

'Challenges of drafting in a developing country'¹

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Author's background

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Barrister in Birmingham, U.K., 1967–76
Senior Crown Counsel, Solomon Islands, 1976–77
Attorney General, Tuvalu, 1977–79
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Senior Crown Counsel (Law Drafting Division), Hong Kong, 1983–86
Deputy Principal Crown Counsel (Localisation & Adaptation), HK, 1986–96
Constitutional Adviser, Tuvalu, 1997
First Parliamentary Counsel, Fiji Islands, 1998–2000
Legislative Draftsman, Grenada, 2000–2002
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Introduction

Happy to be at CALC after missing it in 2003 (Melbourne). Glad that now that I have 'retired' to the U.K. after 30 years of working overseas, CALC has come to London.

Happy to talk about the Challenges of Drafting in a Developing Country. Slightly embarrassed to be on the same platform as Bangladesh, with its 144 million people and 144,000 square kilometres of land. The largest country I have worked for is Hong Kong with 6 million people, but only 1,000 square kilometres. My average size is a few thousand people and only tens of square miles. Tuvalu has 8,000 people on 26 square kilometres. (Ten square miles—the size of a small English village. Imagine drafting laws to comply with the international treaty obligations of Chipping Sodbury!)

At least I can feel some kindred spirit with Lesotho, whose upper chamber is said to be drawn wholly from tribal chiefs (one of the criticisms of the unreformed House of Lords.) In the Fiji Islands, where I was law drafter for 2 years, the Senate consists largely of tribal chiefs, and the Great Council of Chiefs has an important constitutional role in the appointment of the President. (There was a coup in Fiji in April 2000, 3 weeks after I left.)

So—I would like to share some thoughts on drafting in small developing jurisdictions. The title is 'Challenges' but I would like to share some of the rewards as well.

South Pacific

Picture this. You are sitting in an air-conditioned office on the ground floor with a view across a few yards of white coral beach to an azure blue lagoon. The scene is framed by palm trees gently waving in the trade wind breeze and on the horizon are a few tiny islets. On the lagoon there are some hand-carved outrigger canoes from which people are fishing by pole or net. On the beach children are splashing in the surf and dogs are barking. Girls in sulus (lava lavas) with frangipani in their hair walk

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arm-in-arm past the Maneapa meeting house. As the sun goes down in a blaze of colour, a bell rings for evening service, and you close your files after another languorous day in Paradise.

Or picture this. You have some urgent photocopying to be done, but the machine has run out of paper. The only other copier in the building is being repaired. You try to use the computer printer, but that has run out of ink. Your email connection to the outside world is suspended because the satellite has shifted its position. Then the draft Bill you have spent all week on disappears from the computer screen; “unrecoverable disk error” it says (with that irritating spelling with a ‘k’). That evening there is a heavy tropical rainstorm and the next day you come to the office to find the roof has leaked and most of your papers have got soaked.

These are the two sides of Tuvalu, where I worked from 1977 to 1979 as Attorney General and in 1997 as a Constitutional Adviser.

Caribbean

Picture this. You are in a 200 year old colonial-style building on top of a hill with a view across red roofs and green nutmeg trees to a deep blue sea. A white cruise liner is tied up at the wharf. (In the distance is a fort on a headland where the Prime Minister of the country was shot by firing squad 20 years earlier.) Outside a brass band plays as the police in their white uniforms and plumed helmets march up the hill to escort the Governor-General to the opening of Parliament. He is going to give the Throne Speech outlining the laws that you will be drafting during the next year. Around you are men in dark suits and ladies in smart hats, eagerly awaiting the start of this annual event. You can hear the sound of the pipe organ coming from the church across the road, and girls in the convent school next door are practising a song. The Speaker’s clerk, carrying the largest Mace in the Commonwealth, walks in and the timeless ritual begins.

Or this. You are in your rather small office without windows or computer, trying to draft a Bill in pencil legibly enough for the copy typist. You are summoned to the Attorney General’s office and asked to take on a case in the court next door for which a defence must be filed today. The Solicitor General has just resigned, the Special Adviser is on leave and the only other Government lawyers are the DPP and a trainee. The file is incomplete and the witnesses are off the island. The judge has already refused one adjournment and the plaintiffs will be asking for judgment in default if the defence is not filed. You point out to the AG that you have not appeared in court or done litigation for over 20 years; he says “Well—you’re a lawyer, aren’t you?”.

These are the two sides of life in Grenada where I was Legislative Draftsman (no gender neutrality there) from 2000 to 2002.

[The court case was brought by one of the 30 or more law firms that have offices in St. George’s town centre. They squat like hunters around their prey—the Grenada Government—waiting for it to make a mistake they can pounce on. They are all Grenadian lawyers, but none of them want to work for the Government. So the Government has to rely on lawyers from Guyana and Jamaica and other Windward Islands—and the occasional lone Englishman—to fill legal posts.]

Physical challenges

So there you have 4 snapshots of the joys and challenges of law drafting in developing countries. Or, at least, in the small island jurisdictions for which I have worked. Different in size and population from Bangladesh and Lesotho. But the physical challenges are probably much the same—lack of office resources; lack of lawyers prepared to work for the government; computer failures and loss of email connections; seasonal risk of cyclones or hurricanes;³ earthquakes;⁴ even volcanoes.⁵

³ Grenada was devastated by Hurricane Ivan in September 2004, and the Ministry of Legal Affairs lost its roof. The Cook Islands had 2 cyclones during the 3 days I was there in February this year.

⁴ including one in Vanuatu while I was there in February

⁵ Montserrat, where I was AG from 1979 to 1983, was devastated by the Soufriere volcano in 1995.

