DRAFTING IN DEVELOPING COUNTRIES; THE PROBLEMS OF IMPORTING EXPERTISE

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by

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Lawyers in the Commonwealth belong to a noble profession. Our training as lawyers began with the Inns of Court,[1] honoured as Honourable Societies. Out of that growth emerged a specialist group of lawyers later to be known as Parliamentary Counsel. In Canada you call them Legislative Counsel. The teaching of law in the Universities came much, much later. Whatever the appellation Parliamentary Counsel have a history worthy of their role as the king-pins in the whole fabric of government.

Our legal profession is "the vocation based upon expertness in the law and its application." Legal systems have been with us since man organised societies for the common weal. There had been the thought that in ancient times law, religion and morals were one and the same. At least they were fused. In my own Ghana, the Omanhene - King - in days gone by, was the source of law, religion

[1] For those of us who belong to the common law tradition.

and morals. If he became a tyrant, he was "sent to the village".[2] In other words, like King Charles of England, he lost his head. In Mesopotamia, in the 18th century B.C., the Codes of Hammurabi - the "completest and most perfect monument of Babylonian Law"[3]- show that the secular law was distinct from religion and morals. There is now growing evidence through extensive research that in the 3rd millenium Egypt law was held distinct from religion and morals.

In Rome, the juris prudentes with the help of the scribae drafted legislation. The jurists left the drafting of the statutes to the scribae. The scribae neither desired to give up their involved style, nor were they capable of doing so.[4] Tribonian also appears to have had a great deal to do with the legislation of Justinian.[5] The Code of Manu is described as, in the original

> "Written in verse and is divided into twelve chapters. In most Parts, the rules are so clearly and concisely stated that nothing can be gained by

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[2] Sheer scandalous behaviour is also a serious offence for which an omanhene will be offered the alternative of suicide or death.

[3] Encyclopedia Britannica, 1968 vol. 11 p.41

[4] Schutz, Principles of Roman Law 1936 p. 80. Perhaps the modern involved style of legislative drafting owed its origin to the Scribae.

[5] Buckland, A Text Book of Roman Law 2nd Ed. on p. 39

attempting to summarise or condense."[6]

Ashoka in India issued edicts carved in rock and metal. "These edicts, spread out all over India are still with us, and conveyed his messages not only to his people but to posterity ...."[7]

In our own day, the enactment of legislation is, primarily, a function of the government. Governments cannot govern in any meaningful sense without the capacity to govern. That means the drafting of legislation. In days gone by, the legal scriveners concerned themselves with law, religion and morals. Today a Parliamentary Counsel in any of the young countries of the Commonwealth has to contend with the political, social, economic and cultural life - and indeed the whole history - of that particular jurisdiction.

On the 24th July, 1874, the British Crown took over the administration of the Gold Coast. On that day, the statutes of general application, the common law of England and the doctrines of equity as they stood in England became the basic law of the Gold Coast. The further development of a whole body of jurisprudence was set aside. The indigenous laws were to be known as the

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[6] S. Allen, The Evolution of Governments and Laws 1966 p. 1005.

[7] Nehru, The Discovery of India p. 79.

Customary Law. This led to the dual administration of justice - and its attendant problems. There was - and there is still - no intrinsic disharmony between the indigenous institutions - legal or political - of the Gold Coast and the imported Western ideas of jurisprudence and representative government. The details may be dissimilar. The essence is the same. The purposes and methods of the indigenous and the imported institutions were the same. They both embody the representative principle. They both are government by discussion. Or as Mrs Margaret Thatcher would have it, government by consensus.

A look at the past enables us to appreciate the present. That gives us strength and courage to face the future. Today is the tomorrow of yesterday. The present is based upon the past. There can be no future without the present. The taboos of early societies became the customs by which later societies were governed. From custom we graduated to law. And today legislation constitutes the most important source of law. In the language of Dean Roscoe Pound, they are the "rules for social engineering". It is not an operation handed down like custom or usage. Its cause and course are dictated by the history and the ideas, the ideals, the principles and the opinions that prevail in a given society. As Sir Walter Scott[8] said,

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[8] Guy Mannering.

> "A lawyer without a history or literature is a mechanic, mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

Dean Roscoe Pound's assertion and Sir Walter Scott's statement are a timely reminder to Parliamentary Counsel that legislation needs to be drafted bearing in mind sentiments which may not be apparent on the face of the drafting instructions, yet important in providing a sufficient background upon which to base the draft of a piece of legislation.

Article 75 of the Constitution of the Democratic Socialist Republic of Sri Lanka confers on Parliament

> ".... the power to make laws, having retrospective effect and repealing or amending any provision of the Constitution or adding any provision to the Constitution."

