

# The Role of the Constitutional Drafter:

## Thoughts on the Art of Expressing Constitutional Visions

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## 1. Introduction

*“The skill of writing offers little to a viewer. There is only this five-centimetre relationship between your eyes and the pen. Any skill in the divining or dreaming is invisible....1”*

Ondaatjie’s observation is apropos of all genres of writing, but perhaps none more than constitutional drafting. There is a mountain of literature discussing constitutional interpretation, analysis and application, and another growing mountain discussing constitutional development, but very little examining the role and work of those who produce the constitutional text. Indeed, much of the literature exploring the development of constitutions reveals an assumption that the process of imagining and debating constitutional policy and negotiating constitutional powers is inseparable from the function of inscribing constitutional provisions. This pattern extends even to the point of using the term “drafter” to refer to the visionaries and negotiators<sup>2</sup>, as if in every case those individuals were engaged in the task of putting their own ideas into constitutional formulations, and ultimately refining them into a final text<sup>3</sup>.

The paucity of discussion about the actual drafting of constitutions is not addressed in the extensive literature on either legal drafting generally, or legislative drafting in particular. First, legal drafting literature is predominantly concerned with the form and style of the legal text itself, i.e., the artifact that emerges from drafting, rather than with either the act of drafting or the relationship of the drafter with all of the other professionals engaged in the act of rule-making. Despite recent signs of a shift in emphasis towards integrating questions of drafting praxis into discussions of drafting product<sup>4</sup>, the general state of the literature remains largely unchanged since David Marcello’s 1996 observation that—

*“Little attention has been devoted to legislation’s point of origin—the legislative drafting process. Such commentary as has been offered is essentially technical in nature—what goes into producing a well-crafted draft of legislation”<sup>5</sup>.*

Second, the drafting literature draws very little distinction among species of legal texts, at best treating constitutions in the same sub-category as all other legislation<sup>6</sup>. Those who

1 Michael Ondaatjie, *Divisadero* (2007) 193.

2 See e.g., Alicia Bannon, *Designing a Constitution—Drafting Process: Lessons from Kenya*, (2007) 116 *Yale Law Journal* 1824. Ms Bannon uses the words ‘framer,’ ‘drafter’ and ‘writer’ (together with their cognate terms) synonymously and indiscriminately, but she clearly uses each of them to mean ‘participants in the deliberative process’ as revealed by her observation (at page 1855) that there were “over 600” drafters in the Kenya process.

3 In some cases, the roles of visionary, negotiator or advisor to the negotiators, is fused with the role of drafter. In South Africa, a number of ‘theme committees,’ each comprising a small number of the negotiators, worked with technical advisors to develop initial drafts of the various chapters of the constitution, which were then harmonized by the drafting team to create the first full working draft of what would become the 1996 constitution.

4 See, e.g., Constantin Stefanou and Helen Xanthaki (editors), *Drafting Legislation: A Modern Approach* (2008).

5 David Marcello, *The Ethics and Politics of Legislative Drafting*, (1996) 70 *Tulane Law Review*, 2437 at 2439.

6 An exception to this pattern is Felix Cohen, *On the Drafting of Tribal Constitutions* (2006). Although first published in 2006, in an edition edited by David Wilkins, Cohen authored this work in the early 1930’s as an informal “Basic Memorandum” prepared, he said, “to offer useful suggestions to Indians engaged in drawing up constitutions.” Cohen suggested concise principles, which he then illustrated by examples drawn from tribal constitutions extant at the time.

have drafted both will appreciate that there are many substantial differences inherent in the nature of those texts, which in turn are reflected in the challenges encountered when creating them. I discuss some of those challenges in more detail below.

In concluding his definitive narrative on the making of South Africa's constitution, Hassen Ebrahim wrote—

*“The constitution of a country is a sacred document, for it represents the values and aspirations of a nation.”*<sup>1</sup>

Constitutional visionaries and negotiators, and students of their work, are all rightly concerned with the methods and structures that might best capture and define a nation's values and aspirations, and sort out its governing relationships. But, as Ebrahim said, “*the Constitution... is a document*”: the most glorious visions, wonderful aspirations, and clever devices will all be frustrated unless they can be captured and expressed in unifying and enduring literary symbols. That essential component of constitutional development occurs away from the hot glare of public attention. It is done in small rooms and at odd hours, as legislative counsel engage with the visionaries, the negotiators, and their ideas, with the shared goal of balancing certainty and flexibility within a text that is concurrently a social, political and legal instrument, such as will inspire the people, define the nation, direct the state, frame the law, and inform the judiciary.

In this paper, I draw on my professional experience serving as legislative counsel in constitutional development exercises in South Africa, Kenya, and four Canadian aboriginal nations, and as a training contributor to the continuing process in Nepal<sup>2</sup>, to describe some of the challenges that arise in pursuing that goal, and in interacting with visionaries and negotiators in the process. I will describe four different roles that legislative counsel might be called upon to perform, considering the professional implications of serving an entire nation as ‘the client,’ and suggesting a number of features of constitutions that necessitate a modified approach to drafting, as compared with ordinary legislation.

Many people have great expectations of constitutions. I explore the implications that some of those expectations have for the drafter, looking first at expectations relating to power and politics and, second, at the expectations relating to the form and language of the text and the prevailing hope that the constitution will be a literary, legal and linguistic masterpiece: a poetic, inspirational expression of consensus values that is coherent in its revelation of political intent, certain in its prediction of legal implications, and clear, yet elegant, in its form of linguistic expression.

Finally, I summarize the personal attributes that might assist a drafter to navigate among those expectations, and produce a text that meets the goals for a nation's primary law. Drawing on clinical experience, my observations may be rather more intuitive and personal

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1 Hassen Ebrahim, *The Soul of a Nation: Constitution Making in South Africa* (1998) at 258.

2 South Africa, 1995/96; Kenya, 2002–2004; The Nisga'a Nation, 1997/98; The Kaska Nation, 1999–2002; The Kwanlun Dun Nation, 2005; The Teslin Tlingit Nation, 2005–2007; Nepal, 2007. The Nisga'a, Kaska, Kwanlun Dun and Tlingit are all indigenous nations located within British Columbia and Yukon.

than is customary, as, in Whitman's words<sup>1</sup>—

*“Backward I see in my own days where I sweated through fog with linguists and contenders.”*

## 2. The role of the drafter in the constitution-making process

In the six constitutional exercises mentioned above, I performed a variety of roles, which generally fall into the range of the task I describe as “legislative counsel.” Ultimately, the goals of the exercise were always the same: my clients look to me to—

- ♦ Give eloquent expression to their deeply held values, and their favored ideas;
- ♦ Map the public and political landscape, describing and delimiting it while noting within it the landmarks that denote the pathways to consensus;
- ♦ Create a prism through which those with competing ideals can perceive both a place for their own vision, and a common vista of the present and future; and
- ♦ Bridge the personal distance separating the hearts and minds of the participants, both individually, and between and among one another.

Loosely, the experiences fell within one of four models:

### 2.1 Harmonization of the text for management

This most closely resembled a statute drafting assignment in a parliamentary system, in which the drafter receives a combination of general instructions, and some previously drafted provisions, with the direction to produce a legally coherent and linguistically consistent draft, and to address any lacunae as they became apparent either by “filling in the blanks” in a manner consistent with the text, or seeking further instructions. In this model, the drafter engages with very few, sometimes only one, instructing authority.

### 2.2 Harmonization of the text for negotiators

This project, which I engaged in as leader of a team of counsel, involved receiving proposed amendments to an existing text as it was being considered by several different committees, and integrating those amendments into the text on a continuous, rolling basis, while harmonizing the overall text in a manner that ensured continuing consistency, coherence and compliance with an approved style guide.

### 2.3 Engagement with the negotiators as legislative counsel

In this model, the range and scope of the constitution had already been determined through a process of national debate and negotiation, and the constitutional agenda agreed. The legislative counsel was required to interact with the negotiators, witnessing their discussions and providing legal advice during the course of their debates, and subsequently formulating provisions either on the basis of explicit instructions, or general

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1 Walt Whitman, *Leaves of Grass* in Michael Cunningham, *Laws for Creations* (2006).

instructions to produce provisions consistent with the tenor and agreement of those discussions.

## 2.4 Architect of the text in response to vision statements

This called for the widest range of legislative counsel functions. First, it consisted of educating the client constitutional working group on the role and function of a written constitution, and the sorts of provisions ordinarily found in written constitutions, the options they might wish to consider, and the range of alternatives open to them, all while being educated by them on the values and traditions of their culture, and the aspirations they had for their future. Second, it required working with them to define an agenda of constitutional issues, followed by detailed exploration of each of those issues in wide-ranging and relatively unstructured discourses. Based on the information I received as a witness to those discussions, I would prepare a discussion paper for each issue in the form of draft constitutional formulations, which would then be the focus of more detailed discussions, in an iterative process that continued until the working group was satisfied that the text was in a form that they were prepared to recommend to the next level of decision-making in the nation.

Common to all of the models outlined above is a multi-faceted role of the drafter as legal counsel in the process: Acting variously as legal advisor, consultant, original writer, editor and colleague in a shared task, the drafter's function is to acquaint the client with the contextual issues, and help steer a way through them towards realization of the goal of producing not just an accord, but an artifact that represents that accord in a form that will attract social acceptance, political acquiescence, and judicial application.

It will be reasonably apparent that as one moves along the continuum from the first model to the last, the drafter is in a position to exercise increasing influence over the emerging constitutional arrangements. There are dangers inherent in that for both the drafter and the nation whose constitution is being developed, and both should be alive to those dangers and should subject the process to appropriate scrutiny to mitigate those risks.

*“... drafters are continually called upon to exercise personal judgment in the performance of their duties. Such judgments are frequently policy judgments, and drafting decisions are often influenced consciously or subconsciously by the advocacy agenda of the individual drafter. The legislative drafter plays a more active role in the process than is generally accorded the stereotypical scribe, laboring in nameless and faceless obscurity to produce a bill draft.*

*Because of the many advocacy opportunities that exist in the legislative drafting process, even the most conscientious drafter must labor mightily to avoid making decisions about the shape and substance of legislation that are properly the client's own.” 1.*

Constantine Stefanou has reviewed the role of the drafter during the development of ordinary legislation, acknowledging:

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1 David Marcello, *supra* note 5 at 2463.

*“What becomes obvious is that drafters do have a role in policy initiation. It is not an institutionalized role nor is it present for every single policy initiation decision. ... But what is certain is that once again it appears that the notion of drafters considering neither policy nor substance is a myth. ... Irrespective of jurisdiction, [policy formulation] is dominated by drafters in the sense that they are the ones who translate instructions or broad ideas into actual drafts.”<sup>1</sup>*

Additionally, as the relationship moves progressively towards the point that the drafter becomes less the craftsman and more the architect of the constitution, there is an increasing potential for the drafter to lose professional detachment, identify with the text, assume ownership of it, and become an advocate for the particular political resolutions expressed in it. The drafter who loses sight of the potential for this endangers not only his client’s interests but his own professionalism, and ironically risks disempowering the client nation at the very moment that it is exercising its right to self-determination.

For that is the point—in the constitution drafting exercise, legislative counsel’s client is the nation, not any of its office holders or representatives who acted on behalf of the nation to retain the counsel. This is more than an arcane point of organizational structure: it speaks to every question of professional duty and it should direct the mind of counsel whenever a question arises touching on professional ethics and responsibility. The drafter must constantly bear in mind that the constitution is the text by which the nation ordains its state and establishes its government. The constitution is the nation addressing itself and the world; the drafter is finding words to express the nation’s will: The nation is the client.

