines but was not subject to approval by the highest authorities in the land.

The agreement of 5 August 1847 did not cause any upheaval in the judicial institutions of the 1845 code. The fact that only seven articles of the agreement of 1847 dealt with judicial power and that article 29 stipulated that "all laws made in 1842 and which were not repealed by those of 1845, or to which the latter made no modifications are still valid..." support this idea. However, one noteworthy fact is that the judges were thenceforth paid by the French Government - a fact that could compromise the independence of Tahitian judges.

A record of the Toohitu hearings was passed on to both the Queen and the Representative of the French Government.

D. The Tahitian Code of 1848 and subsequent laws

By stipulating in article 6 of its law XXXIII that "all measures from the 1842 laws which were renewed in the Legislative Assembly in 1845, along with the new laws of 1845 which did not previously exist in 1842, and such decrees as do not conform with the very latest laws, are all annulled" the Code of 1848 clarified certain points which had remained vague in the preceding codes. Particularly, the competence *ratione loci* of the Tahitian tribunals was defined as being that of the place of residence of "the native" - the judge from the district in which the "accused" Tahitian lived was taken as his native judge.

The two appeals made available to the "sentenced man" by the measures of the 1845 code were reconfirmed in the new code. From 1848, after the first appeal the Regent would designate one senior judge and two district judges to hear the case. The second of the possible appeals against the decision of the district judges would take place before

the Toohitu Court after a declaration to this effect had been made by the Clerk of the Court. In difficult cases, the judges were authorized to seek the assistance of six persons to help with the decision. The judges chose these six persons, but "the accused" had the right to ask that up to half of them be replaced. In appeal rulings regarding property matters provision was made for only a single appeal : the decision of the district judge, assisted in the matter by the *imiroa*, was placed before the Toohitu whose judgment was final²⁰.

By the electoral law of 22 March 1852, the office of district judge became an elective one. Moreover, the elected person had to be appointed by the Queen and the Commissioner. Only *hui-raatira* from the district were eligible.

The right of appeal was limited by the law of 20 July 1853 to sentences for "offences merely against law enforcement", i.e. offences against laws on spirituous liquors, on schooling and on public works. However, the right of appeal was still available to civil servants because for them conviction brought automatic dismissal.

E. Laws voted by the Tahitian Legislative Assembly in 1855

The law of 30 November 1855 on justice revised all the relevant legislation.

1. The district judge

Elected by the local people and appointed by the Queen and the Commissioner, the district judge - in accordance with the electoral law of 22 March 1852 - was the judge who had jurisdiction over the inhabitants of his own district and inhabitants of other district. In property matters, he was assisted by the *hui-raatira* - ten of them for large districts and four or six for small districts. There was always an even number of *hui-raatira* so that the problem of a split vote was avoided. Except where he was related to one of the parties or when he was ill, the district judge could not decline to give a ruling on any matter.

The district judge before whom a case was brought had to refer the matter to the district chief who, after deliberation with the district council, decided whether or not it would be necessary to make a judgment. A decision to put off further proceedings was passed on to the Government which, according to what seemed appropriate, would either ratify the decision or refuse it. In the latter case, the district judge would be required to reconsider the matter. This procedure did not apply to offenders who were caught in flagrante delicto. In those cases the district judge could make a ruling without reference to the chief. Appeals against initial rulings made by the district judge could be made

20 Law XXVI concerning judgments of the Toohitu: If the whole of the piece of land is in dispute and the owners can not settle the matter themselves they will call on public officers and the district judge together with the *imiroa* to settle the matter and if after they have decided it one of the owners is still not satisfied and appeals to the seven Toohitu to rehear the case the judgment pronounced by the Toohitu will be final. In urgent cases the Queen can ask the Regent for two or three Toohitu who will decide the case "immediately".

before an appeal tribunal which sat at Papeete or, for matters concerning the Tuamotu Islands, at Anaa.

2. *The Appeal Tribunal*

The Appeal Tribunal at Papeete consisted of a president appointed by the Queen and the Imperial Commissioner, and two judges chosen by the president from among the district judges. The tribunal had a clerk appointed by the president. The Imperial Commissioner chose a delegate whose role it was to be present at hearings and to inform the tribunal if it stepped outside the law²¹. This delegate took no part in the decision in any case.

The judge responsible for the challenged decision was notified of the day on which the appeal would be heard. And he, in turn, had to advise the plaintiff or defendant and the witnesses. Then, along with all these, he attended the hearing and gave the president all the relevant details but did not participate in the appeal deliberations. The appeal judgment was final only if the accused did not, within the 20 day time-limit for appeal, make an appeal to the Toohitu court.