But, in the exercise of this legislative power Parliament is bound by the Constitution. The courts can declare statutes as not being valid on the ground that they are unconstitutional. An interesting illustration is the case of Liyanage v. Rex.[9] In this case the appellants were charged with participation in an abortive coup

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[9] [1967] 1 A.C. 259 P.C.

d'etat. By the Criminal Law (Special Provisions) Act[10], the Legislature sought to retrospectively validate the prolonged imprisonment without trial of the appellants; to create ex post facto a new criminal offence so as to cover the situation of the abortive coup d'etat; to alter the law of evidence so as to render admissible much that otherwise would be inadmissible and to prescribe a minimum penalty.

All those provisions were limited in their effect to the appellants and to the circumstances of the coup d'etat. By another Act, a special tribunal nominated by the Chief Justice was constituted to try the case. The Privy Council declared the legislation to be invalid because it infringed the doctrine of separation of powers, which was a part of the Constitution of Sri Lanka. Most Commonwealth countries have a written constitution. It is the supreme law. All statutes would be drafted with a close reading of the relevant constitution. Failure to do so might raise serious constitutional problems.

Many different systems of law are administered in Sri Lanka. They are Sinhalese Law,[11] Buddhist Law, Hindu Law, Tamil Law,

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[10] No. 1 of 1962.

[11] This is more commonly referred to as Kandyan Law, a term introduced by the British to describe what was originally the law of the Sinhalese. By the time the British took over Ceylon the Maritime Provinces had already been under the Dutch and were thus subject the to Roman-Dutch Law. The operation of Sinhalese Law was limited to those who could trace their

Islamic Law, Roman-Dutch Law[12] and the English Law. A Tamil living in the Jaffna district of Sri Lanka would inherit property on his father's or mother's death according to Tamil Law. He might be called upon to be a trustee of a Hindu temple. He would thus be subject to principles which originated in the English Courts of equity and Hindu religious law relevant to determine his powers, his rights, his duties. He would mortgage his property according to the principles of Roman-Dutch Law. He has a choice whether to contract a marriage according to statute law or customary law. His capacity to marry would be determined by statute law. If he brought an action for divorce he would to some extent be subject to the principles of English Law. His claims to the custody of his children would depend on Roman-Dutch Law. His wife's right to retain property she had brought into the marriage community and any property she may have acquired subsequently would be governed by Tamil Law.[13]

A discussion on the importance of legislation in the political, social, cultural and economic development of Sri Lanka,

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ancestry to the Kandyan Provinces.

[12] The British recognised the Roman-Dutch Law as the "common law" of Ceylon. In its application, however, the English judges introduced English ideas of law into the Roman-Dutch Law.

[13] The Thesawalamai Law applies to the Malabar inhabitants of the province of Jaffna, that is the Jaffna Tamils. Other Tamils are governed by the Roman-Dutch Law.

as in the case of Ghana, and any other young Commonwealth country, must be prefaced by a short account of its people and history. It is against that background that one can appreciate the role of legislation in the development of the country. It equips Parliamentary Counsel to better understand the policies and developmental strategies adopted by the government for which Counsel drafts a piece of legislation.

Sri Lanka, formerly Ceylon, is inhabited by three major communities, the Sinhalese, the Tamils and the Muslims. She was under foreign domination from 1505 - 1948, being ruled successively by the Portuguese, the Dutch and the British. The British were the only power to exercise sovereignty over the whole of Ceylon, when the last Sinhalese Kingdom, Kandy, was ceded to the British in 1815. The treaty of cession guaranteed "to all classes of the people" the continuance of the laws, "institutions and customs" in force among them. Consequently the Roman-Dutch Law and the Customary Law of the Sinhalese, Tamils and the Muslims continued in force.

These laws of Sri Lanka were greatly expanded by legislation during the years 1796 to 1948. The introduction of English Law by statute was effected in four ways. In the first place, a statute passed by the Parliament of the United Kingdom was enacted as law in Ceylon. Examples are the Insolvents Ordinance, 1853, the Joint Stock Companies Ordinance, 1861, the Sale of Goods Ordinance, 1896,

the Bills of Exchange Ordinance, 1937, and the Companies Ordinance, 1938. Secondly, the principles underlying decisions of the English Courts were codified. As examples, mention may be made of the Penal Code, 1883, the Criminal Procedure Code, 1898, the Evidence Ordinance, 1895 and the Trusts Ordinance, 1917.

