Constitution Drafting:
The Good, the Bad, and the Beautiful

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A constitution is the queen of legal documents. All the legal-writing rules that have evolved for drafting contracts, wills, legislation, and the like apply most compellingly to drafting constitutions. The language of a 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 piece of legislation. It is not just a higher law, not just a 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. Constitution drafting is thus a momentous responsibility.

Mexico's constitution explicitly recognizes its own overriding authority. Written in 1917, this constitution — like the United States Constitution — proclaims its supremacy. Article 133 states:

> This Constitution, and the laws of the Congress of the Union which emanate therefrom, and all treaties made, or which shall be made in accordance therewith by the President of the Republic, with the approval of the Senate, shall be the Supreme Law throughout the Union. The judges of every State shall be bound to the said Constitution, the laws, and treaties, notwithstand-

> ing any contradictory provisions that may appear in the Constitution or laws of the States.[1]

Of course, no constitution is entirely sharp, clear, and moving. Even Gouveneur Morris, chief drafter at the United States Constitutional Convention, was himself unable to maintain the magnificence of his preamble ("We the People . . .") throughout the entire document. To be sure, our Constitution — the oldest and most respected in the world — contains some dull, boring, wretched language. Nowhere is its language more confusing than in Article II, section 1, clause 3. This 286-word clause on electoral procedure has been superseded by a clearer, albeit wordier, Twelfth Amendment (parts of which were, in turn, superseded by the Twentieth Amendment).

Wretched constitution drafting results from either unclear thinking or clear thinking for undesirable ends. Sloppy thought in any kind of drafting can result in ambiguous language subject to misinterpretation. But sloppy thought in constitution drafting is much more serious: It can imperil society itself.

Poor constitution drafting can be analyzed in three categories: deplorable, dangerous, and defective.

WRETCHED CONSTITUTION DRAFTING

Deplorable Provisions

What I call "deplorable" writing results from unclear thinking. Such writing is open to unintended and often unfortunate interpretations. When it appears in a constitution, it can jeopardize a government and its people.

Germany's 1919 Weimar constitution contains several deplorable provisions. Originally acclaimed as a model of social-

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1 All constitutional references are taken from CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & G. Flanz eds. 1971–present).

democratic idealism, it later opened the door for totalitarian dictatorship. In fact, Hitler's lawyers used it to justify Nazi rule.

Article 1, section I of the Weimar constitution begins auspiciously, in a progressive spirit:

> The German Reich is a Republic. All state authority emanates from the people.

Article 2, however, contains deplorable writing, which provided fertile ground for the growth of expansionism. These words enabled the Reich to assert increasing control over territories outside Germany:

> The territory of the Reich consists of the territories of the German States. Other territories may, by the law of the Reich, be incorporated in the Reich if their population so desire in virtue of the right of self-determination.

Article 48 likewise empowered the Reich in its quest to assert internal control over the German *Länder* (states) and the German people:

> In the event of a State not fulfilling the duties imposed on it by the constitution or the laws of the Reich, the President of the Reich may make use of the armed forces to compel it to do so.

If public security and order were seriously disturbed or endangered within the Reich, the President could take measures to restore them, using armed forces if necessary. For this purpose he could abrogate the fundamental rights set out elsewhere in the constitution.

With so many respected scholars drafting the Weimar constitution, it is shocking that such provisions came to pass. Were they unintentional? Surely the Weimar framers — recovering as they were from the ravages of World War I and facing the future

without a Kaisar — did not realize that they were helping give birth to a monstrous dictatorship.

Similarly, Germany's 1949 drafters had the best of intentions. With American help, the drafters strove to create a document that would preclude authoritarianism. Naturally, they wanted to prohibit destructive political parties. To this end, they wrote the now famous "anti-Nazi" clause in article 21:

> (1) The political parties shall participate in the forming of the political will of the people. They may be freely established. Their internal organization must conform to democratic principles. They must publicly account for the sources of their funds.
>
> (2) Parties which, by reason of their aims or the behaviour of their adherents, seek to impair or abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany, shall be unconstitutional. The Federal Constitutional Court shall decide on the question of unconstitutionality.

So effective was that clause in keeping West Germany free from party monopoly that I once borrowed it. When charged with drafting the 1982 Liberian constitution, I incorporated the provision almost verbatim. It seemed like a good idea at the time. But when Sergeant Sam Doe broke his promise to the Liberian people that he would not run for president under the new constitution, he used its "anti-Nazi" clause to eliminate all meaningful opposition.

Banning other political parties because they threatened "to impair or abolish the free democratic society" ensured Sam Doe's election. Ironically, after Doe's assassination in 1990, Doe's previously banned opponent, Dr. Amos Sawyer, took over as acting president — opening the way for democracy.

