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<th><strong>Gauteng workshops on legislative drafting</strong></th>
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OUTLINE OF TALK ON GAUTENG WORKSHOP
(a learning process cum participatory research)

I. Introduction:

A. "Good governance" increasingly recognized as necessary to provide stability, transparency and predictability needed for a market economy

1. Shihata, World Bank Counsel: for IBRD 'conditions' to work, must provide appropriate legal order

2. UNDP: trying to raise $300 million for all of Africa to achieve 'good governance'

B. Here discuss Gauteng project for three reasons:

1. these = hypotheses as to tasks of governance
   a. Everywhere, as in South Africa, to achieve good governance requires more than democratic elections to 'throw the rascals out';
      (1) need to change inherited institutions -- (defined as repetitive patterns of behavior) to release initiatives for development;
      (2) law = government's primary instrument for changing behaviors (indeed, law can only
      (3) Therefore, to achieve development, need good governance; must change government institutions (ie the law-making and implementing processes) as well as social and economic institutions.

2. Given necessity of fitting new laws into country specific realities, need deep knowledge of country-specific circumstances
   a. law-makers need adequate relevant social science research findings to design appropriate legislation
   b. Need a legislative theory to guide law-makers, working together with social scientists, in process of formulating and enacting laws that fit country-specific circumstances
      (1) Can't copy law from other countries because each country's realities remain unique; but need theory to guide process of learning from other countries' experience with efforts to use laws to solve similar
development problems

(2) challenge: call for 'good governance' opens up a new realm for development of legislative theory to guide process; neglected in past because:

(a) lawyers and law schools centered attention on courts, viewed as resolving disputes between market actors

i) (although increasingly, courts' role has been replaced by administrative regulations);

ii) train lawyers to take clients by hand through forest of existing laws to come out profitably on other side; challenge here is to change laws to meet new circumstances.

[iii) when considered drafting of new law at all, considered it merely a technical skill for writing out stated policies in 'legal form;' courts = 'rational;' legislature = political]

(b) political science developed various forms of pluralist theories, but -- building on US experience -- these tended to assume law as compromise resulting from interest group bargaining

i) Underlies useful proposition that law-making should require inputs from all 'stakeholders;' but ignores point that those with power usually win the bargains

ii) Do not guide law-makers in using reason informed by experience to formulate legislation

(3) Criteria: for a legislative theory adequate to guide law-makers in preparing and assessing bills designed to facilitate transformation, it must assist drafters and legislators:

(a) to ground bills on reason informed by experience, logic and their country's unique realities.

(b) (since laws can only address
behaviors) to structure available evidence, and where necessary obtain more, relating to the country-specific factors that influence behaviors in the face of the law;

(c) to build into the the law-making process the capacity to evaluate new laws' social impact as a basis of revising them to meet changing circumstances;

(d) to ensure participation by those affected by the laws (the stakeholders), especially the vulnerable usually excluded,

i) they have the most intimate knowledge of the facts relevant to the problems and their causes that the laws purport to address

ii) note that stress on reason informed by experience (as opposed to bargaining dominated by power) opens possibility for even society's weakest citizens to advance better logic or facts.

C. Here propose to use Gauteng experience to illustrate use of a legislative theory, rooted in American legal realism and John Dewey's problem-solving approach, to help country drafters and legislators to ground legislation in reason informed by experience

1. we have been using theory in projects in China, Lao PDR, Mozambique and now in Gauteng to help country law-makers draft and prepare transformatory laws;

2. Note that we used the proposed legislative theory to guide the learning process used by the Gauteng project;

a. underlying assumption: no one can learn to draft (including learning the essential theory) without actually engaging in the drafting process;

b. that requires actually using the theory to structure the available evidence (and to direct search for new evidence) relevant to designing legislation likely to solve the social problem at hand

II. Background of Gauteng project, designed to assist Gauteng
Province government officials and legislators to carry out their responsibilities under the new Constitution:

A. Constitution aimed to decentralize

1. seems result of at least two sets of concerns:
   a. result of National Party's and Inkatha's efforts to retain control of local affairs;
   b. accepted as an aspect of world-wide perception of need to bring government 'closer to people'

2. In Gauteng, as elsewhere, provincial governments combined white and black areas, both in terms of legislatures (councils, provincial legislature) and departments that provide services

3. Purpose of Gauteng project: To equip Provincial drafters with legislative theory and methodology to draft bills to implement policies of ridding Province of apartheid institutions in provision of services as well as forms of governance.