Thirdly, the English Law on a particular subject was extended to Ceylon by the Colonial Laws Validity Act, 1865,[14] by reference to the laws in force in England. An example is the Laws of England Ordinance which enacted that the Law of England was to be observed in maritime matters and in respect of all contracts and questions relating to bills of exchange, promissory notes and cheques. This Ordinance also made similar provisions as regards the law of partnerships, joint stock companies, corporations, banks and banking, principals and agents, carriers by land and fire insurance.

Lastly, provision was made for the application of English Law where a statute of the United Kingdom Parliament adopted for Ceylon was silent on a particular issue. Section 100 of the Evidence Ordinance, 1895, section 58(2) of the Sales of Goods Ordinance, 1896, section 6 of the Criminal Procedure Code, 1898, section 2 of the Trusts Ordinance, 1917, and section 98 (2) of the Bills of Exchange Ordinance, 1927, provide for the application of the

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[14] 28 & 29 Vict. c. 63.

English Law on matters relating to evidence, sale of goods, criminal procedure, trusts and bills of exchange respectively where the particular Ordinance is not complete.

English Statutes have also been markedly adopted to suit conditions in Sri Lanka. These statutes are the Prevention of Frauds Ordinance, 1840, the Wills Ordinance, 1844, the Partition Ordinance, 1863, the Prescription Ordinance, 1871, and the Land Registration Ordinance, 1927. Further, certain Acts of the Parliament of the United Kingdom relating for example, to copy-right and air navigation became part of the Law of Sri Lanka during the British period. As in Ghana and Sri Lanka, so in many other young Commonwealth countries.

Legislation, whether it be statute law enacted by a legislature or subsidiary legislation issued by a subordinate authority is in our day a chief instrument of change and innovation in the law. The twentieth century saw a shift in emphasis from common law to statute law. Roscoe Pound's statement that, "The capital fact in the mechanism of modern states is the energy of legislation"[15] is true of many a young Commonwealth country. As already indicated, most Commonwealth countries inherited the British system of government and of legislation under which supreme

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[15] 21 Harv L. R., 1908 p. 383.

legislative authority is conferred on Parliament,[16] subject only to the Constitution which created that Parliament.

When Zambia became independent on 24th October 1964, the Constitution provided for the multi-party system of government. The executive power previously exercised by the Governor in the name of the Sovereign in the United Kingdom became vested in the President. The power to alter the Constitution passed to Parliament. In the exercise of that power, Parliament in 1972 transformed the multi-party system of government into a one-party system. The Constitution (Amendment) Act[17] recognized only one political party and prohibited the formation of any other political party. Why the change? Why the curtailment of a fundamental human right, that is to say, the freedom to associate freely?

A national Commission[18] was appointed to consider changes in the constitution of the Republic and the constitution of the dominant political party necessary for the implementation of a one party "participatory democracy". The Commission's terms of reference did not include the consideration of the issue of the desirability of the change from the multi-party system of

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[16] See for example art. 63 of the Constitution of Zambia. And also Ibralebe v. R [1964] A.C. 900

[17] No. 5 of 1972.

[18] Statutory Instrument No. 46 of 1972.

government to the one-party system. The Commission could only consider the form the change was going to take in the context of Zambia's philosophy of Humanism. No reason seems to have been advanced by the government as to why the people could not be trusted to make its views known on a very crucial issue. Or was it a foregone conclusion that the people endorsed the view of the dominant political party and what was needed was the best possible means of bringing about the change?

In Nkumbula v. Attorney General[19] the appellant challenged the legality of the moves towards the establishment of a one-party democracy on the ground that his fundamental rights were "likely to be contravened". The Court of Appeal rejected the petition. There was no evidence, it argued, that under the Constitution, as it existed, any action would be taken to prevent the formation of political parties. It would only be on the amendment of the Constitution that an interference would have taken place. The appellant had no right to prevent or question a constitutional amendment bill before it became law even if that law intended to breach a fundamental human right. The court was not prepared to give an anticipatory relief.

The aspirations of a people may present acute problems which border on the ethical. How does a Parliamentary Counsel, taught to

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[19] [1972] Z. R. 205.

fearlessly defend fundamental human rights, deal with such situations which are against the grain of Counsel's training? The protection of fundamental human rights in a one-party state has been much discussed because of the increasing popularity - or decreasing popularity - of the one-party state particularly in Africa. Human rights activists fear that the provisions for a one-party state whittle down individual rights and freedoms,[20] in particular the fact that political activity is limited to one political party implies a limitation on the rights of association and of freedom of expression.

