
Evaluation of Factors Compelling British to Introduce Colonial and Imperial Laws in Their Dependences in South Pacific Islands: A Systematic Review

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Abstract

The European arrival in the South Pacific Islands brought a long-lasting impact on its legal system. The fourth quarter of the nineteenth century (the 1870s-1900) is considered a crucial period in determining the relevance of pre-colonial South Pacific Island nation's laws and the implication of imperial or colonial laws by the European colonizers, including Britain, Germany, and France. This transition period had predominant options of continuing the pre-existing traditional laws and commencing the introduced and colonial laws or a mixture of both. The British's dependencies noticed the change in laws as the governance was done directly and indirectly in various dependencies based on their requirement. The article systematically reviews the factors that led to the change in pre-colonial laws in some British colonies of the South Pacific Islands. Based on the study of secondary sources, it can be asserted that the factors that pushed the British to make necessary legal changes to establish their governance included: having administrative compulsion, establishing authenticity and legitimacy, supporting their political and commercial motives, and other motivating factors. The colonial legacy of laws prevailed to establish 'legal pluralism' and led to a legal debate over patriate laws in the South Pacific.

Keywords: Legislation, Customary Laws, Colonization, Imperial and Colonial Laws, Common law and Equity, pluralism, South Pacific Islands

1. Introduction

The rules and techniques to resolve disputes, maintain law and order, protect property, and establish social order have existed in the Pacific Islands for 5,000 years in Western Micronesia and 3,000 years in Polynesia (Powles, 1988). In fact, their legal systems were so foreign that certain nations and peoples were believed to have no civilized legal system (Farran, 2009). Gradually, formal rules were developed to establish law and order in the Pacific society. In many of these Pacific societies, chiefs, headmen or elders, or their councils formed the courts, whereas in some cases, an orator or advocate was instituted. Several laws and regulations existed in the pre-colonies Pacific societies that were integrated into the colonial power's legal systems. The colonizers transported the legal system to the tiny islands of the South Pacific, especially with the beginning of the British colonial rule in the South Pacific from the mid-1870s (Dupont, 2001; Farran, 2012; Kundra, 2022; Robert-Wray, 1966). Many believed these laws were imposed, not chosen by the colonial powers (Farran, 2009). The laws could have served as the foundation for the political structure of a nation-state. The chiefs, aristocracy members, and other traditional leaders continued to serve in leadership and advisory capacities during colonization. However, few post-independence constitutions gave them a central or extensive role in the new governmental structure (Ntumu, 1993).

Across the Pacific, the introduction of European law occurred on different dates and in various structures. However, the focus of this article is restricted to factors assessing the reasons for Britain's legal jurisdiction implied on the South Pacific dependencies during the early phase of colonization. The laws applied or adopted in the South Pacific Islands during the phase of colonization varied in nature. Today, Pacific laws are not autochthonous but were transplanted from colonizers' nations. The colonial laws (local laws that were made in the colonized nation by the representatives of the imperial government) or imperial laws (introduced or received laws that were applied or adopted in the colonized Pacific Nations by European colonizers with or without modification; these laws were tested as they had been in force in some other countries) introduced in the Pacific, had their origin in Europe and North America before they were brought to the Pacific as a colonial legacy. The imperial laws assisted the colonial powers in maintaining legal order in the dependencies; these were introduced through application (extension) or adoption. Most of the British dependencies in the USP region had legislation made by the British governor or High Commissioner of the Western Pacific (local or locally enacted legislation); and also had legislation made in British Parliament (introduced or received legislations) (Corrin & Paterson, 2007).

A variety of laws existed and were introduced during this phase. The laws that form the main provision of the government's organs or the government's basic structure are called Constituent laws. In contemporary society, it is referred to as a written constitution. Subsidiary legislation is the regulations, rules, and orders issued by the person or bodies authorized by the legislation. Common law and equity are based on the decision of the courts, which was applied to and adopted in the dependencies of British. Lastly, the customary laws were mainly derived from the local customs and regulating rights. The laws of different origins merged together over time and gradually were interwoven to produce a structure of 'legal pluralism'. Legal pluralism was not new to the Melanesians before the advent of Europeans, albeit the customary diversity of multiple law ways was far different from the European-created hierarchy of the legal system (Care and Zorn, 2001). The traditional system of justice before the establishment of the courts existed in the Pacific, where dispute settlement mechanism was adopted through community participation. These traditional systems, including conciliation, compensation, and apology, were considered weak, limited, and given little recognition in the colonial system of law (Powles & Pulea, 2013).

