

# **Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)**

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## **Abstract**

It seems to me that a sort of hieratic language has developed by which the priests incant the commandments. I seem to see the ordinary citizen today standing before the law like the laity in a medieval church: at the far end the lights glow, the priestly figures move to and fro, but it is in an unknown tongue that the great mysteries of right and wrong are proclaimed.<sup>1</sup>

# 1. Setting the Scene

During the 1980s in South Africa, in an almost desperate attempt to make sense of an Act of Parliament (as amended on numerous occasions), an appeal judge expressed himself as follows on the confusion:<sup>2</sup>

In an attempt to escape from the prolixity which disgraces this piece of legislation I shall take a number of short cuts when referring to its provisions ... In my opinion the man in the street would be at least as perplexed by the language used by the legislature as is the man on the Bench who is writing this judgment.

Over the past three decades, the issue of 'plain language' drafting of legislation, contracts and other legal documents became one of the new buzzwords among legal academics and practitioners. This led to a healthy (and sometimes robust) debate, not only as to what plain language drafting should and should not be, but its consequences for drafting and legal interpretation as well.

Yes, this article is about legal drafting and 'keeping it simple' in South Africa. But it is much more than the usual well-known arguments about all the social and legal benefits of plain language drafting. We do not intend to enter into the current debates between Starke, Cutts, Butt, Sullivan *et al.* Suffice to say that, for the purpose of this article at least, we do in principle accept the pressing need for plain language drafting of legal documents.

However, we would like to position ourselves with Jeffrey Barnes<sup>3</sup> in looking at the South African legislative landscape from a law reform context. Post-apartheid South Africa is in a process of substantive transformation. The current (1996) Constitution of South Africa<sup>4</sup> (hereafter the Constitution) is a profoundly transformative document.

Klare<sup>5</sup> explains this concept as follows:

By transformative constitutionalism I mean a long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country's political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.

In our view, the problems and demands of plain language drafting in South Africa (and many other Southern African countries) must be analysed within the paradigm of law reform, development, and transformation. In the process, the 'general truths' in

the law reform literature (as mentioned by Jeffrey Barnes) will probably be self-evident: the operation of legislation can only be understood in terms of its background, there are inherent difficulties in language, the implementation of legislation must be influenced by those who implement and interpret it, public participation in the law-making process, the drafting process and drafting style, the accessibility of the law, dissemination of information about the substance of the law and the law-making process, democracy and the rule of law, and so on. In his essay on the link between human rights and development, Paul Martin quotes Julius Nyerere, the former president of Tanzania:<sup>6</sup>

A man can defend his rights effectively only when he understands what they are, and how to use the constitutional machinery which exists for the defense of those rights—and knowledge of this kind is part of development.

In 1991, the Canadian Bar Association adopted a resolution on plain language drafting, stating that '[p]lain language drafting should be viewed as a dynamic process rather than simply the mechanical application of static rules'.<sup>7</sup> In this article we intend to illustrate that, in South Africa at least, plain language drafting of legislation cannot be explored without considering the wider process of law-making, including its structural, political, and historical contexts.

## **2. Principles of Plain Language Drafting: A Brief**

### **Overview**

#### **(A) Introduction**

The reality of globalization and the incredible of the digital age have again emphasized the global need for effective and clear communication. In an effort to facilitate aspects, such as international trade agreements, cross-border financial commitments, the increasing importance of international law, as well as domestic legal requirements, all forms of written and spoken communication should be as clear and effective as possible. Even in the super-technological 21st century with its high-speed broadband Internet, global satellite connectivity, and wireless cellular communications, there is still a need for clearer, simpler, and more understandable communication. It is against this global backdrop that plain language drafting of all types of legal documents is again revisited, albeit from a South African perspective.

Lawyers and drafters of legal documents have long been accused of drafting documents that are dubious and fraught with deception. Many reasons have been advanced why legal documents are often ambiguous and difficult to understand. It is argued in particular that lawyers intentionally draft documents as difficult as possible, so as to create confusion and future loopholes, should the need for repudiation arise. It is obvious that if legal documents are clear and to the point, further legal assistance could be limited. A general practice in almost all legal systems has developed over hundreds of years: lawyers and other legal drafters used difficult legal jargon and complicated legalese in order to secure their continued services and alternative interpretation options, should disputes arise. To illustrate how difficult legal drafting can complicate a seemingly simple issue, the well-known and infamous (probably apocryphal) ‘Nuts Order’ is a case in point:

In the Nuts (underground) (other than ground nuts) Order, the expression nuts shall have reference to such nuts, other than ground nuts, as would but for this amending Order not qualify as nuts (underground) (other than ground nuts) by reason of their being nuts (underground).<sup>8</sup>

## **(B) Revisiting Some Principles of Plain Language Drafting**

The need to make the law (including legal documents) more accessible and easier to understand applies to both written and spoken communication, and gave rise to the plain language movement. In essence, plain language refers to legal communication that is clear, understandable, accessible, and also user-friendly. When a legal document is in plain language, communication is improved, information is shared more effectively, and all the role players are better informed of what is expected of them. To ensure that legal documents are drafted in plain language dedication, exceptional reading and writing skills and the application of various drafting techniques are required. Over the years the following common plain language principles have been identified:<sup>9</sup>

### **(i) Structure of the Legal Document**

It is imperative that before a legal document is drafted the author(s) should consider its most applicable structure. The final document should not appear unwieldy and cumbersome, and should be divided into chapters and parts. In other words, the overall design and layout should be user-friendly and attractive, including (where necessary) a comprehensive table of contents and an index and bibliography. Chapters should have

appropriate headings and subheadings, and clear and chronological numbering is required. Difficult or technical and foreign words should be used sparingly, and where used should be highlighted in italics with explanations in footnotes, schedules, or definition sections. Flow charts, diagrams, and other graphic tools should be utilized where possible.<sup>10</sup> Overall, the document text should be in 'open text' (well spaced) and the typeface must be legible. To avoid confusion, all role players should be clearly identified and the entire document should be arranged carefully according to central theme and chronological requirements.

### **(ii) Structure within Chapters or Parts**

Chapters and other related parts of a document should be subdivided further in order to ensure that their content is understandable and clear. The most important issues should be explained at the beginning and basic principles should be clarified before comprehensive detail is provided, progressing from known facts to new information.

### **(iii) Sentence Construction and Language**

Where possible, sentences and paragraphs should be kept short: the general rule is that one theme, one paragraph, and one sentence should be used to explain one concept. Sentences should be in the active voice, and should be positive rather than negative or neutral. Clear and simple language must be used, with the emphasis on clarity, recognizability, intelligibility, accessibility, accuracy, and unambiguity. Unnecessary, difficult or overly technical words should be avoided where possible. The final product should be gender-neutral and the employment of cross-references should be minimized, or at least be simplified. To achieve certainty in a document, the use of mandatory words such as 'must' are preferred, and 'shall' or 'can' are to be avoided. Finally, unknown or foreign words or expressions should be used sparingly, and if possible, be excluded altogether.<sup>11</sup> Sentences should be as short as possible and the first or second person should be used rather than the third person. Emphasis on the verb in a sentence is to be encouraged.

These plain language guidelines should go a long way in making legal documents more accessible and understandable. All legal documents would benefit from such techniques, including legislation, Bills, white papers, and other policy documents, as well as standard legal documents such as wills, opinions, heads of argument, and contracts. Notwithstanding the apparent benefits, many politicians and lawyers are still sceptical about the need for plain language writing techniques. Many opponents argue that language and content differ from document to document and that the

effectiveness of a document ultimately depends on the particular audience or target group, and that legal or technical terms can often not be translated into plain language. There is no doubt that the expansion of plain language drafting faces challenges, including the development of an awareness about the benefits (as well as the limitations) of plain language drafting, a changing of attitudes, and increased international co-operation between proponents of plain language drafting.<sup>12</sup>

### **(C) Plain Language: The International Perspective**

The development of plain language writing is not restricted to a few isolated countries, but seems to be an international phenomenon. Initially, the concept of plain language took hold in the United States, but many other countries soon followed suit.<sup>13</sup> Other factors such as globalization, the expansion of international trade, as well as regional organizations such as the European Union and the African Union, have necessitated better and clearer communication.

#### **(i) Plain Language in Australia**

Plain language developments began in Australia in the early 1970s. During 1990, a Centre for Plain Legal Language was established as a joint project between the Law Foundation of New South Wales and the law faculty of the University of Sydney. The aim of the Centre was to do research about (and to promote) the use of plain language in the drafting of legislation and other legal documents.<sup>14</sup> Reportedly, the Centre has made a huge contribution to the development of plain language in both the public and private domains. Apart from various state departments which have employed plain language techniques, many private law firms have also created their own in-house plain language units.<sup>15</sup> Most role players seem to favour the principles of plain legal language rather than laws and legal documents that have originally been drafted in more difficult and technical terms.<sup>16</sup>

#### **(ii) Plain Language in the United Kingdom**

Since Anglo-Saxon times, when legal documents were written in basic Anglo-Saxon, the use of plain legal language has steadily deteriorated. This was largely attributed to the importation of different languages and the usage of various synonyms from each language.<sup>17</sup>

Modern developments in the United Kingdom regarding plain language can be traced back to 1960. The importance of plain language was identified by the general public, who argued that all ordinary people have a right to understand the law. During the

early 1980s two distinct plain language institutions were established: in 1980, a Plain Language Commission was set up and, in 1983, the organization 'Clarity' was created. Both institutions are involved in the promotion of plain language principles. More recently, it has become accepted practice for legal documents to be drafted (as far as possible) in plain language. Almost all legislatures, many practitioners, and even some judicial structures support the idea of plain legal language. Many lawyers, who in the past were criticized for drafting legal documents in verbose language and ambiguous legalese to generate litigation, have now adopted the plain language approach.<sup>18</sup>

### **(iii) Plain Language in the United States**

A number of plain language initiatives in the United States started in 1970, but the idea is much older.<sup>19</sup> In 1978, the so-called Document Design Project was launched with the aim to improve clear writing skills and to promote practical design criteria for the drafting of public documents. Since 1990, a strong drive towards plain language was initiated. A number of states have since adopted laws which require documents to be prepared in plain language.<sup>20</sup> Special mention should be made of former president Bill Clinton's specific executive directives to use plain language in the Federal Administration. According to two presidential executive orders (in 1993 and 1998 respectively), government documents had to be drafted in plain, simple, and understandable language.<sup>21</sup> These initiatives have since filtered through to some state administrations and private law firms.