Rights are generally pursued against the background of political reality even if the courts, in some cases, become timid in their dispensation of justice. In Nkumbula's case from Zambia the appellant sought a declaration that the government's intention to impose the one-party state was likely to infringe his fundamental rights to freely assemble and to freely associate with others. The appellant won at first instance. Doyle C. J., stated:

> "Quite clearly, section 23 (of the Constitution) in its existing form would be inconsistent with the notion of a one-party state, in that at present it guarantees freedom of association, including the power by

[20] J. B. Ojwang, (1988) P.L., 162

implication to form political parties."[21]

The Court of Appeal avoided the issue. They reversed the decision on the basis that the appellant had not shown any actual violation of his rights. The extent of freedom in a one-party state would depend on the commitment of the party in power to justice and economic and social development. Where the structure of a one-party state is truly democratic, fundamental rights may flourish to an extent that is even greater than the rights available in a multi-party state. The divisiveness, sabotage and the lack of choice available, where ruling parties have popular support to the exclusion of minority opinion, could be avoided. In the one-party state, the party should ideally be the party of the masses. Where the party is structured on a narrow basis, it often becomes elitist, and does not represent the interests of the majority. And you have a recipe for tyranny and instability.

Where power is concentrated in the hands of a few, this leads to totalitarianism. Fundamental human rights and freedoms should only be tampered with in so far as they do not lead to tyranny.[22] The reality is that the theory is beautiful, the practice has been shown to be ugly. In such circumstances, what is the response of

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[21] Quoted by J.B.Ojwang [1988] P.L. p.161 at p 162.

[22] As for example in an emergency or times of war.

Parliamentary Counsel, local or imported? When Sir George Engel[23] from the United Kingdom was working in Nigeria some years ago, he was asked to draft a piece of legislation which he thought was against the grain. He said,"No". He would not. And was prepared to leave the country and go back to Britain.[24]

While in Uganda, I advised against the introduction of preventive detention. I had seen its effects in Ghana. It was introduced after I had left Uganda. However much we argue about the rights and wrongs of policy contained in drafting instructions, there comes a time when Parliamentary Counsel may have to say "No". Even though Counsel is not primarily concerned with policy matters, Counsel is in a position to advise on policy. Because by virtue of Counsel's expertise and independence, much can be achieved especially when Counsel has to point out the implications and dangers inherent in a particular policy proposal.

The West Indian case of Payne v. The Attorney-General[25] arose out of the political and other differences in the Associated States of St. Christopher, Nevis and Anguilla in 1967. After negotiations with Her Majesty's Government in the United Kingdom, the Anguilla

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[23] He later became First Parliamentary Counsel at Westminster.

[24] In conversation with the present writer at the Eighth Commonwealth Law Conference, Ocho Rios, Jamaica, September 1986.

[25] Suit No. 7 of 1981.

Act, 1980,[26] was passed by the United Kingdom Parliament to separate Anguilla from Saint Christopher and Nevis.

In pursuance of the West Indies Act, 1967,[27] the United Kingdom established the Associated States of Saint Christopher, Nevis and Anguilla on the 27th February, 1967. The United Kingdom imposed certain limitations on its responsibility for the Associated States. Section 3 of the West Indies Act, 1967, provided that

> "... No Act of the Parliament of the United Kingdom passed on or after the appointed day[28] shall extend or be deemed to extend, to an Associated State as part of its law unless it is expressly declared in that Act that that State has requested and consented to its being enacted".

In 1980, the United Kingdom passed the Anguilla Act, 1980,[29] which provided that as from the appointed day[30]

> "Anguilla shall cease to form part of the terri-

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[26] 1980 c. 67.

[27] 1967 c. 4

[28] 27th February, 1967.

[29] 1980 c. 67

[30] 19th December, 1980.

tory of the Associated States of St. Christopher, Nevis and Anguilla".

Section 3 of the Statutes Act, 1967, passed by St. Christopher, Nevis and Anguilla provided that

> In every bill presented to the Governor for assent the words of enactment shall be as follows:
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> > "BE IT ENACTED by the Queen's Most Excellent Majesty by and with the advice and consent of the House of Assembly of Saint Christopher, Nevis and Anguilla, and by the authority of the same .... "

On the 10th February, 1981, the applicant, an elected member of Parliament, attended a sitting of the House. The House passed eight bills in each of which the enacting formula had the expression, "St. Christopher and Nevis" instead of "St. Christopher, Nevis and Anguilla". The applicant contended that the enacting formula was wrong and unconstitutional. He was overruled by the Speaker. He took the matter to the Courts.

