

# **PACIFIC JUDICIAL CONFERENCE 2014**

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## **‘The Tahitian Pomare Code of 1819: First steps to written law in the Pacific’**

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### **1. Introduction**

Madam Chair and distinguished Delegates. Some of you may be wondering why I have chosen the subject of this historically distant and jurisprudentially obscure and obsolete Code of Laws promulgated by King Pomare II in Tahiti in 1819 to lay before a Conference of busy and practical Judges of the Pacific gathering to consider the theme ‘Equal Access to Justice’. There are two reasons.

The first reason I’m afraid is autobiographical. I grew up in Tahiti – in fact in the very place where the laws were designed and declared. The district of Arue in Tahiti, Matavai Bay, and the Pomare lands at the south-western end are shown in the maps below. The interaction between Pomare and that remarkable group of London Missionary Society brothers and sisters who arrived in Matavai Bay on the ship *Duff* in 1797 has become a matter of interest to me and is the subject of an account which I have been researching in recent years and hope to publish in the near future.



**Arue, Tahiti, 1955.**

That interaction produced several cooperative enterprises. A Brig was built, the Bible was progressively translated and printed at a local press, mission schools were established, and of most interest for present purposes, a Code of Laws was drafted and declared at King Pomare's 'Royal Chapel' in Pare (nowadays called Arue) in 1819. There are several good accounts of these proceedings and I have come to think that the remaining long-view question is that of 'agency': who was the real 'driver'? Was it the missionaries, with help from Pomare? Or was it, as I now suspect, Pomare, with help from the missionaries?

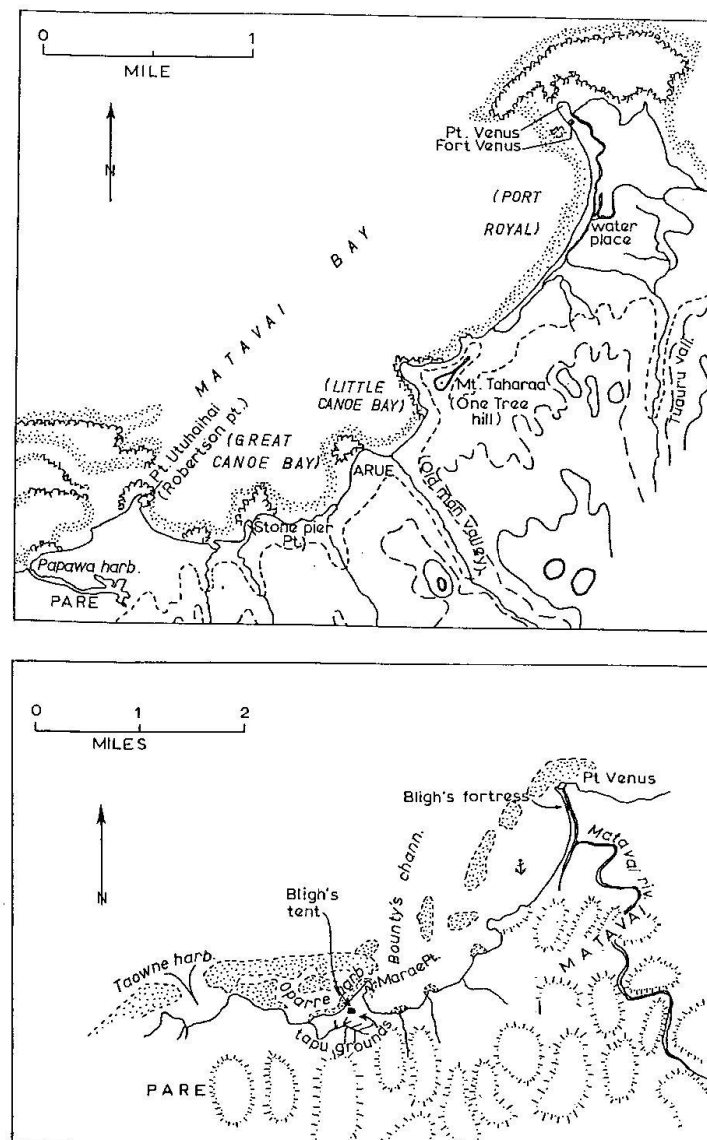


Figure 1 Map of Matavai Bay. Place Names from Cook's First Voyage, with earlier names from Wallis in Brackets, (After Beaglehole, 1955, Fig. 26).

The second reason for bringing this Code of Laws to your attention today is more directly relevant to the practical business of law in modern Polynesia.<sup>1</sup> I want to suggest that the document invites two inquiries:

- The reasons for the acceptance of the Code by many Tahitians in modern times as ‘indigenous’, and a comparison of this with the ambivalent social ‘ownership’ of the post-WWII ‘Westminster’ Constitutions in the Pacific Islands.
- Reflection on the relationship between customary law and modern constitution-making in the Pacific islands, and perhaps beyond.

## 2. The Origins, Drafting, and Declaration of the Code

1815 was a momentous year in Europe as Napoleon Bonaparte was finally defeated at Waterloo, and in Tahiti where Pomare II finally secured his Kingdom with the victory over his enemies at the battle of Fe’i Pi. In November of that year, officials at the London Missionary Society discussed the suggestion that the Tahitian Mission might propose laws for consideration by the chiefs and people of the Society Islands.<sup>2</sup>

The feature of the written and printed word which most struck Pomare was its power to act at a distance. The radius of action for the exercise of political and administrative power could be greatly enhanced. In the hands of the missionaries, the Bible was itself of course a demonstration of this potential.