The courts of many Pacific Islands during colonialization used English common law and customary law for adjudication. The importance of imported common law in the Pacific Nation varied. In many countries, the link between custom and legislation is also distinct. Some constitutions give importance to statutes over customs. In contrast, some give overriding powers to customs over the statutes. Some of these nations had customs placed over the statutes enacted before the independence (Ntumu, 1993). Customs recognized by the Constitution or other laws can be implied and useful until they are applied and recognized by the judges of the higher courts.

Some of these laws were changed, and some were adopted from colonial power's structures. The causes of establishing the British introduced or colonial laws during the early colonization phase are ambiguous and require further research. The coming of the British made a drastic change in the legal system of the South Pacific Island nations. The duality in the legal system emerged due to the imposed imperial and colonial laws in the Pacific by the colonial powers. The wide variety existed due to the diversity of indigenous cultures. This eventually led to the emergence of 'pluralism' or 'pluralistic nature of law' (Farran, 2006).

Some Pacific constitutions recognized both the imported/imperial laws and customary laws as a source for the development by the courts of an indigenous common law (Ntumu, 1993). Many major laws passed during this phase included the Kidnapping Act of 1872 (Mortensen, 2000), later known as the Pacific Islanders Protection Act of 1872. These laws were made to reduce the incidence of blackbirding by British subjects. This legislation, Pacific Islanders Protection Act 1875, further amended 'An Act for the prevention and punishment of criminal outrages upon natives of the islands in the Pacific Ocean'. The British Privy Council made the Western Pacific Order in Council 1877 (Scarr, 1967), which appointed the High Commissioner of the Western Pacific and set up a High Commissioner's Court to exercise authority over all British subjects with respect to their committed criminal offenses. Later this legislation was superseded by the broader Pacific Order in Council 1893; it permitted the British government to exert its authority over the people of nations it had been asked to safeguard, and this was not limited to British citizens. Corrin and Paterson (2007) explained that from s 20 of the Pacific Order in Council 1893, the common law and equity of England were introduced in British Solomon Islands Protectorate, Gilbert and Ellice Islands Colony, New Hebrides, and Tonga. The same authors further explain that in Fiji, s 35 of the Supreme Court Ordinance 1875, provided that 'the common law, rules of equity and the statutes of general application... shall be in force within the colony'. All the introduced laws in the British dependencies stated 'to be in force only so far as they are not inappropriate to the circumstances of the particular country, or words to that effect' (Corrin, 2007).

1.1 Research objective

The paper attempts to study the following in the context of analyzing the historical evolution of the legal system in the South Pacific Islands:

- Determine the factors that led British Colonial power to introduce colonial and imperial laws in the South Pacific's colonies during the fourth quarter of the nineteenth century.
- Ascertain the factors that forced the British to continue some pre-colonial or traditional laws in their South Pacific colonies.
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2. Research Methodology

The article is based on secondary sources, consisting of legal research books, textbooks, journal articles, reports, and Constitutions. Due to the lack of sources, the reviewer did a comprehensive review, and a holistic approach was adopted due to a large number of British control dependencies of the South Pacific Islands studied in this research.

3. Literature review

In the South Pacific Islands, post the 1850s saw the promulgation of written laws and even written constitutions in addition to earlier customs and practices. The historical discourse of formulation of written laws in the South Pacific islands is reviewed. It is pertinent to assess the existing laws and other implications that compelled the British to bring the introduced or colonial laws in its dependencies in the USP region.

Written constitutions accompanied by written laws were produced in Fiji in 1867, 1871, and 1873. Seru Cakobua did this when he seized the throne of Fiji in 1852. Cakaudrove, the opposing chief of Bau, produced competing written constitutions and written laws in 1868 (Corrin & Paterson, 2007). Ntuny (1993) explained that Fiji Islands were colonized between 1874-1970, during which time the British monarch served as the country's Head of State. Fiji had been broken up into small, rival governmental entities prior to European contact. In the 1850s, Fiji saw an upsurge in European commercial and residential colonization. In 1865 and 1871, a national government was founded by the major local chief of the Bau, Cabokau, with the help of some element of the European community. But on 10 October 1874, Cabokau and other high chiefs signed a Deed of Cession, effectively handing over control of Fiji to the British. In 1875, the Governor established the Bose Levu Vakaturaga (Great Council of Chiefs) to provide advice on matters of national importance to the Fijians. Over time, it shifted from having members nominated to having members elected at large (Ntuny, 1993). By the s 35 of the Supreme Court Ordinance 1875, 'the statutes of general application which were in force in England at... the second day of January 1875' (Corrin & Paterson, 2007). During colonial times, the legislature source that applied in Fiji were the ordinances of the Legislative Council of Fiji, statutes of general application of the British Parliament in force in England on 2 January 1875 (Ntuny, 1993). Native Courts in Fiji were established with regulations of s 10, Native Affairs Ordinance 1876. These courts authorized the native customs and incorporated many Fijian customs (Corrin & Paterson, 2007).

