Gauteng workshops on legislative drafting

Seidman, Robert
Dear Bob and Anne,

I'm sorry this took so long to send but things have been rather strange down here.

It seems as though, much to my surprise, our technological base is somewhat more developed here in the "third world". We received your article which has been very useful in stimulating our thoughts around the issues in question. South Africans have a tendency (perhaps a universal human tendency) to believe that the problems they face are unique. Many of the problems with legislative process that you raise in your document are the subject of ongoing debate amongst us.

We are extremely excited about, and convinced of the need for, a process aimed at building our capacity to legislate for development and transformation. There are a number of things, however, that we need to do before proceeding.

The first problem is funding. We are confident in our ability to raise the necessary funds - either from within the government or from outside it (or both). In order to do this we will need concrete proposal that can be discussed with possible donors. This would include a draft seminar programme and a budget, both of which we will need your input in preparing.

Secondly, we wish to submit a memorandum to Cabinet on the workshop. This would be aimed at securing official sanction (and thus guaranteed attendance from our bureaucrats) and, possibly, the assistance of the Treasury. Again, it would be useful to have a draft programme and budget for this purpose.

We will be unable to finalize the time and duration of the workshop prior to submitting this memo and obtaining funding. We therefore request that, on the basis of the proposals and comments contained herein, you prepare a draft programme and estimate the costs involved.

Now for the interesting stuff.

We feel that the process should engage with the following problems:

1. Drafting Technique

Within our public service, the officials engaged in policy development and legislative drafting are, in general, of two types: Firstly, there are those inherited from the previous political order, who are steeped in the tradition of Apartheid bureaucracy and legal positivism. The concepts of development and transformation are both new and strange to them. Their ability to draft legislation aimed at achieving these ends is thus somewhat limited. Secondly, we have a new generation of civil servants whose main political experience has been the liberation struggle.
While they have clear ideas on development, transformation and mass work, they lack the skills to transform these ideas into legislative programmes or even determine which policy areas are appropriate for legislation.

The infrastructure of the central drafting office (the Legal Services Directorate) is newly established and lacks a skills base. The development of technical skills in legislative drafting is thus one of our priorities. The possible linkage of your programme with the Tulane programme presents exciting possibilities in this regard.

2. Developing a Legislative Process and Institutional Framework

In your article you comment that most governments specify the process through which an idea becomes a bill through regulations which *invariably did no more that prescribe the route a bill should travel*. We are currently engaged in the process of building a provincial government from nothing. We lack even such routes and believe that, in order to ensure the efficiency of our legislative programmes we must develop them. A lack of consensus around the legislative process has led to a profusion of errors and lapses.. It is urgent that this consensus (as opposed to prescription) be developed in the context of the institutions that we have so far created.

We also believe that review of the institutional framework which surrounds this process bill creation is of vital importance. We do not aim to simply design a shadow of the British system. We believe that the opportunity for creating institutions and process which encourages developmental and transformative programmes are both possible and necessary in our situation. Of special importance in this regard is the development of a Cabinet system which achieves these aims.

3. Generating Legislation

We have read your article regarding your experience in China and believe that the programme should aim to generate (i.e. draft) actual legislation. As we discussed on the phone, we suggest that the following be considered:

(a) Legislation on the legislative process itself. In this regard two provisions of the constitution are of interest:

\[ s120(2)\] An Act of the province must provide for a procedure by which the legislature may amend a money Bill

\[ s140(4)\] Provincial Legislation may specify the manner in which and the extent to which proclamations and subordinate legislation must be tabled in or approved by the provincial legislature

A process towards amending the existing Exchequer Act is currently under way within the Department of Finance with regard s120. It may be completed by the time we have the seminar in which case it would not be appropriate. The second area presents an exciting challenge in our context as most of our law takes the form of subordinate legislation and there
is at present no procedure for legislative review of such regulations.

(b) Legislation in the area of government accountability, public service ethics and corruption. While our administration has been relatively free of corruption over the past two years we believe it is important to put measures in place which regulate these areas. Again, a process in currently underway, with the support of the National Democratic Institute, with the aim of drafting such legislation. We would have to review the progress in this project closer to the time. (c) Finally we should look at one or two bills aimed at delivery of services or social/economic development.

It should be noted that a final identification of bills for the purpose of drafting during the workshop would require more extensive consultation with political structures in the Province.

4. Developing the Capacity of Legislators

A footnote in you article refers to the "inability of many elected members to assess legislative materials". This is most definitely a capacity problem which exists in our own legislature. We should perhaps investigate the possibility of a separate workshop to address these problems.

The participants in the workshop would include the staff of the Legal Service Directorate, key officials involved in the policy making process, legal advisors and elected officials (such as standing committee chairs). We would have to do further consultation and thinking around this and would appreciate any thoughts you may have.

In terms of time frames, we are currently considering the period 1 - 20 July this year. Again it will be impossible to be absolutely sure before we have discussed the matter in Cabinet and secured funding for the project.

We will await your reply and hopefully, once we have a draft programme and budget estimate we will be able to expedite the process of finalising all the outstanding areas.

We look forward to hearing from you.

Michael Sachs