Dictators have used other seemingly innocuous provisions as pretexts. Consider, for example, article 86 of the 1986 Nicaraguan constitution:

> All Nicaraguans have the right to freely elect and exercise their profession or trade and to choose their place of work with no requirements other than requisite schooling and that the work serve a social purpose.

The Sandinistas used the last clause to empty the universities of noncommunist faculty, to repress democratic journalists, and to curtail the business of citizens who were not party members.

Dangerous Provisions

By "dangerous" provisions I mean those designed to achieve specific political ends. Many dangerous constitutions arose in Eastern-bloc countries after World War II. Drafters used them to tip the balance of rights from populace to politburo.

Consider the 1982 Chinese constitution, which supported the government's attack on protestors at Tiananmen Square in 1989. Articles 53 and 54 establish vague, undefined duties to "observe public order" and to "respect social ethics" — but the drafters also secured unfettered governmental control over citizens' lives:

> Citizens of the People's Republic of China must abide by the constitution and the law, keep state secrets, protect public property and observe labour discipline and public order and respect social ethics.
>
> It is [their] duty . . . to safeguard the security, honour and interests of the motherland; they must not commit acts detrimental to the security, honour and interests of the motherland.

Article 4 of the infamous 1986 constitution of Nicaragua's Sandinista government follows suit, using progressive-sounding expressions to achieve oppressive results:

> The Nicaraguan people have established a new state in order to promote their interests and guarantee their social and political achievements. The state is the fundamental instrument of the people to eliminate all

> forms of exploitation and submission of human beings, to promote the material and spiritual progress of the entire nation, and to ensure that the interests and rights of the popular majority prevail.

Not without guile, the framers of this constitution asserted in article 68 that "the means of mass communication are in the service of national interests" and that "the state shall promote the access of the public . . . to the means of communication, and shall prevent [the public] from responding to foreign interests . . . ."

Presidents, kings, prime ministers, and commissars alike have shielded themselves by using the constitution to dissolve both legitimate and illegitimate political and social opponents. An extreme example occurred when drafters commissioned by the king in 1962 to write the former constitution of Nepal envisioned an absolute monarch protected by a partyless political system. The preamble (dangerously) acknowledged:

> AND WHEREAS We are firmly convinced that such arrangement is possible only through the partyless democratic Panchayat system rooted in the life of the people in general, and in keeping with the national genius and tradition and as originating from the very base with the active cooperation of the whole people, and embodying the principles of decentralisation . . . .

Until its revision in 1990, that same constitution gave the king authority to revise judicial decisions. It also prohibited the supreme court from reversing itself.

Defective Provisions

Defective provisions include those that are wordy, confusing, or inconsistent with other parts of the same constitution. An example of such defective writing is the unduly complex language in the eighth schedule, part I of the 1963 constitution of Malaysia. If nothing else, it results in public bewilderment and denies citizens the right to understand the constitution under which they live. The provision gives the Ruler the power to appoint an Executive Council following these rules:

> (2) The Executive Council shall be appointed as follows, that is to say:
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> (a) the Ruler shall first appoint as Menteri Besar to preside over the Executive Council a member of the Legislative Assembly who in his judgment is likely to command the confidence of the majority of the members of the Assembly . . . .
>
> . . .
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> (4) In appointing a Menteri Besar the Ruler may, in his discretion, dispense with any provision in the Constitution of this State restricting his choice of a Menteri Besar, if in his opinion it is necessary to do so in order to comply with the provisions of this section.

Similarly, article 99 of the 1982 constitution of the People's Republic of China invites confusion:

> The people's congresses of nationality townships may, within the limits of their authority as prescribed by law, take specific measures suited to the peculiarities of the nationalities concerned.

And what of the disarray that might result from article 137 of the 1947 Italian constitution?

> A constitutional law establishes the conditions, forms and time limits for decisions on constitutional legitimacy and guarantees the independence of the judges of the Court.
>
> All other norms necessary for the constitution and functioning of the Court are established by ordinary legislation.
>
> The decisions of the Constitutional Court may not be contested.

Inconsistency runs wild in the various descriptions of the state's role in religion and public education in the 1987 constitution of the Philippines. Article III, section 5, which is based on the First Amendment to the United States Constitution, provides:

> No law shall be made respecting an establishment of religion, or prohibiting the free exercise thereof. The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed. No religious test shall be required for the exercise of civil or political rights.

Article II, section 6, which echoes the Soviet constitution, provides:

> The separation of Church and State shall be inviolable.

Finally, article XIV, section 2(3) explains:

> At the option expressed in writing by the parents or guardians, religion shall be allowed to be taught to their children or wards in public elementary and high schools within the regular class hours by instructors designated or approved by the religious authorities of the religion to which the children or wards belong, without additional cost to the Government.

