Intervention Canberra. September, 25th, 2014
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Legal pluralism in French Polynesia contemporary determinants
The example of rahui

Content

1 Introduction

Scholars consider *tapu* and *rahui* to be fundamental institutions in pre-European societies across all parts of the Polynesian Triangle. *Tapu* is a term that applies to an object, person, or location that is "marked", "contained", "restricted", or "put aside". In a first sense, *tapu* is the state of a person, a thing, a place where *mana* (divine power) is present. In a second meaning, it signifies "forbidden to certain categories of persons in certain contexts". *Rahui* generally refers to the ability of a chief to order a *tapu* on a specific place or a particular resource, for a limited period of time. *Rahui* refers to a *tapu* on a territory and/or resource during a given period. *Mana* is present in a country or a resource that is sacred (by appropriate rites), and standing too close to such *mana*-imbued objects can be dangerous. The main difference between *tapu* and *rahui* is the authority at its origin. In the case of *rahui*, the chief is at the origin of the ban whereas in the case of *tapu*, the *atua* (Tahitian god) is at the origin of the interdiction (Ottino-Garanger and al. 2014).

In terms of legal pluralism theory, i argue that the facts observed in Tahiti demonstrate how an institution such as the *rahui* was deeply embedded into the social organisation and did not obey any absolute stratification of the society. The plurality and the network of relationships paralleled the political and religious hierarchy. In so doing, it provided a great number of opportunities for decision making within and between kin-congregations. This accounts for the profound plurality of Polynesian society, and because social organisation was pluralistic, a legal pluralistic approach is not only pertinent, but indeed necessary.

2 The role of *rahui* in *Maohi* (Indigenous Tahitian) political, religious and social organization

The institution of *rahui* included the implementation of authority, rituals and special ceremonies on the *marae* (religious precinct), forms of delimitation of the territory subject to the prohibitions, and various forms of penalties for non-compliance to the *rahui*. Sanctions could even escalate into open warfare in some cases. To better understand how the *rahui* fitted into the socio-political structure, it is important to say a word about the main notions that prevailed and the statutes around which Society Island communities were organised.

Since the work of Douglas Oliver (1974), it has been assumed that *marae* were widespread in all social hierarchies of the Maohi society. These included the "*marae tupuna*"[1] (ancestral *marae*) appropriated by all extended families, known as *opu* (literally the stomach, a term referring to several branches of related *opu fetii* or smaller families) and the chiefdom *marae* that could serve both the paramout family *opu-* and the chiefdom[2]. We can distinguish four main hierarchical statuses in Maohi society: the *arii*, the *tahua*, the *raatira* and the *manahune.*[3] The translation of these four terms is difficult. The *arii* was the leader of a territory and of a population that he did not control directly. This control was still left to a *raatira*: a secondary, but still powerful chief who was in charge of the territory of the *arii*. The *raatira* cared for the resources of the territory, he was in charge of several domains, including the important work of agrarian rites at different times of the year. The lowest class of the society was the *manahune*, who had exclusive control of their family territory, but worked mainly for *raatira* and *arii*. As mentioned, each of these three status levels had a family *marae* from which the extended family members derived their rights to use land and parts of the lagoon attached to the *marae*. The last social category was priests-specialists (*tahua*) who were drawn from all social status levels[4]. According to the testimony of James Morrison (1966), who stayed in Tahiti in the late 18th century, whatever the family rank, all extended families had a *tahua* attached to them and the *tahua*

[1] Or "*marae fetii*" We retain here the terms "*marae tupuna*" used by Oliver (1974)
[2] Sometimes a separate *marae* was built.
[3] According to Tahitian linguistic norms, the plural is not indicated by adding an «s» at the end of words, adjectives and nouns. Specific attributes are added to words, such as «rau», «mau» to specify that more than one object is concerned. We follow this rule throughout this article when Tahitian nouns are used. Therefore, we write «many raatira» and not «many raatiras», as in Tahitian «te mau raatira».
[4] For reasons relating to the status of informants (the highest hierarchies) and the ideology of rapporteurs (missionaries, state officials), there is a major discrepancy between the importance of specialists (*tahua*) and the limited information available on their knowledge from eighteenth century sources.

often had their own *marae* dedicated to specific gods.[5] Each extended family (*opu*) seemed to form a group in which normative social interactions with the gods and deified ancestors' family were constantly built and maintained by all status levels of society and not only by the paramount chiefs, the *arii*.