In his *History of the Tahitian Mission*, John Davies records that Pomare had written to the missionaries as early as October 1816 ‘wishing them to draw up for his use certain laws and regulations’<sup>3</sup>

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<sup>1</sup> As Serge Tcherkézoff points out in his *Jeunes Filles en Pleur*, Au Vent des Iles, Tahiti, 2004, at p. 13, the term ‘Polynesian’ was invented in 1756 by a French humanist, Charles de Brosses, a lawyer, historian, and geographer. He used it as a selling-point to persuade the French Court that the Pacific Ocean contained ‘a great number of islands’ (polus-nesos) which were rich in spices and that a programme of exploration should therefore be started. The time may not be far away when we will prefer the expression *ma’ohi* (Aotearoa: *maori*) to designate the ‘Polynesian’ family.

<sup>2</sup> Robert Koenig provides a useful summary of the background in ‘Des Bords de la Tamise aux Rivages de Arue, Le Code de Tahiti’, *Bulletin de la Société des Etudes Océaniques*, No. 269-270, Tome XXIII, No.5, 1996. The same volume contains a new translation of the Code into French by Winston Pukoki and his students.

<sup>3</sup> John Davies, *History of the Tahitian Mission 1799-1830*, with supplementary papers..., edited by C.W. Newbury, published for the Hakluyt Society, Cambridge University Press, 1961, p. 203.

This letter from the Papetoai missionaries to London on 2 July 1817 suggests the connection in Pomare's thinking between the establishment of the printing press in Moorea and the project of creating a written legal code for Tahiti:

Since the arrival of Brother Ellis...[It] was at length agreed by all the brethren that, for the present, in order to satisfy the King ...the press should be put up in Eimeo, and that such books as we have got ready, viz the gospel of St. Luke, Catechism, and spelling book should be printed...

At no period have we been in more need of counsel and direction. Such a complete revolution having taken place now through the islands, the king, chiefs, and people from all quarters, apply to us for advice and direction, not only in regard to moral and religious, but likewise civil and political affairs of every description. The religious and political systems of the islanders having been blended together in every affair of life, the change affects every custom and usage...

We have advised him (Pomare) to call a general meeting of all the principal chiefs, and, with their assistance and approbation, adopt such laws and regulations as would tend to the good of the community, and the stability of his government, and that in these things, if he desired it, we would give him the best advice in our power, and inform him of what is contained in the word of God, and also of the law and customs of our own country and other civilized nations.<sup>4</sup>

John Davies' private Journal recorded that at a meeting of the Moorea missionaries at Afareaitu on Thursday 14 May:

It was also requested and agreed to that br N [brother Nott] should produce those laws for the use of the Tahitians which were violently opposed at a former meeting. These were read and approved, and br N and myself appointed to confer with the King

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<sup>4</sup> Missionaries at Papeto'ai (Moorea) to LMS, 2 July 1817, *Quarterly Chronicle of Transactions of the London Missionary Society (1815-20)*, Vol. 1, printed for the Society, London, 1821. The published version of this letter has excised the passage in which the Papeto'ai group bitterly reject the criticism from London that they have been 'too inactive both in temporal and spiritual concerns'. The original letter in full is at Box 2, Folder 5.

on the subject, and prepare for being translated into Tahitian which br N had engaged to do...<sup>5</sup>

Davies specifies that on the following day, 15 May 1818:

Mssrs Nott and Davies had a long conference with the King on the subject of the laws, who approved of them, and wished them to be written in Tahitian, so that he might propose them to the chiefs for their approbation, and hear if they had objections or amendments to make before they were printed.<sup>6</sup>

Pomare's enthusiasm for this code of laws is evident in his own communication to Dr Haweis, a leading LMS figure, in London in October 1818, which is quoted at length to show the personal relationship which Pomare sought 'over the heads' of the missionaries with a person he viewed as his chiefly counterpart in London. The Tahitian text of Pomare's letter to Dr Haweis accompanies a literal translation in the Alexander Turnbull Library in New Zealand:<sup>7</sup>

Ehoaino e,	Dear Friend,
Iaorana oe, e to fetii atoa i te ora raa ia Jehova i te Atua mau ra!	May you be blessed and your family with the salvation of Jehovah the true God...
Ua faatupu hia ihone i te Society i Tahiti nei, ia May 1818 nei te faatupu roa hia, te haaputu nei matou i te mori, te puaa, te pia, e te vava'i, ei taoa i te faatupu raa i te parau a te Atua...	A Society has been formed here in Tahiti. It was formed in May 1818. We are collecting coconut oil, pork, arrowroot and cotton as property to promote the word of God...
Ia tae ia May ra, i reira te Ture e faatupu hia'I i reira to Tahiti atoa	Next May we intend to establish a code of laws. Then all the people of

<sup>5</sup> Nicholson, Ian Hawkins: *Extracts from Journals of Missionaries of LMS* (compiled in the 1990's), Mitchell Library, Sydney, ML MSS 6911, 'Extracts from Brother Davies's private Journal commencing at Afareaitu in Eimeo, Friday Dec. 5, 1817'.

<sup>6</sup> John Davies, *History of the Tahitian Mission 1799-1830*, supra, p.220. [75A/26]. Newbury's Appendix II titled 'A Note on Missionary Codes of Laws..' states that: 'it is clear that the first draft of the Code was in English from which it was translated by Nott with Tahitian assistance', at p. 366.

