CUSTOM IN LEGISLATIVE DRAFTING:
Adopting the *FUSSY* or *FUZZY* style?

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This Paper is based on two lectures delivered to the Drafting class of Semester II, 2000, by guest speakers (drafters): Dr Marcus Pilowski, Ministry of Health *(Public Health Act)* and Prof. Don Paterson, USP *(Customary Lands Tribunals Act).* No access has been made to the draft bills, thus, the analysis contained in this paper are purely the authors own, developed in line with the said lectures.

Introduction

Legislative drafting in the region has evolved or developed very little over the last century. Besides inheriting and adopting statutes from their colonial past, Pacific Island states continue to maintain the style of drafting reminiscent of their ***colonial drafters***. Most noticeable is the ***fussy*** style of drafting advocated by English or common law drafters, which puts emphasis along lines of specificity, certainty, and particularity. The alternative ***fuzzy*** style of legislative drafting practised in France and continental Europe is yet to be adopted in the region. Hence, any inclination to advocate its application may likely result in a ***drafting and interpretative revolution*** which may certainly impact on the roles of the legislature and judiciary in the region. The current trend of regional legislative law making indicates an inclination towards the codification, or at least, the incorporation of customary principles into statutes. In any event, paramount importance lies to the style that will bring the law ***nearest*** to the people whose affairs and values it is meant to reflect.

The distinctive characteristics of both styles are well elaborated by Lisbeth Campbell of the Australian National University Law Faculty. Lisbeth chooses the English and Australian style of drafting as clear portrayal of ***fussy*** drafting in which:

Explicit certainty is prized above all else and statutes tend therefore to be elaborate and detailed as they attempt to be exhaustive and cover every imaginable situation. ...drafters sought to be as specific as possible about legislative requirements so that courts could not fail to follow them rather than existing common law. Specification of factual circumstances and their legal consequences could ensure this. By being specific in its instructions to drafters Parliament sought to control judicial construction of its enactments. [1]

On the contrary, ***fuzzy*** drafting embarks, inter alia, on flexibility and generality. Thus, it may be seen as a ***form*** purporting to dispense with any intention to encumber or interfere with the integrity or independence of the judiciary. In essence therefore:

...the interpretation of all legislation is carried out in the light of the fundamental assumption that the particular legislative provision is no more than a part of a general legislative intent covering all legal relations within the national society. It is the function of the Judge to cooperate with the legislature in providing through interpretation a systematic treatment of the whole field of legal relationships. ...statutes are stated in broad terms, to guide and inform rather than dictate judicial decisions.[2]

When the purpose of a statute is *to guide and not to* dictate, the judiciary, by implication, is given so much room within which to manoeuvre in arriving at its decisions or setting the law in light of the contemporary perceptions of justice in a particular society or country. Would this be desirable within the context of the South Pacific region?

Gaining insight into the salient features of the two styles may assist one in choosing which style best accommodates the prevailing circumstances of the country or region. Similarly, the nature of the purported law predetermines the style that will best ensure its effectiveness, comprehensiveness, workability, and more importantly, fulfilling the purpose for which it was meant.

It can be broached as conclusion that retention of the colonial legacy, not only as regards introduced law but the way statutes are drafted, contributes to a large degree the gulf existing between law and the vast majority of a population within any given South Pacific society. Hence, law, at present, is more like a ***master*** whose dictatorial commands undermines any chances of creating a harmonious relationship deemed a necessary ingredient for fostering ***progress*** and ***development***. In a sense, alienation remains a characteristic feature of law in the region. But this will be far more disastrous if, for reasons of 'poor' drafting, custom – the people's very own - has been written in a form that is far beyond understanding and comprehension of the very people whose traditional values the written law is meant to reflect!

This paper presents a brief evaluation and analysis of the approach taken by modern day legislative 'drafters' in the region purporting to incorporate custom *into the written law*. Major analysis will focus on a case study of Vanuatu, being one such Melanesian country attempting to incorporate customary enforcement and dispute resolution 'mechanisms' into the formal system. The Paper will be divided into two segments: (i) a general presentation of the identifiable areas of common approach; and (ii) Case studies of drafting exercises in Vanuatu.

A. Common Grounds

At the preliminary stages of any drafting project, the imperative of asking oneself a series of questions relating to the socio-cultural, economic and political circumstances of a country manifests intelligibility on the part of the drafter. Leaving aside questions of "substance" of the purported law – customary rules, principles, remedies – attention diverts to how *these* can be framed and expressed in terms giving comprehensiveness and effective workability in a culturally diverse society.