Clarity on this point allows counsel to differentiate authoritative instructions properly emanating from the representatives of the nation, on the one hand, from manipulative presumptions arising improperly from particular participants in the process, on the other. Practically, the drafter receiving instructions should always consider the source, question whether the source has authority to speak on behalf of the nation, and respectfully, but diligently and courageously, resist the inevitable attempts that will be made to usurp authority and arrogate the nation’s power.

The writer of a constitution, irrespective whether domestic or foreign, must be able to distinguish the role of drafting from that of constitutional visionary, negotiator or advocate. The fundamental objective of all legislative drafting is to “give effect to the intent of the law maker.” That statement does not admit of a separate, independent intent of the drafter. David Marcello, after noting Elmer Dreidger’s observation that “*It is not the function of a draftsman either to originate or determine legislative policy,*” wrote,

*“This sounds simple and value neutral—the drafter as scribe, faithfully putting down on paper whatever the client seeks to accomplish.”<sup>2</sup>*

However, he argued that in fact, it is not that simple:

*“At every stage in the evolution of the bill, the drafter’s personal and political agendas exert an unavoidable influence on the conceptual, architectural, and compositional development of*

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1 Constantine Stefanou, *Drafters, Drafting, and the Policy Process*, in Stefanou and Xanthekei, *supra* note 4 at 325.

2 David Marcello, *supra* note 5 at 2440.

*proposed legislation.”<sup>1</sup>*

Richard Nzerem explains that point:

*“ . . . laws . . . do not arise in a vacuum. A drafter has to bear in mind the reasons for the legislation. He or she has to consider the state of the society as it was in the past, as it is in the present and as it is desired that it should be in the future. This means that the drafter has to deal with the problems of the past and present but must also think of the future by laying down rules of conduct for the guidance of society. . . . the dividing line between policy and the substance or content of law enacted to implement that policy, may be blurred. As a consequence, the drafter cannot escape being involved in policy considerations. . . . Between policy and legislation there are open spaces, which the drafter may have to fill.”<sup>2</sup>*

Zione Ntaba observed:

*“The drafter in this process, according to Thornton, is not a mere policy translator, but a drafter has a lot of bearing on every aspect of legislation from the type, contents, structure of legislation to even deciding whether there should be legislation at all. Therefore, a drafter is vested with an enormous and important discretion....”<sup>3</sup>*

Robert Martineau took the matter a step further, asserting that at this stage in drafting, “almost every word chosen by the drafter reflects a policy choice.”<sup>4</sup> Even while acknowledging that, Marcello concluded,

*“The drafter who fails to get the client’s views on all of these word/policy choices is effectively usurping that client’s policymaking function.”<sup>5</sup>*

A drafter engaged in constitution making cannot avoid being aware of the historical circumstances and the political forces at work, indeed, such awareness is essential to being able to serve effectively as counsel. It is almost unimaginable that the drafter would have no personal opinion on the issues being debated, and it is incomprehensible to suppose that the drafter would be wholly lacking in personal values that would inform his or her opinion about those issues, and might well conflict with the negotiators’ resolution of them.

The challenge for the drafter is to actively engage in the process to the extent required to understand the issues, comprehend and appreciate the competing positions, and find appropriate unbiased language to express the compromises that the negotiators reach, all while continuously suppressing any inclination to give expression to the drafter’s own values and opinions. More than anyone else, the drafter may be the literary author of the final text, but the values woven into it, and the resolutions reflected in it, must be the values and resolutions of the society whose constitution it is, not their values and resolu-

1 David Marcello, *supra* note 5 at 2440.

2 Richard Nzerem, *The Role of the Legislative Drafter in Promoting Social Transformation*, in Stephanou and Xanthaki, *supra* note 4, at 132.

3 Zione Ntaba, *Pre-Legislative Scrutiny*, in Stephanou and Xanthaki, *supra* note 4, at 120.

4 Robert Martineau, *Drafting Legislation and Rules in Plain English*, quoted in Marcello, *supra* note 5 at 2441

5 David Marcello, *supra* note 5 at 2441.



tions as filtered through the drafter, much less the values or resolutions of the drafter.

However, the deference that the drafter owes to the other participants in the constitution making process is not a license for dereliction of professional responsibility. Acting as legislative counsel, the drafter has a responsibility to advise on the range of alternatives available to those giving instructions, and the probable consequences of the resolutions that are proposed or the instructions that are given. A drafter who takes a “hands-off” view of the exercise and fails to advise on alternatives or potential consequences engages in an improper political act as surely as the drafter who substitutes their own view for the resolution reached by the negotiators.

The drafter must be prepared and willing to issue cautionary statements, and to propose alternative mechanisms to achieve the purposes or goals agreed by the negotiators. Working with the National Constitutional Conference as part of the process in Kenya I did just that with respect to a proposed constitutional restriction of land ownership by non-citizens. In pursuit of a policy that non-citizen ownership should be limited to interests that could not exceed a 99-year lease, a formulation had been drafted and circulated stipulating that non-citizens could hold land only under a 99-year lease. Recognising the profound differences between the policy and the proposed formulation of the rule, I believed it was my duty as legislative counsel to point out those differences to the negotiators, outline the range and impact of the probable unintended consequences should the rule be adopted as proposed, and propose alternatives to give full effect to the principle, which was not in dispute.

As Marcello observed:

*“The unscrupulous drafter who does not explain matters sufficiently to let the client make informed decisions not only subverts the ethical obligation to consult with clients but also sidesteps a second duty to “abide by a client’s decisions...”*

Achieving the proper balance between deference to the values and resolutions of the negotiators on the one hand, and ethical discharge of the drafter’s professional obligations on the other, requires critical self-awareness on the part of the drafter, a respectful engagement between the drafter and the other participants, and constant scrutiny and continual re-evaluation of the text as it evolves.

### 3. The challenges of writing a constitution

From the perspective of the drafter there should be little doubt that a constitution is a unique sort of legal document, particularly as compared to ordinary legislation. Some of its unique characteristics make the drafting task more difficult; others simplify it.

Perhaps the most apparent distinction between drafting ordinary legislation and drafting a constitution is the process by which the drafter receives instructions. In the common law world, outside of the American congressional system, ordinary legislation is initiated, and its overall focus set, by instructions emanating from a highly focused policy maker, often a

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1 David Marcello, *supra* note 5 at 2446.

relatively small group within a single Ministry, and it proceeds along its course with only a modest increase in the engaged audience, until it is finally considered by the legislature. Michael Zander critically described the drafting process in the United Kingdom:

*“The traditional Whitehall view has been that outside persons and bodies should not normally be consulted at this stage—that the time for consultation is later when the bill has been introduced in Parliament. The effect of this is that consultation only starts when it is generally too late to influence the basic shape of the legislation and all that can be achieved is adjustment at the margins. But in recent years consultation has become more common.”*<sup>1</sup>

Although, as with ordinary legislation, the ultimate act of adopting the constitution will be taken by a full constitutional assembly or parliament, the process by which constitutional policy is formulated and instructions are given to a drafter are exactly reversed<sup>2</sup>. The process is initiated at a society or nation level, broad policy issues are debated in a large open forum—often including public consultation—principles are agreed through a more focused process of negotiation and, finally, instructions are given to the drafter by an assigned spokesperson acting on behalf of the negotiators, who will in turn review, further negotiate and request refinements to the text. Ebrahim summarized this process in South Africa, noting that—

*“As a whole, the Constitution was drafted by first negotiating areas of potential agreement. What followed was an attempt to bring expression to the interests of individual parties, which gave parties the confidence to buy into the Constitution as a whole”*<sup>3</sup>

A drafter accustomed to, and comfortable with, the centralized, focused and streamlined processes of statutory drafting in the parliamentary world faces a difficult challenge in accommodating this structurally reversed process of constitution making. In every constitution making exercise in which I have been involved, I have engaged with other legal advisors who, at one time or another, appeared to find this change in the order of things sufficiently disconcerting and disorienting that they openly expressed dismay and impatience, particularly with the public participation stages of the process. In at least one such case, co-counsel was openly hostile to, and dismissive of, proposals emerging from the public process that gave voice to the participants’ hopes and aspirations, even to the point of expressing disapproval of draft provisions that were entirely consistent and harmonious with the philosophical foundations and political orientation of the project. Those reactions, which seemed irrational in the social, political or legal context, were comprehensible to me only in procedural terms. Counsel demonstrated a desire for a more traditional drafting process in which concise instructions were authoritatively delivered in a single voice, preferably an office holder whom the drafter respected on the strength of a well developed and mutually understood working relationship.

Equally disconcerting, at least to the novice constitutional drafter, is the discovery of the extent to which the constitution is a unique species of law. Although written and presented

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1 Michael Zander, *The Law Making Process* (1994) 7.

2 See Yash Ghai and Guido Galli, *Constitution Building Processes and Democratization* (2006)

3 Hassen Ebrahim, *supra* note 7, at 252.

in the style typical of ordinary legislation, it is a legal text without peer, standing outside the entire body of law, influencing every other legal text, yet not directly influenced by them in return—except to the extent that its meaning is amplified by the legal texts that will cascade behind it as the society occupies the space created by it, and by interpretations of pre-existing legal instruments that are not explicitly rejected by it. This is a considerable paradigm shift for the drafter, who is accustomed to the parallel status of each Act in the statute book, and is therefore concerned to identify all potential external conflicts, avoid them where possible, and address the resolution of them in the remaining cases.

This does not mean that the constitutional drafter would ignore the impact on existing law of the constitutional provisions, or the impact of the existing law in the application of constitutional provisions. But the manner in which the statute drafter, on one hand, and the constitution drafter, on the other, respond to the interface between existing law and the text they are producing is profoundly different.

In a system of constitutional supremacy, the statute drafter is always concerned about the validity of each provision of the statute being drafted. If a provision is inconsistent with the constitution, or if perhaps the government convinces Parliament to press a legislative point in order to explore the boundaries of constitutional validity, there is always a risk that the courts will excise the offending provision or, at a minimum, reduce its effect. The constitutional drafter is freed from that concern because, by definition, a Constitution is harmonious. It is a whole tapestry, a single fabric woven of many diverse provisions, but all against this unconventional legislative background: no provision of a constitution can ever be constitutionally invalid.

Of course, the constitutional drafter cannot cavalierly disregard internal inconsistencies in the text, because courts faced with any such inconsistency will need to interpret each inconsistent provision in the light of the other, modifying the effect of both to the extent necessary to achieve harmony. But the essential fact—that a constitutional provision that is inconsistent with another constitutional provision cannot be excised—fundamentally alters the drafting environment from that to which the statute drafter is generally accustomed<sup>1</sup>.

The supreme and internally inviolable character of a constitution has one further consequence for the drafter. As noted above, the drafter of ordinary statutes works in a context of the parallel status of all Acts, with any inconsistencies or conflicts between a new Act and those that preceded it being resolved by applying general interpretative rules. But if the newly drafted constitution conflicts or is inconsistent with a pre-existing statute, it renders the pre-existing law unconstitutional. The constitutional drafter cannot rely on the general rules to resolve such conflicts with the intended result, and must be continuously alert to the possible existence of them, and constantly aware of the potential for the serious unintended and damaging consequences that could flow from them.