## **3. Welcome to the Quagmire**

### **(A) The Complex South African Background**

The following section is a brief overview to illustrate some of the structural factors, historical influences, and other juridical complexities that any legal drafter in South Africa has to contend with.

South African legal language prior to 1994 was largely influenced by English and Roman-Dutch law. During the apartheid-era, plain language legal drafting was not high on the agenda of the former National Party government, and as a result, the general population's access to and understanding of the law was severely limited. Only two official languages (English and Afrikaans) were used to draft and publish legislation. Laws and legal documents were often very complicated and inaccessible.<sup>23</sup>

Although the new Constitution of 1996 was to a large extent drafted in plain language, neither South African law nor existing drafting conventions expressly require plain language drafting. This is unfortunate, since it is generally accepted that a Constitution of a country is an important educational tool and instrument for empowerment, and in the case of South Africa, for transformation and social justice. The drafters of the South African Constitution did attempt to produce an accessible, open document, drafted in language that can be understood by the people who are influenced by it: a constitutional document by the people for the people.

The interim Constitution<sup>24</sup> was legally adopted by the former tri-cameral parliament. However, the Constitution of 1996 was not adopted by parliament, but drafted by an elected Constitutional Assembly and certified by the Constitutional Court<sup>25</sup> before it commenced on 4 February 1997. In view of the importance of a Constitution in general, the Constitutional Assembly decided to draft the new Constitution in plain language. In this regard, a number of plain language principles were employed in an effort to make the final text as accessible and plain as possible, especially with regard to the justifiable Bill of Rights.<sup>26</sup> Some of the most significant methods used to ensure a plain language constitutional text are the following:<sup>27</sup> identify direct obligations clearly; the word ‘shall’ was excluded from the constitutional text and replaced by ‘must’;<sup>28</sup> more generic and wider terms were used (e.g. ‘every person’ was substituted with ‘everyone’);<sup>29</sup> the active form is used rather than the passive form (e.g. the requirement ‘must be done’); sentences are short and to the point, and long and overly complicated sentences were avoided;<sup>30</sup> simple and contemporary words were used; unnecessary cross-referencing was avoided and, where necessary, definitions were provided at the end of the Constitution;<sup>31</sup> and finally the structure and layout were carefully considered and chronological divisions of the major constitutional provisions were provided.<sup>32</sup>

Apart from the constitutional efforts, mention should also be made of the South African Law Reform Commission, an independent statutory body,<sup>33</sup> which is responsible for research in respect of the law of South Africa with a view to advising the government on the development, improvement, modernization, and reform of the law of South Africa in all its facets to establish a permanent, simplified, coherent, and generally accessible statute book, complying with the principles of the Constitution.<sup>34</sup> The use of plain language drafting is expressly mentioned and discussed (and



officially recommended) in chapter 15 of the standard South African legislative drafting manual.<sup>35</sup>

### **(B) Typologies and Categories: Some Conceptual Difficulties**

In terms of one of the South African common-law presumptions of statutory interpretation the legislature is aware of the existing law. As a result, legislative drafters should know the existing law, including legislation. As a source of law the types and categories of legislation should be self-explanatory—or is it that simple? Section 1 of the South African Interpretation Act<sup>36</sup> provides that it applies to ‘... every law (as in this Act defined) in force, at or after the commencement of this Act, in the Republic or any portion thereof, and to the interpretation of all by-laws, rules, regulations or orders made under the authority of any such law ...’. In terms of section 2 of the Interpretation Act, ‘law’ means any law, proclamation, ordinance, Act of Parliament, or other enactment having the force of the law.

So far, so good—but wait there is more, much more! The Constitution defines<sup>37</sup> ‘old order legislation’ as legislation enacted before the previous Constitution took effect, ‘previous Constitution’ meaning the interim Constitution. But sections 101(3) and 140(3) of the Constitution refer to ‘... proclamations, regulations and other instruments of subordinate legislation’. Section 239 of the Constitution also defines legislation, distinguishing between national and provincial legislation. National legislation is defined as including ‘... subordinate legislation made in terms of an Act of Parliament; and legislation that was in force when the Constitution took effect and that is administered by the national government’. Provincial legislation is defined as including ‘... subordinate legislation made in terms of a provincial Act; and legislation that was in force when the Constitution took effect and that is administered by a provincial government’.

In terms of section 36 of the Constitution (the general limitation clause), a fundamental right in the Bill of Rights may be limited in terms of law of general application. For the purpose of this article it is sufficient to note that the Constitutional Court<sup>38</sup> has held that ‘law of general application’ includes all forms of legislation (both original and subordinate), as well as the common law and indigenous customary law.

### **(C) The Chronological Dimension: ‘The Law Is Always Speaking’**

Before anything else, South African legislative drafters have to contend with the unique chronological complexities of the South African historical context. With regard to the legislative timeline, two<sup>39</sup> distinct eras can be identified:

#### **(i) Old Order legislation (1806–1994)**

##### *(a) Pre-Union legislation (1806–1910)*

This category refers to the legislation adopted between the British annexation of the Cape in 1806 and the creation of the Union in 1910. It consists of legislation of the British colonies and the former Boer Republics. Most of these had been incorporated into legislation of the Union (1910–61) and the Republic (since 1961).

##### *(b) Legislation between the Union of South Africa and the new democratic era (1910–94)*

In view of South Africa's political history and the constitutional changes since 1994, this legislation is now known as ‘old order legislation’ and would include most existing South African legislation: Acts of Parliament,<sup>40</sup> legislation of the four former so-called ‘independent homelands’,<sup>41</sup> legislation of the six former self-governing territories (Bantustans or homelands),<sup>42</sup> provincial ordinances enacted by the provincial councils of the former four ‘white’ provinces<sup>43</sup> (1910–86), regulations of the four provinces (1986–94), by-laws enacted by the various local authorities, as well as other existing delegated (subordinate) legislation.

#### **(ii) Legislation in the New Democratic Constitutional Order**

This category comprises all legislation enacted after the start of a truly constitutional democracy in 1994. It includes the repealed interim Constitution; the Constitution; national legislation (Acts of Parliament and delegated legislation issued in terms thereof); provincial legislation (Acts of the nine new provincial legislatures<sup>44</sup> and delegated legislation issued in terms thereof); other regulations and proclamations; and legislation (by-laws) by the new municipalities which were established since 1994.

The interim Constitution stipulated that all existing legislation will remain in force until repealed or amended by a competent authority.<sup>45</sup> In effect this meant that the vast majority of existing legislative enactments, including those of the previous four provinces and self-governing territories, as well as the former so-called ‘independent homelands’, remain on the statute book. In terms of the Constitution, all law that was in force when the Constitution took effect continues in force, subject to any

amendment or repeal, and consistency with the Constitution.<sup>46</sup> Although the Constitution expressly proclaims its status as the supreme law of the land in section 2, stating that any law or conduct inconsistent with it is invalid, it merely creates the potential of invalidity,<sup>47</sup> since the Constitution is not self-executing. In other words, a competent (legally authorized) body has either to repeal or amend, or strike down<sup>48</sup> existing legislation which may, on the face of it, seem unconstitutional. Old order legislation (legislation in force before the commencement of the interim Constitution)<sup>49</sup> which still remains in force does not have a wider application than it had before, and continues to be administered by the authorities that administered it when the Constitution took effect, unless the Constitution stipulates otherwise.

#### **(D) The Hierarchical Levels of Legislation**

Apart from the temporal questions facing the legal drafter (What is the existing law? Is it in force? Has it been amended?), the hierarchical levels of the different types of legislation must also be considered. Before 1994, the various South African constitutions were not supreme, and the classification of legislation was simple and straightforward. The drafting conventions and hierarchical classification of legislation generally followed the typical Commonwealth-style<sup>50</sup> of classifying legislation into original (or primary) legislation such as Acts of Parliament and subordinate (delegated or secondary) legislation such as regulations and proclamations.

The post-1994 picture is somewhat more complicated. Although the traditional classification still continues, South Africa now also has a supreme Constitution (with all old order legislation and new post-1994 legislation subordinate to it), as well as legislation emanating from three spheres (previously known as levels) of government (national, provincial, and local). It could be argued that since all types of legislation are now 'subordinate' to the supreme Constitution, and that legislation issued by the administration (previously known as subordinate legislation) should rather be referred to as 'delegated legislation' to avoid confusion. However, the Constitution itself expressly refers<sup>51</sup> to regulations, proclamations, and other instruments of subordinate legislation, adding to the conceptual confusion. Under the Constitution, a clear division between original and subordinate (or delegated legislation) is provided. The position is summarized as follows:

### **(i) Original (or Primary) Legislation**

Original legislation derives from the complete and comprehensive legislative capacity of an elected legislative body. It is also known as direct or primary legislative capacity, since it is derived directly from the Constitution, or is assigned by another Act of Parliament.

#### *(a) Acts of Parliament*

These include all Acts of Parliament since 1910. Between 1910 and 1983,<sup>52</sup> Parliament consisted of the House of Assembly and Senate; between 1983 and 1994, it comprised the House of Assembly, the House of Representatives, the House of Delegates, and the President's Council; and since 1994, Parliament consists of the National Assembly and the National Council of Provinces.<sup>53</sup> The legislative authority of the current Parliament is derived directly from the Constitution [sections 43(a) and 44]. Parliament is the highest legislative body in South Africa and it may, subject to the Constitution, pass legislation on any matter.

It should also be noted that during 2000 three specific Acts of Parliament<sup>54</sup> were enacted to give effect to specific and express legislative measures required by the Constitution.<sup>55</sup> As a result, these Acts have a specific 'higher' status in the South African legal order, both hierarchically and substantively.<sup>56</sup>

#### *(b) New provincial Acts (1994–)*

This category comprises the legislation enacted by the nine new provincial legislatures. Their legislative power is also derived directly from the Constitution [sections 43(b) and 104], or assigned to them by Acts of Parliament. The courts also have the power to review provincial Acts in the light of the Constitution. Provincial legislatures also have additional legislative powers assigned by Acts of Parliament.<sup>57</sup>

#### *(c) Provincial ordinances (1961–86)*

The Provincial Government Act<sup>58</sup> empowered the four former provincial councils of that time to enact provincial ordinances on matters concerning the respective provinces, but the four provincial councils were abolished on 1 July 1986.<sup>59</sup> Since provincial ordinances were enacted by an elected body, could alter the common law, and could even have retrospective force, they represent a category of original legislation.