The Gilbert and Ellice Islands became a British protectorate in 1866 and then a colony under British rule in 1916. Colonial institutions mirrored conventional British colonial structures. British magistrates were present on each island and could rule with the help of a jury made up of the local Councillors of the government, the Kaubure. This occurred as a result of the interaction between imperial policies and local customs and perceptions (Ntuny, 1993). Ntuny (1993) stated that the system of law in these islands became largely anglicized during the British colonial rule phase. The resident commissioner had compiled all the laws of the islands, enforced by customs and the missions, in order to develop a standard code for both island groups. The British High Commissioner for the Western Pacific, who was stationed in Fiji until 1950, drafted the laws for Gilbert and Ellice Islands. This was owing to the colony's limited size and significance. In the Gilbert and Ellice Islands, section 20 of the Pacific Order in Council 1893 (UK) applied 'The substance of the law for the time being in force in England' (Corrin & Paterson, 2007). Ellice Islands' legal system noticed the introduction of English common law and statutory law; simultaneously, concepts and vocabulary of the common law were established. The introduction of common law procedures was noted in regard to criminal and civil matters. In Ellice Islands, the magistrate emerged as the dominant figure of the administration in place of the chiefs and village elders (Ntuny, 1993).

According to Ntuny (1993), the British exercised colonial control over the Solomon Islands via the Western Pacific High Commission in Fiji. Under the Western Pacific Order-in-Council of 1877, the High Commissioner at the time was granted extraterritorial authority over British subjects residing in the Solomon. None of the native Solomons or other Europeans fall within its authority. In 1892, the British declared the Solomon Islands a protectorate. In 1896, a British resident administrator was sent to the Solomon Islands and given the mandate to support himself by native means. The Resident commissioner maintained British control over the Solomon Islands and reported to the colonial government through the Western Pacific High Commission in Fiji (Ntuny, 1993). British Solomon Island Protectorate sent a resident commissioner to this protectorate, who was not authorized to make laws, but it had of British High Commissioner for the Western Pacific.

King George Tupou of Tonga established the country's first written laws in 1850 and 1860, shortly after he became monarch in 1845 (Corrin & Paterson, 2007). In 1875, the king of the Kingdom of Tonga granted a written constitution of Tonga that was adopted by the Legislative Assembly. Gradually, the consolidated laws of Tonga were published, and the legal system was inspired by the British. The substance of the law in force in England was applied by s 20 of the Pacific Order in Council 1893 (UK) (Corrin & Paterson, 2007). In 1900, the British made a proclamation of Tonga as a British-protected state. With the rise in the involvement of the British in Tonga, they signed another supplementary agreement in 1905 with the King of Tonga, where they wanted to appoint Europeans in the vital position of Cabinet, public service, and treasure (Ntuny, 1993). Thus, the first expatriate Chief justice was appointed. They became the ultimate sanction power if the case was beyond the jurisdiction of the Tongan monarch and Tongan courts. The early British governance phase was mostly related to indirect governing implemented in Tonga and many other Pacific colonies. Tonga's protectorate status allowed it to have its own legislature, the King and Legislative Assembly, which

could pass laws (named Laws before 1917 and Acts thereafter). (Corrin and Paterson, 2007). Ordinances were laws enacted by the King of Tonga with the advice and agreement of the Privy Council.