From the first day they begin their studies, law students and lawyers are immersed in the ideology of hierarchical deference. Anything at the apex of its sub-system of the legal

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<sup>1</sup> This is even more the case if the drafter has been accustomed to developing regulations, rules or other secondary legislation, to which the *ultra vires* doctrine would apply.

enterprise is deemed to be more authoritative and deserving of respect than that which falls below it. Perhaps for that reason, there is a tendency to imagine that the hierarchical pattern is congruent with and reflected in the conceptual complexity of a matter. Of course that is an illusion, but nevertheless one widely thought to extend to legal texts, resulting in a commonly expressed sentiment that a constitution, as the apex legal document in the state, must be one of its most complex.

Actually, the complexity of constitutions arises more from their social and political function than from their legal architecture. Indeed, constitutions are among the simpler examples of codified law. On any subject, lawmakers have a wide range of policy alternatives, and drafters are equipped with an equally extensive set of legal instruments, with which to give effect to the policy choices of the legislature or executive. Consider the range of commonplace statutory instruments available to us—from prohibition through regulation (in its many forms) to establishment, empowerment and authorization, all the way to imposition of duties and procedural requirements: we see very few of them arrayed in most constitutions. This seems equally true irrespective whether a particular constitution falls within the preservative or transformative model of Cass Sunstein's taxonomy (following Lessig)<sup>1</sup>.

The work of the constitution is done more by description than prescription, by opening and defining political and legal space within which the institutions of the state are authorized and empowered to exercise their role and fulfill their mandates. That is significantly different from the focused prohibitions, requirements, declarations of legal status, and imposed procedures that commonly comprise ordinary legislation. Broad principles expressed in general vocabulary are consistent with constitutional function and design. Given all of the other attributes of a constitution that render it unlike ordinary legislation, it is appropriate that the language of constitutions is more general and less defined than ordinarily found in other statutes, even though this challenges the legislative drafter, who comes to the task deeply committed to the ideals of linguistic precision and certainty of meaning.

According to Bennion,

*“Legislation is what the legislator says it is. The meaning of legislation is what the court says it is.”*

...

*“Many factors bear on this meaning, and it may not turn out to be the same as the grammatical or literal meaning. Finding it must be done in accordance with the rules, principles, presumptions, and canons governing statutory interpretation.”<sup>2</sup>*

Those rules and principles to which he refers are the subject of voluminous literature. But there is some consistent recognition of how courts will go about interpreting statutes. The

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1 Cass Sunstein, *Designing Democracy: What Constitutions Do* (2001) 67. [Referring to Lessig, *Code and other Laws of Cyberspace* (1999)]

2 Francis Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (2001) 16-17

prudent drafter is aware of those rules, but ought to regard them much in the way that a sailor regards a lighthouse, as compared to a harbor. For, while the harbor is a place of comfort, the lighthouse is a marker of caution: note it carefully, consider where you are in relation to it, and stay well away from it—for it is put there to warn you of danger. Similarly, while the maxims of interpretation serve to warn how the drafter's words might be applied in future, it would be imprudent to rely on them as a safe harbor of intended meaning.

A constitution is subject to a wider range of interpretive processes and philosophies. Analyzing just the relatively recent jurisprudence emanating from the South African Constitutional Court, de Ville notes that:

*“In interpreting the Constitution, the Constitutional Court uses grammatical, contextual (or schematic), historical, comparative, and purposive methods of interpretation. Although the general approach of the court is therefore very ‘traditionally hermeneutic,’ at least some of the judges of the Constitutional Court appear to be well aware of the dangers of placing too much faith in the traditional methods of interpretation and have clearly moved beyond applying these methods.”<sup>1</sup>*

As if that were not enough to differentiate the constitution from statutes, Whittington argues that—

*“The jurisprudential model needs to be supplemented with a more explicitly political one that describes a distinct effort to understand and rework the meaning of the received constitutional text. The more political model is one of constitutional construction. Both interpretation and construction assume a fidelity to the existing text. Both seek to elaborate a meaning somehow already present in the text, making constitutional meaning more explicit without altering the terms of the text itself.*

...

*Unlike jurisprudential interpretation, construction provides for an element of creativity in construing constitutional meaning. Constructions do not pursue a pre-existing if deeply hidden meaning in the founding document; rather they elucidate the text in the interstices of discoverable interpreted meaning, where the text is so broad or so undetermined as to be incapable of faithful but exhaustive reduction to legal rules.<sup>2</sup>*

## 4. Expectations of the Constitutional Text: Power and Politics

Constitution making occurs within, and contributes to a sense of, a unique historical moment. At least in its initial stages, it is often attended by a heady atmosphere of goodwill: an old order has been routed, a new world awaits creation; contending parties have

1 J.R. de Ville, *Constitutional and Statutory Interpretation* (2000) 41. See also the discussion comparing interpretive methods at 33–51.

2 Keith Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (1999) 5.

laid down their arms, set aside their differences, and agreed to negotiate. The universe is about to unfold as it should, and there is an implicit assumption that the change in the air is an absolute good, that harmony in all things is the order of the day.

Of course, that all assumes that life is considerably simpler than it is—that as individuals and as a society, our interests and motives are always pure and constant, shared and common. The reality is rather different: it would be a rare constitution indeed that expressed an unequivocally accepted norm based on universally agreed perceptions and shared values. Why would we bother? Law and politics do not deal in matters of universal agreement or absolute certainty, but in the areas of human conflict, contradiction, contest, competition, compromise and consensus.

The historical moment creates opportunities, and the crucible of constitution making is shaped by competing visions ranging from reactionary through conservative to reformist, radical, revolutionary, and anarchist. Across that continuum advocates may well be united in a common desire to transform the society, but their transformative visions are focused around the full 360 degrees of both the historical and political compasses. The constitutional process will arbitrate among the protagonists, refining their visions by careful use of language. For, as the novelist E.L. Doctorow adroitly observed in *The March*, “*Language is war by other means.*”

The values that find expression in the constitution are always partial—in both senses of that word, first limited to those who are privileged to control (however briefly) the drafter’s pencil, and secondly skewed by the assumptions, biases, preconceptions and limited vision that frame their choice of legal agenda, their balancing of rights, their preferred remedies, their modes of expression. And of course, those privileged few are not singular, but many, and subject to contradictory impulses and motivations.

More often than we care to admit, our deepest values are in conflict with each other, and almost constantly conflict with one another’s. At the heart of all law writing there lies an essential ambivalence because, for any individual or group, certainty is Janus faced: First, it seeks to minimize the potential for others to affect my well-being; Second, it seeks to maximize the potential for me to affect my well-being. Constitution making is the act of either striking a balance between those two faces, or determining the process by which such a balance will be struck on a case-by-case basis in future. The art of constitution making involves first, determining which of those things to do to resolve particular issues and, second, striking the proper balance, or instituting the appropriate process, as the case may be. The task of the constitutional drafter is to facilitate the performance of that art, not to direct it.

The constitutional hall is filled with advocates for particular values and proponents of particular positions: The drafter ought not to be one of them. As difficult as it may be to rise above the emotional atmosphere of the occasion, the constitutional drafter should strive to remain dispassionate and objective, an irenic observer avoiding partisanship—the better to absorb and appreciate the full range of nuanced values represented in competing positions, and to recognize how they are reflected in the rhetoric of arguments and pro-

posed resolutions. If called upon to advise the participants, drafters ought to remind them of the essential competition between certainty and flexibility, and be prepared to propose formulations that strike an appropriate balance consistent with the prevailing values—to the extent they have been agreed. When called upon to draft specific formulations, the drafter should exercise sensitivity in the choice of words, preferring language that reflects the balance, and so supports and advances the participants’ mutual quest for agreement.

Constitutions are unique because of their supremacy, which is reinforced by, and reinforces, their relative immutability and permanence. Those three characteristics make them highly desirable targets for every passionate person or entity with a political agenda. As participation in constitution making opens to allow increasing public involvement in the national debate, it is inevitable that advocates of particular issues will struggle to see their favored policy embedded within the text, made supreme, and thus put out of reach of easy change. A multitude of those present contend to become the “dead hand of the past,” controlling the evolution of the society into the future. At one point during the National Constitutional Conference stage of Kenya’s reform project, an “environmentalist” proposal circulated calling for the introduction of a clause into the Bill of Rights that would make it constitutionally illegal for any person to acquire, hold, or exercise any property rights in respect of a living organism, and further requiring that any person in possession of any living organism treat it at all times in a manner consistent with its continued existence. Put simply, it would have been constitutionally forbidden for Kenyans to weed their vegetable gardens, among several other things, many of which had considerably more significant social and economic consequences. Both the specific wording and policy orientation of that proposal raised deep concern, particularly because of inconsistencies with provisions that had already been largely agreed.

More importantly, the very fact that such a proposal was advanced and entertained, however briefly, reveals an assumption that a rule of that type might properly be addressed in the constitution, at all. That assumption is contestable. Cass Sunstein suggests:

*“Democratic constitutions are ... designed to solve concrete problems and to make political life work better. Such constitutions are badly misconceived if they are understood as a place to state all general truths, or to provide a full account of human rights.”<sup>1</sup>*

The drafter who is asked to comment on such highly focused political proposals must balance the advice given between a proper recognition of that which is possible to be done in the constitution, and that which may be prudent. While it is true that the constitution, as a supreme law, is a container capable of holding literally any particular rule, it doesn’t follow that it ought to hold every rule, or even be open to doing so. In addition, the advice to be given must be neutral as to the values implicit in the proposal, and the value of the proposal to the nation, while equally being candid as to its foreseeable legal consequences as well as the probable social, economic and political ramifications of those consequences.

The constitution drafter must also be aware of two less overt practices in which participants may attempt to exercise power outside of the approved constitution making process.

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1 Cass Sunstein, *supra* note 23 at 240.

First, there is a tendency for participants to get ahead of the process of deliberation, resolution and approval. It is easy to understand why this can happen in an atmosphere of high emotion, enthusiasm and constant engagement in debate on issues. Private conversations, especially those between like-minded individuals, are sometimes sufficient to convince people that consensus has been achieved among a wider group. This is particularly true where participants are marginal to the process or outside the final decision making forum, or if group polarization, as described and discussed by Sunstein<sup>1</sup>, has occurred among the negotiators.

Second, some participants may believe that the drafter can take instructions from any participant in the process, can essentially referee between competing parties, or even freelance. The drafter must be careful to avoid encouraging these perceptions, and consistent in declining any invitation to engage in these practices.

## 5. Expectations of the Constitutional Text: Disillusion and Distrust

Paul Simon, the American composer and poet, wrote that “*everybody loves the sound of a train in the distance, everybody thinks its true*”<sup>2</sup>. Because off in the distance, its strong low tones washing across the landscape, a train evokes the romance of escape, change, promise, and hopeful imagination. But up close, where it is all noise, bother, heat, chaos, tremendous force and barely controlled energy, people jostle to step back and re-assess its potential to alter their lives. The initial release of a working draft has much the same effect, prompting a re-evaluation of the enthusiasm that accompanied the early stages of the constitutional process.