<sup>7</sup> King Pomare to Dr Haweis (LMS), Tahiti, 3 October 1818, Ms – Papers – 3681, Alexander Turnbull Library, Wellington, New Zealand.

nei e ruru ai i Pare i te faatupuraa i te Ture, i reira hoi e apoo ai, e faatitiaifaro faahou i te vahi i pio ra ia maitai roa a hoi ai te taata i te utu fare.	Tahiti will assemble at Pare. The laws will be established and a consultation will take place. The faulty parts will be corrected and when it is very correct the people will return to their homes.
Ua topa hia ihonei e au te ioa i te pahi i papaihia nei. I marohai e au, i parau hoi te hoepae, ei ioa e te haamani i te pahi, parau atu ra vau, ‘eiaha, o te Haweis te ioa’. E mea vau i maro atu ai, o oe tei manao maro mai i Tahiti nei...	Your name has been given by me to the vessel which has been built here. I was urgent about it for some said that it should have another name but I said ‘no, the name must be the Haweis’. The reason I was so urgent about it was because you were so very attentive to us of Tahiti...
Faatono mai nei outou i te Missionary Tahiti nei, faaoho i te pu, ei faaite i te ea ora..	Send missionaries here to Tahiti that they might sound the trumpet and make known the way of life...
Haa mahuta mai nei te Fatu i te fetia ave, tiaia aenei tana fetia ave nei i a Tahiti (paradi) roa aenei Tahiti i tana fetia ave nei...	The Lord caused the Comet to fly, Tahiti was struck by that Comet and (the enchantment of) Tahiti was broken by that Comet...

More importantly, King Pomare was about to stage his most revolutionary political event, involving public ratification of his personal regime, Tahitianisation of the alliance with the missionaries, and legitimation of his authority to make and enforce law. The power of the printing press to assist this project was already evident. In 1818 Pomare had set up the ‘Tahitian Society’ – intended to replicate the structure and function of the parent London Missionary Society. The President of the Society was the King himself, and a ‘Posting Bill’ was printed setting out its constitution:<sup>8</sup>

VI: Ia tae ia May ra a ruru atoa i te feia toroa e te mau taata toa o teienei Societi i te fare bure raa a te	VI: A General Meeting shall be held every year in the Month of May at the Chapel belonging to the
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<sup>8</sup> ‘Posting Bill for the Tahitian Society established 13<sup>th</sup> May 1818’, LMS, *Quarterly Chronicle* (1815-20), Vol. 1, p.445.

<p>Arii i Pare ra; e na tehoe Missionary e parau mai i te parau a te Atua. E oti aera, a apoo ai te feia torea e te mau taata toa no te Societi, a faatitiaifero ai i te vahi i pio ra, ia tia maitai roa, a hoi ai i te fenua.</p>	<p>King in Pare, on which occasion one of the Missionaries shall preach. At the end of the service a meeting of the members shall be held for transacting and adjusting (literally, to straighten any crooked place) the business of the Society, after which all persons shall disperse to their houses.</p>
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In May 1819 a great meeting, lasting a week, was called at Pare – the modern-day Arue - with a number of purposes, the first of which was to open a great house constructed by the King. The events of the week were carefully recorded in a Circular, signed by all the Missionaries at Tahiti, and printed at the Eimeo Press.

The King, Pomare, has lately erected a large and very long building at Papaoa, in the district of Pare, in Otaheite, and devoted it to the meetings of the Missionary Society, which was formed among the Otaheiteans last year. This building we denominate the *Royal Mission Chapel* and its dimensions are as follows: it is 712 feet long, by 54 wide. The ridge pole, or middle, is supported by 36 massy pillars of the bread-fruit tree. The outside pillars all around the house are 280. It has 133 windows with sliding shutters, and 29 doors; the ends are of semicircular form. There are three square pulpits, about 260 feet apart from each other, and the extreme ones about 100 feet from the ends of the house. It is filled with forms, except an area before each pulpit, and laid with clean grass. The rafters are covered with a fine kind of fringed matting, which is bound on with cords of various colours in a very neat manner; and the ends of the matting are left hanging down, like the naval and military flags in St Paul's Cathedral. The whole building is surrounded with a very strong fence of wood, and the space between it and the building is filled with gravel...<sup>9</sup>

The Circular went on to announce that, King Pomare having expressed an earnest desire for baptism and promised 'to devote himself to the Lord,

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<sup>9</sup> Copy of Circular printed at the Mission Press in Eimeo, containing an Account of the opening of the Royal Mission Chapel in Otaheite; the first Anniversary Meeting of the Taheitean Missionary Society; the Promulgation and Acceptance of the Laws; Baptism of Pomare, etc., dated 18 May 1819, reprinted in *Quarterly Chronicle* (1815-20), Vol. 1, p. 491 – 496.

and to put away every sin', would be baptized on Sunday 16 May 1819. The Circular then described the opening of the Chapel on Tuesday 11 May:

About 11 o'clock we met the King at the east end of the house. He was dressed in a white shirt, with a neat variegated mat around his loins, and a tiputa all over, coloured and ornamented with red and yellow. The Queen and principal women were dressed in native clothing, with an English frill around the neck. The assembled thousands were clean, and dressed in their best...

Brothers Platt, Darling and Crook were assigned to the three pulpits and, after singing by the congregation, each read Luke, Chapter 14 with its message of humility and service – 'For whoever exalteth himself shall be abased; and he that humbleth himself shall be exalted'. The size of the house allowed three speakers to preach simultaneously without confusion for the congregation, which was estimated at between 5 and 6 thousand. Although King Pomare had security guards posted throughout the building, fears that the bringing together of former enemies and rival groups could lead to disorder proved unfounded: 'every thing was very peacable and orderly, and not the least disturbance occurred'. The Circular then turned to the First Anniversary Meeting of the 'Tahitian Missionary Society' on Wednesday 12 May, and then the Promulgation of the Laws on Thursday 13 May 1819:

About noon we all assembled in the centre of the Royal Mission Chapel. The King requested Brother Crook to open the business of the day. He ascended the pulpit and Pomare followed. After singing, reading the Scriptures and prayer, the King stood up, and looked upon the thousands of his subjects on his right hand and on his left. Addressing himself to Tati, the pious chief of the southern part of the island, he said: 'Tati, what is your desire? What can I do for you?'. Tati, who sat nearly opposite the pulpit, arose and said, 'Those are what we want, the papers you hold in your hand – the laws; give them to us, that we may have them in our hands, that we may regard them, and do what is right...

