The following was published in the *Stabroek News* on the 13th and 14th September 2000 under the captions "**Proposed constitution ignores principles of legislative drafting**" and "**Ouster clauses in draft constitution repugnant to the rule of law**" and in the *Guyana Chronicle* on the 23rd September 2000 under the caption "**The Constitution is a document for the people**".

6th September 2000.

Dear Editor,

I have just seen for the first time the draft of the new Constitution. The Constitution is the supreme law. It is a document for the people. It is therefore an absolute necessity that the provisions be drafted in a simple manner that is easily communicable to the citizens. Unfortunately, all the modern principles of legislative drafting were observed in the breach.

A basic rule is to write short simple sentences and list them as sections or articles. Each sentence should contain one idea. Where appropriate, subsections and paragraphs should be used. Instead, there are many sentences which are more than 200 words in length with no attempt to separate ideas. Little attention seems to have been paid to punctuation, grammar and the avoidance of prolixity.

Although the policy was to draft in gender neutral language, the new draft resembles a patchwork quilt with a lack of coordination as male pronouns surface at times. Article 200 (2) refers to Chairperson, but by the time the persons drafting the law reached Article 200 (5) all attempts to use gender neutral language were abandoned and there was a reversion to sexist language by the use of Chairman.

The use of the phrases "he or she", "him or her" and "his or her" 3 times, all in one sentence illustrates a lack of awareness of the proper use of gender neutral language. In redrafting a fundamental right what was achieved was a cacophony of misused words and phrases.

An effort could have been made to arrange the rights of a person charged with a criminal offence to be placed in one Article as far as possible and set out in a manner that is easily readable.

A basic rule is to draft provisions in such a way that they can easily be found. There should be no effort to produce mass verbiage which is unintelligible.

In drafting legislation, the words used must be simple, clear, accurate, consistent in style and free from ambiguity. These basic rules seem to be totally unfamiliar to those who crafted this document. Instead, verbosity and tautology seems to have been the order of the day.

There should never be unnecessary duplication. This caveat was studiously avoided when the new Article 139(3) repeated what was already in Article 142(2)b, which was retained unaltered from the 1980 Constitution.

The principles of natural justice and legitimate expectation which are based on fairness are considered to be the most important principles of good administration. The fair hearing principle is the most litigious fundamental right. The right to a fair hearing in civil matters can be found in Article 144(8). This fundamental right should have been redrafted as a separate provision so that it would be clearly understood that whenever a citizen's rights and interests are affected, whenever a power is given or an exercise of discretion is involved, the citizen is entitled to a fair hearing from a person or body that is independent, impartial and free from bias.

Modern drafting techniques dictate that provisions should be drafted to impose an obligation on all decision makers to give written decisions with reasons within a specified time and where appropriate, a duty to disclose information should be included.

An attempt was made to impose this on judges in Article 197(3), but the result was a half baked clause. The only significant change in Article 197(3) was to lengthen the sentence from 47 words to 72 words to include 2 other reasons for removing a judge. They are "for persistently not writing decisions or for continuously failing to give reasons therefor until such time as may be specified by Parliament."

This clause is decorative but ineffectual until further legislation is drafted and passed by Parliament to specify a time limit. If the provision were considered important enough to be included in the Constitution, then it should have been comprehensive, effectual and definite without the hope that Parliament would at some future date enact the relevant legislation.

The last phrase in Article 197(3) "and shall not be so removed except in accordance with the provisions in this article" is redundant and useless verbiage. The use in this century of archaic words such as "therefor" adds no meaning and is also redundant.

While the focus in relation to judges was to include grounds for removal, Article 211N(8) provided "The President may with the concurrence of the Leader of the Opposition remove the Chairperson from Office." The persons drafting seem not to realise that grounds for removal must be stated. As it stands, this sub Article, like many other Articles, does nothing more than add volume to the Constitution.

Ouster clauses are clauses that seek to oust or preclude the inherent jurisdiction of the Court by saying a decision is final or shall not be enquired into by the court.

It is interesting to note that these clauses have been retained in relation to powers exercised by the Commissions and the Public Service Appellate Tribunal, but deleted in regard to powers exercised by the President.

Ouster clauses are repugnant to the rule of law and ought not to be drafted. In addition, the Courts generally circumvent these provisions as was done in *Barnwell v AG*. See also the local cases of *Re Sarran* and *Re Langhorne.* An exercise of power should always be subject to review.

Legislation should also provide for a remedy to an aggrieved person. It should go further and state whether the remedy is in addition to or alternative to other remedies; and whether the statutory remedy should be exhausted first.