Constitution making faces a critical moment when participants in the deliberative body get their first sight of the representation of their visions, and the crystallization of their ideas, expressed in the rather bald and bland language of legal declarations. Given the passion surrounding the discussion up to that point, personal and collective expectations may be disappointed as their policy arguments and advocacy yield to legal pronouncements, and the enthusiasm of the negotiators yields to the explication of the legal proposition. Dr. Helen Caldwell has neatly captured the brutal impact of the typical legislative style:

*“Authors of great literary works do not chop their prose up into clauses, machete the clauses into subsections or axe the subsections into paragraphs. But we do this routinely when drafting legislation.”*<sup>3</sup>

As indeed we do when drafting constitutions, because constitutions are justiciable legal texts, and so conform to the framework of ordinary legislation, which is familiar to those who debate the meaning of such texts, and the courts who must finally construe them. This has implications beyond the staccato recitation of legal propositions. Legislation and

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1 See Sunstein, *supra* note 23 at 22–38.

2 *Train in the Distance* from the album *Hearts and Bones* (1983). Lyrics and music by Paul Simon.

3 Dr. Helen Caldwell, *Can Legislation Rank as Literature*, in Stefanou and Xanthaki, *supra* n. 4, page 245 at 254.



constitutions are both forms of stipulative legal texts. It is the nature of such documents that they speak entirely in declarations, which they do not have to justify. As statements made in the classic style described by Thomas and Turner<sup>1</sup>, legislative propositions inform, but they do not question, narrate, explain, advocate or reason.

Participants in the constitutional process have had to wrestle rhetorically with competing ideals, justify their arguments in polemic tracts, persuade through advocacy, and compromise through negotiation. Now at last, this long-sought document, the highest expression of the nation's vision of itself, is in front of them looking stark, naked, legalistic and unconvincing. It is profoundly disappointing: it is simply not literature. Again, Helen Caldwell has explained the reason for this:

*“Generating a sensation of delicious suspense in the reader is not the main objective [of drafting].*

...

*“... the statute book cannot consist just of high-minded objectives. Most of the time the working everyday law has to grapple with more mundane matters. For every clause 1 of a bill that contains laudable aims of this sort, there usually needs to follow a raft of rules that can be used to decide specific issues. 2*

I have always found that the initial reactions of participants to the style of the text, though occasionally expressed vehemently, were short lived. When South Africa's Constitutional Assembly convened the technical refinement team in September 1995, and we began the work of producing the first working draft, John Tsalamandris, one of the technical committee secretaries, cautioned me, *“You must be careful what you do. These are politicians: They love their words and do not want you to change them.”* Well, with some trepidation, we did change their words, and quickly discovered that what politicians really love are their ideas. Once they saw their own ideas polished and set like diamonds in the bezel of the constitutional text, they quickly recovered from any dismay over the wording and style of the document.

Dismay over the content of particular constitutional provisions proves to be much more durable, and even more difficult to address. Jill Cottrell and Yash Ghai have related the details of negative executive reaction to the constitutional proposals emerging from the National Constitutional Conference in Kenya<sup>3</sup> and Alicia Bannon has summarized the arguments for an executive “veil of ignorance” with respect to certain aspects of constitutional negotiation<sup>4</sup>.

In every constitution process in which I've been involved, incumbent office holders, or their advocates or partisan supporters, have uniformly greeted initial publication of the draft with expressions of dismay or even discomfort. Two things in particular awaken that

1 Francis-Noel Thomas and Mark Turner, *Clear and Simple as the Truth: Writing Classic Prose* (1994)

2 Dr. Helen Caldwell, *supra* note 30 at 253, and 256, respectively.

3 Jill Cottrell and Yash Ghai, *Constitution Making and Democratization in Kenya (2000–2005)* (2007) 14 Democratization 1-25

4 Alicia Bannon, *supra* note 2 at 1851.

discomfort, and there is a common thread linking those things. First, they frequently express concern over the scope of the constitution—they would like it to be shorter. They immediately recognize that every constitutional rule is implicitly a limit on the flexibility of the incumbent and future administrations, which will restrict the freedom of office holders to act in what they perceive to be the best interest of the nation. They would prefer to see the nation simply create strong constitutional offices with broadly worded powers, and then entrust those offices and powers to the discretion and good judgment of the leaders whom the nation elects from time to time.

Second, incumbent officer holders chafe against the constitutional checks, balances and restraints proposed to limit the risk of good leaders turning into bad rulers. So they argue against placing any specific limitations on the power of the state, and in particular, the offices they hold, and against requirements of transparency and accountability, and avenues for review of state action. In some cases there has even been a tendency to personalize this issue from either of two perspectives: First, with expressions of frustration at the apparent lack of trust being shown by “our people” toward the incumbent office holders as individuals; and second, with implied, sometimes explicit, criticism of the drafter, as the person responsible for having given expression to the public determination to restrain officials and hold them accountable. It is may be human nature for incumbent officers of the state to defend their personal integrity. But that seems to miss the point, which is that constitutional proposals affecting them are seldom personal: they are intended to govern the state long after the incumbents have retired from the public stage.

The drafter in this position can do little more than resort to the role of counselor, assuring all participants that questions about the scope of, and amount of detail in, the constitution are reasonable matters calling for negotiated resolution, while reminding those who feel discomfort of two important realities. First, that provisions designed to impose checks and balances, or to hold officials accountable, are inserted not because the public assumes that every office holder is engaged in mischief every day, but because they know that some office holder will engage in mischief some day. Prudence dictates that it is better to establish a prophylactic against mischief arising at all or, failing that, to act before mischief arises by providing a well-designed rule to deal with it rather than waiting to design one amid the passion and confusion of a crisis. As Sunstein explained:

*“... democratic constitution operate as “pre-commitment strategies,” in which nations, aware of problems that are likely to arise, take steps to ensure that those problems will not arise or that they will produce minimal damage if they do.”<sup>1</sup>*

Second, office holders may need to be reminded that, as individuals, they may well spend much more of their lives as ordinary citizens within the state created by the constitution than they will spend as officers of that state. A more nuanced calculation, even one based on their own self-interest, might counsel support for the institutions and principles that advance the well being of the state, as assessed from the perspective of an ordinary citizen,

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1 Cass Sunstein, *supra* note 23 at 240.

rather than from their temporary status of high office.

In my experience, the sensitivity of incumbent officers of the state, or their advocates, to the emerging constitutional draft is perhaps the most delicate problem that confronts the drafter, and the one with the most potential to rupture the professional relationship, subvert the process or bring it to failure. In addition, when a team is doing the drafting, this problem is pregnant with possibility for partisanship and divisiveness to develop among the team if any of its members come to identify with any of the individual office holders and promote their concerns. This is the time when all members of the drafting team need to recall that their client is the nation, not its particular office holders.

The preference of incumbent office holders for a minimalist approach in so far as the constitution would restrain them and hold them accountable extends to the provisions that express the powers and perquisites of their office. They readily endorse the constitutional style that employs broad principles, expressed in general language affording ample room for later liberal construction. But many people find that disquieting, and the initial reading of the text often gives rise to many questions for most readers. The text seems to be silent on so many details that often it is difficult to imagine how its promises will be realized. Some participants find this sufficiently disconcerting that they call for more detail to be added. This is particularly the case for participants who come to the process representing civil society interests or focused issues. They would like to see their issue dealt with conclusively and exhaustively. All of this tends toward ‘feature creep,’ and places those advocates in stark opposition to the political interests who support and call for a more minimalist approach.

There can never be a single answer on the question of how much detail is enough for the constitutional text, but the drafter must be alert to the dangers of feature creep. Once one topic is dealt with exhaustively in the text, the supreme nature of the constitution and the canons of interpretation will impel other participants to seek equal treatment for other issues, in an escalating rush towards an omnibus code. As the draft becomes larger and more complex, it becomes ever more rigid and brittle, and more prone to internal policy contradiction and inconsistent detail. At the same time, it becomes increasingly difficult to achieve the required support to approve or adopt the final draft: while many people may be happy with most of the text, a majority may find some details so unacceptable that they vote against the entire document.

The drafter does not have an absolute answer to these concerns, but ought to be prepared to provide advice as to the appropriate boundary between that which is to be included in the Constitution and that which is better left to be addressed through ordinary legislation.

## 6. Expectations of the Constitutional Text: Poetry and Symbolism

Many participants in constitutional negotiations harbor expectations for poetry in the text, and inspiration from it, and look to the drafter to produce something approaching mystical incantation. Where do those ideas come from, and to what extent should the drafter

attempt to honor them?

Inherent in the nature of a written constitution is an attempt to “fix” history—to limit the legitimacy of the ancien regime, to legitimize the current or incipient regime, and to establish a prophylactic against future need or attempts to repeat the process. But this fixing is always partial with respect to the past, and contingent with respect to the future, and is best achieved by the use of symbolic rather than specific language.<sup>1</sup>

The desire for a poetic text may be driven partly by a sense of occasion: the event that Cyril Ramaphosa called “*the birth of a new country*”<sup>2</sup> should be documented in a style befitting its historic nature, and which coincidentally helps to ‘fix history’ by the rhetorical device of employing memorable words to frame new constitutional ideas and structures.

Perhaps, recognizing a common tendency to associate majestic rhetoric and ritual with magisterial authority, there is a tendency to infer the opposite: that which is to be authoritative ought to appear and sound ‘majestic’. In the same way that people often expect that law ought to ‘sound like law,’ so too they might expect constitutional law to ‘sound constitutional,’ echoing the linguistic flourishes of Jefferson, Morris and Madison who, by virtue of being first to the modern constitutional drafting table, established something of a norm for such things with the late 18th century style of their prose.

It may even be driven to a degree by ego: having labored for a long time at what Hassen Ebrahim called “*grueling, frustrating, difficult and extremely hard work*”<sup>3</sup>, it is understandable that participants might wish for some memorable soaring rhetoric as a monumental testament to their efforts.

Whatever may drive the desire, not everyone agrees that a drafter should aspire to produce literature. Helen Caldwell, after noting Shelley’s assertion that ‘poets are the unacknowledged legislators of the world,’ challenged the reciprocal proposition:

*“I do not think legislation is much like literature in the sense of writing claiming attention on account of its qualities of form or emotional effect. The closer it gets to being literature in that sense, the farther away it moves from the primary function of legislation, which is to provide a system of rules.”*<sup>4</sup>

On the other hand, Albert Blaustein, one of the few constitutional drafters to write about his work, passionately supports those with literary aspirations:

*“A constitution is the queen of legal documents. The language of the constitution must satisfy not only the requirements of accuracy, brevity and clarity, but also the test of beauty and inspiration. It is enough for most legal documents to contain good prose; a constitution must aspire to poetry. What British-trained drafters have never understood is that a constitution is not just another*

1 For a complex and detailed approach, see the Preamble to the Constitution of Laos, 1994; for a less expansive approach, see the Preamble to the Constitution of South Africa, 1996; for a concise approach that hints at, rather than explicates, the relevant history, see the Preamble to the Constitution of the United States.

2 Cyril Ramaphosa, Foreword to Hassen Ebrahim, *supra* note 7

3 Hassen Ebrahim, Preface to *The Soul of a Nation*: *supra* note 7.

4 Dr. Helen Caldwell, *supra* note 30.

*piece of legislation. It is not just a higher law, not just the supreme law, not just a law to which all other laws are subject. A constitution must express national purpose, national spirit, and national aspirations—and it should have words to match.*

*Embodying a society's dreams and goals, the prose in a constitution must epitomize meticulous, probing, stirring speech. It must express the will of the people and nurture the ideals that give birth to a just society.”<sup>1</sup>*

...