#### *(d) Legislation of the former homelands*

The former homelands (self-governing territories) enjoyed concurrent original

legislative powers with the central government. In terms of the (now repealed) Constitution of the homelands,<sup>60</sup> these territories were granted complete legislative authority regarding specific matters.<sup>61</sup>

*(e) Legislation of the former TBVC states*

Although legislation of the former so-called 'independent homelands' did not form part of South African law, they are valid South African legislation in the area where it previously applied, because these states have been reincorporated into the Republic. It will have the same force of law as provincial Acts, provincial ordinances, and legislation of the former self-governing territories in their areas of operation, and the judiciary may test its constitutionality against the provisions of the supreme Constitution like any Act of Parliament.<sup>62</sup>

*(f) New municipal legislation*

In terms of section 156, the Constitution municipal councils may enact by-laws in respect of local government matters for their areas. Because municipal councils are now fully representative and deliberative legislative bodies, new municipal by-laws are classified as original legislation.<sup>63</sup> Municipalities also have additional legislative powers assigned to them by Acts of Parliament<sup>64</sup> and provincial Acts.<sup>65</sup>

**(ii) Subordinate (Delegated) Legislation**

In any modern society, legislatures delegate many of their powers to other persons, bodies, or tribunals in the executive branch. These are then vested with delegated legislative powers under enabling legislation. Such delegated legislative enactments are known as legislative administrative acts whose validity may be reviewed by the courts.<sup>66</sup> In each case the scope of the subordinate (delegated) legislation will depend on the provisions of the particular enabling legislation.

*(a) Existing provincial proclamations and regulations (1968–94)*

Before the provincial councils were abolished in 1986, certain ordinances enabled members of the various provincial executive committees to issue regulations and proclamations. When the provincial councils were abolished, the legislative authority for the provinces was transferred to the Administrator of each province. The Administrator enacted, amended, or repealed provincial legislation by proclamation and could issue regulations under existing or new parliamentary Acts, provincial ordinances, or new proclamations. As a result, old order provincial legislation consists of both original and delegated legislation, which may have to be read together.

*(b) New provincial proclamations and regulations (1994–)*

The new provincial legislatures will, like their parliamentary counterparts, be able to empower other functionaries, such as the Premier or members of the provincial cabinet, to issue proclamations or regulations.<sup>67</sup>

*(c) Other proclamations and regulations*

The Constitution and other Acts of Parliament confer delegated legislative powers to certain persons or bodies, and section 239 of the Constitution also defines these as ‘national legislation’. For example, the President is authorized,<sup>68</sup> subject to section 203 of the Constitution, to declare a state of national defence by proclamation; a minister is authorized to promulgate certain regulations in accordance with the prescription of the particular statute;<sup>69</sup> and a statutory body or a person may be empowered to make regulations.<sup>70</sup>

**(E) A Myriad of Geographical Units**

As pointed out earlier, the interim Constitution and the Constitution created nine new provinces which replaced the four former white provinces, the four independent homelands, and the six self-governing territories.

Each of the nine new provinces has its own provincial legislature and executive, generating new original and delegated legislation.<sup>71</sup> The new provincial boundaries overlap with those of the four former provinces and the territories of the former self-governing territories and the independent homelands. The local authorities (municipalities) within the nine provinces also have legislative authority<sup>72</sup> and sometimes ‘old’ neighbouring local authorities have been amalgamated. It must also be borne in mind that during the apartheid-era local government was structured on a racial basis. Black local authorities were controlled by ‘general affairs’ legislation, while the white, Indian, and coloured local authorities derived their powers from ‘own affairs’ legislation.

The new authorities at national, provincial, and local levels have to contend with both existing and new legislation, applicable to old and new areas of jurisdiction. Some of the old order legislation has been repealed fully, some merely in part, while the greater part of existing legislation remains in force to enable the new structures and authorities to govern, and services to continue. New Acts of Parliament have to be read together with other existing original legislation, as well as a vast amount of delegated legislation (e.g. provincial regulations and local government by-laws) to

keep 'the system' going. Existing legislation cannot simply disappear. Legislation has to be repealed or declared unconstitutional by a competent authority, and officials and administrative bodies derive their powers and authority from existing enabling legislation.

One example of a new South African provincial legislature trying to deal with existing old order legislation from three former geographical areas (administered by three former administrations) applicable in a new single area should illustrate this problem. North West province consists of parts of the former Transvaal and Cape provinces, and bits and pieces of the former independent Bophuthatswana, inheriting legislation from those territories in so far as those applied to the province.<sup>73</sup> A few years ago, the province embarked on a programme of consolidation (repeal and replacement) of the existing legislation dealing with the exhumation and reburial of bodies. This somewhat macabre issue was governed by three sets of old order legislation: the old Transvaal Removal of Graves and Dead Bodies Ordinance,<sup>74</sup> the old Cape Province Exhumations Ordinance,<sup>75</sup> and the old Bophuthatswana Traditional Authorities Act.<sup>76</sup> In terms of the ordinances permission to exhume a body had to be obtained from the Administrator (now the Premier) of the province, and in terms of the Bophuthatswana Act permission for an exhumation was obtained from the local tribal authority. Apart from the consultation with the traditional leaders in the relevant areas of North West province, the process to repeal the existing three enactments and replace it with a new consolidated provincial Act seemed to be a fairly simple drafting exercise. Since the 'old order legislation' in question are also still in force in some of the other 'new' provinces, the North West provincial legislature only has the authority to repeal such legislation to the extent they apply in North West province. So far, so good!

However, in terms of the Constitution<sup>77</sup> municipalities may make and administer by-laws dealing with cemeteries, funeral parlours, and crematoria, as well as municipal health services. This effectively means that the North West provincial legislature has the legislative authority to repeal and replace (consolidate) the existing three old order enactments dealing with the exhumation of bodies, but the various municipalities have the legislative authority to regulate reburial of such exhumed bodies! In the event of the municipalities being unable or unwilling to pass local government legislation (by-laws) to regulate the reburials, the province may adopt Standard Draft By-laws (which, in itself, is fraught with political and legal difficulties).<sup>78</sup> Suffice to say that, at the time of writing, this particular legislative consolidation has not been finalized.

## **(F) Three Spheres Of Government**

The South African Constitution currently provides for spheres of government as opposed to levels of government. It is specifically stated that in the Republic, the government is constituted as national, provincial, and local spheres, which are distinctive, interdependent, and interrelated.<sup>79</sup> All three spheres are further constitutionally obligated to observe and adhere to the specific principles of co-operative government which have been included in the Constitution. The principles mentioned above are specifically included to foster a system of co-operative federalism and to facilitate the resolution of inter-governmental disputes. The Constitution also allows for the devolution of powers/functions between the three spheres. However, no institution or sphere can however exercise a power or function unless such a power or function was lawfully allocated to it. Government bodies must thus act within the scope and extent as is permitted by the law.<sup>80</sup>

In terms of the supreme Constitution, the role of legislatures and legislators (and by implication, legislative drafters) in a constitutional democracy is clear. The preamble refers to a democratic and open society in which government is based on the will of the people; section 1 establishes the principles of democracy, constitutional supremacy, and the rule of law; section 2 reaffirms the supremacy of the Constitution; in terms of section 7(2), the state must respect, protect, promote, and fulfil the rights in the Bill of Rights; and the Bill of Rights applies to all law and binds the legislature as well. Section 43 of the Constitution provides elected legislatures at national, provincial, and municipal levels the legislative authority to 'make law': in other words, to produce authoritative 'enacted law-texts'. During the legislative process, a number of constitutional values must be borne in mind: democracy, access to justice, transformation, separation of powers, accountability, and so on. In fact, in terms of the oath or solemn affirmation of office [item 4(1) schedule 2 of the Constitution], members of parliament and provincial legislatures undertake to obey, respect, and uphold the Constitution and all other law of the Republic. These fundamental values are not only prescribed to the various lawmakers, but (as will be discussed below) the courts are obliged to interpret legislation in such a way that it promotes the values underlying the Bill of Rights. In other words, the lawmakers have to produce legislation to promote the constitutional values, and the courts must promote those values during the interpretation of that legislation.



### **(G) Three Sources of Formal Law under a Supreme Justiciable Constitution**

South African legal drafters have to contend with distinct ‘families’ of existing law (legislation, common law, and indigenous customary law), all three of which are subject (subordinate) to the supreme Constitution.

The South African Roman-Dutch common law is not sacrosanct, untouchable, or protected from constitutional scrutiny (although some lawyers still believe otherwise).

The Constitution is the supreme law in the Republic, and any law (including the common law) inconsistent with the Constitution is invalid, and in terms of section 39(2) of the Constitution, the courts must promote the spirit, purport, and objects of the Bill of Rights when they develop the common law. In *Carmichele v. Minister of Safety and Security*,<sup>81</sup> the Constitutional Court stressed that a court is obliged to develop the common law in view of the Constitution. In *Pharmaceutical Manufacturers Association of SA; Re ex parte Application of the President of the Republic of South Africa*,<sup>82</sup> former CJ Chaskalson very clearly put the common law in a constitutional framework:

I cannot accept this contention, which treats the common law as a body of law separate and distinct from the Constitution. There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest Court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

Although it is presumed that the legislature does not intend to alter the common law more than is necessary, common law may expressly be trumped (overruled) by legislation. However, just to make things really interesting, certain common-law rules (such as presumptions) are used to interpret legislation. The courts and other interpreters may still rely on these common-law maxims and presumptions in so far as they are not in conflict with the values of the Constitution.

In *Alexkor Ltd v. The Richtersveld Community*,<sup>83</sup> the Constitutional Court held that the Constitution acknowledged the originality and distinctiveness of indigenous law as an independent source of norms within the legal system. At the same time the Constitution, while giving force to indigenous law, made it clear that such law was subject to the Constitution and had to be interpreted in the light of its values.