3. *The Toohitu Court*

The Toohitu Court continued with seven senior judges appointed by the Queen and the Imperial Commissioner. It sat three times a year at Papeete. The president of the appeal tribunal responsible for the appeal decision appeared before the Court to provide information to the Toohitu if required.

4. *A Court of Appeal*

Although it is specified in the text that "the judgments of the Toohitu cannot be appealed against and are final", both the Queen and the Imperial Commissioner had the right to "have these judgments declared invalid" if any irregularity existed in their form or their content. In practice, this right - properly speaking a fourth degree of jurisdiction - accorded to the representatives of the Tahitian Kingdom and the French Government was rarely used. A delegate, especially appointed by the Government, was present at the judgments in order "to point out the trouble caused by the frequent invalidation of judgments - a circumstance arising from a failure to observe the necessary formalities with which the Toohitu are not accustomed". Yet, it appears from the joint invalidation ordinances given by Queen Pomare and the Commander and Imperial Commissioner that this procedure of invalidation was used frequently in connection with property dealings.

An Ordinance of 28 January 1862 altered slightly the composition of the Toohitu Court and the Appeal Court. The Toohitu Court was thereafter to consist of a Chief Justice, a president, a vice-president, six judges and a clerk - all appointed by the Queen

21 The Tahitian law on judgments - Title II - Article 25 "... and to see that the application of the legislation is just".

and the Imperial Commissioner. At each session the Chief Justice would nominate one judge, in addition to the five who were sitting, to fill the function of reporter.

The Appeal Court had a quorum of three judges, all of whom were appointed by the Queen and the Imperial Commissioner. By special order the Court could hold sessions in the districts of Tahiti and Moorea, and an order would be made in the event of a judgment concerning problems with the registration of native lands.

F. Ordinance of 14 December 1865

The Ordinance of 14 December 1865 (ratified with modifications by the law of 28 March 1866) transferred civil and criminal jurisdiction over Tahitians to the French tribunals of the Protectorate. However, each time a "native" was involved in a case, either as a plaintiff or a defendant, the judges had to call a Tahitian advisor nominated by the tribunal. This advisor had consultative status and his presence and opinions had to be made known in the judgment. Only one reservation was made by Queen Pomare : the former native jurisdictions had to be retained for rulings concerning disputes between natives about the ownership of lands.

1. The district councils

The limiting of jurisdiction over and matters between one Tahitian and another brought about the disappearance of district judges. They were replaced by district councils and the Court of Appeal. Of the original judicial organization, all that remained was the Toohitu Court and the right to bring a case on appeal before the Queen and the Government representative.

When the Tahitian law of 28 March 1866 was "passed" by Queen Pomare and the Imperial Commissioner, the measures it contained concerning property matters replaced all those mentioned in the 1865 Ordinance. From then on, when a case arose involving a dispute between parties over a piece of land and when no amicable arrangement was reached, the only competent authority was that of the council of the district where the land was situated. On a day set by the President of the district council, members of the council, parties and witnesses would meet together at the "local headquarters". A reconnaissance trip out to the lands could take place for the purpose of measuring the boundaries of the disputed area. The *hui-raatira* or the elders of the district would make their deposition after their names were noted on the register. After having deliberated over the matter, the district council would make public its decision.

2. The Tahitian High Court

Decisions made by the district councils could be appealed against within 20 days. Beyond this period, all decisions which had not been appealed were automatically presented to the High Court of Justice which approved them, subject to their conformity with the laws of the land. After this the only possible means of appeal left was to the Court of Appeal. Made up of Toohitu and the President of the First Instance Tribunal, the Tahitian High Court met at least once every quarter when the Queen and the Imperial Commissioner called them together. Though they were absent from the district

councils, the representatives of colonial justice made their presence felt before the Tahitian High Court. The functions of the State Prosecutor were fulfilled by "the Imperial Prosecutor to the tribunals of the Protectorate". The President of the First Instance Tribunal, although he did not take part in the decision, appointed the five Toohitu and presided over the discussions.

In cases where the rules of procedure, common to all district councils, were not observed, the judgment of the High Court was invalidated and the matter again put before the judges so that the proper legal procedures, particularly respect for the public nature of the proceedings, the admission of evidence, the hearing of witnesses, contradictions and challenges, might be followed.