*“Who can fail to appreciate grand inspiring provisions—the constitutional statements that represent the highest ideals of humanity, democracy and constitutionalism? We are moved by valuable ideas, expressed incisively and, yes, poetically.”<sup>2</sup>*

Blaustein is correct that ‘the constitution is not just another piece of legislation,’ and must express national purpose, spirit, and aspirations. But his assertion that, as a consequence, ‘a constitution must aspire to poetry’ at once begs the question, projects a subjective view of what constitutes inspiring style, and rests on the untested formalist assumption that the apex legal text of a state must necessarily be expressed in the apex linguistic style of the culture—whatever that style might be. Leaving aside the logical lapses and subjectivity of his comment, his assumption of a necessary link between the legal status of a text and a particular style is contestable, both empirically from a scan of the world’s constitutions and theoretically in terms of either jurisprudence or linguistics. Opening his note on constitution drafting, Blaustein acknowledged—

*“All the legal writing rules that have evolved for drafting contracts, wills, legislation and the like apply most compellingly to drafting constitutions.”<sup>3</sup>*

Many of the legal drafting rules to which he refers are directed towards production of a text that is efficient, effective and efficacious. Helen Xanthaki sets achievement of the second and third of those qualities as the highest objectives of the drafting function, although the distinction she draws between them seems somewhat over-stated and formal:

*Efficacy is at the heart of legislative efforts. It orders all actors in the policy process to achieve the desired result. ... In contrast to efficacy, effectiveness is focused on legislative drafting and can be assigned to the drafting team. As a result, effectiveness in legislative drafting can be identified as the virtue pursued by drafting teams in common and civil law jurisdictions, in developed and developing countries, in older and newer legal systems, in financially robust and financially vulnerable States. ... It applies to drafting around the world and it unifies legislative drafters under the umbrella of a common pursuit in a common search for quality in legislation.”<sup>4</sup>*

Karl Llewellyn expressed a similar sentiment:

*“Thus the only aesthetic rule which I recognize about adornment in relation to function is that*

1 Albert P Blaustein, *Constitution Drafting: The Good, the Bad, and the Beautiful* (1991) 2 *Scribes Journal of Legal Writing* 49.

2 Albert P Blaustein, *supra*, at 59.

3 Albert P Blaustein, *supra*, at 49

4 Helen Xanthaki, *Of Transferability of Legislative Solutions: the Functionality Test*, in Stefanou and Xanthaki,

*adornment is best when it can be made to serve function, and is bad when it interferes with function; ... Consider the single legal rule. Its esthetics are functional, in the strictest sense. It has room for not one jot of ornament; and the measure of its beauty is the measure of its sweetness of effect.”<sup>1</sup>*

Framing his argument in the logic of formalism, Blaustein unfortunately did not attempt to explain how his “grand, inspiring provisions” might serve the drafter’s function, or what contribution they could make towards achieving the objective of producing an effective constitutional text.

It is a simple thing for a constitution to proclaim its own supremacy, but to invest that claim with moral, political and legal force, the constitution must convince readers of its authority; to be effective, it must be perceived to be legitimate. Initially, its legitimacy will rest on acceptance of the process out of which the constitution evolved<sup>2</sup>. But that is exceedingly transient; from the day that negotiations end and the constitution takes effect conflicts will arise among the erstwhile negotiators. As the goodwill and memory of the negotiators fade, the constitution as written, interpreted and applied must evince a perception of its own legitimacy. To the extent that a constitution emerges within the framework of widely accepted political and legal continuity, the question of legitimacy is easily addressed, often in a somewhat sterile statement of legal provenance, such as is expressed in the premises of the Jamaican constitution, set out in Appendix 1<sup>3</sup>.

That style is typical of many of the independence constitutions of the 1960’s, which reflected both a continuation of the deepest philosophical assumptions of the metropolitan society<sup>4</sup>, and a projection onto the new state of the legal authority claimed by the retiring colonial regime. It did not much matter whether the drafters—often civil servants in the metropolitan state—appreciated the subject nation’s history, culture and sense of identity, or were indifferent to it. It was sufficient that they recognized that the legitimacy bestowed on independence derived from the accepted legitimacy of the colonial rulers—even if that was accepted only as a politic fiction.

Instead of dismissing British trained drafters as allegedly lacking in comprehension or appreciation of their task, Blaustein might have considered the fact that they worked in circumstances in which legal provenance was accepted as flowing from the *status quo ante*, and that constitutional legitimacy could therefore be established without resort to more florid rhetorical devices. In other words, it is possible that the drafters were not being

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supra note 4, at 16.

- 1 Quoted in Richard Weisberg, *Poethics and other Strategies of Law & Literature* (1992) 14.
- 2 Nicholas Haysom, *Negotiating a Sustainable Political Settlement: Lessons from the South African Transition* in Hari Bhattarai & Jhalak Subedi, *Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa, Sri Lanka* (2007) 105 at 111.
- 3 Jamaica’s text is included only as a concise illustration. Canada’s constitution is also an excellent example: the three legal instruments that primarily form the constitution [Constitution Act, 1867, Canada Act, 1982 and Constitution Act, 1982] have a combined total of 7 perambulatory premises and clauses. Six address legal provenance, only one invokes a claim to a non-legal source of authority, and it does not use particularly ‘grand, inspiring’ language.
- 4 Yash Ghai, *A Journey Around Constitutions: Reflections on Contemporary Constitutions*

ignorant as a consequence of their British training, but rather, that they were simply being effective and efficient.

On the other hand, when political or legal authority has been fundamentally contested, or its continuity ruptured, and the emerging constitution represents a reconstruction of the state by the surviving society, legitimacy must be evinced by other means, including by employing “adornment... to serve function.” Weisberg speaks of a style in which—

*Rhetoric, ... does not assist an argument to march to a conclusion; rhetoric is the argument, ...*<sup>1</sup>

A drafter can satisfy a perceived need to establish legitimacy by using majestic language to communicate literally as well as symbolically, making rhetoric both the argument itself, and the means to advancing the argument to its conclusion. Grand statements, which often appear in preambles or purpose clauses, advance the cause of legitimacy because they transcend the rupture in the continuity of the state by literally evoking the society’s earlier shared reality, whether of values, identity or experience.

The drafter can reinforce the claim to constitutional legitimacy by using poetic and symbolic language to deliver a grand statement, employing an appropriate iconography to awaken a vestigial deference to symbolism in art, music, architecture, dress, liturgy and ritual which, during the society’s pre-literary stage, were the predominant means used both to invest authority, and to reflect its presence. An example is found in the opening clauses of the *Declaration of the Tlingit Nation*, an aboriginal people whose territory lies within southern Yukon:

*We are Tlingit, people of the land, people of the water—  
People of the mountains, the forests, and the Wolf;  
People of the rivers, the lakes, the Frog and the Beaver;  
People of the Eagle and the Raven Children, we walk below the skies of the creator in the  
footsteps of our ancestors.  
We are one spirit, one mind, one people—  
Dakhl awèdi, Ishkitàn, Yanyèdi, Kùkhbittàn, Dèshitàn  
Each is equal, with an honoured history  
Etched in the names and sacred places entrusted to its care, and  
Told in the stories, songs, dances and symbols that are our language.  
We follow ancient Tlingit law—  
Founded on our understanding of the spirit in all living things;  
Based on our respect for the land and its resources; and  
Rooted in our history, and our traditional practices and knowledge.  
Tlingit law is our identity—  
Reflecting the unity and inclusiveness of our Clans and communities;  
Demonstrating the value, uniqueness and dignity of each person; and  
Enriching all aspects of Tlingit community and personal life.*<sup>2</sup>

1 Richard Wiesberg, supra note 44 at 16.

2 *Ha Kus Teyea: the Declaration of the Teslin Tlingit Nation*, set out fully in Appendix 2.

Symbolic language is a potent instrument of legitimization, evoking ideals associated with a time when the values that governed those who govern were portrayed and communicated through visual media—such as Ambrogio Lorenzetti’s mural, the *Allegory of Good and Bad Government* in the Palazzo Pubblico in Siena<sup>1</sup>—or were socially inculcated and instilled through oral traditions, as in ancient Rome, or indeed, in modern Canadian aboriginal nations. Gordon described the idea of the *mos maiorum* of the Roman republic:

*“To understand the political role of the Senate, one must appreciate the importance to Roman culture of what was called the mos maiorum. McCollough suggests that this might be regarded as “Rome’s unwritten constitution” and crisply defines it as “the established order of things... mos meant established customs; maiores meant ancestors or forebears in this context. The mos maiorum was how things had always been done” (1991, 863). Throughout the history of the Republic and, indeed, even after Augustus, it counted much in Roman political discourse to refer to the mos maiorum. The status of the Senate rested solely on the Roman people’s unquestioning acceptance of a hierarchical social structure and the belief that the topmost class in that structure possessed, by virtue of long-standing tradition, unchallengeable authority in large matters of state.”*<sup>2</sup>

That approach to constitutional norms rooted in oral tradition and social inculcation is echoed across the ages in the *Ayuukhl Nisga’a* acknowledged in the *Declaration of the Nisga’a Nation*, an aboriginal people in northern British Columbia:

*We are Nisga’a, the people of K’aliaksim Lisims—*

*From time immemorial we have lived in the lands that K’amligiibahlhat gave to our ancestors.*

*We observe Ayuukhl Nisga’a, we have heard our Adaawaak relating to all our Ango’oskw, from the Simgigat and Sigidimhaanak’ of each of our wilp.*

*We honour and respect the principle of the common bowl.*

*We are Nisga’a—*

*Since the beginning of time, our leaders have upheld the honour of our nation, and many have grown old and passed on seeking justice for our people.*

*We have heard their stories, we celebrate their loyalty, and we are inspired by their courage.*

...

*We commit ourselves to the values of our Ayuuk which have always sustained us and by which we govern ourselves, and we each acknowledge our accountability to those values, and to the*

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Available at <http://www.ttc-teslin.com/pdf/ha%20kus%20teyee.pdf>

The published text, which is titled as a draft for discussion, comprises two distinct elements—the Declaration and the Charter. I am advised that as of the time of writing, the Declaration has been adopted as published and reproduced in Appendix 2; only the Charter remains under review.

1 For an anthropological description of which, see Maria Luisa Meoni, *Utopia and Reality in Ambrogio Lorenzetti’s Good Government* (2005)

2 See Scott Gordon, *Controlling the State: Constitutionalism from Ancient Athens to Today* (1999)



*Nisga'a Nation.1*

Expressed poetically and symbolically, the grand statement serves the function of creating an effective constitution by linking the political methodologies of the current era of literary constitution making with those of the culture's pre-literary past, and locating the source of legitimacy of the new state simultaneously within the nation's deepest sense of itself, its ancient origins, and its remembered experience.