Law and custom are intangible concepts with seemingly ambiguous characteristics. Understanding, prudence and care are essential requisites when undertaking to express and convert such intangible and ambiguous concepts into a visible form more readily comprehensive to the lay society. Thus, "***writing***" – the medium through which customs are transmitted into ***the formal law***[3] – must ***spell*** the law in no harder terms than when first understood or intended. Writing out the law with aim of achieving ***the*** best possible reflection of the customary principles to be incorporated is no easy task in the context of the region. Cultural diversity, oral tradition, and conflicting customs are some of the major barriers faced by drafters. But in any event, the recent move towards legislating for more recognition of customs is a positive development which must be pursued by regional countries with constitutions recognising custom as a source of law. That direction, when pursued by any particular regional country, will land "benefits" as well as introducing technical problems so far as drafting is concerned.

Firstly, one may postulate that the incorporation of custom into the formal law, as pursued by any modern day drafter in the region, aims to achieve the principal objective of departing from the traditional court structure which is deemed ineffective and costly in the South Pacific context. The sure alternative is the re-establishment of '***the old ways'*** of resolving disputes. And this is exactly the current goal in Vanuatu.

Professor Don Paterson and Dr Marcus Pilowski[4] embark on a mission of *rediscovering* the 'established'

system of dispute resolution and enforcement in custom. As earlier highlighted, the rationale being that the current court system contributes to the alienation of society from the law; the latter which is suppose to serve the needs and aspirations of the former. Most significant to the approach by both drafters is the need to properly evaluate the effects of diverting customary dispute resolution and enforcement mechanisms from ambits of the adversarial system. It has been argued, as noted by Professor Paterson, that there is great dissatisfaction with the adversarial system which is deemed alien and incompatible with customary means of resolving disputes. Hence, it is seen as a source for creating and perpetuating social tensions and enmity – an unfortunate situation that could have been prevented or quelled had customary 'mechanisms' were employed right from the outset. A primary attribute to this problem is the "winner-loser" situation that is at the inherent core of the adversarial system. Compromise in the courts is a rarity, occurring only when the relationship between the parties is not extremely severed, but rather characterised still by mutuality. Thus, it could be postulated that the problem with the current law is prima facie not one of drafting, but rather one of the country's colonial legacy – the court system adopted.

But argument remains still that drafting is an attribute to the problems faced with current legislation in the region. If that can be substantiated, the question therefore is whether it is a problem of 'drafting' (*as to form and style*) or one of law (*as to substance*). Assuming it is one of drafting, *would a change of style* bring the law any nearer to accomplishing its function in a culturally diverse society? In other words, would the systems of customary resolution and enforcement identified by Messrs Paterson and Pilowski, be properly accommodated under either style (*fussy or fuzzy*) of drafting? This has to be considered against the backdrop of cultural diversity and differences of approach in terms of dispute resolution and enforcement mechanisms, tenure systems, social hierarchy, and norms. The heterogeneous nature found of pacific island societies needs careful evaluation of any attempts to bring the law right down to the ***grassroots*** level. [5] How can legislation well understood by the literate minority be of similar effect to the illiterate majority? Similarly, overemphasis or underestimation could lead to bad drafting and creating situations of confusion, chaos, and ignorance of prevailing circumstances; a mistake that is most often committed by legal academics and theorists who professed to master the skills of "good law making". Hence, to recap, a desire to depart from the traditional adversarial system is not in itself an ultimate solution although is a precursor. Any law drafted to achieve such objective will still need to address the question of which *style* will best assure justice as objectively perceived. The western notion of justice is not the same as that advocated in traditional pacific societies. [6] Given this, a compromise needs to be struck somewhere in between the extreme ends of fussy and fuzzy styles; both of which were aligned to western law making and not readily compatible with attempts to codify or incorporate custom.

Secondly, as earlier noted, the diversity of cultures throws at the forefront the question of which style of drafting can best address the situation. In the one hand, a generalisation (fuzzy) might give so much discretion to the chiefs or adjudicators to manipulate custom, which, to a great extent, is susceptible to distortion and deceit. [7] Commercial pressure and integration into the cash economy renders decision-making institutions less insulated and susceptible to external influences. This could be more disastrous if decisions of customary tribunal are not subject to judicial review. On the other hand, specificity and certainly (fussy) may omit circumstances for reasons of diversity and incoherence. Custom in Melanesian societies are not uniform, thus not a unified whole. Its application is restricted to territorial jurisdictions and not otherwise. From a positivist point of view, this does not operate in parallel to the notion and functions of the state; a unified sovereign which enunciates unity in the law. Thus, to be law, a customary principle must be of *national* application, irrespective of the cultural boundaries[8] there are within the country. However, submission to this view could be misleading and narrow-focused, taking into consideration the country's prevailing circumstances in which legal pluralism is more preferable and practical. But that is not final. Given cultural diversity, it not only needs pluralism ***within the legal system*** (that is, different sources and laws), but also *pluralism* ***within 'a' law***. The latter focus on the possibility of accommodating all different cultures *within a law* either by specificity *or* generalisation, as an aspect. In pursuit of this absurd idea, how can *a law* be narrowed down by way of fussy or fuzzy drafting to