3. *The Court of Appeal*

The appeals procedure in place since 1855 was confirmed by the law of 28 March 1866. Within 30 days of judgment the parties involved in the case or the President of the First Instance Tribunal could lodge an appeal. The only grounds for such an appeal were the "violation or improper application of the law". Appeal on the basis of irregularities in the formalities of procedure was no longer available.

The decree of 18 August 1868, which governed all the tribunals in the French Oceanic Establishments and in the Protectorate States, confirmed the principles set out in the 1865 and 1866 texts.

An Ordinance of 8 March 1870, under the pretext that "the requirements of the service and the best interests of those standing trial before the Tahitian High court" demanded it entrusted the presidency of the High Court to the President of the Higher Tribunal. Although this measure was revoked on 16 March 1872, the President regained the office after the Ordinance of 21 September 1874. At the same time, the number of Toohitu called to sit in each case was reduced from five to four to avoid a split vote.

According to the terms of the decree of 30 July 1872, the High Court was obliged, in addition to its usual sessions, to hold one or two sessions annually in the Tuamotu Islands to judge on property matters in the archipelago.

The Court's seat was fixed on the island of Anaa but due to the difficulties of transportation, the decree of 28 March 1874 allowed the President to appoint as auxiliary Toohitu, members from the district councils of the island of Anaa. This Ordinance also gave the casting-vote to the President of the Toohitu court - the President of the Higher Appeal Tribunal. A decision by the Queen and the Imperial Commissioner dated 2 May 1866 had equally allowed that members of the district councils of Pare, Arue and Faa in Tahiti be appointed as auxiliary judges.

G. *Tahitian courts after the Annexation*

On 29 June 1880, King Pomare V made a declaration in which he asked that "his states be made one with France". He also requested that the Tahitian courts might continue to exist for property disputes between native Tahitians. On the 30 December 1880, the President of the French Republic ratified the annexation of the Society Islands to France with a law accepting the terms of request from King Pomare V and the principle of the continuation of the native courts as they had been organized by the 1868 law. The inclusion of a Tahitian assessor before the French tribunals was also reaffirmed.

On 29 December 1887, a joint declaration by King Pomare V and Governor Lacascade suggested that, within a short period of time, the Tahitian jurisdiction would disappear altogether. Indeed, they were to be "done away with as soon as proceedings relative to the delimitation of property" had been "completed and disputes arising on account of these delimitations" had been settled²².

After the death of Pomare V on 12 June 1891, and well after the annexation had been announced, the Tahitian Court of Appeal of which the late King had been one of the two members de facto disappeared. The decree of 27 February 1892 transferred the functions of the Tahitian Court of Appeal to the Higher Tribunal of Papeete. But in the guise of "reconstituting the Tahitian Court of Appeal", the colonial authority managed to annex the Tahitian High Court - this by declaring that henceforth, the presidency of this court would be held by the Chief Justice of the First Instance Tribunal of Papeete or, in his absence, by the next highest-ranking judge.

On 27 May 1892²³ a decree promulgated the law of 10 March 1891, which ratified the declarations signed on 29 December 1887 by King Pomare V and the Governor of the French Oceanic Establishments. However, it must be recognized that, although reduced to dealing only with property litigation between "natives", the Tahitian courts survived a long time. The Code of Civil Procedure recognised that they still existed on 21 November 1933 : "In the other islands (with the exception of the Leeward Islands,

22 Declaration of 29 December 1887 between Pomare V and governor Lacascade Bulletin officiel 1892 p.128. It was stated that this declaration was made "because the reservations contained in the royal declaration of 29 June 1880 (which concerned the full transfer to France of the sovereignty of His Majesty Pomare V) create an obstacle to the perfect union of Tahitians with their new fellow citizens. Therefore His Majesty wanting to give his former subjects a new proof of his affection and the government of the French Republic a new testimony of his good faith...".

In his report to the President of the Republic in 1892 Jules Roche Minister for Commerce and Industry in the Colonies stated that he thought it would take at least another "three or four years" before the boundaries for the native lands were settled. This estimate proved very optimistic because in 1933 the matter was still not settled. Bulletin officiel 1892 p.129.

23 The renunciation by King Pomare V of the reservations contained in the Act of Annexation were given in exchange for an annuity of 6,000 francs payable in favour of Prince Hinoi Pomare.

Ruruta and Rimatara) by applying the decrees of 18 August 1868, the law of the 10 March 1891 and the decree of 27 February 1892, the native courts will continue to deal with disputes between natives over property and boundaries, and declarations arising from surveys of areas where these matters have not been settled. All other matters are outside their competence".