Wiesberg tells us why, and how, this works:

*"Our poetic method once again joins with the poetical treatment of legal language. Sound and sense work to the careful communicator's benefit, because they are linked in every display of effective legal discourse. ... effective arguments are as sensuous as they are logical, ... audiences respond to the music and the confluence of words perhaps more than their merely rational sense."*<sup>2</sup>

Even so, not every drafter has the rhetorical skill to do this well—a point Gore Vidal made obliquely while discussing the American Declaration of Independence:

*"... George Mason ... on May 27, 1776 completed a draft of... an instrument for the governance of Virginia... [with] the premise that "all men are born free and independent and have certain inherent natural rights ... among which are the enjoyment of life and liberty, with the means of acquiring and possessing property in pursuing and obtaining happiness and safety."*

*"Later that most famous summer of 1776, Jefferson wrote the Declaration of Independence, making literature of Mason's somewhat desultory laundry list consisting of John Locke's garments."*<sup>3</sup>

Despite the utility of grand language in some cases, and the recurring demand for majesty in constitutional texts in almost all cases, it is an aspiration honored more in the breach than in the observation: a scan of constitutions will reveal far more pedestrian writing than inspiring prose. Wiesberg notes that—

*"The good lawyer is the skillful communicator, and ... the essence of the skill is awareness of the audience. Yet lawyers rarely learn much about their audiences in school. Nor are they trained well in the collateral skill of listening."*<sup>4</sup>

It has been my experience that immersion in the culture of the audience, combined with a willingness to spend a great deal of time listening to them, listening equally to the surface and deep meanings of their messages, listening to understand the rituals of their story telling and discourse, listening to comprehend their values and aspirations, listening to absorb the vocabulary, cadence and rhythm of their speech, are indeed essential prerequisites for any drafter aspiring to successfully employ a grand statement in a manner that will

1 *Declaration of the Nisga'a Nation*, Preamble to the *Constitution of the Nisga'a Nation*, adopted 1998, Set out fully in Appendix 3. Available at [http://www.nisgaalisims.ca/files/nlg/u2/The\\_Constitution\\_of\\_the\\_Nisga\\_a\\_Nation\\_\\_October\\_1998.pdf](http://www.nisgaalisims.ca/files/nlg/u2/The_Constitution_of_the_Nisga_a_Nation__October_1998.pdf)

2 Richard Wiesberg, *supra* note 44 at page 39.

3 Gore Vidal, *Inventing a Nation: Washington, Adams, Jefferson* (2003) 28.

4 Richard Wiesberg, *supra* note 44 at page 40.

inspire the nation and give legitimacy to its constitution.

## 7. Expectations of the Constitutional Text: Elegant simplicity & Flexible certainty

In September 1995, the management committee of South Africa's Constitutional Assembly established a team to prepare the first working draft, which would bring together all of the extant formulations and proposals and which, as Ebrahim reported, was to take—

*“... into account legal and linguistic consistency and coherence as well as ensuring that the text was in plain and accessible language... This was the first time the constitutional issues were formulated in this way.”<sup>1</sup>*

The call for “plain language,” while apparently unprecedented in constitution drafting, was not surprising, as the language of the interim constitution, and particularly the Bill of Rights, had been criticized as inaccessible. In her 1996 *Clarity* critique of the interim constitution, South African linguist Ailsa Stewart Smith wrote

*Our emergent democracy needs to discard the inherited imbalance where an elite minority has the knowledge to understand the laws of which they are also the crafters, administrators and practitioners. This power differential has been supported by traditional legal language. The complexity of legal language, combined with the feeling of vulnerability arising from the situation in which they encounter it, obstruct the already complicated process of reading and understanding. Readers cannot focus on structure and substance equally. Texts which are structurally complicated demand greater reader energy, to the detriment of their content. Language experience acquaints readers with standard and possible patterns. This knowledge involves grammar, but also expectations where certain information is likely to be found in the sentence. ... A relationship exists between first and final positions in a sentence which, if used effectively, develops and connects meaning. Readers expect that what they read first will logically lead on to what is at the end of the sentence. And the same principle generally applies to paragraph structure and extended text. A legal style which meets these expectations will be effective: traditional legal writing violates them. The language used in the interim constitution is simpler than in previous statutes, but this improvement is neither consistent nor extensive enough.<sup>2</sup>*

Willie Hoffmeyer, then an ANC member of Parliament, had been promoting the concept of plain language as an instrument of legal and social transformation for some time, and had persuaded the then Minister of Justice, Dullah Omar, to host a conference on the topic in March 1995. In his opening comments, the Minister set out the argument that would justify the call for plain language to be used in the constitution:

*“The best defenders of the rights of the people are the people themselves. I believe therefore that, if our system of justice is to serve the people of this country, we must give our citizens the means to use rights for the benefit of themselves and their communities. We must create a culture of human*

1 Hassen Ebrahim, *supra* note 7 at 193.

2 Ailsa Stewart Smith, *The Legislated Double Bluff: How democratic rights are undermined by the language of the new constitution in South Africa*, (1996) 34 *Clarity* 14

*rights that gives South Africans both the confidence and an internalized understanding of their rights and role in society. It is in the pursuit of this goal that the nature and style of public information becomes so critical. If we write laws in complicated and difficult language how can we possibly expect the citizens of this country to understand or obey the laws?*

...

*Clear, simple, understandable communication is a whole lot more than just something we should be dreaming about. It is an absolute and critical necessity for democracy. People have a right to understand the laws that govern them, to understand court proceedings in matters that affect them, to understand what government is doing in their name.*

...

*Simplicity of language reflects a commitment to democracy.*

....

*... [P]eople must know and understand their rights.... And they must have an internalized sense of themselves as citizens living in a democracy with rights that they can exercise and obligations they must meet.*

...

*Only when people feel that democracy is theirs and for real, will they be prepared to defend it.”<sup>1</sup>*

In the same month that the Constitutional Assembly established the drafting team, South Africa’s National Assembly had given first reading to the Labour Relations Act, 1995<sup>2</sup>, the first piece of legislation that was overtly prepared in the style advocated in the “plain language” literature, which was described in some detail by co-drafter Amanda Armstrong in a 2001 conference report<sup>3</sup>. Prof. Halton Cheadle,<sup>4</sup> the principal policy architect and head of the team that drafted that Act, had championed the use of that style as a response to a directive from then Minister of Labour, Tito Mboweni, requiring that

*The Labour Relations Bill is to be simple and wherever possible, written in language that the users of the legislation, namely workers and employers, can understand, and provide procedures that workers and employers are able to use themselves.<sup>5</sup>*

Many members of parliament approved of the style. As a result, Professor Cheadle, in his later capacity as a leading member of the Bill of Rights technical committee, insisted on emulating the style in the committee’s preparation of the first draft of the Bill of Rights. I was invited to explain the relevant drafting issues and principles to the core constitutional

1 See Dullah Omar, *Plain Language, the Law and the Right to Information* (1995) 33 Clarity 11.

2 Republic of South Africa, Labour Relations Act, 1995 (Act No. 66 of 1995).

3 Amanda Armstrong, *Some concise guidelines to the process of drafting the new Labour Relations Act in plain language*, in Viljoen and Nienaber, editors, *Plain Language for a New Democracy* (2001) 71

For additional details, see Knight, *Clarity in South Africa* (1996) 34 Clarity 21

4 Now a professor of labor and constitutional law at the University of Cape Town.

5 Quoted in Knight, *Clarity in South Africa* (1996) 34 Clarity 21

committee. Not everyone was impressed<sup>1</sup>. Nevertheless the decision was made, the management committee stood by it, and the resulting 1996 Constitution is often held out as exemplifying that style.<sup>2</sup> Fink Haysom, who was legal counsel to President Mandela during the final constitutional debates, noted that,

*“Although the ‘plain language’ advocates had their detractors, the eventual product contributed to a constitution which is in general more accessible than most.”*<sup>3</sup>

University of Pretoria Professor Frans Viljoen agrees, arguing that

*“Following the fall of the Berlin wall in 1989, a number of countries, including South Africa, underwent a process of democratization. In many instances this process resulted in the redrafting of old or the drafting of new constitutions. In none of these countries has the impact of the plain language movement on the constitution-drafting process been as visible as in the case of the South African constitution.”*<sup>4</sup>

Constitutional Court Justice Johan van der Westhuizen, who in 1996 was a member of the drafting team, said in 2001,

*“... generally I believe that the attempt was worth it. And, in spite of predictions, I’m not aware of serious confusion among judges or anyone else because of the language used in the Constitution.”*<sup>5</sup>

The call for ‘plain language’ is best understood as expressing a desire for a document that is a model of style, simplicity, and clarity—though there is little agreement about what those terms signify, how they might be measured, or indeed, what techniques might best produce them. As Thomas and Turner point out, style—of some sort—is an attribute inherent in every text, and choice of a particular style ought to be a conscious act by every writer:

*“To write without a chosen and consistent style is to write without a tacit concept of what writing can do, what its limits are, who its audience is, and what the writer’s goals are. In the absence of settled decisions about these things, writing can be torture.”*<sup>6</sup>

Does that caution extend to drafters of legal texts like constitutions? Garner (exhibiting a fine sense of style himself) suggests the answer is quite clear:

*“Legal writers must recognize what other inhabitants of the literary world already know: A good style powerfully improves substance. Indeed, it largely is substance. Good legal style consists mostly of figuring out the substance precisely and accurately, and stating it clearly. Too many of us equate artful writing, or “style,” with the warriors’ cumbersome headdress, pleasing to the eye but irrelevant (perhaps even a hindrance) to the conquest. Music provides a better analogy: Does*

1 Hassen Ebrahim, *supra* note 7 at 193.

2 For a summary of some legislative drafters’ opinion about the style, see Peg James, *Drafters of South Africa’s new Constitution adapt to plain language* (1997) 38 *Clarity* 13.

3 Haysom, *supra* note 45 at 115.

4 Frans Viljoen, *Baring the Nation’s Soul Through Plain Language* (2001) 46 *Clarity* 15

5 Johan van der Westhuizen, *Plain Language in the Drafting of the 1996 Constitution* in Viljoen and Nienaber, editors, *Plain Language for a New Democracy* (2001) 61

6 Francis-Noel Thomas & Mark Turner, *supra* note 37 at 13.

*anyone fail to recognize that a Beethoven symphony becomes a different piece when played by an ensemble of kazooes instead of a major symphony orchestra? The medium is the music. Why should we find it difficult to accept the parallel truth in writing?<sup>1</sup>*

So, when the constitutional drafter is called upon to produce a text that exudes style, what is really meant is that a particular, consciously selected style, executed consistently and with professional skill and grace, is desirable. There are different views as to what that style ought to be. I have already discussed the view that a constitution should have a grand and poetic style. Garner, whose general counsel is to “*be direct, simple, lucid, and brief*”<sup>2</sup> calls as well for the drafter to develop a good ear, and become sensitive to cadence:

*“Prose writers are seldom as sensitive to rhythm as poets, no doubt because rhythm is less crucial in prose. But it is not unimportant. Rhythm makes the difference between clumsy, monotonous writing and graceful writing that shows logic. Masterly writing suggests inevitability: a sense that each word must follow the one that precedes it and that no other placement of sentences and paragraphs would have worked so well.”<sup>3</sup>*

Beyond that, Castle and Butt suggest that

*“. . . legal documents should be written in modern standard English—that is standard English as currently used and understood. . . . Its hallmark is a style that is direct, informative and readable” . . . more is required than simply a process of translation. While merely updating terminology will help, a well-drawn document goes further. It takes into account matters of structure, layout, word order and design. It also takes into account the issues of substantive law that will almost certainly arise.”<sup>4</sup>*

Simplicity, precision, and clarity are very much the “holy trinity” of plain language advocacy. Those are indeed desirable qualities of a constitutional text. But we err when we elevate those qualities of the text itself to the level of becoming the drafter’s objective. That error is akin to suggesting that in a game of football the desired qualities of play—controlling the ball expertly and forcefully while avoiding penalties—are the reason for playing the game. They are not: a team could “Bend it like Beckham” for 90 minutes and still fail to win. And, in football, winning is the only objective.