The legal problems that arose, inter alia, for determination

apart from the issue of locus standi, were

(a) the extent to which the United Kingdom Parliament retains its classical doctrine of parliamentary sovereignty over Caribbean States or whether the "New View"[31] of Parliamentary sovereignty is to apply;

(b) whether the United Kingdom Parliament could properly pass an Act extending its law to an associate state despite the failure of that Parliament to honour the very letter, to say nothing of the spirit, of the 1967 Act;

(c) whether the Anguilla Act, 1980, impliedly repealed the Statutes Act, 1967;

(d) should anticipatory review be granted regarding a breach of manner and form;

(e) whether the writing of a rule constituting a

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[31] This view is based upon the argument that in the Caribbean there is no sovereignty of Parliament as classically understood, there is Constitutional sovereignty. No one can disobey the Constitution with impugnity, not even Parliament: Ministry of Home Affairs v. Fisher [1980] A.C. 319. See also Alexis, Changing Caribbean Constitutions, p. 57, and Alexis, (1977) Vol 1 No.1 Guy L.J., 41.

convention changes that convention into law;

(f) whether the Anguilla (Consequential Provisions) Order 1981 was effective to change the name of the State to St. Kitts and Nevis.

Payne's case raised some very interesting problems relating to legislative drafting. The first is the problem of constitutional limitations: how to legally limit the powers of the Parliament of the United Kingdom without derogating from the principle of parliamentary sovereignty in a fundamental way. This might be solved by the United Kingdom Parliament extinguishing itself in relation to the country concerned after surrendering its powers to a new written constitution. Secondly, should the West Indies Act have contained a provision for a case where an Associated State does not consent to separation? Rather than drafting the Anguilla (Consequential) Order, should the United Kingdom Parliament have acted under the West Indies Act? To do this, the provision for request and consent would have been modified.

Thirdly, all West Indian constitutions are derived from Orders in Council. Unless the Parliament of the United Kingdom

surrenders its powers, not one constitution is safe.[32] However, if the constitution or the West Indies Act had outlined a procedure for secession of an Associated State, many a problem could have been averted. Since the British Government had not abdicated power, was the solution an amendment of section 5 of the West Indies Act? That would allow Her Majesty through the Privy Council to amend the Order-in-Council. The conflict between the Statutes Act and the Constitution would then have been avoided. The Constitution would prevail.

Here is a case where the relevant legislation was drafted outside the jurisdiction. The political and other concerns of the people concerned appear to have been brushed aside. Most probably, Parliamentary Counsel from within would have taken account of the history of the islands from, at least, the early nineteenth century.

Such then is the magnitude of the problems that face Parliamentary Counsel in young Commonwealth countries. Importing expertise has two faces. One, the face of imported legislation. Two, the face of imported personnel. The problems of imported legislation as already now made clear by the references to the history of, and legislation in, the Gold Coast, Ceylon, Zambia and

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[32] This is, in fact, done. See, for example, the Ghana Independence Act, 1957, of the United Kingdom Parliament.

the West Indies, can be further illustrated by the Zimbabwe case of John Katekwe[33] A man seduces the daughter of another man. Under the Customary Law, the father of the seduced daughter has a cause of action. But legislation has conferred legal majority on the daughter. Has the father then lost his cause of action? The lower courts said, "No". The Supreme Court said, "Yes".

In the view of the lower courts, the Legislature in enacting the Age of Majority Act, 1982,[34] did not eradicate

> "the whole fabric of our society's customs. Was it the intention of Parliament in enacting section 3(3) that the tenets of custom should be done away with? The Court is of the strongest opinion that at no time was it the intention of the Law giver".

The Supreme Court, for its part, stated:

> "Does the father still have the right to sue for damages for the seduction of his major daughter? The answer is simple. He has not because his daughter is a major and cannot vest her own right

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[33] S. C. 87/84Civil Appeal No. 99/84. For a fuller treatment of the case see Statute Law Review Vol. 11 No. 2 p. 90 et seq.

[34] No. 15 of 1982. Though this Act was a local Act, the concept is an imported one.

in her father. He has lost his right under customary law to sue for damages for seduction. What then is the position? It is this. The right to sue for damages for seduction - a delict - now falls on the daughter. The daughter can sue for damages for seduction under the general law of Zimbabwe. She has now the capacity do so. That she was given, so to speak, by s. 3 of Act 15 of 1982. She can bring her claim for damages for seduction under the general law. If she does and damages are granted and her father brings a claim for damages under the customary law, he will be non-suited. He will have no cause of action.

The result of the conclusion ... is this: the daughter can sue for damages for her seduction and not the father. If the daughter is a minor the right of action remains with the father under the customary law .... this was the intention of the Legislature."