B. History of project:

1. Newly elected legislature, now in office almost three years, has passed almost no transformatory laws; and those passed have not produced the desired results.
   a. Speaker of House realized causes of the problem lay in fact that newly created provincial departments did not produce quality bills, and that legislators have neither the skills nor the resources to draft bills themselves
   b. Provincial cabinet recently appointed drafting group, about 15 lawyers, mostly black, but few had any drafting experience (until 1994, no blacks served national government as drafters)
   c. Asked our assistance in helping drafters produce transformatory bills while strengthening their capacity.

2. Preparation for workshops:
   a. Cabinet asked Ministries to propose bills dealing with significant social problems (had no regularized system of determining legislative priorities); result = bills dealing with 2 social problems involved in:

      (1) legislative oversight of subsidiary
legislation (seems technical, but given typical discretion granted Ministers, becomes an important issue relating to legislature's control over law-making);

(2) local departments' slow pace in improving use of human resource -- ie hiring, promoting and training to overcome legacy of institutionalized past apartheid employment practices.

(3) local councils' difficulties in fulfilling their responsibilities as local communities' representatives in supervising local departments to ensure improved delivery of services, especially to historically disadvantaged peoples

(a) focus on this problem here; if you have questions relating to other two, we will be happy to answer them in the question period.

b. Drawing on our experience in other projects, we requested the House Speaker to arrange a series of workshops:

(1) With top leaders (2 hours) to introduce theory and methodology and proposed learning process, in an effort to ensure they 'owned' (and would continue to develop) the project - ie to ensure sustainability;

(2) With main drafters and top leaders (2 days) mainly working in small groups, using theory and methodology to structure main outlines of research reports and bills

(3) With 15 drafters (2 weeks), mainly continuing work in small groups, to actually draft research reports, including evidence, and bills;

(4) with legislators (one day) to provide them an opportunity to assess the bills and reports, and discuss them with the drafters.

3. Underlying methodology: Problem-solving, using logic and facts at each of 4 steps, (review, using diagram):

a. Providing facts to identify nature of problem and behaviors that comprise it;
b. Explain causes of behaviors that comprise problems, showing that those hypothesized prove consistent with available facts;

c. Draft bills' measures, using facts to weigh costs and benefits of range of measures logically likely to overcome causes identified; and

d. Monitor and evaluate facts as to law's social impact after its enactment.

4. Limits on Gauteng process' effectiveness:

a. As a learning process, did not include country personnel, equipped with theory and methodology, to give leadership in process of structuring evidence to justify proposed measures;

b. Drafting groups did not include as regular participants, either departmental, civic leaders, or academics who could provide essential available documents, and other evidence;

c. Two weeks not enough to complete job; Local government department agreed to continue work with drafters to produce draft reports and bills; the Cabinet agreed to continue the work to undertake the necessary further investigations and complete the drafts for submission to the Provincial legislature.

d. Drafters had little opportunity to learn from other countries' efforts to use law to deal with these kinds of problems

III. The 'learning process' did produce bills, backed by research reports containing some of the available evidence, to justify them:

A. Gauteng Province background: local governments = very different sizes, different problems, with different causes requiring different solutions:

   1. Joburg: national urban center, complex services for millions of citizens, budgets run into millions of rands;

   2. Small rural towns of several thousand citizens, limited services, small budgets

B. One of the two draft bill aimed to overcome problems involved in establishing 'democratic' provincial governance, ie municipal councils:
1. The initial social problem leading to demand for new bill: Citizens not persuaded newly-elected councils represented their demands for better services at lower costs; i.e., councils not fulfilling proposed role:

   a. eg. the reality: departments still do not always provide equal services, though claim are making efforts

      (1) garbage collection: in white areas, 2 x weekly; in townships, 1/2 weeks;

      (2) electricity: government demands payment before providing more service; people resent/cannot afford costs; government sent in bull-dozers to dig up power lines in non-paying areas (but papers report big industries have delayed payments for months without that treatment)

   b. citizen reactions: eg. burned down some councillors' homes; other councillors moved to remote areas for safety

2. Causes of newly-elected Councillors' behaviors: (used ROCCIPPI check list to generate hypotheses, gather <limited> available facts to test them)

   a. Even if assume interest ad ideology support reallocation of resources (and may not always prove true), other factors thwart efforts to monitor, evaluate, and press departments for needed changes;

   b. Capacity: lack skills and knowledge about how departments work, and how to monitor them; how to read budgets to see whether really are trying to reallocate resources; how to question department officials; etc.

   c. Process limits councillors' role in providing inputs, feedback, assessing departments criteria and procedures:

      (1) meet infrequently, leaving main decisions to executive, (need to examine causes of their failures to press issues)

      (2) limited use of committee structures; no clear responsibilities; wide responsibilities; not pursued/into.