When drafting a constitution (or any other legal text) the objective is to bring some certainty and predictability to the lives of those who will be affected by the text. The constitutional drafter should aim to give effect to the intentions of the negotiators, and to state those intentions so clearly that the readers of the constitution can know their rights, obligations, and legal position as they pursue their interests, livelihoods, hopes and aspirations. That objective is attainable, but it requires much more than simply reproducing a

1 Bryan Garner, *The Elements of Legal Style* (1991) 4.

2 Bryan Garner, *supra* at 13.

3 Bryan Garner, *An Approach to Legal Style* (1991) 2 *Scribes Journal of Legal Writing* 1 at 21.

4 Peter Butt and Richard Castle, *Modern Legal Drafting: A Guide to Using Clearer Language* (2001) 129.

particular form, following specific guidelines, or improving readability.

Both Zander<sup>1</sup> and Xanthaki<sup>2</sup>, in their respective discussions of drafting practice in the United Kingdom, canvas the literature that deals with the question of simplicity in legislative style. Xanthaki suggests that clarity, precision, and consistency serve vital interests, but are secondary to the plenary, over-arching goals of effectiveness and efficacy:

*“First, without clarity, precision and consistency, law lacks predictability. Second, democratic governments seeking to induce transformation require that the law is understood and followed by common people. Third, democracy requires clarity and precision: the rule of law requires that officers of the law understand and apply the law. Fourth, there are high costs to inaccessible law related to enforcement, application and interpretation of texts whose meaning is under doubt.*

...

*One cannot provide a generally applicable response to the questions of the hierarchy between clarity, precision and unambiguity. ... the prism under which the choice is to be made rests in abstracto and relates to effectiveness. Effectiveness is the virtue sought by the drafter and effectiveness must serve as the qualifier for a negotiation between clarity, precision and ambiguity.*

...

*If effectiveness is accepted as a qualifier for any choice made by the drafter, then the relationship between clarity, precision and ambiguity is a non-hierarchical one and these three virtues must be viewed as tools of effectiveness, bearing equal gravitas and power.<sup>3</sup>*

I find unsettling her use of the term “ambiguity” as one of the three drafting virtues. People sometimes suggest that because constitutions deal with visions, principles and general policies, they are best expressed in ‘ambiguous language’. I assume, hopefully though perhaps naively, that when those who hold that view use the word ‘ambiguous,’ they actually mean to refer to generality<sup>4</sup>. To the extent that they do mean to suggest that true ambiguity is a virtue, theirs is a minority view. I see no room for Xanthaki’s ‘negotiation between clarity, precision and ambiguity’—if by ambiguity we mean ambiguity. A word can certainly be both general and precise, requiring the negotiation she calls for. But a word cannot be ambiguous and precise: that is an oxymoron.

Xanthaki argues further that specific stylistic prescriptions, such as ‘simplicity,’ ‘plain language’ and ‘gender neutral language’ while instrumental in achieving clarity, precision and unambiguity, should be treated as subservient to them:

*“... they bow down when in conflict with any of these values or virtues. If there is a conflict between gender-neutral language and plain language, again the deciding factor is clarity,*

1 Michael Zander, *supra* note 19 at 25—52

2 Helen Xanthaki, *supra* note 43 at 9–18.

3 Xanthaki, *supra*.

4 For a clear enunciation of the distinction, see William Popkin, *Materials on Legislation: Political Language and the Political Process* (1997) 185-6

*precision, and unambiguity and ultimately effectiveness in legislation.”<sup>1</sup>*

Her hierarchical analysis of drafting purposes is helpful in reminding constitutional drafters that form must follow function, and that ultimately questions of style are best answered with reference to purpose. But a more persuasive hierarchy would result if her analytical model were less rooted in organizational form and structure (who has to be responsible for which outcomes), and more in the process and operations of the drafting function. Under that approach, the considerations for the drafter might look like this:

- ◆ The objective for any law maker ought to be an efficient and effectual policy.
- ◆ That objective can be realized only by creation of a legal text that creates predictability.
- ◆ Coherence, consistency and certainty (roughly analogous to Xanthaki’s *Clarity, Precision and unambiguity*) are essential qualities of such a text, without which it will not create predictability.
- ◆ Thorough research, careful analysis, thought and imagination, and disciplined writing and editing are the methods by which the drafter produces those qualities.
- ◆ Disciplined writing requires good organisation, consistent sentence structure, and refined choice of words.
- ◆ Simple, inclusive, standard language, and user-friendly presentation, are some of the critical instruments of disciplined editing, by which the text is perfected.

Rules—even constitutional rules—have to be followed by real people going about their busy lives. They have better things to do than puzzle through arcane language and pursue tedious legal procedures. So of course, the drafter must keep each rule as simple in its design as the circumstances allow and should avoid rules that are overly complicated or fussy. But more than that is required. Helen Xanthaki’s observation that legislation needs to be effective, efficient and efficacious<sup>2</sup> simply means that rules must work, they must work well relative to the costs they impose on the society, and they must achieve the intended purpose. A rule that cannot pass that test will be judged poorly and should be reconsidered before being embedded into a constitution. To achieve the objective of drafting requires the creation of a text that is coherent, consistent and certain.

To achieve coherence, the text as a whole has to fit properly into its legal, political, social and economic context. Its various provisions must fit together properly and must reflect the purposes and values that formed the impulse or rationale for the constitution. The specific legal or political offices, institutions, instruments and processes established by the constitution should reflect and be appropriate to the values embodied within the constitution. Finally, the words, sentences and language expressing the law should be a holistic literary expression of those same values.

The means by which rights are expressed influences awareness of them. By way of example, that belief is reflected in the linguistic style of South Africa’s Bill of Rights—the language

1 Xanthaki, *supra* note 74 at 17.

2 Helen Xanthaki, *supra*.

itself being designed to reinforce the substantive content by reflecting the underlying values, with the clear intent of delivering a message about social transformation. Thus, if you think it important to assert an inherent right of dignity in every individual, then it seems incumbent on you to express that right in words which themselves show a decent respect for the dignity of the individuals to whom, for whom, and about whom you assert that right.

To achieve consistency, provisions should not contradict one another. The wording in formulations should follow a clear and consistent pattern, the organization of the text, as well as the legal instruments created by it, should follow and be congruent with the patterns of common experience within those aspects of life that are governed by the text. But there is a second dimension to consistency: the drafter has to understand that it is necessary for each rule inscribed within the constitution to “make sense” to the readers against the background of their human experience, common sense, and beliefs in the way things should work. To the extent that a particular rule is fundamentally inconsistent with the legal culture, is an affront to readers’ expectations, or is contrary to their experience, the rule is apt to be dismissed as wrong, or at best interpreted as meaning something other than the drafter intended.

Certainty is achieved when it is apparent how particular constitutional provisions are to apply to a particular set of circumstances when they arise. For all the simplicity of that statement, certainty is the most difficult drafting quality to realize. There are several reasons for this.

First, the drafter has nothing to use but words, and words can express no more than approximations of reality. Despite the deep faith of some lawyers in the power of precedent and the “settled meaning of judicially interpreted words and phrases,” there is in fact no more certainty in legal vocabulary than in any other use of language. As Popkin notes:

*“There is nothing plain about the concept of a text or how an interpreter determines whether it has a plain meaning.”<sup>1</sup>*

In English, and perhaps in other languages as well, many words have more than one ordinary meaning and the meaning that will be judicially assigned to a word in a constitution is that meaning, ordinary or otherwise, that is best supported by the context in which the word appears. But context is a multi-dimensional thing, and the question of which of the competing elements of context should frame the issue, and thus determine the meaning to be specified, in a particular case is a highly subjective matter, as is continually demonstrated in the arguments at the center of all constitutional litigation.

Every rule reflects a balancing of the competing impulses to produce both certainty and flexibility. In a constitution, enhanced certainty for the state tends to reduce the flexibility afforded to the citizen, and *vice versa*. But even that over simplifies the dynamic: Because life is inherently ambiguous and uncertain, very few people will ever approach a particular provision desiring absolute certainty or flexibility. And within a society governed by the

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1 Popkin, *supra* note 76 at 185.



constitution, there exists an impossibly large mixture of preferences as to how the balance should be struck in any given case on any given day, much less for all time and in all cases.

Users of a constitutional text are also predictably ambivalent about claiming that uncertainty exists in a text, even when the text is clearly ambiguous. Those satisfied with the *status quo* interpretation or application of a provision will tend to deny that any uncertainty exists, while those seeking a change will advocate both for the recognition of the ambiguity and for an alternative, more favorable, interpretation.

And, when we talk about “the users” and “the readers” of a constitution, we have to remember that they are not singular, but legion. Yash Ghai commented:

*I have talked throughout about ‘the people’. But we have to disaggregate the concept of the people. There is no such thing as ‘the people’. There are doctors and lawyers, engineers, dentists, Christians, Muslims, Hindus, people from the northern part, people from the south, women, youth, disabled, dalits, ethnic groups, farmers, workers, and so on. Each group has its own interest, its own moral perspective and views.”<sup>1</sup>*

Second, constitutions project their words into an uncertain future, of uncertain duration, to be interpreted and applied within a specific factual context whose presently unforeseeable circumstances will frame our future perception of the text, focusing a particular aspect, perspective and nuance, and thus informing our conclusions about its meaning at that time. Words that seemed certain when the drafter penned them tend to acquire unclear connotations when viewed later in an unforeseen setting. The colloquial meaning of words is constantly evolving and shifting, giving entirely new connotations to things written decades ago. Circumstances arise that were unimaginable when the constitution was adopted, requiring provisions to be applied beyond their original intent, simultaneously stretching and extending the meaning of the original words. Social structures, values and opinions shift over time, bringing what once may have been the uncontested ‘clear, plain’ meaning of a provision into focus as the “ambiguous” object of emerging political contests. Popkin, writing about ordinary statutes, suggests:

*“All rules are the result of an equilibrium of policies imparting both thrust and limit to the rule. Uncertainty arises when the interaction of text and facts appears to unsettle the original equilibrium, suggesting that the apparent application of the text to the facts is wrong or that the failure to apply the text makes little sense. Because all rules are what their applications signify, any doubt about whether they apply to new facts is potentially unsettling and requires some rethinking of the rule’s meaning in a contemporary setting.”<sup>2</sup>*

The least certain of all contingencies is the balance that the nation will strike between jurisprudential interpretation, and political construction of the constitution, as differentiated by Whittington<sup>3</sup>. Uncertainty expands to the extent that the nation affords opportu-

1 Yash Ghai, *People Take Lead: Participatory Process of Constitution Making in Kenya* in Hari Bhattarai & Jhalak Subedi, *Democratic Constitution Making: Experiences from Nepal, Kenya, South Africa, Sri Lanka* (2007) 119 at 127.

2 Popkin, *supra* note 76 at 361.

3 Keith E. Whittington, *supra* note 26.

nities for the exercise of a political model of construction, because there are no clear doctrines comparable to jurisprudential rules of interpretation restraining the use of that instrument, and no way to predict what clauses of the text might lend themselves to be exploited in pursuit of such claims, what political choices may be asserted and permitted to take hold and become definitive of the meaning of the constitutional text.