The decree of 5 April 1945 on the granting of French citizenship to all persons born in the French Oceanic Establishments was the death knell for the native courts. All inhabitants of the French Oceanic Establishments were subject "without distinction on the basis of origin or nationality" to French courts.

APPENDIX 1

REQUEST FOR THE PROTECTORATE made by the Queen and the Chiefs to Admiral Du Petit-Thouars

Tahiti 9 September 1842

Because we are unable, under the present circumstances, to continue to govern ourselves in such a way as to maintain good relations with foreign governments without risking the loss of our islands, our liberty and our authority, we write this document to request that the King of the French might place us under his protection, on the following conditions:

- 1 that the sovereignty of the Queen and her authority and the authority of the paramount chiefs over their people are guaranteed;
- 2 that all rules and laws will be made in the name of Queen Pomare and will be signed by her;
- 3 that the ownership of lands belonging to the Queen and the people will be guaranteed them. These lands will remain theirs. All disputes relative to the right of ownership or to the owners of the lands will come under the special jurisdiction of local tribunals;
- 4 that everyone will be free to practise his worship or his religion;
- 5 that currently existing churches will continue to exist and that the English missionaries will continue their work without interference. The same will apply to all other beliefs; no-one can be harmed or harassed for their beliefs.

Under these conditions, Queen Pomare and her paramount chiefs ask the protection of the King of the French, leaving in his hands or in the care of the French Government or the person appointed by him and with the approval of Queen Pomare, relations with foreign governments... and to take such measures as he might deem useful for good harmony and peace.

**AGREEMENT CONCLUDED between the Queen and the Admiral on 9 September 1842
about the Protectorate**

Her Majesty, Queen Pomare, on the one hand;

And Rear-Admiral A. Du Petit-Thouars, Commander of the Legion of Honour and Commander-in-Chief of the Pacific Ocean Station, on the other ;

Taking into consideration the stipulations on which the protection of H.R.H. Louis Philippe is founded, protection temporarily given, subject to approval by the King ; owing to the impossibility of receiving immediately the orders of His Majesty the King of the French ; bearing in mind, besides, the total absence of laws and directions and the need to set up in Tahiti a temporary Government to take care of the whites, external relations and the guarantee of individual safety, property and public order;

Queen Pomare and Rear-Admiral Du Petit-Thouars decree :

- 1 That a Government Council will be established at Papeete, capital of Tahiti. In accordance with the conditions of the Protectorate, this Council will be invested with administrative and executive power, and with the foreign relations of the States of Queen Pomare ;
- 2 The Government Council is comprised of three members, notably : the French Consul, Commissioner of the King at the Government of her Majesty Queen Pomare; the military Governor of Papeete; the captain of the port of Papeete.

Decrees of the Government Council can only be made after deliberation in Council, and will be executive only when they are announced unanimously.

Outside the Council, each of the members will retain only the power relative to their own special function ; the Council can only come together when called to do so by the French Consul, Commissioner of the King, or by the military Governor of Papeete.

All decisions which are not made unanimously are null and will be referred to the King's Government for resolution.

The minutes of all Council deliberations, whatever their result might be, will be kept and recorded on registers stamped for this purpose.

Two copies of accurate minutes signed by all members of the Council will, in the 24 hours following the session, be handed over to the chancellory of the French consulate, one to be sent to the Minister of the Navy ; the other to form part of the archives of the consulate and to be passed on, if necessary, to authorized parties or to foreign consuls.

In the event of a request for a judgment from the Government Council, the Council must call in, as assessors, the consuls of affected nations or, if the affair is mixed, that is to say between a white and a native, the consul of the relevant nation on the one hand, and the district Governor, on the other. In this case, the judgment will be made on majority vote.

The Government Council will only ask for a judgment from the King's Government in criminal cases; in no case may the Government Council pronounce a death sentence; matters of this gravity will be sent back to the King's Government for a decision.

All requests for a judgment on matters between natives will be rejected by the Government Council, unless it receives such a request, in writing, from Queen Pomare who, in all cases and according to the conditions of the Protectorate, has retained exclusive powers of administration and jurisdiction over the natives.

Civil justice will be carried out in Tahiti:

- 1 By tribunals entirely composed of natives appointed by the Queen for cases between natives, in accordance with established custom ;
- 2 By the same tribunals to which will be added, in equal number to the native jurors, for the formation of mixed tribunals, white jurors appointed by the Government Council which will choose them from three lists of candidates presented in equal number for each one of the foreign consuls, for matters between whites and natives.