Working in small developing jurisdictions presents a constant juxtaposition of the fascinating and the frustrating; the sublime and the squalid. Joseph Conrad well describes the challenge of working in such an environment. In *An Outpost of Progress* he says—

To grapple effectually with even purely material problems requires more serenity of mind and more lofty courage than people generally imagine.

So please don't think that I have had an easy time of it, quaffing sundowners on the verandah of my villa while 'real' drafters have been commuting to their offices in cities through polluted traffic jams. It's tough out there!

Organisational challenges

I mentioned earlier the lack of government legal personnel in developing countries. One reason for this is economic: it is often better for a lawyer to work in a neighbouring island than in his or her own country, because of extra allowances, etc. For a law drafter this means that there may be few other lawyers to consult on a drafting proposal; few doors you can knock on for a bit of friendly advice (so to speak). Even if there are other government lawyers, they probably have little grasp of legislative technique or even parliamentary procedure. So even more than in a developed jurisdiction, a drafter in a developing country needs to be a Jack or Jill (Jane?) of all trades.

This is stimulating, but the challenge is compounded by the difficulty of keeping up with developments in the law in the world outside. There might be old copies of *The Times* around the office, but the library budget probably doesn't extend to any magazine subscriptions, let alone updates of textbooks. Fortunately, there are nowadays websites where legal texts can be found—the LexisNexis setup in the UK, and the PacLII websites for the Pacific jurisdictions. Assuming, of course, that you have access to a computer, which was not the case in Grenada. There was a computer, but in order to avoid misuse, the password to the internet was not made generally available so research after hours was not possible.

Another challenge of drafting in a small jurisdiction is that the people one needs to consult on a piece of legislation are often out of the country on conferences or negotiations. If in the country, they might well be at a training workshop, out in the villages explaining government policy, or off sick or on leave. The fact is that government officials in small and developing countries are too few and too busy. They are trying to meet the country's international obligations, deal with aid donors, formulate budgets and deal with personnel matters, while at the same time pleasing their political masters. They are quite likely to be running a business or looking after a small-holding, and will have their own domestic and financial problems to deal with. It is not surprising that it is sometimes difficult to get instructions on a piece of legislation.

Lack of scrutiny

Assuming you manage to produce a draft Bill, it's often difficult to get much critical input from the Cabinet or legislature in a small jurisdiction. Cabinet are concerned mostly with policy, and legislators are more concerned with making speeches to impress their constituents than with the detailed wording of a Bill. (No doubt this also applies to developed countries, but there are usually committees to sort out the details and they don't often exist in small jurisdictions.)

In a small jurisdiction it is rare to find a legislature with much continuity of membership, so that the knowledge of drafting conventions and legislative style is just not there. For example, it might be necessary to explain to legislators that there is an Interpretation Act which says that 'person' includes a body corporate. (And the male gender embraces the female?)

Knowing that there will be little scrutiny of a Bill puts a considerable onus on the drafter to get things right first time round. But it makes it difficult to know, for example, whether to give powers to the Minister or to a civil servant; whether to require consultation with the private sector; what rules to put in the Bill and what to leave to regulations; what level to pitch the penalties at; how much 'plain

English' to adopt, etc. It is tempting to include a salary increase for the drafter and see if it is spotted (along the lines of the Town Clerk of Derby precedent)—but so far I have resisted the temptation!

Role of drafter

The local response to any complaint about lack of instructions, etc, is likely to be, "*You are the drafter, so just get on and draft.*" No doubt most drafters would enjoy such a challenge. It means that whatever you put into a Bill is likely to become law. But it can be difficult to adjust to another working environment, as I found when I went to Hong Kong after being in small islands—not once, but twice (1983 and 2002). There, the extensive revisions of the drafting instructions and the detailed scrutiny of Bills by select committees of the legislature rather took me aback at first. The contrast in approach is shown by the numbers: during 2 years in Fiji I produced or vetted over 100 Bills and 300 items of subsidiary legislation. During my final 2 years in Hong Kong I drafted 4 Bills....

Apart from productivity, being the only drafter for a country, or one of a very small team, has other rewards. One of the rewards is a close involvement with the parliamentary process, including advising the Clerk, Speaker and President of the Senate on procedural points. The drafter has direct access to Permanent Secretaries and even Ministers and may be asked to attend Cabinet meetings to explain a Bill. In Fiji, I sometimes sat in the Parliament chamber at the Speaker's right hand, so that I could be consulted on any points that arose, particularly in Committee. So I was on Fiji One TV news some evenings, much to the delight of my 2 young daughters.

The challenge for a drafter in these circumstances is to maintain a boundary between law and politics. Still on the subject of Fiji, I saw recently on the Fijilive website that my successor, Rupeni Nawaqakuta, has been sent out to some of the villages to inform them about the Reconciliation, Tolerance and Unity Bill. This is a highly controversial Bill which has drawn criticism from many quarters, including overseas, as one of its provisions is amnesty for persons involved in the 2000 coup who can show that their offence was 'politically motivated'. (The army has even threatened to remove the Government if the Bill is passed!)⁶

Rupeni, who is a Fijian, has been sent on his own to 3 of the Provincial Councils as the Government's representative, and I have no doubt he is expected to persuade them to approve the Bill. As a professional colleague and former mentor, I hope he is successful. As a friend of Fiji, I am not so sure. As a law drafter, I am proud of the trust placed in a colleague by the Government. But I shudder at the responsibility implied, and I offer this as a striking example of the challenges of drafting in a developing country.

Thank you for listening.

⁶ [Readers will be aware of the coup led by Colonel Frank Bainimarama on 5 December 2006. For further information, please refer to article <http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/6161587.stm>, published 12 December 2006 on the BBC News site.]