Furthermore, like the common law, indigenous law was subject to any legislation (consistent with the Constitution) that specifically dealt with it.

This effectively means that the courts must develop common law and customary indigenous law, and legislation may override both, but legislation is also subject to the Constitution. South African legislative drafters (at all three spheres of government) must be aware of this complex and interwoven legal system, not only with regard to the existing law but also with regard to co-operative government and political sensitivities as well.

### **(H) Repeal and Commencement of Legislation**

In view of the quagmire explained above, another potential minefield for legislative drafters is the repeal and commencement of legislation, and a few examples should suffice.

When Parliament has passed a Bill, the Bill then has to be assented to and signed by the President. In the case of a Bill passed by a provincial legislature, the premier of that province has to assent to and sign the Bill. Once signed, such a Bill (parliamentary or provincial) becomes an Act. However, although such an Act is now legally enacted legislation, it is not yet in operation. In terms of sections 81 and 123 of the Constitution, Acts of Parliament and provincial Acts take effect when published or on a date determined in terms of those Acts. Acts of Parliament and provincial Acts must be published in the Government Gazette or the Official Gazette of the relevant province.<sup>84</sup> In terms of section 162 of the Constitution, municipal by-laws may be enforced after they have been published in the Official Gazette of the relevant province.

Section 13(1) of the Interpretation Act stipulates that unless the particular legislation itself provides another date, it commences on the day of its publication in the Gazette.<sup>85</sup> In other words, if the legislation does not prescribe a date of commencement, it automatically commences when it is published. However, in terms of section 13(1), the legislation as published in the Gazette may prescribe another fixed date for its commencement, which may be total or partial, or the published legislation may expressly indicate that it will commence at a later unspecified date to be proclaimed.

When legislation repeals (wholly or partially) any other legislation and substitutes the repealed provisions, the repealed legislation will remain in force until the substituted provisions come into operation.<sup>86</sup>

If an enabling Act is repealed, all the delegated legislation issued in terms of the repealed Act will automatically cease to exist.<sup>87</sup>

## **(I) The Sensitive Issues: Language, Linguistics, and Culture**

### **(i) Multilingualism**

South Africa has a multilingual society, and in such a society it is even more important to ensure an effective communication system. Such a system would not only benefit lawyers but the public at large. Multilingual societies require multilingual terminology, including the various indigenous languages. This means that only mother-tongue subject specialists would be able to translate technical legal language into indigenous languages. It goes without saying that precise and clear communication can only be achieved when both the sender of a message and the receiver attach the same meaning to the content. Ambiguity gives rise to confusion, and can often be prevented through the standardization of concepts and terms. Communication is often impeded when concepts do not coincide, or when concepts differ from one language to another. Exact communication is only possible when there is a one-to-one relation between a term and a concept.<sup>88</sup>

Multilingualism is further linked to multiculturalism. Different cultures assign different meanings to seemingly general terms. Sometimes cultural realities make it impossible to translate a particular term or concept successfully. In many cases a specific term or word is used to denote a different meaning.<sup>89</sup> Any drafter working within diverse cultural communities should have a sound background of the words and meanings attached to such words that are generally used, as well as knowledge of the indigenous law and customary practices. Often, cultural differences result in a different meaning attached to a specific word or term.<sup>90</sup>

It should be clear that cultural and linguistic differences should be treated very carefully. Although English or French is often used as a basic language source on the African continent, such languages are often difficult to translate into the plain language of a particular indigenous language group. Drafters should be fully aware of the orthographical rules that are applicable, neologisms that have been developed, and

customary or religious practices to avoid connotations in words or terms that could potentially be regarded as offensive or insensitive.<sup>91</sup>

In South Africa, multilingualism and multiculturalism are often seen as stumbling blocks to the achievement and advancement of plain language in the legal domain. There might be many reasons why it may be impossible and unpractical to translate laws and other legal documents in as many as 11 official languages. For example, it may be argued that it would not only require money and other resources, but time and a lack of terminology in some languages would also make it unattainable. Only if terms and concepts are significantly unified, would it be practical to translate certain legal documents in the other languages of a specific group or culture within the broader society.<sup>92</sup>

### **(ii) Legislation and the Official Languages**

South Africa has 11 official languages that are constitutionally protected, and the state must take positive measures to elevate the status and advance the use of indigenous languages which were historically neglected. All official languages, except where the Constitution permits otherwise, must enjoy parity and must be treated equitably.<sup>93</sup>

Apart from the politically sensitive complexities of language, linguistics, and culture, these also create another interesting legal issue for legal drafters.

Assent to and signing of legislation is part of the prescribed procedure during the passing of original legislation.<sup>94</sup> Legislative texts are signed alternately (in turn) in the different languages in which they were adopted and the text in the other language may be used to clarify obscurities.<sup>95</sup> In case of an irreconcilable conflict between the various legislative texts, the signed one prevailed. This principle was expressly included in the 1961 and 1983 Constitutions, as well as the interim Constitution. Prior to the commencement of the interim Constitution, legislation in South Africa was adopted in two official languages (usually Afrikaans and English), and the signed text was enrolled for record at the Appellate Division.

With regard to the Constitution itself, section 240 provides that the English text will prevail in the event of any inconsistency between the different texts. In terms of the Constitution, the texts of all new national and provincial legislation which have been signed by the President or a provincial premier, respectively, must be entrusted to the Constitutional Court for safe keeping. The signed text will be conclusive evidence of the provisions of that legislation (sections 82 and 124 of the Constitution). The

Constitution does not refer to irreconcilable conflicts between texts of other legislation.<sup>96</sup>

The signed version of the legislative text does not carry more weight simply because it was signed. The signed version of the text is only conclusive when there is an irreconcilable conflict between the versions. If the one version of the text is wider than the other the 'common-denominator' rule is followed, and the texts are read together to establish the common denominator. If there is no conflict, the versions complement one another and they must be read together. An attempt must be made to reconcile the texts with reference to the context and the purpose of the legislation.

There are no constitutional guidelines with regard to conflicting texts of delegated legislation. In practice, all the versions of delegated legislation will be signed, and the signed text cannot be relied upon to resolve conflicts between texts.

It should be clear that the signed texts of existing legislation, amendments, and constitutionally mandated multilingualism will also necessarily affect the ability of South African legal drafters to give effect to the demands of plain language drafting.

## **4. Constitutional and other legal demands**

### **(A) Introduction**

The Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The courts may now test all legislation (including new and old order Acts of Parliament) and government action in the light of the Constitution.<sup>97</sup>

With the negotiation and adoption of a new constitutional dispensation, it was emphasized that a complex and legalistic worded text would limit the new supreme constitutional vision and ethos unnecessarily. With the commencement of the Constitution, South Africa has made a determined move towards creating legislation and legal documents that are simpler and more understandable. The concept of plain legal language was embraced in an effort to make justice and the law more accessible to all the diverse people living within the state. Under the supreme Constitution, there is a general commitment to create a legal environment in which people are empowered not only to know their rights but also how to protect and enforce those rights.<sup>98</sup>

South Africa further follows a value-orientated or normative approach to constitutional interpretation. The law, including the Constitution, is studied critically and is evaluated against higher legal values which have been entrenched within the overall constitutional text. It therefore follows that any law or conduct inconsistent with the underlying values could be declared unconstitutional and invalid.<sup>99</sup>

### **(B) The Founding Values and Basic Constitutional Features**

Mention was made above that the new South African constitutional system is founded on certain pre-determined values. These values are part of the constitutional text and are mainly identified in the preamble, section 1, and the entire Bill of Rights.<sup>100</sup> It should be noted that the democratic values of human dignity, equality, and freedom have been identified as being foundational to the new legal system.<sup>101</sup>

### **(C) The Impact of the Bill of Rights**

Under the Bill of Rights, various universally accepted fundamental rights are protected. The extent and application of these rights are comprehensive but the scope of this article does not allow for in-depth evaluation of the different rights.

All state bodies and lawyers should, however, ensure that the requirements of the Bill of Rights are fully complied with. Since the Bill of Rights has both vertical and horizontal application, it is of importance to both government legal advisers and private drafters alike.<sup>102</sup> For the purpose of drafting and plain language perspectives, the following three fundamental rights are highlighted:

#### **(i) Equality**

The Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law.<sup>103</sup> This equality includes the full and equal enjoyment of all rights and freedoms. No unfair state or private discrimination is allowed on various grounds including ethnic and social origin, language, and also culture.<sup>104</sup> If the law in general or even private legal documents are not clear to those who need to understand their content, then there could be a clear limitation on the right to equality and a particular situation can be declared to be unconstitutional.

#### **(ii) Human Dignity**

Human dignity is also a core value or right under the South African Constitution. The right underscores all the other rights and encapsulates various aspects. In essence, if a person is not put in a position where he or she not only could understand and apply the

law but cannot protect and enforce their rights, then their right to human dignity could be violated.<sup>105</sup>

### **(iii) Access to Information**

The Constitution specifically protects the right of everyone to have access to information held by the state and also private information if such information is required for the exercise or protection of any other right or rights.<sup>106</sup> On a very basic reading, this right encapsulates the right of a natural person or even a juristic person not only to have access to the law but also to be able to understand and interpret the law. If the law or a particular legal document is not clear because of difficult and unclear language, then relevant parties to such document will not be able to protect their rights or other entitlements. All public and private drafters must familiarize themselves with section 32 and its application.

### **(D) Aspects of South African Legislative Procedures**

The Constitution specifically explains the legislative procedure for all three legislatures. All spheres of government have original legislative competencies. Such competencies must however be exercised in accordance with specific constitutional directives. The Constitution sets both procedural and substantive requirements. Both requirements must be met and the outcome of any legislative exercise will be constitutionally tested for both form and content. Under the formal procedural requirements, the Constitution *inter alia* requires that only certain legislatures may legislate on certain functional areas that proposed Bills must follow a pre-determined process through a particular legislative body and that in all instances the public should be allowed to participate in the legislative processes. Recently, the Constitutional Court has struck down legislation that did not comply with constitutional procedural requirements: In *Matatiele Municipality v. The President of the Republic of South Africa*,<sup>107</sup> the Constitution Twelfth Amendment Act and the Cross-boundary Municipalities Laws Repeal and Related Matters Act were struck down as unconstitutional. The court held that Parliament failed to adopt the proper procedure set out in section 74 of the Constitution for enactment of constitutional amendments, because the applicant municipality and people in its area were not afforded opportunity to be heard regarding proposed alteration of the municipal boundaries. In *Doctors for Life International v. The Speaker of the National Assembly*,<sup>108</sup> the Constitutional Court held that the obligation to facilitate public involvement is a

material part of the law-making process as contemplated by section 72(1)(a) of the Constitution. Failure to comply with it renders the resulting legislation invalid. The court accordingly declared the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Amendment Act invalid, but suspended the order of invalidity for a period of 18 months to enable Parliament to enact these statutes afresh in accordance with the provisions of the Constitution.