accommodate the customs of groups with cultures so distinct from each other? Whilst this remains an issue for legal theorist, it may seem impractical to drafters. Nevertheless, what is of essence is that the drafting style to be employed should render the law comprehensible and effective across all cultural boundaries, both in ***form*** and ***substance*** - a goal that might be far from being fully achievable.

Thirdly, a lack of appreciation of the inherent 'complexities' of custom could create underestimation and complacency. Most drafters are tempted to conclude that custom is not as complex as western legal principles, thus can be dealt with quite easily. What is often overlooked or ignored is that a ***single*** customary principle may apply to various situations, bearing with it exceptions and scopes of application just as western law does. Problematic, however, is that unlike western law which clearly demarcates the areas within which certain laws apply (e.g. family law, property law, criminal law, etc.), custom of a particular society is more or less "***a single code with divisions"*** which tries to compound every possible situation. Knowledgeable men, in their right judgement, are to determine which "division" applies. The "perfectness" of this code is seemingly complicated by the medium through which these compounded rules are passed on and maintained for generations – the oral tradition. The more customs thrive on through time, the more complex it becomes, as "undocumented" knowledge is lost, distorted or altered, coupled with external influences such as westernisation, and societal expansion.

Finally, the prescriptive attitude towards law on the part of drafters may not work too well with custom. Pilowski and Paterson my likely fall into this description, given their attempts in prescribing the powers of chiefs, fines, etc, in relation to the areas to be addressed in the proposed statutes. In the one hand, certainty may be achieved, either wholly or partly, but on the other, it may not be exhaustive as the a *success* of prescriptive drafting, if any, is nothing more than a fallacy.

B. CASE STUDIES

(ii) Pilowski Approach – Public Health Act

Dr. Pilowski attempts to incorporate the role of customary chiefs in enforcing public health. As raised in earlier discussion, this is a departure from the traditional court and enforcement system, which, as asserted by Pilowski, aggravates poverty leading to poor health standards. Firstly, what he may have been unaware of is that "health" has never been an issue addressed in custom. In other words, no one owes a customary duty to the extent of maintaining "health standards" within a whole community or society. It is a totally new concept as opposed to that pursued by Prof. Paterson. Introduction of the health requirements into rural areas would need radical changes to the peoples' way of life. Specificity as to the customary tribunals constituted by chiefs is one thing, but it is another to see whether public health standards, being the underpinning objective, will be achievable, considered against the way of living practised for centuries. [9] Specificity could assist by detailing provisions that may exclude or include or prescribe 'rules' applying to particular cases. This may or may not be achieved in fuzzy drafting.

Secondly, the proposed Act could lead to the expansion of jurisdiction or role of chiefs to *a new* area that has never been 'explored' by custom either through set of rules or norms. Applying the fuzzy style would give room for chiefs to extrapolate existing 'customary rules' to encompass newly imposed health standards. This would be analogous to fuzzy drafting in which generalisation *allows judges to make the law* through intelligibility and appreciation of the changes needed "in light of contemporary ideas of justice.[10] Conversely, fussy drafting may allow chiefs (adjudicators) to draw from the *bank of customary rules* recognised or incorporated in legislation and determine which rule is to apply to a case – the parallel of judges discovering the law, which is more aligned to fussy law making and the common law.

Thirdly, given that 'health' is a matter of 'public concern' affecting humans irrespective of social boundaries, the Pilowski approach is faced with the obstacle of integrating all the different "classes" within the law and jurisdiction of the customary health tribunal. By class is meant to distinguish between

the poor and the rich who may settle side by side in urban areas, and the rural dwellers. [11] In any health issue, this distinction is important as diseases can spread irrespective of social boundaries, most notably in urban areas. Thus, a law that is drafted in a way that places no duty on a rich towards his slum neighbours may render the proposed law far from achieving its objective. Similarly, it may likely put the '*rich neighbourhood'* susceptible to any disease that is bred or spreads in the slump. [12] The law has to be drafted in a fussy style to make specific reference as to duties at certain levels or classes. A point to note is that generalisation may not pre-accommodate such situations because chiefs' powers and influence are more or less confined to their areas or subjects, being the ni-Vanuatu. Similarly, no customary rules applying to public health can be established in custom.