      (3) no offices or regular scheduled meetings with community members

3. These explanations suggested several concrete measures for inclusion in the proposed bill (all subject Provincial legislative)


to revision and additions in light of further evidence)

to:

a. provide detailed measures requiring Local Government Ministry to train councillors with needed skills and help them obtain knowledge of departments' activities;

b. require departments to publish regular reports in readable form for councillors and citizens,

(1) show per capita changes in reallocation of services by district, and provide annual plans showing proposed further changes;

(2) Provincial Local government Department to summarize these for Provincial Legislature (responsible for overall oversight)

c. require greater reliance on council committees, assigning them to monitor specific departments, ensuring council members had appropriate skills, and preparing reports and holding hearings on those departments' progress;

require councillors to find specific places and publish schedules containing specific times when they would become available to meet and discuss problems with community members;

e. require more regular, open council meetings to debate relevant issues relating to department activities.

C. Improving local departments' use of human resources

1. The problems:

a. 40% of staff = unskilled, mostly black, no upward career paths; possess unknown qualifications; not considered for higher posts

b. top leadership and professional levels, almost all white except for some former bantustan officials;

c. new hires at top levels not always adequately qualified

2. Causes of problematic behaviors of main social actors, mainly department managers and supervisors: (used ROCCIPI check list to generate hypotheses, gather <limited> available facts to test them)
a. No standardized rules for promoting or hiring new personnel;

b. Especially in the smaller local departments, managers and supervisors had little knowledge or skills for identifying and promoting or hiring qualified personnel at any level, especially candidates from disadvantaged groups;

c. In the past, the existing processes

   (1) left decisions primarily to existing managers' discretion;

   (2) usually enabled managers to make decisions in secret;

   (3) provided neither for records on bottom 40% of departmental employees, nor efforts to promote them for higher-level jobs for which they might be qualified;

   (4) excluded community inputs in determining criteria or procedures for hiring senior officials or professionals, not to mention in considering high level individual appointments;

d. Some managers and supervisors did not see it as in their interest to employ highly qualified members of disadvantaged groups who might insist on changing departmental procedures for allocating services, etc. Others' ideologies persuaded them that disadvantaged group.

3. Proposed bill would:

a. Require Local Government Department to provide default guidelines for departments to establish standard rules (department personnel must follow these unless Departments pass their own which prove acceptable to Minister):

   (1) requiring specific inter-departmental and external publication of openings;

   (2) establish criteria and procedures for decisions

   (3) require published reports on decisions re hiring, promotion and training, showing how they meet required criteria and procedures;

   (4) specifying community inputs for top
officials and professionals; 
b. Establish Local Government Department agency:

(1) to review municipal hiring, promotion, training decisions in light of guidelines
   (a) ensure qualified staff and resources;
   (b) publish summaries of departmental reports for provincial legislature to assess;

(2) to help municipal departments provide training for personnel responsible for hiring, promoting and training:
   (a) identify potential trainers
   (b) provide training materials
   (c) work with municipal departments to identify who will participate, where, when, how,

(3) provide for responsible Legislature committee to review social consequences of Local Government Department agency's work, make proposals, and if necessary revise the law.

IV. In conclusion:

A. Gauteng project provided opportunity to test legislative theory as guide for training drafters to prepare research reports and bills grounded in reason informed by experience

B. Only the beginning of the project:

1. Require training Gauteng drafters to conduct workshops to produce other bills while training more drafters (hopefully by bringing BU Program for Legislative Drafting for Social Change);

2. Need to institutionalize the learning process to train law-makers (especially drafters) in Provincial Departments, Cabinet and Gauteng Provincial Assembly, and at municipal levels.

C. Need help of African Studies Center to strengthen interdisciplinary capacity of law and social science faculties to continue this work.
Bustin: the problem-solving: difficulty in the boundary etc.; prob. explanation?

Parker:

Curie: 1. Non-lawyers in
2. Civil society & role

Edmund: (Curie): def of 'insts.' = guideline to behavior - how identify pobs/insts when changing?

Tom: Fear transformation/implementation of laws or just more visibility/ transparency; eg councils not getting job done - in fact did to get elected?

Kwagema: 1. When law -> enacted, man out of date. 2. Wanting to build into system mechanism for review (eg in US: reauthorization of laws) 3. Extent to which lack of resources undermines insti. structure & effectiveness; eg 'procrustes' that for to perpetuate past probs. - definition must ind. What = 'priority' eg white councillors don't see it as to blacks = need more resources ("bigger pie")

Parker: 1. Copying bad law/finance law - doesn't work. 2. Undesirable 'think'; might have been copied from (41st) The...

Celestin Monga, "Measuring Democracy: A Comparative Theory of Political Well-Being"