From a substantive point of view, all Bills must ensure compliance with the underlying values and fundamental rights incorporated in the constitutional text. Public participation and involvement will only be maximized if the public is made aware of their rights and if they are trained and educated in the legal procedures.<sup>109</sup> It should be pointed out that there is a general lack of knowledge and training in the public domain with regard to the legislative processes, not only in South Africa, but in many other legal systems as well.

Another practical impediment to plain language drafting is that of amendments to existing legislation. Ultimately, a legislative amendment forms part of the original enactment, and as a result it must read and mean the same as the original (including its definitions and, where applicable, subordinate legislation issued in terms of it). In other words, in terms of drafting conventions and the rules of statutory interpretation, the amendment must be in the same style and general language as the original.

According to the common-law presumptions of interpretation, it is not only presumed that the legislature is aware of the existing law, but it is also presumed that the same words and terms in an enactment carry the same meaning. This then means that drafters are legally inhibited with regard to plain language amendments of existing law. In a legal system with codified legislation, the drafters would be able to plain language existing legislation through amendments as a continuous process (e.g. staff of the Legislative Services Agency of Indiana are continuously updating and consolidating existing legal codes in plain language), but as a result of South Africa's historical and legal history, such a process would not be possible logistically and financially.

### **(E) Legislative Drafting and the Move from a Text-based Approach to Constitution-based (Text-in-Context) Approach to Statutory Interpretation**

Recent changes to the rules of statutory interpretation should also be mentioned, albeit briefly. Another impediment to plain language drafting is the fact that many lawyers



(including drafters) come from a different (positivist) era, and still feel comfortable with an established drafting regime based on verbosity and legalese, as well as an orthodox and text-based (literal) approach to statutory interpretation, grounded in well-known common-law maxims and a narrow view about language, meaning, and understanding.

However, interpretation of legislation in South Africa is now governed by the Constitution.<sup>110</sup> The Constitution includes an express and mandatory interpretation provision [section 39(2)], and statutory interpretation (like all law in South Africa) must now be conducted within the value-laden framework of a supreme Constitution which is the supreme law of the Republic. Section 39(2) provides:

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.<sup>111</sup>

Everything and everybody; all law and conduct; and all traditions and perceptions and procedures are now subject to the Constitution.<sup>112</sup> In *Holomisa v. Argus Newspapers Ltd*<sup>113</sup> Cameron J summarized this principle as follows:

The Constitution has changed the ‘context’ of all legal thought and decision-making in South Africa.

Section 39(2) has the effect that any reading of legislation (as well as common law and indigenous customary law) by courts, tribunals, or forums now promotes the values of the Bill of Rights—and most lawyers, judges, and legal drafters are not yet comfortable with values! In *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd: Re Hyundai Motor Distributors (Pty) Ltd v. Smit*,<sup>114</sup> Langa DP explained the constitutional foundation of this ‘new’ methodology as follows:

Section 39(2) of the Constitution means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This

spirit of transition and transformation characterises the constitutional enterprise as a whole.

All of this means that the courts have to interpret and apply legislation in a substantive (value-based and value-coherent) manner. Formalistic and mechanical interpretations based on strict text-based analyses are not only outdated, but go against the spirit of the Constitution as well. In *Coetzee v. Government of the Republic of South Africa; Matiso v. Commanding Officer, Port Elizabeth Prison*,<sup>115</sup> the Constitutional Court explained this teleological dimension of statutory interpretation as follows:

The values that must suffuse the whole process are derived from the concept of an open and democratic society based on freedom and equality, several times referred to in the Constitution. The notion of an open and democratic society is thus not merely aspirational or decorative, it is normative, furnishing the matrix of ideals within which we work, the source from which we derive the principles and rules we apply, and the final measure we use for testing the legitimacy of impugned norms and conduct ... [W]e should not engage in purely formal or academic analysis, nor simply restrict ourselves to ad hoc technicism, but rather focus on what has been called the synergetic relation between the values underlying the guarantees of fundamental rights and the circumstances of the particular case.

## **5. Other related issues in South Africa**

In South Africa, legal writing is not part of the university law curricula (as at most US law schools).<sup>116</sup> At best the curriculum for the LLB degree at most South African universities includes a skills component in which students are exposed to generic practical skills such as problem solving, analysis, research, as well as practical reading, writing, communication, and basic numeracy skills. South African universities offer one degree for entering all the branches of the legal profession (a four-year LLB degree, without any pre-law requirements).<sup>117</sup>

Legislative drafting is an acquired skill, but it does not form part of formal university curricula in South Africa, nor is it officially taught by government agencies. At the time of writing, three South African universities offer postgraduate certificate courses in legislative drafting. The University of Pretoria<sup>118</sup> offers a practical legislative drafting programme during each semester of the academic year. The University of Johannesburg also offers a similar course in legislative drafting;<sup>119</sup> and the

Professional Education Project of the Law Faculty, University of Cape Town, presents a Certificate Course in Legal Writing.<sup>120</sup>

Since the transition to democracy in 1994 a large number of experienced drafters left government service. Although some of them are still active private drafting consultants, this exodus has, at least for the interim, left a serious vacuum of expertise. Although it is debatable whether legislation should be drafted to be understandable by the general population, the literacy rate in South Africa does have an impact on the access to law and justice. According to the mid-2005 estimates from Statistics South Africa, the country's population stands at approximately 46.9 million, up from the census 2001 count of 44.8 million. The backlogs from the apartheid-era education are immense. Illiteracy rates are at 30 per cent of adults over 15 years old (6–8 million adults are not functionally literate), teachers in schools from the former 'township' schools are poorly trained, and the final-year high school pass rate remains unacceptably low. While 65 per cent of whites over 20 years old and 40 per cent of Indians have a high school or higher qualification, this figure is only 14 per cent among blacks and 17 per cent among the so-called 'coloured' population. Finally, in South Africa, the issues of the costing and the regulatory framework analysis of legislation are becoming increasingly important during the legislative process, and will likely in future affect the role of legislative drafters. Regulatory impact analysis assesses the likely consequences of proposed regulations and the actual consequences of existing regulations; policy/regulatory options in terms of costs, benefits, and risks of a proposal; and questions needed for government action and whether regulation is the best form of government action, and it promotes better regulation, good governance, transparency, accountability, and consistency in policymaking across government. Regulatory impact analysis is usually conducted before the drafting of legislation, exploring all avenues available for policy implementation.<sup>121</sup>

## **6. What is being done (and what more should be done)**

A number of initiatives were launched in an attempt to address some of the challenges for legislative drafting in South Africa.

As mentioned earlier, three postgraduate certificate courses in legislative drafting are offered by the universities of Pretoria, Johannesburg, and Cape Town.<sup>122</sup>

As part of the Legislative Drafting Programme for South Africa,<sup>123</sup> a number of advanced workshops on legislative drafting were held in Pretoria (2002), Northern Cape Province (2003), and the Free State (2004).

The Department of Legal History, Comparative Law, and Legal Philosophy of the University of Pretoria, the University of Pretoria Centre for Human Rights, and the Pan-African Parliament are currently involved in a project on the harmonization of certain categories of African legislation. The accessibility of African law is also addressed with the compilation of the 'Law of Collection' in the Oliver R. Tambo Law Library of the University of Pretoria.<sup>124</sup>

Members of the African universities of Johannesburg, JOS (Nigeria), Nairobi, Pretoria, and the Western Cape (in collaboration with the Pan-African Parliament and a number of European universities) are currently also involved in the UN-sponsored legal informatics project. The project is still at a preliminary stage, and a number of problems (language, culture, and different legislative styles of Anglophone, Francophone, and Portuguese legal traditions, ethnic differences, as well as the division between secular law and Sha'ria law) will have to be addressed.<sup>125</sup>

This article is by no means a general critique of plain language drafting. In an era of increasing globalization and regional harmonization of laws, the quest for more understandable legislation and contracts is laudable and must be continued. Although not unique, the current South African context provides a formidable drafting recipe that even Jamie Oliver will find difficult to cope with.

The mere numbers are astounding: inexperienced legal drafters with a four-year law degree have to draft two hierarchical categories of legislation in three spheres of government (including one central government, nine provinces, and a host of municipalities), being mindful of a supreme justifiable Constitution and three types of law (legislation, Roman-Dutch common law, and indigenous customary law), as well as existing old order legislation from the apartheid era (including two categories of legislation from four former provinces, six former self-governing territories, and four independent homelands) in now-overlapping geographical areas. Add a host of sophisticated legislative procedures; 1 progressive Bill of Rights; 11 official languages; countless developmental and economic demands, transformation, and

reconciliation; and all the political, religious, and socio-economic issues of a third-world country and mix well.

Furthermore, the drafting of legislation is not a mechanical exercise during which pre-determined formulae and templates will result in a legislative provision. Technical aspects (e.g. the structure of the legislation and language rules) must be applied in conjunction with substantive aspects (e.g. constitutional values and fundamental rights). Apart from the inherent difficulties of language and meaning, the South African drafter has to keep a number of other related issues in mind. The provision must be drafted, understood, and applied within the framework of the supreme Constitution and the Bill of Rights. What is the impact of so-called constitutional legislation (e.g. the Promotion of Access to Information Act, the Promotion of Administrative Justice Act, and the Promotion of Equality and Prevention of Unfair Discrimination Act)? Are other enactments still in force? Has it been amended? If, for instance, a provision in an existing statute is to be construed, it must be read with the rest of the Act, including its definition section, and possibly schedules as well. There may be regulations issued in terms of the particular provision, which have to be read with the enabling legislation. Are the regulations valid and still in force? What is the context (general background or surrounding circumstances) of the legislative text? Other extrinsic sources (e.g. dictionaries or commission reports) may be consulted to draft new legislation. It not only requires excellent language skills, but the drafter must also have a very good knowledge of the existing law and where to find it. This means continuous research: reading the latest case law, and finding and analysing existing law (including subordinate legislation and the latest developments in common law).