Pomare then proceeded to read and comment upon the laws respecting murder, theft, trespass, stolen property, lost property, Sabbath-breaking, rebellion, marriage, adultery, the judges, court-houses, etc.. in eighteen articles. After reading and explaining the several articles, he asked the chiefs if they approved of them. They replied aloud, 'We agree to them – we heartily agree to them'. The



King then addressed the people, and desired them, if they approved of the laws, to signify the same by lifting up their right hands. This was unanimously done, with a remarkable rushing noise, owing to the thousands of arms being lifted at once. When Pomare came to the article on rebellion, stirring up war, etc, he seemed inclined to pass it over, but after a while proceeded. At the conclusion of that article, Tati was not contented with signifying his approbation in the usual way only, but standing up, he called in a spirited manner to his people to lift up their hands again, even both hands, he setting the example, which was universally followed. Thus all the articles were passed and approved. Brother Henry concluded the meeting with a short address, prayer, and blessing...

### 3. The Content of the Code

The following table attempts to summarise the effect of each of the 19 Articles and provides some short notes on linguistic points of interest:

I. Murder	<i>Taparahi Ta'ata</i> . Forbids <i>arioi</i> custom of killing children at birth, and then all other killings
2. Theft	<i>Eiā</i> (Maori <i>Kaiā</i> or <i>Keiā</i> ). Prescribes penalty of four times value of goods stolen
3. Wandering Pigs	<i>Bua'a</i> . Damages recoverable depended on state of fencing of plaintiff
4. Stolen Property	<i>Ta'oa eiā</i> (Maori <i>Taonga Keiā</i> ) Receiving also made a crime
5. Lost Property	<i>Ta'oa moe</i> (Maori <i>Taonga moe</i> ) Duty to return lost goods
6. Exchanges of goods	<i>Ho'o</i> (Maori <i>Hoko</i> ) Binding unless goods defective
7. Observing the Sabbath	<i>Sābati</i> . Work and travel forbidden except for narrow exceptions
8. Anti-social Conduct and Sedition	<i>Tama'i</i> ('stirring-up') (Maori <i>Tamaki</i> , twitching?) Elaborate list of particular examples. See section 4 below.
9. Monogamy	Forbids two women to live with one man, or two men with one woman, unless...
10. Transition from pagan times	<i>Te vahine ma'iri</i> (dropped) <i>tāhito</i>

	(in the old times of <i>etene</i> or Satan). New rules not applicable
11. Seduction	Judges to award substantial damages to wronged partner
12. Abandonment of Partner	Judges to urge reconciliation. Guilty party forbidden to take new partner
13. Failure to feed Partner	<i>Te rave ore i te ma'a</i> . Judges to counsel miscreant
14. Marriage	<i>Fa'aipoipo</i> . Prescribed ceremony to be carried out by missionary or by judge
15. False accusations	<i>Te Ha'avare</i> (Maori <i>whakaware</i> ). Serious crime attracting punishment of cleaning 4 miles of road
16. Judges	<i>Te Ha'avā</i> (Maori <i>Whakawā</i> ). Names the appointments from each district of Tahiti and Mo'orea
17. Function of Judges ( <i>Ha'avā</i> )	Injured party forbidden vengeance. Judges to decide penalty having heard two witnesses
18. Court Houses to be built ( <i>Fare Ha'avā</i> )	Court Houses to be built in all districts of Tahiti and Mo'orea
19. Publication of Code by Notice on Court Houses	<i>E teienei ture i fa'atupuhia e te hui ra'atira i Tahiti nei ra, e piahia ia i nia i te pou o te mau fare ha'avā ..</i>

# P O M A R I,

*No te horoa noa hie e te Atua ei Arii no TAHITI, Moorea, e te mau fenua atoa i pihaiho, &c. &c. &c. e tona mau taata atoa e aroha mai iana ra, iaorana outou i te Atua mau ra.*

No te aroha rahi mai o te Atua ia tatou nei i haapono mai ai oia i tana parau ia tatou nei. Ua mau tatou i tei reira parau ei ora no tatou. Te hinaaro nei matou ia haapao maite tatou i te parau tana i faaue maira. No te mea ra ia au maite to tatou haerea i te foia mau o te Atua ra, a faaite adu ai matou ia outou i teienei.

## E TURE NO TAHITI.

I. *No te taparahi taata.*—Ia taparahi te foia medua i te tamarii fanau api ra, e tei ore i fanau ra, aore te medua ra, o te fetii, aore ia o te taata e iho, e te tanta atoa hoi ia taparahi noa i te taata ra, e pohe ana ia.

II. *No te Eia.*—Ia eia te taata i te buaa hoe ra, ia maha mai ana ia hopoi mai ei hoo, na te taata buaa epiti, na te arii epiti; aore ana buaa ra, ei vaa tipae piti, na te taata buaa te hoe, na te arii te hoe; aore te vaa ra, ei ruru ia piti ae, na te taata buaa te hoe, na te arii hoi te hoe; aore te ruru ra, ei taata e ac; e na reira atoa te hoo mai i te mau taata atoa nei ia eialia ra, ia maha mai a ta te eia ia hopoi mai ei hoo, na te feia taata a epiti, na te arii a hoi epiti; e aore ana taata ra, e haere oia e faaapu i te fenua o tana taata i eialia ana te taata ra, e aore ana ia, na te arii tona fenua afira oia i te eia ra ori haere noa ai e atuu noa du; e ia faahoia mai e te arii ra, ua faahoia ia, aore i faahoia ra, ore noa du a ia; na te feia haava ra e faaite adu ta te taata eia utua ia hoo na maite tana parau iho.