Finally, whites will bring their cases before local tribunals but, in this case, all jurors will be appointed by the Government Council, as described above for jurors for mixed tribunals.

Foreign consuls - as long as the French Government and their own Governments are informed about it - will retain their jurisdiction over their own nationals.

They may proceed on their own behalf to reconcile them - either by means of persuasion or arbitration - or may refer the matter to a tribunal, the formation of which they will assist by appointing candidates from their own nation, among whom the jurors must be taken in a number proportional to that of nations represented in Tahiti.

After judgments by the Tribunal, they may still appeal for a judgment from the Government Council to which, by law, they will be added as assessors ; finally, they may even appeal directly to the King's Government against the judgment of the tribunal.

All judgments will be made according to already existing laws of the land.

Natives and whites are equal before the law.

The freedom of belief is proclaimed ; the Government will give them equal protection. No one can be investigated for his religious opinions or restricted in the practice of his worship.

Individual freedom is guaranteed; it can only be taken away by a written order coming from the Council after deliberation and a unanimously taken decision.

All ownership, without distinction, is guaranteed; disputes which may arise on this subject, in accordance with the stipulations made by the Queen, will fall under the exclusive domain of native tribunals. No one can be forced to sell or exchange his

exclusive domain of native tribunals. No one can be forced to sell or exchange his property.

All whites living in Papeete must have a certificate attesting their nationality, or must be recognized by the consul of their nation, or must be taken under the protection of those who are accredited; failing a guarantee, they may be considered as vagabonds and, as such, forced to leave the country. However, this judgment can only be made after the deliberation of the Government Council and on a unanimous vote.

Any person wishing to engage in retail trading will be required to obtain a licence; until a decision is made by the Government, these will be delivered without charge courtesy of the Government Council and noted down on a special list; the licences must be signed by the three members of the Government.

The banning of the sale of spirituous liquors, decreed by the laws of Queen Pomare, will remain in force.

The sale of wines, beer or other low alcohol drinks, since they cannot be seen in the same light as spirituous liquors, will continue to be authorized in the interim.

Private homes are inviolable ; nothing can be done to breach this right unless the owners have public houses such as hotels, inns, cabarets, dance halls or billiard saloons. In any case, these public places can only be visited on the order of the Council, or of the Military Governor.

Gaming houses are not permitted; all contraventions of this measure will be severely punished and, in the case of reoffending, the guilty party will be forced to leave the country.

Any white who interferes in the affairs concerning the Government of Queen Pomare and that of the King - affairs such as have been temporarily established - or who seeks by means of his protests, his intrigues, his lies or his actions to disturb public order and the atmosphere of good harmony which is being established, may, on the strength of a decree made in Council and on unanimous vote, be forced to leave the country.

Captains of vessels entering the port of Papeete will be required to make a declaration as to their reasons for making it a port of call. This will be done in the office of the Captain of the Port. It will also be necessary that prior notification is given of the day of departure, and that settlement is made for the rights to piloting and anchorage set by Queen Pomare. These rights will remain unaltered until a decision is received from the King regarding the acceptance of the Protectorate.

At any time when public force is required to have the decrees of the Government Council carried out, the native Governor of Papeete, appointed by Queen Pomare, will, on written request from the Government Council, lend such assistance as is required.

APPENDIX 2

Declaration of Annexation made by Pomare V King of the Society Islands and its Dependencies - 29 June 1880

We, Pomare V, King of the Society Islands and its Dependencies,

because we appreciate the good government given by France to our states, and because we know that the French Republic is attentive towards our people and our country with whom she wants increased happiness and prosperity,

eager to give to the Government of the French Republic a striking proof of our confidence and of our friendship, declare by this act, on our behalf and on the behalf of our descendants and successors, to give completely and for ever into France's hands, the government and the administration of our states and in the same manner, of our rights and powers upon the Society Islands and its Dependencies.

Our states are therefore joined together with France, but we ask this great country to continue governing our people by taking into consideration Tahiti's laws and usages.

We ask, also, to be judged for the petty affairs by our district council in order to spare our people the trouble of travel and expense.

We wish, also, to leave all cases related to land in our native court's hands.

As for us, we shall keep for ourselves the title of King and all honours and precedence attached to the title. The Tahitian flag, when we shall desire it, continue to fly over our palace.

We desire to keep personally the right of pardon which had been given to us by the Tahitian law of 28 March 1866.

We are making this declaration to the Royal family, to the chiefs and our people, to be listened to and respected.