We have a number of descriptions of *rahui* in practice from early European observers. Morrison (1966, 162-163), who came in with the *Bounty* and became an astute observer of Maohi society during his stay of several months, described the establishment of a *rahui* in a lagoon:

> "The *rahui* on the reefs is signified by placing bushes along the part rahui-ed with small pieces of white cloth tied to them, and after they appear there, no person dare fish there on pain of forfeiting their lands, but they may fish with nets, hooks etc in their canoes, by which means they procure good supplies, if the beach is rahui-ed, they must not launch a canoe off to fish, or any other purpose; but this never happens but when the King's flag is passing."

The report of William Ellis (1829, II, 286), a missionary of the London Missionary Society, describes the territorial categorization of the lagoon:

> "If landowners want to preserve the fish of the sea adjacent to the coast, they *rahui*, or restrict, soil, setting a post on the reef or the shore, with a bunch of bamboo leaves attached to it, by this brand, it is understood that the fish are taboo, and fishing prohibited, and no one will interfere in these parts without the owner's consent."

According to the description of Ellis, the stretch of sea near the land was treated in the same manner as land. However, "the owner's consent" mentioned refers to a control or a privileged control of land, a portion of the lagoon or other resource. The description of Morrison suggests that the prohibition was one on collecting resources in general rather than a specific ban: all resources in the designated area are subject to a *rahui*. Finally, according to several witnesses, the political status of the person who implemented the *rahui* may vary from *arii* to the simple landowner (in this case, it extends to user rights over the beach).

As noted, the *rahui* on land and sea gave rise to several kinds of rights according to the status of the chief. The decision of the chief to *rahui* resources involved a social decision-making process. It is unlikely that the leader was the sole decision-maker. Clan members and other leaders were included in the many debates (Oliver 1974). It is likely that the *rahui* of the lagoon and probably the sea was not so different from *rahui* on the ground in terms of associated use rights; rights of access, harvesting rights, penalties for violations, and jurisdictions.
Thus, contrary to what many authors claim (Pomare Takau 1971, Cadousteau 1996, Henry 1968), the institution of *rahui* was not the monopoly of *arii*, but could be implemented by different intermediaries leaders such as *raatira* and *toofa* (chief next in rank to *arii*, Davies 1851, 279), including the head of an extended family from the *manahune* (commoner) status. We agree with the hypothesis put forward by Oliver (1974) that the head of a "congregation of kin" had the power to impose a *rahui* on the territory under its direct control, including the lagoon adjacent to its territory. Other leaders of higher status could impose a *rahui* on land they did not directly control, but only with the agreement of the local authority figures[6]. According to the equilibrium of power, *rahui* could be implemented by many groups and status levels, including the *manahune* who occupied the lowest status of the pre-European Polynesian society.

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[5] It is unclear if all extended families, whatever their social status, could enjoy *tahua* status, or if this status was reserved for the higher hierarchies. It seems though that the former was the case as evidenced by the manuscript for James Morrison. Morrison also states that in regard to *marae tupuna* (ancestral mare), "each head of family has its own, and there are frequent offerings and prayers otherwise regular" [Morrison 1966: 51].

[6] Therefore, it appears that the political economy of Tahiti was based on a ramified organization according to the meaning given by Firth (1965). The eldest of the "congregation" (Oliver 1974, 632) was usually the leader not only of his congregation, but of the entire chiefdom. These congregations were organized in branches, with each elder of each congregation recognized as chief of his own extended family on their own territory. Such recognition implied specific rights of control of the land and the lagoon attached to its territory. Among these rights, it should be emphasized, was the right to implement a *rahui* on land and sea territory of his congregation. The usage rights associated with the *rahui* are more relative than absolute. On some occasions and in different contexts, a major leader may have solemn rights (in terms of first fruits or first fish brought to him) associated with a *rahui* on a territory that he did not directly control. On other occasions, the right to implement a *rahui* was independent of the privilege of the principal chief. These rights applied to the whole territory controlled by the congregation in the context of overlapping functions and responsibilities, both terrestrial and maritime (Bambridge 2009).

3 The process of assimilation after the contact period

The process of assimilation by state law of the polynesian legal pluralism equilibrium, began through the transformation of the chiefly system.
The brillant article by Tcherkezoff (2000) on the historical transformation of the matai system in Samoa that led to a multiplication of the matai chiefs in a context of greater democraty, shows that pluralism is a dynamic configuration and requires greater attention in scholarship work and underlines in Samoa an evolution towards more pluralism.
In Tahiti, on the other hand, the process of state formation at the begining of the 19th century led to the opposite situation, ie, an assimilation of pluralistic norms by state laws.