The problem here is that under the customary law, the cause of action of the father lay "in the damage done to the honour of the father - the shame that the man had brought on the family by the seduction of the daughter which finds expression in the lessening of the dowry .... The basis of the right of the father

is largely unrelated to the age of the daughter."[35] In an article[36] I had stated:

> "Two points for consideration were at issue here. Did the lady surrender to her father her right to sue? And if she did, could she do so under the 1982 Act? The reasoning of the Supreme Court appears to be that the lady could not surrender her right here because her `father has no independent right to seduction damages'. Can it be argued that the lady surrendered her right to her father because her father did not have the right to sue and that she had conferred on her father the right to sue which she had under the 1982 Act? If the lady had a right she had a discretion how to exercise that right. That aspect of the case was not considered by the Supreme Court.
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> On what authority did the Supreme Court base its proposition that `a woman of status cannot surrender her majority in order to enable her father to sue'? Did she surrender her majority or did she confer her right to sue on the father? I believe

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[35] Stat. L.R. Vol 11 No.2, p. 100.

[36] Ibid

there is a distinction between the surrender of a status and the conferment on another person of a right to act which one has by virtue of a status. The majority status conferred many rights upon the minor including the right to sue. The right to vote at an election is another right flowing from the attainment of the majority status. If the father could, by proxy, vote for his daughter could it be said that in the casting of the proxy vote by the father the daughter has surrendered her majority status _qua_ status by exercising her right to vote through the father?

Herein lies the danger of importing a concept in one system of law into another system of law. Is _delicit_ under Roman-Dutch law synonymous with _wrong_ under the customary law? Delict is a word unknown under the customary law, and a mere translation is inappropriate, since the _concept_ that a word in one system connotes is not the same _concept_ in the other system. Delict[37] under the Roman-Dutch law is _injuria_ - an act which infringes the legal rights of another person, be it life,

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[37] The following analysis of Roman-Dutch law is taken from Willie, Principles of South African law, 5th edn., at 483, 535.

property, reputation. Delicts are of two kinds -

> injuria and damnum injuria datum. Injuria is the unlawful infringement of a person's rights - his dignity, reputation, liberty - committed maliciously. The claim is for sentimental damages for the insult. There is no need to prove pecuniary loss. On the other hand, in the case of damnum injuria datum the unlawful infringement is caused intentionally, negligently, and there is pecuniary loss."[38]

What is required is a provision which specifies the areas, such as the right to vote, the right to sue and be sued, the right to enter into a contract, in respect of which the Majority Act would apply. In other words, certain incidents of the Customary Law should be left in tact. Not every inch of the Customary Law is bad. Not every inch of the imported law is good. There is the great need for balance, for the improvement of the law, both customary and statutory, and in the improvement of social conditions, the one with the other. The vast majority of the people in many jurisdictions of the Commonwealth live by the tenets of the Customary Law. That is a fact to be reckoned with in the drafting of legislation.

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[38] Stat. L.R., Vol 11 No. 2, p. 101.

This question of concept should not be taken lightly. In West Africa we have the concept of allodial and communal ownership of land. A customary right of occupancy of land is perpetual in duration. Yet it confers no ownership. It confers no right of property. There is only a right of possession. There is no power of disposal. It "is no more than a tenancy creating certain rights and obligations between occupier as tenant and the grantor, and determinable upon certain conditions."[39] To provide for fee simple absolute in possession or freehold land is thus to create problems and litigation. As was stated by the Privy Council in the Gold Coast case of Enimil v. Tuakyi,[40]

> "It seems clear from the authorities .... that the term owner is loosely used in West Africa. Sometimes it denotes what is in effect absolute ownership; at other times it is used in a context which indicates that the reference is only to right of occupancy ..... This looseness of language is, their Lordships think, due very largely to the confused state of the law in (West Africa) as it now stands. As appears from the report made in 1898 by Rayner, C.J., on Land Tenure in West Africa ....

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[39] B. O. Nwabueze, Nigerian Land Law, 1972 p. 27.

[40] (1952) 13 W.A.C.A. 10 (Gold Coast).

there has been introduced into the .... customary law, to which the notion of individual ownership was quite foreign, conceptions and terminology derived from English law. In these circumstances it is not surprising that it is difficult to be sure what is meant in any particular case by the use of the expression owner."

Enimil v. Tuakyi cited the Nigerian case of Amodou Tijani v. Secretary Southern Nigeria[41] in which the Privy Council said,

"As a rule, in the various systems of native jurisprudence throughout the Empire, there is no such full division between property and possession as English lawyers are familiar with. A very useful form of native title is that of a usufructuary right which is a mere qualification of or burden on the radical or final title .... Their Lordships have elsewhere explained principles of this kind in connection with the Indian title to reserve lands in Canada. But the Indian title in Canada affords by no means the only illustration of the necessity of getting rid of the assumption that the ownership of land naturally breaks itself up into estates

[41] [1921] A. C. 399.

> conceived as creatures of inherent legal principle .... The notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual .... This is pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas."