The application of plain language principles in the drafting of legislation and other legal documents (such as commercial contracts) is an important factor in ensuring that the law is more accessible and that legal communication is more effective and correctly understood. It is crucial to get the correct message across to all parties involved in and affected by law. In this regard Eagleson aptly states:<sup>126</sup>

Language—and therefore all legal drafting as a manifestation of it—is a social as well as a purposeful activity. It exists not just to express a message but also to communicate it successfully to others. It cannot be said that an act of language has really occurred unless the message is comprehended; and no law can accomplish its task of regulating behaviour unless it can be understood. The most competent version

of language and legal drafting then is that version which enables the message to be grasped readily; without difficulty and confusion. This is none other than plain language—language which gets its message across in a straightforward, unentangled way, that lets the message stand out clearly and does not enshroud or enmesh it in convoluted or prolixity.

All communication, written or spoken, should employ basic grammatical rules and words to ensure that the content of communication is readily understood. The use of language is not an exact science and an instrument of mathematical precision. Many factors (such as mentioned above) must be considered to ensure that communications are clear and simple. Where possible however, plain language principles should be applied.

It would seem that the responsibility to apply and develop plain language principles lies mainly at the door of government institutions and other public agencies. If government is to take the lead in applying and supporting plain language principles, other role players such as big business and lawyers in general would follow suit. After all, it is the government's responsibility to ensure that the law is accessible and that the people are informed about matters that concern them. All drafters of legal documents should strive to convert or produce legal documents (including legislation, policy documents, and commercial documents) in such a way that the role players are able to understand and comply with the prescribed requirements. However, one should be careful not to use plain language principles to accomplish simplicity without precision. Every drafter must pursue clarity, and clarity implies both simplicity and precision. A compromise is needed between the precision of certain technical concepts and the use of ordinary or simple words.<sup>127</sup> It is also important to ensure consistency in the style and approach of legal documents (especially legislation). Such consistency is often very time consuming, and requires skill, dedication, and drafting experience. Both commercial legal documents and general legislative enactments should apply the basic principles and techniques of plain legal drafting. Drafters and lawyers alike should pursue the overall objective to make legal communications as plain, clear, and simple as possible. A balance between simplicity and precision should be the ultimate goal. Only when precision cannot be achieved with common/basic linguistic expressions would it be acceptable to employ more difficult and technical quotations. The end result should be to produce clear and effective communication between

applicable role players. In view of their obvious benefits, plain legal drafting principles/techniques should be incorporated into the formal 'black letter' law. From a South African drafting point of view, it is unfortunate that the law (including the Constitution) does not expressly prescribe guidelines or criteria for the use of plain language in the drafting of legislation or other legal documents. Although the Constitution encapsulates various aspects indirectly aimed at facilitating plain language drafting, no express requirements are set. Express guidelines, either in the form of legislation or policy directives, are urgently needed. With the advent of constitutionalism, some role players in the South African legal system seem to have a general preference for the application of plain language principles.<sup>128</sup> The younger generation within society seem to favour the application of plain language principles in law. Since legal precedent also forms an important part of the law, plain language' should also be a requirement when legal judgments are written. Case law (as important source of law) should also be readily accessible and understandable.<sup>129</sup> So spare a thought for the South African legal drafters: suddenly plain language drafting does not seem to be very 'plain' at all! Perhaps, then, it is fitting to end with a quote from the inimitable Jack Stark:<sup>130</sup>

Legislative drafters suffer more pain than other writers. They endure considerable time pressure, and they serve many persons whose patience is less than saintly. Moreover, because their product—statutes—directs human conduct, their work is fraught with weighty consequences. Tax drafters, for example, have nightmares in which they defend besieged cities, trying desperately to repel battalions of lawyers and accountants who probe the city's walls for weak sectors through which they and their clients can pour.

## Notes

\* Edited and expanded version of a paper (jointly presented by the authors) on 20 September 2006 during the Public Law session at the annual conference of the International Bar Association, Chicago. It contains revised material previously published by the authors.

<sup>1</sup> Lord Radcliffe 'Some Reflections on Law and Lawyers' [1950] 10 CLJ 368.

<sup>2</sup> *Santam Insurance Ltd v Taylor* [1985] 1 SA 514 (A) 523B and 526E.

<sup>3</sup> ‘The Continuing Debate About "Plain Language" Legislation: A Law Reform Conundrum’ [2006] Statute L Rev 27, 83–132.

<sup>4</sup> The Constitution was previously incorrectly cited as the Constitution of the Republic of South Africa, Act 108 of 1996. This situation was retroactively rectified by the Citation of Constitutional Laws Act 5 of 2005, and the supreme Constitution is now officially (and correctly) known as the Constitution of the Republic of South Africa, 1996. Item 1 of sch 6 of the Constitution refers to itself as the ‘new Constitution’.

<sup>5</sup> K Klare ‘Legal Culture and Transformative Constitutionalism’ [1998] South African J Human Rights 147, 178–79. See also Friedman J in *Baloro v University of Bophuthatswana* [1995] 4 SA 197 (B) 241B (emphasis added): ‘This Constitution has a dynamic tension because *its aims and purport are to metamorphose South African society* in accordance with the aims and objects of the Constitution. In this regard it cannot be viewed as an inert and stagnant document. It has its own inner dynamism, *and the Courts are charged with effecting and generating changes.*’

<sup>6</sup> J Paul Martin ‘Development and Rights Revisited: Lessons from Africa’ [2006] 3 SUR: International J Human Rights 97.

<sup>7</sup> See para 1 of the Resolution on Plain Language Documentation of the Canadian Bar Association (<http://plainlanguagenetwork.org/Organisations/cbares.html>).

<sup>8</sup> See F Viljoen and A Nienaber (eds) *Plain Legal Language for a New Democracy* (Protea Book House Pretoria 2001) 62.

<sup>9</sup> *Ibid* 24 and 71–75.

<sup>10</sup> The South African Labour Relations Act 66 of 1995 is a good example. Schedule 4 (‘Dispute resolution: flow diagrams’) contains flow diagrams that provide guidelines to the procedures for the resolution of some of the more important disputes that may arise under the Act. The schedule is not part of the Act and it does not have the force of law. The flow diagrams are intended only to provide assistance to those parties who may become involved in a dispute.

<sup>11</sup> There seems to be a general tendency to minimize the use of Latin words in modern day legal documents. Since the study of Latin as part of a legal degree curriculum has been abolished in many countries—South Africa in particular—this development would seem to have merit.

<sup>12</sup> Viljoen and Nienaber, n 8 at 25.



<sup>13</sup> At present, countries such as Australia, Canada, New Zealand, United Kingdom, India, Ireland, Japan, Spain, Sweden, and South Africa (to name but a few) are pursuing the concept.

<sup>14</sup> Viljoen and Nienaber, n 8 at 32.

<sup>15</sup> Ibid 33.

<sup>16</sup> Ibid 35.

<sup>17</sup> Compare the English word ‘give’, the French ‘devise’, and the Latin ‘bequeath’. See also D Mellinkoff *The Language of the Law* (Aspen Publishers Maryland 1963).

<sup>18</sup> Viljoen and Nienaber, n 8 at 42–44. The authors mention that most English judges still do not actively encourage plain language and still write judgments in the same legalese as in the past.

<sup>19</sup> See Art 4 s 20 of Constitution of the State of Indiana of 1851, which provides: ‘Every act and joint resolution shall be plainly worded, avoiding, as far as practicable, the use of technical terms.’

<sup>20</sup> See the New Jersey Plain Language Act of 1980.

<sup>21</sup> Viljoen and Nienaber, n 8 at 48.

<sup>22</sup> The use of Lord Brightman's terminology in ‘Drafting Quagmires’ [2002] Statute L Rev 23, 1, is acknowledged with due respect. We have merely employed the time-honoured drafting technique of incorporation by reference (otherwise known as selective ‘cutting-and-pasting’)!

<sup>23</sup> See Viljoen and Nienaber, n 8 at 9.

<sup>24</sup> The Constitution of the Republic of South Africa Act 200 of 1993.

<sup>25</sup> The Constitutional Court had to certify that the new constitutional text complied with the 34 constitutional principles agreed upon in advance by the negotiators of the IC. In *Ex p Chairperson of the Constitutional Assembly: Re Certification of the Constitution of the Republic of South Africa, 1996* (1996) 4 SA 744 (CC) the Constitutional Court unanimously rejected certain clauses and ruled that the text adopted in May 1996 could not be certified. In *Ex p Chairperson of the Constitutional Assembly: Re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996* (1997) 2 SA 97 (CC) the Constitutional Court found that the Constitutional Assembly had remedied the defective provisions, and certified that the text complied with the constitutional principles. The text then became the Constitution, and it was signed by former president Nelson Mandela on 10 December 1996. It

commenced on 4 February 1997. The rules, history, and all judgments of the South African Constitutional Court can be accessed at [www.constitutionalcourt.org.za](http://www.constitutionalcourt.org.za).

<sup>26</sup> Ch. 2 of the Constitution.

<sup>27</sup> See also J van der Westhuizen 'Plain Language in the Drafting of the 1996 Constitution' in Viljoen and Nienaber, n 8 at 63–70. Justice Johan van der Westhuizen is currently a serving justice of the Constitutional Court of South Africa. He is a former professor of law at the University of Pretoria, and a former member of the Panel of Constitutional Experts, as well as the Technical Refinement Team, who advised the Constitutional Assembly, and who were responsible for the linguistic refinement of the draft 1996 constitutional text.

<sup>28</sup> The Constitution states that 'everyone has the right to ...', as apposed 'to everyone shall have the right to ...' (see ss 9, 10, 11, and 12). See also s 2, 3, and 7 which clearly determine an obligation to do something (e.g. s 7: 'The state "must" respect, protect, promote or fulfil the rights in the Bill of Rights').