3.1 The independant period

The code of 1824 introduced major changes: a new balance of power between the *arii* and other leaders, a parliamentary assembly, and substantial changes in the *rahui* (the stealing of provisions, bans on climbing trees, Sabbath observance) which already reveal new contexts: the influence of a new religion, the introduction, still implicit, but very real, of a Western style of a property right, and increasing trade with the outside world, European and American. In terms of the implications for legal pluralism, this legislation can be seen as the first substantial step away from Polynesia-wide principles of plural regulation of authorities and resources.

The logic initiated by Pomare II (centralization of power, redirection of earnings for the benefit of *rahui*) was maintained by Pomare IV on an even larger scale with the ultimate intention of controlling the trade relations between the pearl-rich Tuamotu Archipelago and the outside world. In addition, the missionaries took advantage of this new environment to redirect the *rahui* to also benefit the *Toohitu*, which was a new group of judges. It should be added that the notion was invented and put in place by the missionaries in the 1820s (although today many people believe it to be a pre-contact institution) (Saura 1996). The word applies to the notion as well as to the office bearers. In practice, it was mainly the *Toohitu* that controlled the annual redistribution of tribal contributions from the 1830s. From an initial situation where the *Toohitu* had juridiction over all civil and penal matters, their role became gradually reduced to land matters over more than hundred years (the institution was dismantled by France in 1945).

Thus, for two decades (1820s to 1840), the *rahui* was reformulated as a cultural category based on interpretations of historical events, which varied according to the actors (chiefs, missionaries, the new class of people forming the *toohitu*), the social dynamics at work, and the new legal concepts which now more or less governed practice.

3.2 Protectorate and the assimilation of legal pluralism

External influence on Tahiti and Moorea increased dramatically in the 1840s as France sought to impose its military control and establish a base in response to perceived challenges to French national interests by Britain's rising presence in the Pacific. After many vicissitudes[7], a protectorate treaty written by French Admiral Dupetit-Thouars was forced upon Queen Pomare IV, and reluctantly signed by her representatives in Tahiti in 1842 as she was absent on Moorea in preparation for childbirth. The French could not totally impose their will however. Article 3 of the Protectorate Treaty of September 8, 1842, is explicit about Tahitians retention of ownership and control of their land:

> "The Queen and all the people shall keep possession of their lands. Land disputes are to be left to themselves. Foreigners shall not interfere with them." (Newbury, 1980, 107)

In the decade that followed the protectorate treaty, the status of indigenous land remained the responsibility of the indigenous courts, the *Toohitu*. However, shortly after the signing of the protectorate treaty, the "protector" issued orders that flagrantly contradicted the sharing of power arrangements agreed for the protectorate.

[7] See for example, Bambridge 2006, 2007. Newbury 1956; and Baré 1987.

Relations between the Queen and the *Toohitu* were equally sensitive. Newbury (1967a) notes that many of the *Toohitu,* the source of judicial power, were no longer drawn from the *arii*. They attempted to proclaim a republic in 1852 in direct challenge to the rule of the Pomares (Caillot 1910, 290). This time, it was the governor who restored Pomare's prerogatives. The new political organization of power in the Protectorate went hand in hand with a new approach towards *rahui* in Tahiti and Moorea. In reality, however, this fundamental indigenous tradition persevered at the local level within the indigenous realm as is apparent in the 1852 land registration described below.

A new colonial policy of land registration faced an already complex sociology of land tenure in the middle of the nineteenth century. The 1852 Act on registration of land was intended to firmly set up a private property, a policy begun with missionary policies introduced with the articles on theft in the 1819 constitution some three decades before. In light of resistance to this policy among more traditional elements of Tahitian society, the new 1852 legislation instigated by the governor, empowered the Tahitian legislature to vote this law, without the countersignature of Pomare IV (Coppenrath 2003, 34).

The law of 24 March 1852 on the registration of land applied in eleven districts of Tahiti. It was based on the reports received in each district by the District Council now consisting of the Chief, the Judge, the *mutoi* (police), two elected owners (electoral law of 22 March 1852), and the *Toohitu*. The law provides for two types of land: *fariihau* land (appanage) held by chiefs because of their charges, and private lands. Curiously, the law does not mention the concept of "ownership" but only the "owner" for which a list must be drawn up in each district on a territorial basis, covering the entire district from one end to the other.