But even here, the Privy Council got it wrong as regards the concept of individual ownership. The concept of individual ownership is not foreign to the customary law. As Bentsi-Enchill[42] makes it quite clear,

> "The very notions of family, sub-family, and immediate family properly carry with them an acknowledgement of original individual acquisition by the founder of the family or branch of the family."

Even the terms, "family", "sub-family", and "immediate family" do not fully express such terms as abusua or abusua panyin, the latter of which is equivalent to the Roman paterfamilias. For this purpose, I often encourage students in my legislative drafting classes to use terms which are readily understood in their

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[42] Ghana Land Law (1964) p. 81.

jurisdictions. A Ugandan will readily understand the word magendo and what it imports rather than the word "black market."

In this regard I often tell them the story which Sir Reginald Croom-Johnson told the Canadian Bar Association some years ago. "A superior advocate who cultivated to excess what used to be called the Oxford manner was cross-examining a seaman who had deposed to having seen a fellow seaman in his bunk, light a light in the night time and commit a theft. The cross-examiner, to discredit the story, was trying to find out if the seaman objected to the light in the night season, and assayed to do it by asking why he had not intervened. One question was, `Did you tell him to extinguish the luminary?' `Eh!' said the witness. `Did you tell him to extinguish the luminary?' `Eh!' said the still puzzled witness. They made no progress. `Mr. Gwynne-James,' said the Judge at long last, `Would it not be better to speak to the witness in the vernacular?" The advocate himself looked puzzled. `See here, my man,' said Justice Hawkins, `Did you tell him to douse the glim?' `Aye, Aye,' said the old seaman, and all was well.[43]

Years ago, when I was a Crown Counsel in the Gold Coast, I dealt with a case involving bigamy. The then Criminal Code provided that a person committed the offence of bigamy if being married under the Ordinance he marries another person. The Law

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[43] 1946 The Canadian Bar Review, Vol. XXIV p. 785 at p. 787-788.

then provided that if you were married under the customary law you could not marry under the Ordinance except to the same woman. If you were married under the Ordinance, you could not marry under the customary law except to the same woman. Statute Law recognised the validity of a customary law marriage. A man who was married under the Marriage Ordinance in the Gold Coast, left the Gold Coast and married under the English Law - to another woman. We could not prosecute because he did not marry under the Marriage Ordinance. In 1960 when we had the opportunity, we changed the expression "under the Act" to "under a monogamous system of marriage".

Importing legislation has another aspect. A sad one. It led to a lot of copy drafting. It was the practice of the Colonial Office to send draft bills to the Colonies, for enactment into Ordinances by the respective Legislative Council. A competent Attorney-General and his competent Legal Draftsman would - and did - improve upon those Colonial Office drafts. But what happens when there was not that type of competence? Allison Russell[44] was also at hand. The not so competent Legal Draftsman saw a lot of virtue in just copying precedent after precedent. Warts and all!

The late Sir Hugh Wooding,then Chief Justice of Trinidad and Tobago, in an address to the County and District Court Judges

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[44] Legislative Drafting and Forms

Association at the Royal York Hotel, Toronto, on the 28th April, 1966, also had this to say:

> "Our laws are a heritage from our pre-Independence past when the Colonial Office issued model legislation for use throughout what was then referred to as `the Empire'.....in many instances the legislation was totally unrelated to our social order and, in some instances in which it was appropriate, it has become too antiquated to serve any longer any meaningful purpose. Moreover, it taught our draftsmen the scissors-and-paste technique....."

But legislative drafting does not consist in copying precedents nor in polishing what others have drafted! What happens when there is no precedent in respect of a particular problem? Parliamentary Counsel will be left to Counsel's own devices and defences. The result is bound to be a bad draft. The appropriate skill is lacking. Precedents have their place. You can use them for comparative purposes, to check on your own draft. But a slavish reliance on precedent, robs Counsel of that which is essential in a competent Parliamentary Counsel - the creative ability to compose a legislative sentence without the aid of a precedent.

The other face of importing expertise lies in a full grasp of

(a) the corpus of the existing law, not forgetting the indigenous law;

(b) a thorough knowledge of the cultural, social, political, and economic history of the country; and

(c) a full grasp of the personal motives that lurk behind the intent of the sponsors in promoting a piece of legislation.

In Uganda, years ago, when I was First Parliamentary Counsel, I drafted the Oaths Act.[45] I thought I had understood the existing law. But not quite. Assessors in Uganda, at least in those days, unlike members of a jury, do not take an oath. Their functions are quite different from those of the members of a jury. But then, I provided for a form of oath for assessors to take. That was quite wrong. I had not fully grasped the significance of the role of the assessor in the administration of justice in Uganda.