III. *No te Buaa.*—Ia tomora te buaa i roto i te aua ra, e pau ihora te mau i tana buaa ra, ehio ra tana aua ra i te maitai raa, na te feia haava e hio e; e aua maitai ra, na te feia haava e parau adu i te taata buaa ra i te hoo, na tana taata nana te buaa ra ia e hopoi adu te hoo, ia faito maite atoa i tana maa rii i pau ra, nana atoa hoi e aua te vahi i parari ra. E e aua rave ino ra, e o noa te buaa i roto, a pau ai te mau i te buaa, eialia ia e hoolia. E ia taora te taata i te buaa ra, e fahi ihora te aua, e ia taparahi hoi te buaa, e paruparu ihora, e rave te taata i taparahi ra nana, e imi oia i te hoe buaa e ia faito atoa te rahi, a hopoi adu ai na te taata nana te buaa i taparahi eana ra; aore te buaa ra, eia tona e ne tana e hoolia ei hoo; e aore hoi ia, ei ohipa tana e rave na te taata nana te buaa i taparahi ra; na te feia haava e faaite adu tana ohipa ei hoo; e aita oia i hopoi mai i te hoo, aore hoi i rave i te ohipa, e tiavaru ia.

IV. *No te Taata eia.*—Ia eia ra te taata i te taata ra, e noua maira, hoo adura i te taata a tehoe taata e, e taon eia tei hoolia adu iana ra, aore aera oia i fai, huna ihora, e eia atoa ia, e mai ta te eia atoa ra hoi te huru i tana utua. E te taata toa e huna i te taata i eialia e vetahi e ra, ua ite hoi oia e, e taata eialia, e eia atoa hoi ia, mai ta te eia toa ra hoi te huru o tana utua.

V. *No te Taata moe.*—Ia itea ra te taata moe i tehoe taata ra, ua ite hoi oia i te fahu nana tana taata ra, e faahoia adu ia i te taata taata ra, e taon maitai ra, e homai tehoe taata i na te ite; e taon ino ra, eialia ia e faahoia, e faahoia noa du ia. Ia hunaia ra tana taata ra i moe ra, ua ite hoi oia i te fatu, e hunaia ihora hoi eana, e eia atoa ia, ia faito atoa tona utua e te eia.

VI. *No te Hoo.*—Ia hoo ra te taata i te taata ra, ia maitai maie te hoo ra, e tia maitai roa aera, hopoi e adura tetahi i tana, mau adura hoi tehoe i tana, e roaora i aera, ua faahoia faahou maira hoi, eialia ia e ravehia ia ore ia hinaaro: ia hinaaro ra te taata taata i te rave i tana taata i faahoia maira, tei anailio i te rave a rave ia. Eia tona itea ore ra te ino i te hoo raa ra, ia tae ra i te utuafare e itea ai te ino i tana taata ra, e tia ia ia faahoia; te ino ra itea i te hoo raa ra, e hopoi adura i te utuafare ma re al, e faahoia adura i te taata taata ra, eialia ia e ravehia. Te taata ra i pohe i te mai ra, na vetahi e i hopoi i tana hoo, e hoo na maira, e hopoi ia i te taata nana te hoo ra, nana ia e faahoia tana taata ra, a faahoia aera te taata hoo iho, i hinaaro hoi te rave ra, a rave ia. Eialia ra te feia hoo ore ra e haamere noa du i ta vetahi e ra hoo raa, e mea ino ia, eialia e na reira te feia hoo ore i ta vetahi e ra hoo raa, na tana ihora e haamere, e mea maitai ia.

Not every French colonial administrator could lay claim to the scholarship of Louis-Joseph Bouge (1878-1960). That official published, in 1952, a valuable account in French of the origins of the Tahitian text of the Code, together with notes on a translation of it into French.<sup>10</sup>

The Code, in its original form, in Tahitian, was made up of three pieces of paper printed on one side only. Together, they formed a broad sheet of 70 cm by 30 cm from the press of the protestant mission in Tahiti. It contained proscriptions of acts, gestures, and intentions which had never previously been defined, and a great number of novel duties. Drafted in Tahitian from the outset, it contains words which no longer have equivalents in the modern language. Knowledge of the native culture of the time is essential for understanding certain phrases pregnant with meaning and the range of many expressions drawn from custom...<sup>11</sup>

The account by John Davies in his *History of the Tahitian Mission* quoted earlier implies that there was some sort of draft document or list, in English, submitted to Pomare by Henry Nott. At first glance this appears to be at odds with a subsequent account by William Ellis, occasioned in 1829 when a French version of the Code appeared in France suggesting that the Code was heavily influenced by the missionaries in Tahiti and was designed to secure and protect their position. Ellis stated that:

The King asked the advice of the missionaries but I believe framed the laws himself. He submitted them to the inspection of some of the missionaries near him, copied them out with his own hand and promulgated them with his own voice in a large assembly of the people, receiving their assent to each separate law...

I have read very carefully the 'literal translation of a French copy of Tahitian Laws'... Mr Lejeune is mistaken in supposing the laws were translated from the English to the Tahitian. They were originally framed in the Tahitian [by the King] [bracketed words crossed out in original] language...<sup>12</sup>

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<sup>10</sup> L-J Bouge, 'Première Législation Tahitienne: Le Code Pomaré de 1819: Historique et Traduction', *Journal des Océanistes*, Vol. 8, Paris, 1952, p. 5 – 26.

<sup>11</sup> Bouge, p.7.

<sup>12</sup> Comments of William Ellis on French 'translation' of the Laws, attached to letter from Henry Nott, Tahiti, 17 March 1829, CWM/LMS, South Seas, Incoming Corr., Box 7 (1829-1830).