<sup>29</sup> See s 9, 10, and 11. 'Every person' refers only to people (unless, of course, otherwise indicated). The reference to 'everyone' includes both natural and juristic persons and is more inclusive, since wider and more effective protection is provided.

<sup>30</sup> In respect of the right to life, for example, s 11 of the Constitution merely states: 'Everyone has the right to life.'

<sup>31</sup> See s 239 of the Constitution.

<sup>32</sup> The Constitution starts with a comprehensive table of contents, a preamble, the most important or foundational issues first, and general provisions at the end together with various schedules detailing secondary information.

<sup>33</sup> Established by the South African Law Reform Commission Act 19 of 1973.

<sup>34</sup> See [www.doj.gov.za/2004dojsite/b\\_lcd/lcd\\_about.htm](http://www.doj.gov.za/2004dojsite/b_lcd/lcd_about.htm).

<sup>35</sup> *Practice Manual for Legislative Drafting* (2000), compiled by the State Law Advisers. This is a comprehensive drafting manual (tailored for South African circumstances) and it deals with structure, style, conventions, and procedures. Unfortunately, this manual is not yet available to all legislative drafters, especially at provincial and local government levels.

<sup>36</sup> Act 33 of 1957.

<sup>37</sup> Item 1 sch 6 of the Constitution.

<sup>38</sup> *Du Plessis v De Klerk* [1996] 5 BCLR 658 (CC).

<sup>39</sup> Legislative enactments before 1806, if any still exist, are viewed as common law. As a result, no formal procedures are required for their demise, and they could be abrogated by disuse.

<sup>40</sup> Including ‘general affairs’ and ‘own affairs’ legislation between 1983 and 1994 (in terms of the 1983 tri-cameral Constitution).

<sup>41</sup> Transkei, Bophuthatswana, Ciskei, and Venda.

<sup>42</sup> KaNgwane, KwaZulu, Lebowa, Gazankulu, QwaQwa, and KwaNdebele.

<sup>43</sup> Transvaal, Orange Free State, Cape Province, and Natal.

<sup>44</sup> Gauteng, Eastern Cape, Western Cape, Northern Cape, Limpopo, North West, Free State, KwaZulu-Natal, and Mpumalanga.

<sup>45</sup> Section 229.

<sup>46</sup> Item 2 of sch 6.

<sup>47</sup> Section 4(1) of the interim Constitution stated: ‘This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution, be of no force and effect to the extent of the inconsistency.’

<sup>48</sup> In terms of s 172 of the Constitution, the High Court or Supreme Court of Appeal or the Constitutional Court may declare legislation unconstitutional. Such a declaration may have immediate effect, or may be suspended to give the relevant legislature the opportunity to correct the defect. If an Act of Parliament or a provincial Act is declared unconstitutional by the High Court or Supreme Court of Appeal, the declaration of unconstitutionality must be confirmed by the Constitutional Court. Local government legislation and delegated legislation may be declared unconstitutional by the High Court or Supreme Court of Appeal, and such invalidation need not be confirmed by the Constitutional Court.

<sup>49</sup> Item 1 sch 6 of the Constitution.

<sup>50</sup> See also VCRAC Crabbe's *Legislative Drafting* (Cavendish Publishing London 1993) and *Understanding Statutes* (Cavendish Publishing London 1994), as well as the *Practice Manual for Legislative Drafting* (2000).

<sup>51</sup> Sections 101, 140, and 239 of the Constitution. This apparent conceptual confusion is also apparent on the website of South African Department of Justice (legislative and constitutional development branch)

([www.doj.gov.za/2004dojsite/b\\_lcd/lcd\\_about.htm](http://www.doj.gov.za/2004dojsite/b_lcd/lcd_about.htm)), with references to ‘primary and secondary’ legislation, as well as ‘primary and subordinate’ legislation.

<sup>52</sup> The now repealed South Africa Act, 1909, the Republic of South Africa Constitution Act 32 of 1961, and the Republic of South Africa Constitution Act 110 of 1983.

<sup>53</sup> Section 42 of the Constitution.

<sup>54</sup> Promotion of Access to Information Act 2 of 2000, the Promotion of Administrative Justice Act 3 of 2000, and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>55</sup> Sections 32 (right to information), 33 (right to just administrative action), and 9 (equality), read with item 23(1) of sch 6.

<sup>56</sup> LM Du Plessis *Re-interpretation of Statutes* (Lexis-Nexus Butterworths Durban 2002) 25–37 also distinguishes between classifications based on the ‘hierarchy’ and the ‘status’ of legislation. His distinction brings a new type of legislation into the equation, namely ‘superordinate non-constitutional’ legislation. J Wessels ‘Legislative Drafting and Legislation Giving Effect to the Constitution’ [2002] 17 SA Public L 131–41 simply refers to these as ‘constitutional legislation’.

<sup>57</sup> Sections 44(1)(a)(iii) and 104(1)(b)(iii) of the Constitution.

<sup>58</sup> Act 32 of 1961.

<sup>59</sup> Abolished by the Provincial Government Act 69 of 1986.

<sup>60</sup> Self-governing Territories Constitution Act 21 of 1971.

<sup>61</sup> For example, health and welfare, education, and agriculture. In these matters, the various legislative assemblies could enact any legislation and even repeal or amend South African parliamentary legislation. A number of prescribed matters (e.g. defence and foreign affairs) fell outside their legislative competence, and they were also not empowered to repeal the Self-governing Territories Constitution Act or the proclamations in terms of the Act which granted self-governing status to a particular homeland.

<sup>62</sup> *Zantsi v Council of State, Ciskei* [1995] 10 BCLR 1424 (CC).

<sup>63</sup> *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] 12 BCLR 1458 (CC).

<sup>64</sup> Sections 44(1)(a)(iii) and 156(1)(b) of the Constitution.

<sup>65</sup> Sections 104(1) and 156(1)(b) of the Constitution.

<sup>66</sup> In *Executive Council Western Cape Legislature v President of the RSA* [1995] 4 SA 877 (CC) the Constitutional Court held that Parliament cannot confer a power on a delegated legislative body to amend or repeal an Act of Parliament. Furthermore,

although delegated legislation must be read and interpreted together with its enabling legislation, it cannot influence the meaning of such enabling legislation (*Moodley v Minister of Education and Culture, House of Delegates* [1989] 3 SA 221 (A) 233E–F).

<sup>67</sup> See ss 104, 126, 127, 137, and 138 of the Constitution.

<sup>68</sup> In terms of s 89 of the Defence Act 42 of 2002.

<sup>69</sup> For example, s 75 of the National Road Traffic Act 93 of 1996 which empowers the Minister of Transport, in consultation with the relevant members of the provincial executives, to issue regulations dealing with the use of any vehicle on public roads.

<sup>70</sup> For example, s 32 (read with s 33) of the Higher Education Act 101 of 1997 which authorizes the council of a university, subject to the approval of the Minister of Education, to issue an institutional statute for the university dealing with the general management of such a university; s 96 of the Telecommunications Act 103 of 1996 which authorizes the South African Telecommunications Regulatory Authority to issue regulations for the regulation of telecommunications activities as prescribed by the Act; or s 171 of the Constitution (read with s 16 of the Constitutional Court Complementary Act 13 of 1995) which authorizes the Chief Justice to prescribe the rules of the Constitutional Court.

<sup>71</sup> Section 104 of the Constitution.

<sup>72</sup> Section 151(2) of the Constitution.

<sup>73</sup> Schedule 1A ('Geographical areas of provinces') of the Constitution, inserted by s 4 of the Constitution Twelfth Amendment Act of 2005.

<sup>74</sup> Transvaal Ordinance 7 of 1925 (as amended). In terms of proclamation 110 of 17 June 1994, the administration of ordinance 7 of 1925 has been assigned to North West province from the former province of Transvaal.

<sup>75</sup> Cape Ordinance 12 of 1980. In terms of proclamation 110 of 17 June 1994, the administration of ordinance 12 of 1980 has been assigned to North West province from the former province of the Cape of Good Hope.

<sup>76</sup> Act 23 of 1978 (as amended). In terms of proclamation 110 of 17 June 1994, the administration of Act 23 of 1978 has been assigned to North West province.

<sup>77</sup> Part B of sch 5 ('Cemeteries, funeral parlours and crematoria') read with s 156(1) ('Powers and functions of municipalities').

<sup>78</sup> Section 14 of the Local Government: Municipal Systems Act 32 of 2000. See also B Bekink *Principles of South African Local Government Law* (Lexis-Nexus Butterworths Durban 2006) 233.

<sup>79</sup> Section 40(1) of the Constitution.

<sup>80</sup> Section 41 of the Constitution.

<sup>81</sup> [2001] 4 SA 938 (CC).

<sup>82</sup> [2000] 2 SA 674 (CC) para 44.

<sup>83</sup> [2004] 5 SA 460 (CC) para 51.

<sup>84</sup> Sections 2 and 13 of the Interpretation Act.

<sup>85</sup> In terms of s 2 of the Interpretation Act Gazette includes both the Government Gazette and the Official Gazette of a province. In terms of s 13(2) of the Act, 'day' begins immediately at the end of the previous day (i.e. immediately after midnight at 00:00 a.m.).

<sup>86</sup> Section 11 of the Interpretation Act. A good example of this somewhat tricky phenomenon is the National Health Act 61 of 2003 which commenced on 2 May 2005, unless otherwise indicated. This Act replaced the Human Tissue Act 65 of 1983. Section 55 ('Removal of tissue, blood, blood products or gametes from living persons') of the new National Health Act will only enter into force on a date to be proclaimed. This means that ch. 2 ('Tissue, blood and gametes of living persons, and blood products') of the repealed Human Tissue Act (including the relevant definitions) will remain in operation until further notice.

<sup>87</sup> *Hatch v Koopoomal* [1936] AD 197; *Pharmaceutical Manufacturers Association of SA; Re ex p Application of the President of the Republic of South Africa* [2000] 2 SA 674 (CC), unless the new Act expressly provides otherwise. Item 24(3) of sch 6 of the Constitution expressly provides that although the interim Constitution has been repealed, the regulations made in terms of s 237(3) of the interim Constitution remain in force.