In connection with the *rahui*, it is interesting to examine the ways in which lands, portions of lagoons offshore and open sea beyond were claimed in drawing up the 11 district land-'owning' lists prepared in accordance with the 1852 Act. In some cases, it is the leaders of a *opu fetii*, or a *opu* (extended family which includes 4-7 generations' of genealogical depth) who made the statement without specifying if the claim is made on behalf of an extended family, or particular extended families. In other cases, individual owners made the statement, with the district council facilitating the shares allocated on the basis of this evidence. In all cases, affiliation with the family *marae* served as a starting point for each candidate's legitimacy to claim land and portion of lagoon.

A variety of landscape and seascape features were claimed or referred to as part of claim legitimacy: *marae*, caves, springs, rivers, fish *operu* (parks), fringing reef passes, outer slopes of the reef, fish holes, among others. For example, in the district of Papeari on the west coast of Tahiti, claims made in 1856 encompassed many partitions of land and sea. In this district alone, 200 distinct parts of the lagoon were named as well as 839 land plots. This wealth of local environmental reference points for local social and economic relations is testimony to the partial nature of the top down reform attempts and the continuing relevance of custom to local communities in this first generation to experience reformulation of *rahui* under Western and static priorities.

On the other hand, the new 1852 requirement to claim ownership had the legal effect of transforming the use and solemn rights associated with *rahui* and shared kin branches into property rights legitimised within and by the new legal system. This is not to say that traditional, seasonal *rahui* did not continue in locations, albeit now legally separated from each other, but often still enacted by extended families. The records also show that many claimants had decided to retain the territory (land and sea) where the family *marae* was built, as a shared community space between all members of the congregation of kin.

3.3 The annexation

The tendency towards a dichotomy between a) state-centred rules about resource use based on political and legal criteria, and b) ecologically and socially influenced resource use practice at the local, community level, became profound during the 1850-1880 period which extended from the Protectorate (1842) to full French annexation (1880).

The colonial "assimilationist" policy (Newbury 1967b) under the Protectorate gathered momentum during the period 1850-1880. The diversion of the *rahui* principles and implementation practices into directions more suited to colonial needs and desires necessitated further reform of the political

authority, especially those with authority over territory and resources that were the target of authorities. The 12 November 1855 law establishing the district councils is a good illustration of this diversion. The composition of the Board was to be determined jointly by the Queen and the Governor, with all acts passed through the censorship of the indigenous director who first referred his findings to the Governor, a copy being made to the Queen. It is also reported that the District Council will look after "all district business and various good or bad customs introduced in the district by the inhabitants"(Article 4), subject to the approval of the regulatory authorities (Article 5-9). In effect, this 1855 law meant that customs were only legally recognized and legitimized if they were validated by the colonial authorities.

The French annexation of the Leeward and Windward archipelagos of Tahiti in 1880 ended the ability to impose fines that have remained one of the last powers of district councils under the Protectorate. This last round of reforms had finally put an end to *rahui,* at least officially. This suppression was not uniform however, and *rahui* remained officially sanctioned and practiced in other archipelagos - until 1917 in the Leeward Islands, and until 1945 in Rurutu and Rimatara in the Austral Islands. It was also, preserved elsewhere despite a hostile legal framework, such as on Rapa (Bambridge and Ghazarian 2002) and Maiao (Finney 1973) for example.

3.4 The 1887 decree

The next emasculation of traditional authority occurred with the Decree of 24 August 1887 in relation to the organization of land in Tahiti and Moorea. This was perhaps the most significant event of this period, because it signalled the final replacement of the authority of ruling chiefs with the institutions of the colonial power. This decree fundamentally changed the relations of the population to their territory. Now, all land was considered as belonging to the colonial government under the doctrine of eminent domain, and, therefore each individual had to make a declaration of ownership to legitimize their control and access to resources and territory. Each claimant who was officially recognized as the owner by the colonial body vested with this responsibility, the *tomite* (from the English committee), could be granted a title of ownership, while unregistered parcels became temporarily "district land". If these district lands were not claimed after a period of one year, they became public land deemed to be vacant land without a legitimate owner. The 1887 Decree also established the principle that, after a period, all future claims and all objections would be considered according to the procedures of the Civil Code.

3.5 Analysis

On the basis of the Decree of 24 August 1887, the colonial administration began to apply the theory of eminent domain as interpreted in ancient French law: State leaders succeeded as proprietor of the right of eminent ground, and the natives were invited to transform their right of possession or use into property rights. Then, in order to promote the development of land and the development of agriculture, the State used legal means to develop the land. Hence the use of the concepts of "state land" or "vacant and ownerless land", allowed the control of much of the land to the State by diminishing indigenous user rights as legitimate instruments for claiming 'ownership'.[8] As rightly noted by N. Rouland (1988) regarding the acculturation of traditional societies:

> "We were now in a system based on the inferiority of the legal status of Aboriginal claims which were for them to prove."