There was another error in the same Act. Provision was made for an oath to be taken by assessors where the issue of a person's fitness to plead was raised in a trial before the High Court. The

[45] Cap. 52, Revised Edition of the Laws of Uganda.

Criminal Procedure Code of Uganda[46] made it quite clear that it was the function of the Judge to decide this matter and only when the Judge was satisfied that the accused person was fit to plead and a plea of not guilty was entered were the assessors called in.

Another blunder on my part was that I did not appreciate the practice of certain provisions of the Criminal Procedure Code when drafting a provision of the Oaths Act. When the Commissioner for the Revised Edition of the Laws considered the matter, he came to the conclusion that the relevant provision of the Criminal Procedure Code had been repealed by the relevant provision of the Oaths Act. In a case before the Chief Justice,[47] the Chief Justice drew attention to this matter and decided that the Commissioner was wrong.

Had I, as Counsel who drafted the Oaths Act, fully appreciated the provisions in the Criminal Procedure Code, the problems that arose would not have arisen. Such conflicts, of course, are unnecessary. More so, they are undesirable. The point should have been made clear, whether the relevant provision of the Oaths Act applied to criminal cases and to civil cases and then to have decided what to do about the relevant provisions of the Criminal Procedure Code. "It is not satisfactory to have pieces of

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[46] Section 267.

[47] Ausi s/o Okuku v. Uganda Cr. Apps. 206-208 of 1968.

legislation covering the same subject matter in different Acts of Parliament".[48]

Legislative drafting is a very difficult discipline. It is indeed a specialty. It "requires a special kind of temperament." As Mayer[49] said,

> "Intellectually, the draftsman's skills are the highest in the practice of law. Judges at bottom need merely reach decisions.....negotiators and advocates need understand only as much of a situation as will gain a victory for their clients; counsellors can be bags of wind.....But the documents survive, and to draw them up will require an extra-ordinary understanding of everything they are supposed to accomplish..."

It is in recognition of sentiments such as Mayer's, the difficulties I have tried to present and the dire needs of governments, especially in the young Commonwealth Countries that led Kutlu Fuad and Sir William Dale to initiate, in 1974, on behalf of the Commonwealth Secretariat, the Scheme for the training of

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[48] The Hon. Mr. Justice K. T. Faud, Notes For Lectures on Legislative Drafting, December 1968, reprinted by Commonwealth Secretariat, May 1974.

[49] Quoted by Reed Dickerson in Materials on Legal Drafting p.14

Legislative Counsel, those who are old to the job and the new ones to come, in addition to the other training programmes then in the Commonwealth. Such Schemes need the support of all Commonwealth Governments. Events have justified their faith. The results have been impressive.

Yes, I blundered. It is no excuse that I was in good company. Others far more competent and experienced than I was at the time had been caught in that web. Perhaps it is in the nature of the job. For we carry with us who we are and what we are: our background and our prejudices, our thinking and our knowledge. It is as well that we forget our prejudices, that we broaden our outlook, that we extend the horizons of our knowledge.

Like our founding fathers, the Knights Templars, going to the Crusades, Parliamentary Counsel from the older Commonwealth have marched forth to the young Commonwealth countries in search of another Holy Grail: to impart knowledge so that a young brother does not falter nor fail in his steps.

I am a recipient of their enterprise and their bounty, their good faith and their devotion to the integrity of legislative drafting. Sir George Mutlow Patteson, my first Attorney-General, Anthony Stainton[50] and Francis Bennion from the United Kingdom;

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[50] He later became First Parliaqmentary Counsel at Westminster.

Fred Boyce from New Zealand; Vincent Grogan and John Hearn from Dublin; Namasivayam from Sri Lanka; Bill O'Meara from Canada: they all, each and every one of them, gave me of their best and taught me how to draft. There are others like Jim Ryan of Canada, my precedessor at Cave Hill, and Thornton. They went forth not only to Ghana but to other countries of the young Commonwealth. I salute them all. The problems had been immense. They did not fail. They did not falter. They gave of their best.

I salute also Elmer Dreidger whose expertise has done so much for legislative drafting all over the Commonwealth - and beyond. I salute men like Arthur Stone of Canada to whom I sent young draftsmen to polish up; Geoff Kolts and Ian Turnbull of Australia who continue to instruct us.

If I am able to present here today a Paper on an aspect of Legislative Drafting, it is to their honour and to their credit that I do so. I can only ask them all - those of blessed memory and those still with us - to read my heart and the hearts of many like me - from our very formal expression, "Thank you".

Perhaps, I should say, in Akan, meda mo ase - Thank you all.