Given this absence of established customary norms or rule, the only workable alternative is direct State intervention by means of adopting the fussy style of drafting. The statute will prescribe in detail the rules, fees, fines, jurisdiction and procedures according to which the chiefs will discharge their adjudication function. This is done for two simple reasons. First, there is lack of prior customary knowledge on the part of the chiefs (as adjudicators) that will assist them address the issues coherently; and secondly, health is a matter of 'public interest' that should remain the function of the state as provider of services to citizens. Legislature should therefore take a proactive role in safeguarding the health of citizens, and not transferring such function to a body[13] not well equipped with the requisite knowledge.

(iii) Paterson Approach – Customary Land Tribunals Act

The role of chiefs is of more significance in this area. As discovered by Paterson, there is already in place a well-established system of *customary governance*. [14] At its heart is land tenure, which seems to be the bedrock of traditional societies. The underpinning object of the proposed legislation is *recognition* of the established customs and dispute resolution mechanisms. In essence, this can take two forms: (i) a general recognition by fuzzy drafting, and (ii) specific recognition by fussy drafting.

Firstly, given the cultural diversity in the country, recognition by way of generalisation of the customary principles pertaining to land can be desirable. Applying the fuzzy style would cater for adaptability to circumstances of the different cultural groups. Secondly, adjudication will be based on the customary knowledge of chiefs of the particular area within which the dispute arise. Different outcomes may be arrived at in different times and different areas, although the same issue may be in question. The likely consequence will be that *uniformity* inherent in the adversarial system will be inapplicable. Given this, will this still be regarded as *'law'*? From a Positivist perspective, the law to be *true law* has to operate "nationally" with uniformity regardless of cultural boundaries.

In the pacific context in which legal pluralism prevails, reception of strict positivist perceptions need not be entertained. Hence, the "irrelevance" of the need for uniformity will be in line with and in fulfilment of the spirit of the proposed legislation which embarks on departing from the current court structure and traditional rules. Contrariwise, there ought to be means of countering the shortfalls of oral tradition which renders custom not always "perfect".[15] Principles of land tenure and dispute resolution can be quite complex, hence needs proper recording to maintain consistency. Specific recognition of customs to be applied in resolving land disputes can be a viable option, which can be achieved through fussy drafting. This may also help in ensuring that customs relating to land are not lost over time,[16] and also a guard against impartiality on the part of adjudicators since the rules are certain, thus restricting or discouraging any deviation.

Finally, since customary land remains within the realm of private law, state interference should only be minimal and restricted to procedural and administrative matters. In other words, Parliamentary 'control' and intervention should be limited. The fuzzy style would provide all the necessary powers to the chiefs to perform their function independent of both the legislature and judiciary. With this in sight, the objective of

the proposed reforms may likely be achieved.

Conclusion

The circumstances of the country alone should determine the style to be applied, and NOT the expertise of the drafter, although his role is merely to ensure that such circumstances are addressed in the law in the most simplified and comprehensive form.

END NOTES

[1] E Law – Murdock University Electronic Journal of Law, Vol.3, No.2 (*July 1996*)

[2] ibid

[3] 'writing' was deemed an aspect of formality

[4] Dr. Pilowski, a graduate in law and medicine

[5] The practice and presence of custom is more felt in the rural areas – the sector described as the base of the 'grassroots level'.

[6] Justice in traditional societies focus more on collectivism than individualism; the latter being the foundation of justice in western societies.

[7] A chief (with ill-motive or otherwise) may likely "forge" a new custom or rule, and capitalising on the insufficient knowledge or unawareness of the parties coupled with his status, may probably gain submission and acceptance.

[8] Cultural boundaries has been referred to by Prof. Paterson as 'custom areas'; a territorial jurisdiction of customary land tribunals to be incorporated in the proposed law.

[9] For instance, the unfencing, thus free roaming and raising of pigs in villages. Would this pose potential hazard to public health? If affirmed, will it be an offence by virtue of the proposed law? Should the term 'public health' is interpreted widely, then pig raising in a village would certainly be an offence!

[10] Lisbeth Campbell, Drafting Styles: Fuzzy or Fussy?