In 1906, another Pacific island, Vanuatu, saw the signing of an Anglo-French agreement known as a Condominium to jointly administer the archipelago. The s 20 of the Pacific Order in Council 1893 (UK) applied 'the substance of the law for the time being in force in England to British nationals and optants' (Corrin & Paterson, 2007). In a condominium, these two European nations had power over their citizens and others living in the New Hebrides (Ntumu, 1993). A subsequent protocol was signed between Britain and France to govern the condominium with French and British laws. These laws were applied to every national of New Hebrides and also overseas nationals. In 1914, the Anglo-French Protocol authorized the Resident Commissioners of both these nations to act together to make joint regulations and subsidiary legislations binding on all inhabitants (Ntumu, 1993).

Written laws were enacted when the King of Samoa was acknowledged by Germany, Britain, and the United States in the 1880s. Ntumu (1993) said that the adoption of Constitutions and laws in 1873, 1875, 1880, and 1887 in Western Samoa was significant when taking into account the conflicting interests of Great Britain, Germany, and the United States during that time. Because of the internal and external conflict, these actions did not last long. In 1900, due to a treaty, Samoa was divided into two; the US took control of the eastern islands, whereas Western Samoa was controlled by the Germans. In 1903, the German colonial administration introduced the land and title commission; it was later renamed as a court and was responsible for settling disputes over customary land and mainly titles (Ntumu, 1993).

4. Result and Diccussion

4.1 Assessment of Factors Led To Introducing Colonial Laws in Pacific Islands

The European administrators in the Pacific Islands allowed the continuation of indigenous customs to persist by the customary leaders or chiefs in order to maintain social control. However, they did not apply the custom laws to be implied in the court except the customary land (Corrin & Paterson, 2007). Many South Pacific Islands continued the jurisdiction of native customs and usage until they became inconsistent with written laws. The traditional customary social institutions made the customary laws. Customs or customary laws played a huge role in the governance of the Pacific islands in the pre-colonial phase. The traditional authority of chiefs and local leaders played a determining role. The colonizers allowed law and order to be maintained in most of the islands to be governed at the village level in customary ways until they had a problem (Powles & Pulea, 1988) and to be resolved by formal courts.

British colonizing the Pacific Islands had a political motive to introduce imperial laws or colonial laws and made subsequent arrangements in the Pacific Island pre-colonial laws. In the early phase of British colonization in the Pacific, it mostly preferred to indirectly rule the nations with the help of local chiefs and leaders. In this period of colonial expansion, administrators noticed conflicts and inconsistencies in governance with old Pacific laws, and compelled them to introduce new laws. The traditional laws were based on unwritten customs, whereas colonizers' laws had written statutes and detailed legal systems. Establishing political and legal control on the USP region pushed the colonial nations to introduce (applied or adopted) laws to control and dispute resolution in the Pacific Islands. The written laws introduced by European powers in the South Pacific Islands were to assert their authority and administer the nation. The British-controlled dependencies had a governor authorized to make laws named ordinances. He had to take the advice and conent of British officials to form a legislative council in the colony.

Laws enacted by the British in their South Pacific colonies gave them influence over the judicial systems of their colonial subjects. The compatibleness was assured by the British as they did not totally remove the traditional customary laws that existed in pre-colonial times. The British introduced laws that gave a massive impetus for them for governance and administration in the South Pacific colonized nations, as they were habitual to these laws. This legislation helped the British establish their legal dominance and control.

Most indigenous customs were allowed to continue to be applied by customary leaders over their communities after the British established their dependencies in the Pacific Islands. However, the British initially made no provision for customs to be applied or enforced by the courts, with the exception of determining title to customary land (Corrin & Paterson, 2007). They aimed to develop a dominant unified legal system that does not hamper their governance and administration. The courts needed effective administrative support and people's consent to accept its institutions as legitimate. If there were two authorities to enforce justice, be it a formal court setting and traditional local leadership, that shall lead to disputes over the authority of each other in resolving disputes and maintaining orders. Despite the introduction of foreign laws, the local customary laws were mostly referred to with respect to land, succession and marriage and divorce matters. In contrast, financial matters and other disputes refer to formal laws. However, it is eventually difficult to separate the customary and introduced laws. Another substituting factor was that the British needed to be made aware of those traditional customs and practices and customary principles. Thus, they imposed their common laws as it was most appropriate for the commercial economy.

The duality of the legal system needs to be eradicated to establish jurisdiction that applies to the dependency. There were inconsistencies in the evidence to be considered during this phase, where locals considered some statements accepted facts. In contrast, the colonial legal system recognized the proper legal evidence of proof beyond a reasonable doubt to adjudicate.