<sup>88</sup> Compare the words 'arsonist' and 'pyromaniac'. Both words describe a person who sets fire to an object. Arson is, however, a criminal act while a pyromaniac is a person who cannot control his/her desire to set fire to an object. See Viljoen and Nienaber, n 8 at 96.

<sup>89</sup> The words *botala* and *tala* (in indigenous African languages) refer to the colours green or blue.

<sup>90</sup> For example, the English word ‘prostitute’ is defined as a man or a woman who exchanges sexual services for money. In some African languages, reference to the word prostitute applies only to woman and is often understood or used in the context where a woman lives outside wedlock, wears trousers, smokes in public, or drinks beer. See Viljoen and Nienaber, n 8 at 98.

<sup>91</sup> Compare the words ‘witch doctor’ and ‘traditional doctor or healer’. One has a negative connotation, while the other refers to a highly respected member of many traditional communities.

<sup>92</sup> It should be noted that the tendency on the international front is indeed to unify/define international terms and concepts. Refer to the International Organization for the Unification of Terminological Neologisms (IOUTN) which is affiliated to the United Nations as a non-governmental organization since 1987. The aim of IOUTN is to unify and define different terms or concepts so that their meaning would be clear and consistent. See also Viljoen and Nienaber, n 8 at 110.

<sup>93</sup> See s 6(1)–(4) of the Constitution. The official languages of the Republic are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa, and isiZulu.

<sup>94</sup> A Bill must be submitted to Parliament in English and one other official language, but the State Law Advisers only have to certify the English text.

<sup>95</sup> A Bill is introduced (and considered) in Parliament in more than one official language.

<sup>96</sup> In terms of item 27 of sch 6, these provisions do not affect the safe keeping of legislation passed before the Constitution of 1996 came into operation. It should also be noted that s 126 of the Constitution (‘Publication of municipal by-laws’) does not mention the signing of new municipal legislation.

<sup>97</sup> Section 2 read with s 165 and 172 of the Constitution.

<sup>98</sup> According to the preamble of the Constitution, read with s 1 of the Constitution, the new legal dispensation is founded on, *inter alia*, establishing a society based on democratic values, social justice, and fundamental human rights; to lay the foundations for a democratic and open society in which the government is based on the will of the people and every citizen is equally protected by law, to improve the quality of life of all citizens, and to free the potential of each person. The government must be accountable, responsive, and open.

<sup>99</sup> See *Minister of Home Affairs v Nicro* [2005] 3 SA 280 (CC) and *K v Minister of Safety and Security* [2005] 6 SA 419 (CC). All lawyers and drafters of legal documents must be alert to the normative framework of the Constitution.

<sup>100</sup> See s 1 and ch. 2 of the Constitution.

<sup>101</sup> Sections 1, 7, 36, and 39 of the Constitution.

<sup>102</sup> See s 8 of the Constitution.

<sup>103</sup> Section 9(1) of the Constitution.

<sup>104</sup> Section 9(2)–(4) of the Constitution.

<sup>105</sup> Section 10 of the Constitution.

<sup>106</sup> Section 32(1)(a)–(b) of the Constitution.

<sup>107</sup> [2006] 5 BCLR 622.

<sup>108</sup> CCT 12/05.

<sup>109</sup> For more on the various legislative procedures, see s 73–81, 119–124, 156, 160, and 162 of the Constitution.

<sup>110</sup> For more on the ‘new’ interpretive paradigm in South Africa, see also (among others) LM Du Plessis *Re-interpretation of Statutes* (Lexis-Nexus Butterworths Durban 2002); LM Du Plessis ‘Re-reading Enacted Law-texts. The Epoch of Constitutionalism and the Agenda for Statutory and Constitutional Interpretation in South Africa’ [2000] 15 SA Public L 257–3003; CJ Botha *Statutory Interpretation: An Introduction for Students* (4<sup>th</sup> edn Juta Cape Town 2005); JR de Ville *Constitutional and Statutory Interpretation* (Interdoc Johannesburg 2000); and CJ Botha ‘Administrative Justice and Interpretation of Statutes’ in C Lange and J Wessels (eds) *The Right to Know* (SiberInk Cape Town 2004) 14–30.

<sup>111</sup> Section 35(3) of the interim Constitution was nearly identical to s 39(2) of the Constitution.

<sup>112</sup> The South African Law Reform Commission has published a discussion paper (Commission Paper 718) with a view to replacing the existing Interpretation Act 33 of 1957 in order to comply with the supreme Constitution. The draft discussion paper is available at [www.doj.gov.za/salrc/dpapers.htm](http://www.doj.gov.za/salrc/dpapers.htm).

<sup>113</sup> [1996] 6 BCLR 836 (W) 863J.

<sup>114</sup> [2001] 1 SA 545 (CC) para 21. Justice Pius Langa has since succeeded Justice Arthur Chaskalson as Chief Justice of South Africa.

<sup>115</sup> [1995] 4 SA 631 (CC) para 46 (per Sachs J).



<sup>116</sup> See, for instance, ‘Preparing for Law School’ (issued by the American Bar Association at [www.abanet.org/legaled/prelaw/prep.html](http://www.abanet.org/legaled/prelaw/prep.html)): ‘As you seek to prepare for a legal education, you should develop a high degree of skill at written communication. Language is the most important tool of a lawyer, and lawyers must learn to express themselves clearly and concisely. Legal education will provide you with good training in writing, and particularly in the specific techniques and forms of written expression that are common in the law. Fundamental writing skills, however, must be acquired and refined before you enter law school. You should seek as many experiences as possible that will require rigorous and analytical writing, including preparing original pieces of substantial length and revising written work in response to constructive criticism.’

<sup>117</sup> For admission as an advocate, s 3(2)(a) of the Admission of Advocates Act 74 of 1964 (as amended) merely requires that a person has satisfied all the requirements for the degree of *baccalaureus legum* of any university in the Republic or a degree with syllabus and standard of instruction equal or superior to those required for the degree of *baccalaureus legum* of any university in the Republic. In principle, s 2 of the Attorneys Act 53 of 1979 provides the same for admission as an attorney.

<sup>118</sup> The course leader is Professor CJ Botha, and the course is presented by academics and drafting practitioners. See [www.up.ac.za/academic/law/public/eng/shc.htm](http://www.up.ac.za/academic/law/public/eng/shc.htm). The course consists of topics such as the constitutional framework of South African legislative process; regulatory impact analysis, project management, and costing of legislation; drafting and statutory interpretation; the structure of original legislation; the principles and conventions of legislative drafting; amending and ‘cleaning-up’ of legislation; statutory guides to drafting; legislative style, punctuation, and ‘plain language drafting; drafting of subordinate legislation; and legislative drafting and administrative law.

<sup>119</sup> The course leader is Professor EFJ Malherbe, and the course is presented by himself and a legal drafting practitioner, Adv. Anton Meyer, former law adviser to Parliament. See also [www.uj.ac.za](http://www.uj.ac.za).

<sup>120</sup> See [www.law.uct.ac.za/profshort/docs/legalwrit.doc](http://www.law.uct.ac.za/profshort/docs/legalwrit.doc). The course is co-ordinated by Professor Halton Cheadle, and one of the lecturers will be Phil Knight, a well-known plain language practitioner from Canada, who was also involved in the drafting of the Constitution. This course includes goals and objectives of legal drafting; revision of statutory interpretation principles; law, language, and legal expression; elements of

professional writing; the legal sentence; unnecessary and inappropriate words; generality vagueness and ambiguity; legislative definitions; problem areas of time, gender, number, and infinitives; presentation of documents, organization of legal documents to improve clarity; and the use of templates in statutory and contractual drafting.

<sup>121</sup> Paper delivered on 5 July 2005 by Ms Fundi Tshazibana from the National Treasury on 'Regulatory Impact Analysis & Legislation' at the Legislative Drafting Conference, Cape Town.

<sup>122</sup> It should also be mentioned that Professor NJC van den Bergh, emeritus professor of law from the Nelson Mandela Metropolitan University in the Eastern Cape, is the editor of *How to Draft and Enforce By-laws: A Practical Guide* (available from Form-a-Law, Port Elizabeth, South Africa). This publication is specifically aimed at legislative drafters at municipal level.

<sup>123</sup> This was a joint project between the universities of Pretoria, Johannesburg, and Indiana (Bloomington) and the Indiana Legislative Services Agency in Indianapolis [supported by a grant from the US Department of State, Bureau of Educational and Cultural Affairs (Office of Citizen Exchanges)].

<sup>124</sup> This collection is arguably the most complete collection of African law available, and is compiled with the assistance of the University of Pretoria Centre for Human Rights ([www.chr.up.ac.za/law\\_of\\_africa.html](http://www.chr.up.ac.za/law_of_africa.html)).

<sup>125</sup> The project will include a generic legislative drafting manual for Africa, the establishment of an African legislative thesaurus, a co-operative African legislative portal, machine-readable legislative and parliamentary documents, and a network of excellence in Africa. See also [www.parliaments.info](http://www.parliaments.info), [www.bungeni.org](http://www.bungeni.org), and [www.akomantoso.org](http://www.akomantoso.org) for more information.

<sup>126</sup> RE Eagleson 'Efficiency in Legal Drafting' in D Kelly (ed) *Essays on Legislative Drafting* (University of Adelaide Adelaide Law Review Association 1988) 13.

<sup>127</sup> See Viljoen and Nienaber, n 8 at 82.

<sup>128</sup> The Judge President of the Labour Appeal Court and Labour Court, J Zondo, recently commented as follows (from the Foreword to the book) about A van Niekerk and K Lindström *Unfair Dismissal* (3<sup>rd</sup> edn SiberInk Cape Town 2006): 'Employers and employees who understand the English language will be able to pick up this book, read it and understand it because it is written in simple language ... This is where the importance of this book lies.'

<sup>129</sup> See MM Corbett 'Writing a Judgment' [1998] 115 South African L J 116–128. See also Viljoen and Nienaber, n 8 at 133–134, *Stassen v Stassen* [1997] 2 SA 105 (W) and *Southern Cape Car Rentals CC t/a Budget Rent a Car v Braun* [1998] 4 SA 1192 (SCA).

<sup>130</sup> J Stark *The Art of the Statute* (Fred B Rothman Colorado 1996) 1.