Ellis went on to itemise the discrepancies and inventions in the supposed French 'translation'. Contrary to the French 'translation', Ellis insisted, there was no law against blasphemy or idol worship; fornication with Europeans was not mentioned; the article regarding the defamation of the missionaries and the unlawfulness of not assisting was 'altogether false. There is no law or usage in reference to it'; there was no requirement to report criticism of missionaries; songs and games were not prohibited; there were no laws against the wearing of flowers by women; public whipping was not prescribed in the laws.<sup>13</sup>

Nott, who had been ring-side throughout, to whose letter Ellis' comments were appended, contented himself with examining the possible source of the French 'translation':

...I have made inquiry and cannot find that any Missionary in Tahiti gave any translation to the Captain or to any other person on board the French ship. We know not how to account for the circumstance except as Mr Orsmond who happened to be at Tahiti at the time, and went down to Porapora in the French ship, most of us think that it is not improbable that Mr Orsmond might while the ship lay at anchor...gave the Captain or some officer an English translation...<sup>14</sup>

The Davies and Ellis accounts, while appearing to be in conflict as to the authorship of the 1819 Code, may I think be reconciled. Certainly Nott and Davies discussed the form and content of the Code with Pomare, but a glance at the idiosyncratic and thoroughly Tahitian tone and scope of the Code strongly suggests that the text is the work of Pomare himself and not a translation of some other document in English. Even if the confirmation of Pomare's authorship in 1829 by Davies, supported by clear implication by Nott's covering letter, is treated with care given its context of advocacy against the French criticism, its thrust seems essentially correct: the 1819 Code was the work of King Pomare.

The laws which the king read to the people were written by himself, and formed, probably, the first written code that ever existed in these islands; and he afterwards wrote out, in a fair, legible and excellent hand a copy for the press. Printed copies were distributed among the people, but the original manuscript in the king's handwriting, signed by himself, is in the possession of the

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<sup>13</sup> Comments by William Ellis, *supra*, note 12.

<sup>14</sup> Letter of Henry Nott, 17 March 1829, *supra*, note 12.

London Missionary Society. The laws were printed on a large sheet of paper, and not only sent to every chief and magistrate throughout both islands, but posted up in most of the public places...<sup>15</sup>

#### 4. A Closer view of Article 8

This is the most difficult Article, but also one of the most interesting, including as it does no fewer than 71 offences ranging from specific acts to very general and apparently vague condemnations of dispositions and demeanours. Although the Article has a tone and character very foreign to modern conceptions of civil rights and freedoms, it does tell us much about the concerns of Pomare and his missionary allies, and in the manner of its expression, about the contemporary state of Tahitian culture and custom. In the table below I have selected a number of the offences identified in Article 8 with a view to comparing Pomare's Tahitian text with Bouge's 1952 translation with the assistance of several Tahitian experts, and of providing also my own general comment for English readers. The numbers correspond to their place in Bouge's treatment.

<b>Pomare's Tahitian</b>	<b>Bouge's French</b>	<b>Possible English</b>
1. Area ra ia fa'atupu te ta'ata i te tama'i ra	Ceux qui poussent a la discorde	Inciting discontent
2. Ia fafau raro haere ra	Ceux qui font le mal en dessous	Secret wrongdoing
3. Ia ta'amu haere i te fatu ra	Ceux qui complotent contre le chef	Plotting against authority
4. Te ara pofai ra	Ceux qui cueillent le long des chemins	Literally picking along the way. Marauding, foraging, pilfering.
17. Te puhi airoto ra	L'Anguille qui se cache don son trou pour digérer sa proie..	Solitary consumption of illegal gains, contrary to Tahitian custom of sharing food.
19. Te hopoi pute ra	Celui qui prend le sac ou dans le sac... délit de voler de l'argent dans le sac ou en le tenait.	Stealing from a bag or safe-place. ( <i>pute</i> may be same word as Maori <i>putea</i> )

<sup>15</sup> The Origin and History of the Missions..., Rev. Thomas Smith and Rev. John O. Choules, S. Walker and Lincoln & Edmands, Boston, 1832, Vol. I, p. 364.

20. Te mata hui ra	Le regard fuyant [le sournois]	Acting suspiciously
23. Te papai uru va'a ra	Celui qui tapote, frappe la proue de la pirogue [marque d'irrespect a l'autorité]	Striking the prow of a canoe, being the symbol of royal authority.
24. Te tia rauti ra	Celui qui se dit <i>rauti</i> [ <i>rauti</i> : feuille de l'arbre <i>ti</i> ; celui qui récitait les chants de guerre... un délit apres la conversion de Pomare II...]	Pretending to be <i>rauti</i> (leaf of the <i>ti</i> tree, the reciter of war chants) Forbidden after Pomare's conversion

25. Te haerepo ra	Les promeneurs de nuit [...diseurs de traditions sacrées, récitées la nuit, en de lentes promenades. Membres de la société des <i>aerois</i> (sic)...]	Literally 'night-walkers'. Those who performed the sacred traditions in slow processions at night. Aimed at the <i>Arioi</i> society.
29. Te fa'a opu ti'i ra	Celui qui se gonfle [a l'imitation du <i>ti'i</i> dieu secondaire au gros ventre]	Puffing oneself up, to be like the <i>ti'i</i> , secondary gods with swollen stomachs.
31. Te ta vai mania ra	Celui qui fait l'eau dormante, donne l'apparence de l'eau tranquille [alors que le fond est tout autre]	Giving the appearance of calm ( <i>mania</i> ) water to conceal bad purposes. Dissembling.
32. Te fa'atomo hau ra	Celui qui essaie de faire couler [tomber] le gouvernement	Attempting to overthrow the government
37. Te ha'avivo parau au ra	Celui qui vous abuse, au son agréable du <i>vivo</i> [la flute tahitienne]	Insults wrapped in sweet words (like the sound of the <i>vivo</i> , the Tahitian flute)
38. Te tapu taura ra	Celui qui coupe la corde...[rupture d'accord, de promesse]	Cutting the rope, meaning breaking the bond or promise
40. Te fa'arue honoa ra	Celui qui abandonne	Literally 'throwing