In a general perspective, it is believed that the customary law courts of the Pacific are considered inferior or lower-ranking institutions by the Colonial powers. The Europeans found these local laws unsuitable as per their standards, but they did not totally abolish them. They had to take into consideration the local necessity of the people and the authority to establish social order and resolve disputes. Others in reference to Melanesian countries, the colonizers believed that they did not have any legal system that gave colonizers the free right to import and impose the legal system on the colonies. This justification of law in the absence of laws in the Pacific became a major factor (Care and Zorn, 2001). The colonizers have the opinion that they are bringing the law to lawless Pacific colonies.

The laws and their content needed to be revised to establish colonial dominance over the Pacific Islands. Some laws were considered inconsistent and outdated, while other traditional laws looked inadequate or unnecessarily complicated (Powles & Pulea, 1988). Their financial or commercial interests were woven with political expansion that required authoritative rules to establish legitimacy and imply a variety of laws. The customary laws were insufficient to cater to the Europeans' needs. Thus, the colonizers brought laws to suit their financial and political motives.

Local chiefs and leaders drafted the customary laws for governance and establishing their authority, whereas the Europeans displaced these local leaders and their laws to confirm their legal system. Many scholars stated that European justification for colonization was to civilize the uncivilized world. The Pacific islands were considered an underdeveloped world before colonization. This 'civilizing mission' was also applied to the legal perspective, where new laws were introduced to eradicate obsolete or irrational laws.

The sources also reflect the conflicting approaches between European 'general law' and the local or land courts. European style insisted on giving judgment on particular individuals, their rights, and obligations that were adjudicated by the courts, whereas local and land courts mostly dealt with families and wider groups to understand the complexity of the dispute (Powles & Pulea, 1988). This factor also motivated the Europeans to implement the written imperial laws but did not abolish the land or customary laws of the Pacific.

The lack of material and human resources in the developing South Pacific Islands has been cited as a barrier to the State's coercive power and to a better comprehension of the State's laws and their purposes (Anita, 2009). These factors also motivated the British to introduce laws that were developed and tested in their home nation and were implied to their dependencies in the South Pacific; it also was a factor for the Pacific island nations to accept the imposed laws. Jowitt (2009) believed that in the colonial period, the people were not treated equally, the imposing of laws and many times, fundamental rights were not recognized (Anita, 2009). Overall, multiple factors played an essential role in motivating the British to introduce foreign law in the Pacific Islands, which assisted in controlling these colonies for many decades.

5. Limitation

The area of review of this research is limited to the British dependencies in the South Pacific. However, further research can critically assess the other colonial powers and their dependencies.

6. Conclusion

The transition from the pre-colonial to the colonial phase was an uncertain period in terms of the legal system and the ambiguous nature of the early stage of the colonial legal establishment from the perspective of locals. British colonial powers did not totally remove the earlier existing traditional laws but governed through indirect administration wherever appropriate. The British compulsion of introducing imperial and colonial laws in the South Pacific colonies can be summarized as an order to establish political and financial control over the colony, establish foreign laws accountability in the Pacific Islands, considering the European laws as more accountable/higher in status due to its tested practical implications whereas pre-existing colony laws as inferior; and Europeans were on a civilizing mission to assist the Pacific colonies in giving civilized laws; the pre-existing laws were made by the local or traditional chiefs or leaders that are removed by the Britishers, so they felt more comfortable in applying their rules. However, holistically, the British did not totally dismiss the traditional laws but continued many to maintain the social order of the Pacific societies.

6.1. Suggestion

During the independence period of South Pacific colonies, the colonial heritage of laws, including supreme laws and existing laws, common law and equity, colonial laws, and broad applicability status remained. Many statute laws that were enacted by the local parliament after independence also kept 'foreign flavor' (Anita, 2009). The need to patriate (or localize) foreign laws were neglected, and it was considered to be a transitional measure until the locally made laws were placed. However, patriation should be adopted with caution as it may not lead to a significant gap in the law (Corrin, 2008). In contemporary times, the laws of the Pacific islands cannot be totally associated with one particular nation, and eradicating the imported common laws and statutes is a cumbersome task. Thus, the best laws as per the current situation should continue, while the obsolete or non-reinforced laws should be eased out.

Acknowledgements

Thanks to Prof. Unaisi Nabobo-Baba for her constant support and motivation towards research.

Declaration of Interest Statement

I wish to confirm that there is no conflict of interest with anyone in regard to this article.

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