In this regard, Article 202(1) which remains unaltered needs to be rewritten. The mere deletion of the proviso in Article 153 is not sufficient as it does not state whether the statutory remedy should be exhausted first. The local cases of *English v AG*, *Sukhdeoji v AG* and *Abrams and Harris v AG* gave different interpretations to Article 153. Consideration was not given to a time limit in which an action should be brought.

Many lofty principles that cannot be enforced have been retained. Other principles including some relating to children have been added although they are already contained in other Acts. They do little more than contribute to the volume of the document. The focus should have been on the protection of the citizens' rights and interests, rather than constitutional window dressing.

For instance, Article 38E states that formal education is compulsory up to the age of 15 years. Article 27 states that every citizen has the right to free education from nursery to university. These two provisions cannot be enforced in a court. There is however an enforceable right to free education from primary to secondary school. However, the question to be asked is what is the right of free education worth if the State cannot provide properly qualified teachers or any teachers at all?

Referential provisions are tedious and burdensome. Provisions should be complete as far as possible and not unduly complex.

Article 212F(2) is certainly not reader friendly. It reads "Except paragraphs (2), (6) and (7) and the provisos to paragraphs (4) and (5), the provisions of article 226 shall *mutatis mutandis* apply to the Ethnic Relations Commission." No proper draftsperson would be proud of this abomination.

Mutatis mutandis and *inter alia* which have been used lack precision and raise doubts. These phrases should generally be avoided especially when rights and interests are affected.

According to *Thornton*, "the very use of such a formula is an admission of at least partial failure – an admission that the old law does not fit the new circumstances without amendment. Such a formula amounts to an invitation to the reader to take over the drafter's role and is thus a casting off of responsibility."

In addition, many persons do not know the meaning of Latin phrases: Latin being considered a 'dead' language and not taught in Guyana.

Legislative drafting is a specialised skill possessed by few. It was never intended to be a cut and paste opportunity for copyists. Article 200 was redrafted to change the composition of the PSC from not less than 5 and not more than 6 members, to 6 members.

Article 200(1) "The Public Service Commission shall consist of six members who shall be appointed as follows, that is to say – "
What useful purpose does it serve to retain the phrase "that is to say"?
Paragraph (a) appoints 3 members.
Paragraph (b) appoints 2 members.
Although with the change to six members it is now mandatory to appoint the sixth member, paragraph (c) retained the anachronism which was no longer appropriate "If the President deems fit, one other member appointed by the President…".

The new human rights of the individual would be amusing if it were not an integral part of a serious document. Although no rights have been effectively conferred on the citizens by Article 153A, a person may apply for redress to a Human Rights Commission consisting of five members, all of whom could be non lawyers.

While the focus was to minimise the powers of the President and the Executive, there was little or no attention to making certain provisions legally effective by providing sanctions against the Commissions, other bodies and persons who are given powers and duties, and who fail to perform their duties.

Further, there are new provisions to facilitate the Commissions and other entities to access money so as to ensure independence, but there is a vague

and obscure provision for the accountability of this 'lump sum'. It is a cardinal principle that laws should not be drafted that could lead to corruption.

There are more flaws, lacunae and non-contributory additions that are too numerous to mention in this letter. The new draft Constitution needs to be thoroughly reviewed and rewritten by competent draftspersons. Many of the Articles included need not be in the Constitution, except of course if the primary aim was to make the document voluminous. The five new Commissions and three new committees take up a lot of space in the Constitution, yet further legislation has to be drafted to make them effective. There are also provisions to provide for the setting up of more commissions.

Draftspersons are not legal mechanics and it is their function to advise when recommendations are inappropriate for a Constitution. Erudition as opposed to compliance separates the proper draftspersons from the legal mechanics.

According to *Lord Denning*, ninety percent of the cases that come before the courts are on the interpretation of one statute or another. Laws should not be drafted that would open the floodgates to litigation or lead to chaos. Absence of clarity encourages those who wish to undermine the rule of law. A Constitution should protect the citizens and not burden them for "Litigation is an activity that does not contribute to the happiness of mankind."

Indeed, it has been recognised that "**Experience indicates that the best draftsman is a good lawyer with an analytical mind who has spent a few years at least in civil law practice."**

Finally, let me say that freedom of expression continues to be an inviolable right and any attempt to curtail this immutable freedom guaranteed by the Constitution must be strenuously resisted.

Yours faithfully,

Jamela A. Ali
LL.B.(Hons.), LL.M.(Legislative Drafting)
Attorney-at-Law