	(viole) un accord	away' an agreement
41. Te hohore apa'a ra	Celui qui arrache des vêtements de cérémonie a un dignitaire	Literally 'peeling', or stripping, the ceremonial garments from an officiator
44. Te urutana rua ra	Celui qui plante deux arbres a pain [qui a deux opinions ou deux chefs...]	Literally someone who plants two breadfruit trees, meaning divided loyalties, or dissenting ideas
45. Te puti'i ta'ai e ra	Les tresses attachées séparément [..un but d'hygiene...la coupe a ras des cheveux]	Having hair in long tresses, contrary to a health policy of short hair

55. Te ono ra	Celui qui se venge [ici apparaît non seulement la nouvelle idée de pardon chrétien mais aussi celle de la punition légale]	Taking vengeance. Bouge comments that this represents both the Christian idea of forgiveness and the new sense of legal punishment
58. Te maere raufaina ra	Celui qui donne son attention..a l'étranger inférieur...	Paying attention to inferior foreigners ( <i>raufaina</i> ). Bouge suggests this means anyone other than missionaries and their friends.
63. Te taraire tiapapa ra	Celui qui fait rompre la paix	The breaker of a long-standing peace
64. Te uhi tia moana ra	Celui qui utilise..au bas-ventre et dans le dos, l'instrument a marquer la peau...	Using the tatoo instrument ( <i>uhi</i> ) below the navel ( <i>tia</i> ). Delicate compromise?
66. Te aparuru aroa ra	Consultation de la divinité au sujet de la guerre et de la paix	Prohibition against the old custom of consulting the gods about war



## 5. Some Points of Interest in the Code

(1) There is some conflict in the evidence as to the authorship of the Code. As we saw above, the LMS records for the period leading up to 1819 tend to emphasise the role of Nott and Davies in guiding, and even drafting, the 19 Articles. On the other hand, when some years later the Code came under attack from French critics of the LMS role, the leading historians of the mission, including Nott, insisted that there was no ‘English draft’ of the Code but that Pomare II had personally drafted the Code directly in Tahitian. I think we may reconcile the apparent conflict by recognising from the content of the Code that the missionaries had a part in its early design, but also from the intensely Tahitian form of Article 8 and other parts, that Pomare had final and decisive control of the text.

(2) The Christian substrate of the Code is emphasised both in the place of its affirmation and declaration – the King’s Royal Chapel – and in its content. The inclusion of the rule against work on the Sabbath is an obvious example. Echoes of this are found in several modern South Pacific constitutions. For example, a carefully phrased 1997 addition to the preamble of the *Constitution of the Cook Islands* declares that:

We, the people of the Cook Islands, recognising the heritage of Christian principles, Cook Islands custom, and the rule of law, remember to keep holy the Sabbath Day, being that day of the week which, according to a person’s belief and conscience, is the Sabbath of the Lord.<sup>16</sup>

New Zealand’s own uncertainty about the place of religion and spirituality in constitutional matters is shown in its approach at the United Nations in Paris in 1948 to the drafting of the Universal Declaration of Human Rights. It had been suggested by the Netherlands and Brazilian delegations that references to the divine origin of man should be introduced to the Preamble and elsewhere. This was firmly resisted by the representatives of India, China, and the Soviet Union. The New Zealand delegate is reported as stating that:

Her delegation believed...that any effective realization of human rights and freedoms could not be separated from the spiritual

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<sup>16</sup> The Preamble was inserted by section 2 of the Constitution Amendment (No. 20) Act 1997 of the Cook Islands Parliament. See also the Constitutions of Tonga (1875) and Samoa (1960) for strong affirmations of Christian principles.

values associated with man's divine origin and immortal destiny. She indicated that she would have voted for the amendment if it had been put to the vote, but expressed approbation of the action of her Dutch colleague in withdrawing an amendment which, as had been made clear in the debates, presented difficulties to members of the Committee with different philosophical backgrounds.<sup>17</sup>

(3) Although the Code marks a transition towards 'written' law, its manner of declaration followed the essential requirements for successful social action in 'performance' cultures such as those of *ma'ohi* society. My friend and colleague Paul Meredith and I have summarised these as follows:

... 'performance cultures' rely for the effectiveness of their rights-creating performances, including those aimed at reconciliation, on fluent, vivid, and stirring action, providing always that it conform with custom. Maori refer to the *ihi* and the *wehi*. Pakeha might say that it 'makes the hairs on the back of your neck stand up'. The action is also public and collective, often on a marae and sealed afterwards by the public eating of food. One function of these characteristics is to make the event memorable. In the absence of written records this is an important matter. Another function is to make it difficult for anyone later to deny that they approved, or at least acquiesced in, the result – the would-be dissenters will be jeeringly reminded that they were seen gorging themselves at the feast.<sup>18</sup>

(4) The Code features several compromises between 'western' ideas imported by the missionaries – and now embraced by Pomare – and Tahitian customary law. The transitional exceptions provide one example, and the idiosyncratic Article 8 discussed above contains several others, such as the restriction on the tatau (tattoo) below the waist. The penalties prescribed avoid imprisonment, preferring compensation in goods and public labour. The all-important change is the substitution of judicial process for self-help and vengeance.

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<sup>17</sup> 'Report of the New Zealand Delegation on...the General Assembly held at Paris 21 September to 12 December 1948', *Appendices to the Journals of the House of Representatives*, 1949, A-2, p. 99. The New Zealand Delegation to the Third Committee at which the Universal Declaration of Human Rights was debated was Mr J. Thorn, Mrs A. Newlands, Dr W.B. Sutch, Mr C.C. Aikman, and Miss H.N. Hampton. The Prime Minister, Peter Fraser, led the Delegation in Paris.

<sup>18</sup> Alex Frame and Paul Meredith, 'Performance and Maori Customary Legal Process', *Journal of the Polynesian Society*, Vol. 114, (2005), p.135-155.