These qualities of coherence, consistency and certainty are not mere matters of form and they cannot be achieved by the application of a particular form or method of drafting, to the exclusion of any other. They require clarity of thought just as much as clarity of expression. Success in responding to the demand for a clear, well styled, constitution requires rigorous logic on the part of the drafter throughout the process, from first principles to final provisions. To express an idea clearly within the constitution the drafter must first understand the idea and its place in the universe of constitutional ideas. This sort of drafting is the art of—

- ♦ applying imagination, logic and reason to legal problems;
- ♦ matching policy choices to functional purposes;
- ♦ designing legal instruments to achieve those functions;
- ♦ crafting each legal sentence in a formulation appropriate to its particular function; and
- ♦ choosing the best words to communicate those functions effectively and economically.

## 8. The ideal constitutional drafter

Ideally, the constitutional drafter is a writer who combines a demonstrated ability in legislative drafting, skill in applying the principles of statutory interpretation to the task of creating new rules, an understanding of constitutionalism and of the critical differences between a constitution and ordinary legislation, an appreciation of the historical moment that has given rise to the particular constitution making process and, finally, the ability and willingness to provide a peculiar sort of legal counsel to the other participants in the process.

To successfully fulfill the mandate as legislative counsel, and in particular as a writer, requires an ability to synthesize ideas and express them with a decent degree of clarity and certainty, while understanding the limitations of any written text as an expression of legal norms. A legal document is not drafted, nor does it exist, in a vacuum. Whatever the specific nature or purpose of the text—even of a constitution—it must operate within the general legal and linguistic culture and it derives its meaning from the fabric of the legal principles and expectations that form and define that culture. The drafter can succeed only by internalizing the truth recognized by Alberto Manguel

*“The relationship between a civilization and its language is symbiotic: a certain kind of society gives rise to a certain kind of language; in turn, that language dictates the stories that inspire,*

*mold, and later transmit the society's imagination and thought.”<sup>1</sup>*

As a writer, the legislative counsel ought to understand that meaning never exists in words on a page, but will be created afresh in the mind of each reader of the constitution. The meaning that readers will create when they read a text is influenced by their experiences, their individual motives for reading it and the particular circumstances that prompted them to do so. The drafter must be able and apt to measure words for their meaning to disparate readers—divided by time and place and spread across class, education and life-experience, to explore the nuances of expression, and to survey the constitutional ideals within their historical, social, economic and political context, and so craft a document that will be congruent with the vision, consonant with the ideals, and compatible with the human context in which it will have to do its work.

At the same time, the drafter must accept the mantle of humanness, and put an end to faith in an illusion of literary absolutism, quit promising the false security of a mystical and yet to be discovered absolute anchorage for legal certainty, and admit that no such thing can or ever will exist. We have to acknowledge that most legal concepts are complex and can be slippery, and that words conceal as much as they reveal and deceive as easily as conceive: The result of the exercise is always compromise, and often, creative ambiguity. We need to say unequivocally that life, language and law are all inherently uncertain and ambiguous, and that it therefore takes great humility and judgment to do justice, that there is always a moral quality to our work, and that drafting a good constitution requires the best we can offer—sound intellect, humility, and good judgment, reinforced by deep immersion in life itself and in the culture that will govern itself by our words.

Creative writers are often urged to “find their own voice” and to learn to express life from their own experiences. But constitutional drafters must do the opposite: they must silence their own voices, move beyond their own interests, and draw on something other than their own assumptions, values and aspirations if they are to have any hope of producing a text that will communicate the fundamental law of the nation to its citizens personally and equally.

Paul Benjamin, a South African lawyer who has drafted legislation in his own country, and who was an adviser to trade unions during the constitutional negotiations in the 1990s, once privately observed to me that “*A legislative drafter is the ultimate ghost writer.*” That seems an apt summation of the terms of reference for a constitutional drafter, because the drafter is indeed expected to suppress his own ideals in favor of the visions of others, to produce a perfect expression of their ideas, to remain out of sight during the creative process and invisible after the publication, and to disclaim any personal credit for, or authorship of, the resulting work. In exchange, the drafter is enriched by what Manguel called “*the precious value of the art of translating experience into words.*”<sup>2</sup>

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1 Alberto Manguel, *The City of Words* (2007) 63

2 Manguel, *supra* at 58.

## Appendix 1

### Premises of the Constitution of Jamaica

*At the Court at Buckingham Palace, the 23rd day of July, 1962*

*Present,*

#### *THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL*

*Her Majesty, by virtue and in exercise of the powers in that behalf by subsection (1) of section 5 of the West Indies Act, 1962 or otherwise in Her vested, is pleased, by and with the advice of Her Privy Council, to order, and it is hereby ordered, as follows:-*

- 1. (1) This Order may be cited as the Jamaica (Constitution) Order in Council 1962.*
- 2. (2) Subject to the provisions of subsection (2) of section 3 of this Order, this Order shall come into operation immediately before the appointed day (in this Order referred to as "the commencement of this Order"):*
- 3. Provided that where by or under this Order the Governor-General has power to make any appointment or to make any Order or to do any other thing for the purposes of this Order that power may be exercised by the Governor of the Colony of Jamaica at any time after the twenty-fourth day of July, 1962 to such extent as may, in his opinion, be necessary or expedient to enable the Constitution established by this Order to function as from the commencement of this Order.*

## Appendix 2

### Declaration of the Teslin Tlingit

*We are Tlingit, people of the land, people of the water—  
People of the mountains, the forests, and the Wolf;  
People of the rivers, the lakes, the Frog and the Beaver;  
People of the Eagle and the Raven Children, we walk below the skies of the creator in the  
footsteps of our ancestors.*

*We are one spirit, one mind, one people—  
Dakht awèdi, Ishkitàn, Yanyèdi, Kukhhittàn, Dèshitàn  
Each is equal, with an honoured history  
Etched in the names and sacred places entrusted to its care, and  
Told in the stories, songs, dances and symbols that are our language.*

*We follow ancient Tlingit law—  
Founded on our understanding of the spirit in all living things;  
Based on our respect for the land and its resources; and  
Rooted in our history, and our traditional practices and knowledge.*

*Tlingit law is our identity—  
Reflecting the unity and inclusiveness of our Clans and communities;  
Demonstrating the value, uniqueness and dignity of each person; and  
Enriching all aspects of Tlingit community and personal life.*

*Under Tlingit law, each individual  
Is a valued part of the community; and  
Is taught to respect the spirit living within themselves  
Bears a traditional name, and is taught to value and honour the history of that name and is  
responsible to preserve its respected place in Tlingit culture;  
Is expected to value and respect the wisdom of our ancestors; and  
Represents the Teslin Tlingit Nation, and their Clan, to the world, and is to bring honour to  
the Nation by their conduct in the world.*

*Under Tlingit law, each person has responsibilities to the Creator—  
To acknowledge and respect the spirit in all living things;  
To care for the air, the land, the water and all living things in the air, on the land or in the  
water;  
To use resources in moderation, acknowledge the resources used, and restore the land;  
To behave with dignity and integrity at all times; and  
To follow those in authority, and obey the laws of the Teslin Tlingit Nation.*

*Under Tlingit law, each person has responsibilities to the community—  
To share the benefits of life with the rest of the community;  
To care for our children, teach and nurture our youth, and help them to learn our values,  
traditional knowledge and rites of passage;  
To support and care for members of their extended family, Clan and Nation; and*

*To care for, nurture and support their parents and Elders*

*Under Tlingit law, each person has responsibilities to other individuals—*

*To act with fairness and understanding in personal relationships;*

*To do no harm;*

*To accept personal responsibility for actions that affects others;*

*To acknowledge actions that do hurt others, and take responsibility for the harm done;*

*To make restitution to those harmed, and to seek forgiveness; and*

*To be reconciled to the community.*

*Under Tlingit law, each of our leaders has responsibilities to the community—*

*To demonstrate responsibility to future generations;*

*To act at all times in accordance with Tlingit law;*

*To exercise the public trust of governance to serve the community, not to rule it;*

*To be diligent in public responsibilities, to give sound counsel, and to exercise good judgment;*

*To set aside personal desires, and make decisions in the best interest of the whole Nation;*

*To base decisions in a clear vision, to manage the Nation's resources prudently and efficiently, and to evaluate the effect of their actions;*

*To keep in confidence all matters entrusted to them;*

*To never abuse the public trust by using information entrusted to them for personal gain or advantage; and*

*To conduct their personal lives without reproach, as an honour to our elders, a credit to the Nation, and an inspiration to our youth.*

*Together, our leaders are responsible to—*

*Enhance the general welfare of the Tlingit,*

*Promote respect for and use of our language and culture;*

*Safeguard our land, resources, and environment;*

*Strengthen our unity, and our educational, social, economic and political development;*

*Protect the spiritual, physical and emotional health of our people; and*

*Keep alive Tlingit traditions, preserving our heritage with dignity and pride for future generations.*

*We are of one spirit, one mind and one people.*

*This is the Declaration of the Tlingit, People of the water—People of the land.*

## Appendix 3

### Declaration of the Nisga'a Nation

*We are Nisga'a, the people of K'aliaksim Lisims—*

*From time immemorial we have lived in the lands that K'amligiihahlhat gave to our ancestors.*

*We observe Ayuukhl Nisga'a, we have heard our Adawaak relating to all our Ango'oskw, from the Simgigat and Sigidimhaanak' of each of our wilp.*

*We honour and respect the principle of the common bowl.*

*We are Nisga'a—*

*Since the beginning of time, our leaders have upheld the honour of our nation, and many have grown old and passed on seeking justice for our people.*

*We have heard their stories, we celebrate their loyalty, and we are inspired by their courage.*

...

*We commit ourselves to the values of our Ayuuk which have always sustained us and by which we govern ourselves, and we each acknowledge our accountability to those values, and to the Nisga'a Nation.*

*We adopt this Constitution, recording here a solemn promise to ourselves and our future generations, confident that under this Constitution—*

*The Nisga'a Nation will prosper as a self-reliant society with a sustainable economy;*

*Nisga'a culture, self-determination, and well-being will be preserved and enhanced for generations to come;*

*The traditional role that the Simgigat and Sigidimhaanak', and respected Nisga'a elders, as recognized and honoured in Nisga'a culture from time immemorial, will be respected;*

*Nisga'a elders, Simgigat and Sigidimhaanak' will continue to provide guidance and interpretation of the Ayuuk to Nisga'a government;*

*Nisga'a spirituality will thrive and prevail in this land that K'amligiihahlhat gave to us; and*

*The Nisga'a Nation will flourish as a free and democratic society.*

*We are Nisga'a, the people of K'aliaksim Lisims—*

*May K'amligiihahlhat continue to protect our land and nation.*

*Extract from*

*The Constitution of the Nisga'a Nation*

*Fundamental values of the Nisga'a Nation*

*The Nisga'a Nation is founded on values that have always been shared by all Nisga'a. In*

*particular:*

*Nisga'a revere K'amligiihahlhat who created this land, placed us in it as stewards, and endowed each person in it with a unique spirit.*

*Nisga'a cherish and celebrate the spirituality of our people.*

*Nisga'a honour the traditions of our ancestors, the authority of our Ayuuk, and the wisdom of our elders.*

*Nisga'a practice the principle of the common bowl.*

*Nisga'a respect the dignity of each person.*

*Simgigat, Sigidimbaanak, and respected Nisga'a elders:*

*nurture the spirit of the Nisga'a Nation;*

*provide guidance to interpretation of the Ayuuk;*

*advise Nisga'a Government on matters relating to the traditional values of the Nisga'a Nation, through the Council of Elders provided for in this Constitution; and*

*contribute to the unity of the Nisga'a Nation, and the harmony of individuals and families within the Nisga'a Nation, during times of personal or national dispute.*