A common problem of constitutional language is wordiness. Two brief excerpts provide a flavor of such language. First, article 25 of the 1990 Namibia constitution begins:

> Save in so far as it may be authorised to do so by this Constitution, Parliament or any subordinate legislative authority shall not make any law, and the Executive and the agencies of Government shall not take any action which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter, and any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that:
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> (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, and any subordinate legislative authority, or the Executive and the agencies of Government, as the case may be, to correct any defect in the impugned law or action within a specified period, subject to such conditions as may be specified by it. In such event and until such correction, or until the expiry of the time limit set by the Court, whichever be the shorter, such impugned law or action shall be deemed to be valid.

Similarly bewildering are selected passages from section 3 of the 1978 constitution of Dominica:

> A person shall not be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say: —
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> (a) in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether established for Dominica or some other country, in respect of a criminal offence of which he has been convicted;
>
> . . .
>
> (j) to such extent as may be necessary in the execution of a lawful order requiring him to remain

> within a specified area within Dominica, or prohibiting him from being within such an area, or to such extent as may be reasonably justifiable for the taking of proceedings against him with a view to the making of any such order or relating to such an order after it has been made, or to such extent as may be reasonably justifiable for restraining him during any visit that he is permitted to make to any part of Dominica in which, in consequence of any such order, his presence would otherwise be unlawful.

Neither in drafting the 1979 constitution of Zimbabwe nor in revising the 1990 constitution of Fiji could I eliminate the redundant phrase that peppers virtually all the constitutions of the former British colonies — "that is to say." Would that I could shake that anonymous Whitehall scrivener whose useless phrase is deemed precedent by succeeding generations of British-influenced framers. What's wrong with a colon instead?

Then there are those legalese favorites, *whereas* and *wherein*. I was instrumental in deleting those words from the first draft of the 1972 Bangladesh constitution. However, the framers in that new state, which had shortly before been East Pakistan, were naturally influenced by the language of the constitution under which they had been reared. The words *whereas* and *wherein*, which had been embedded in the Pakistan constitution, are found in the subsequent revisions.

Since constitutions are largely written by lawyers, legalese is inevitable. Thus unending sentences overburdened with qualifications proliferate. Thus appear the innumerable references and cross-references using numbers, numbers, numbers! Witness section 66(1) of the Zimbabwe constitution:

> Provided that the President shall not be required to act on the advice of any person or authority in the exercise of his functions under subsection (2), section 46 (subject to the provisions of subsection (3) of that section), 63(2)

> or (3), 69(1)(a), 70(1) or (2), 71 (in the circumstances described in the proviso to subsection (2) of that section), 87(6) or (9), 110(3), paragraph 8 of Schedule 4 or any other case where it is expressly so provided.

CONSTITUTIONAL GRANDEUR

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.

After Franco's overthrow, these resounding words began the new 1978 Spanish constitution:

> 1. Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality and political pluralism as the superior values of its juridical order.
> 2. National sovereignty resides in the Spanish people from whom emanate the powers of the state.

The famous article 9 of the 1947 Japanese constitution decisively expressed the altruistic goal of peacefully resolving international disputes. Forced upon the Japanese by General MacArthur, it boomeranged against the United States during the Gulf War, when Japan used it to justify its limited support for the coalition against Iraq:

> Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes.
>
> In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.

How inspiring to read constitutional language that captures a nation's aspirations in a stirring appeal to thought, devotion, and action! The finest examples are in preambles. None is more dramatic than the preamble to the United States Constitution; yet consider this one, from the 1947 Japanese constitution:

> Government is a sacred trust of the people, the authority for which is derived from the people, the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.

Bills of rights likewise tend to include moving language. Having criticized the Philippine constitution for its inadequacies, I should point out its virtues. Article 14 requires that schools teach children the love of all humanity, among other things:

> All educational institutions shall include the study of the Constitution as part of the curricula. . . . They shall inculcate patriotism and nationalism, foster love of humanity, respect for human rights, appreciation of the role of national heroes in the historical development of the country, teach the rights and duties of citizenship, strengthen ethical and spiritual values, develop moral character and personal discipline, encourage critical and creative thinking, broaden scientific and technological knowledge, and promote vocational efficiency.

If eloquence is one of the measures of greatness, the 1776 Virginia Bill of Rights must rank highly. It transformed the shape of future governments with these words:

> [A]ll men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety . . . .

Echoing the Declaration of Independence, these words aptly command the respect and awe of thoughtful political and legal analysts. Would that all framers in future days might show equal facility as they avoid the wretched and strive to create the majestic language that constitutions require.