## 6. Some Concluding Reflections

I have elsewhere contrasted two metaphors for the work of constitution-making. The first I termed ‘the architectural metaphor’<sup>19</sup>. On that view, Constitutions are ‘designed’ by political leaders and lawyers whose objective is the betterment of society by the formulation of fundamental rules judged to be beneficial. The result succeeds or fails in accordance with the vision and wisdom of the designers. But a second and alternative metaphor might be provided by the work of the archaeologist:

‘While I do not discount the value of rational law-making, I would place equal importance on another metaphor - that of scholars lovingly excavating and uncovering the institutions and values of our peoples with a view to adapting and renewing the best of these for our present and joint needs.’<sup>20</sup>

Architects sit at their drawing-boards and attempt to create principles, structures, and processes informed by reason, discovered facts, and an alleged sense of justice. Excavators try to discover the customary ways underlying a particular society, and to bring these to prominence and coherence. Of course, in the real world, these are two poles in between which there is a practical continuum. Even the most inspired architect is likely to pay some attention to the social context, and the most reverential excavator will give thought to the possibility of useful innovation. Nevertheless, attention to the poles may assist us in finding the right balance between these approaches.<sup>21</sup>

In 1991 I had the honour to be engaged as Special Counsel to advise the Constitutional Review Committee of the Niue Assembly on proposals to amend the Niue Constitution enacted in 1974. Working in Alofi, I asked to see any previous materials held there relevant to the preparation of the 1974 Constitution. My inquiry drew a blank with the exception of a beaten-up cardboard box in which I found a few fading typewritten pages containing what appeared to be a transcript of comments by Professor

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<sup>19</sup> Alex Frame, ‘Beware the Architectural Metaphor’, in *Building the Constitution*, ed. Colin James, Institute of Policy Studies, Wellington, 2000, at p.427. The volume collects the Papers presented at the ‘Building the Constitution’ Conference held on 7-8 April in the Legislative Council Chamber of Parliament Buildings in Wellington.

<sup>20</sup> preceding note, at page 431.

<sup>21</sup> Alex Frame, ‘Making Constitutions in the South Pacific: Architects and Excavators’, in *Roles and Perspectives in the Law: Essays in Honour of Sir Ivor Richardson*, ed. David Carter and Matthew Palmer, Victoria University Press, 2002, p.277, at p. 278-9.

R.Q. Quentin-Baxter to the Niue Assembly on 21 January 1976 on the occasion of a meeting to review the operation of the Constitution which had entered into force on 19 October 1974. The presentation, which dealt with specific concerns and questions raised by the Niuean legislators, began with these words:

‘You could think of the Constitution as being a little like the land and the sea of your own island. The land and the sea, the trees and the sunshine, sometimes a little rain, are what make up the basis of your lives. They are what you build upon. And yet, the land and the sea are nothing unless there are men and women here to thank God for them, to cherish their own culture and traditions and to move forward into the future. It is the life of the people that gives a meaning to the land. So too with the Constitution, it should be a solid basis for your lives, as reliable and as firm as the coral rock of the island itself and yet, without life and without the desire to work it, without men and women considering new questions, living in the spirit of the Constitution, it is only words on a piece of paper.’

QB’s sensitive metaphor is attuned to the Tahitian and *ma’ohi* view of customary principle as being *parau tumu fenua* – ‘words whose foundation is the land’. Only when the people see and feel that link between the words of their laws and their land will there be a true ‘buy in’ to the great principles articulated in the *Universal Declaration of Human Rights* in 1948 and subsequently propagated throughout the written constitutions of the post-colonial world including the Pacific.

This process could be assisted by two things. First, the development of ‘performance’ accounts in *ma’ohi* language of the origins of the constitution and of its human rights elements, tracing these back to their histories, both local and global. A kind of genealogy, what Maori would call *whakapapa*, of these instruments is needed, and this would seem to be the joint business of the Ministries of Education and Justice.

A second matter touches the work of judges more closely. Perhaps the most quoted dictum in relation to the interpretation of the fundamental freedoms in the post-war ‘Westminster’ written Constitutions, of which the Pacific provides several examples, is Lord Wilberforce’s call in *Minister of Home Affairs v. Fisher* for a ‘generous’ interpretation and the avoidance of ‘the austerity of tabulated legalism’.<sup>22</sup>

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<sup>22</sup> *Minister of Home Affairs v. Fisher* [1980] AC 319, at page 328.

Lord Wilberforce does not attribute the phrase, although it appears in quotation marks, but it seems to have come from Stanley de Smith's 1964 volume *The New Commonwealth and its Constitutions*, where that author states: 'It brings out the general purport of the guarantees, lifting them above the austerity of tabulated legalism...'.<sup>23</sup> The felicity of the phrase can however mask some underlying perplexities: generous to whom or what? And which tabulations are to be avoided? A competent modern opinion on the application of a fundamental freedom under a particular Pacific constitution is likely to 'tabulate' the Commonwealth precedents for the freedom in question from the very useful *Law Reports of the Commonwealth*, and may even go on to cite European and American cases on similar facts under their respective constitutional instruments. Counsel's most inventive skills in drafting are unlikely to avoid the appearance of 'tabulated legalism' and the spectre of 'austerity' may not be far away either.

Perhaps we may resolve these perplexities if we understand Lord Wilberforce's dictum as encouraging generosity to the spirit of the fundamental freedom in question in its local social and cultural context. This might involve, where possible, the progressive articulation by judges of the constitution and its human rights elements in the context of the customary principles of the people, even where the former are found to be a development or modification of the latter. The process may need to be a two-way street: the 1948 Principles, and the International Covenants and fundamental freedoms elaborating and giving effect to them, may need to allow a 'margin of appreciation' for local custom in very small island societies, just as custom for its part will as in the past accept gradual adaptation and amendment in the light of new circumstances. If the Pomare Code is today hailed by many Tahitians as their indigenous law, it is perhaps because it is seen as having achieved such a synthesis.

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<sup>23</sup> Stanley de Smith, *The New Commonwealth and its Constitutions*, Stevens & Sons, London, 1964. See page 194.