A priori, the chiefs who were already dispossessed from their prerogatives concerning *rahui,* were completely stripped of their use in regard to the land on which they had influence, as unclaimed land became land of the colony. In addition, claims to parts of the lagoon were no longer permitted because of a rule in 1866 making the lagoon a public domain. This imposed even more restrictions on the possibility for all Maohi regardless of their status to exercise rights associated with *rahui* in these territories. Most importantly, the decree of 1887 was not a simple declarative device as in the 1852 Act

[8] The decree generated about 50,000 titles, including approximately 9220 to the island of Tahiti (Coppenrath, 2003: 73, 293). In contrast, *rahui* in the Leeward Islands was reintroduced during the annexation by Article 1 of the Declaration of Annexation in 1888, before being repealed in laws codified in 1917.

for land claims ; in fact this 1887 decree made that the lack of putting forward a claim meant being dispossessed of the land.

4 Implications for legal pluralism today

4.1 The revival of rahui

Since 2000, under the influence of a strong identity claim from the Tahitian population, the State has attempted to reintroduce the Polynesian *rahui* in the fishery laws for the management of marine resources. Several Polynesian states have done the same (Cook Islands, Aotearoa New Zealand, Rapa Nui, Hawaii) during the last decade, reviving a past practice in a radically new context. This dynamic contributes to giving back to local communities an autonomy in decision-making to manage resources and territories. Research carried out to understand the reappropriation of *rahui* today (Bambridge 2014 in press, 2013) shows that the religious aspect was never completely absent even in the darkest days of colonial control, while admitting that in a different political context, it cannot be a replica of the past.

4.2 Implications in term of legal pluralism

1- The detailed account of the fate of *rahui* during a time of political transition and social disruption has also profound implications for current resource management practice and for anthropological theory on cultural resilience and attempts to enforce change without local consent. The central state in the Pacific is a colonial creation with weak capacity (Fry and Kabutaulaka 2008, Larmour 2005). Moves back towards local management of resources, albeit in conjunction with scientific and administrative officers of the state, reflect this reality. The commitment of the state to true partnerships of resource management with indigenous communities remains uncertain. The assertion of central and then colonial state control over resource management reviewed above demonstrates that such partnerships are the only viable means of managing resources, and that the traditional *rahui* endured for two important reasons – it worked, and it gave local communities both benefits and political influence on the process of resource management.

2- Current research conducted in Taiarapu (Bambridge 2013) shows the remaining importance of the *tahua* in the management of the lagoon and the land through the *rahui*. The Pacific Islanders have historically established relations of continuity between land and marine tenure resulting in priority and/or specialized control of territories and resources.
For example in Taiarapu, at the same time, the territory bears differentiated spaces including fishing, pharmacopia and sacred sites. These territories are held in common ownership and are simultaneously subject to specialized control by individuals or specific families. These *tahua* (specialists) hold specific knowledge and master traditional techniques and rites, such as the fishing calendar, lunar expertise, regarding the pharmacopoeia, etc. This mastery does not only come as traditional qualifications but also results through the intimate knowledge of plants and places, both on land and lagoon. In this respect, theses practices are directly observable through toponymies, describing appropriate activities, limits, forbidden places or historical landmarks.

3- The discussion on the institution of *rahui* implies a conceptual model of authority over the control of land, sea and resources based on a network of privileged consanguineous relationships where political status is the basis of the network. Petersen's analysis of power and the kava use in the Caroline Islands shares this position. Because of cross-cutting principles of rank "the character of political power in Pohnpeian society is vague, ambivalent, contradictory, and virtually impossible to observe". In this sense, Petersen wonders whether other supposedly chiefly societies within the Austronesian sphere lack 'chiefs' as well".[9]

4- In term of legal pluralism theory, we may wonder if the tipology proposed by Morse (1988) to describe interactions between customary and state laws (cooperation, separation, assimilation), is still relevant to describe historical situations like the one described in Tahiti ? As a matter of fact, the

[9] Petersen, 1999: 401

assimilation fits well into the model when we observe such relationship from the state law view point. On the opposite, standing from the local communities, the analysis of network of statutes and consanguineous relationships, appears to be more relevant to trace back an institution such as the *rahui*.

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