Course readings in legislative theory

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AN INTERLUDE

As advertised in the introduction to these readings, this course has the purpose of teaching students to "think like a lawyer" about what the law ought to be. It should lead the student to generate good -- that is, wise and just -- legislative proposals. Since no yardstick exists by which to judge the good, the wise or the just, these readings build on the notion that we can do no more than develop an agenda of steps to take which, if followed, will likely lead to those sorts of legislative proposals. To develop that agenda, we look at justifications for legislation. From that examination, we seek to determine the characteristics of a good justification, on the theory that what makes a good justification also prescribes a sensible way of thinking about legislation.

What would you put into an agenda of that sort? Critique the following:

MARY ELLEN CALDWELL, PLANNED RESEARCH PROTOCOL
From The Florida Approach, remarks made at International Seminar and Workshop on the Teaching of Legal Drafting, Indiana University School of Law, Bloomington, October 3-4, 1978, transcript, pp. 179-81.

TIME 1 INTAKE QUESTIONS
Client proposes problem: (Discrepancy between "is" and "ought")
Query client:
  His objective: ostensible "purpose" to be achieved
  Dimensions of the "problem" facts
  His proposed solution
  His estimate of feasibility of adoption/implementation
Investigate client:
  Credibility
  Reliability
  Values
Inquire: time available for me to do the job.
Consider: reference to another lawyer with expertise
Preliminary research:

Facts: HAS ANYONE ELSE ASSEMBLED RELEVANT FACTS?
Who has information?
Is it reliable?
Is it available? [Consider legal, ethical obstacles]
Does "problem" presently constitute a crisis?

Law: HAS ANYONE ELSE RESEARCHED THIS QUESTION?
1. Law in this jurisdiction
2. Law in other jurisdictions
3. Any recommended models, drafts, reports

Problems:
1. Constitutional issues?
2. Is any legislation constitutional?
3. Separation of powers, and territorial jurisdiction
4. Jurisdiction over subject matter
5. Federal-state relations
6. Civil rights and liberties

Decisions:

IF AND ONLY IF
Facts: there is a problem of substantial dimensions and facts are available, and
Law: there is need for legislative action, and
Client: is acceptable, and

Constitution: test is met and legislation is appropriate

TIME 2: INITIAL RESEARCH

Facts: Whose acts/inaction constitute the problem?
Who has relevant information? Reliable?
Informants willing to provide information?
Ethical/legal obstacles in collection of information?
Consider ways of protecting confidentiality of sources
Whose interests are being threatened by action/inaction?
Are they aware of the threat?
What kinds of interests are they?

- health, safety
- affection, loyalty, family
- economic
- knowledge, skills, information (truth, science)
- power, political participation, influence
- respect, status
- ethics, morality, religion
- aesthetics

Interlude 2
Whose action/inaction poses the threat? Direct/indirect? Intentional/unintentional?
- individual/group
- number/proportion
- sex/age/ethnic/personality/cultural characteristics
- hi/med/lo economic status
- hi/med/lo social status

How widely dispersed the actors? the targets (victims)
How well organized? targets and actors
How long has action/inaction occurred?
Has there been a recent increase/decrease in action/inaction?
Recent increase/decrease in victims?
What predictions about increase in "problem" dimensions?
What relevance of communication/ technology/ amount of public-private resources, manpower, interest and support?
What are informant's ideas about how the problem can/should be solved?

Law:
- Constitutional issues: jurisdiction prohibitions on action
- Applicable prior law (statutory, judicial) this jurisdiction
- Application of law in other jurisdictions (evaluate success or failure of other solutions)
- What recommendations have been made by model laws, law journal or other commentaries?

Consider these questions:

1. What is the existing statute law and case law of this jurisdiction governing, or bearing on, the legislative problem at hand?

2. Has the legislature of any other state, or the Federal Congress, enacted legislation along the lines of, designed to accomplish the purposes sought by, this proposed legislation?

3. What has been the experience—administrative, judicial, and "practical"—of the other jurisdictions with the legislation in point? Any administrative or other criticism or suggestion for improvement?

4. What are the various sanctions and other devices available for use in obtaining the objects of the proposed legislation?
QUESTIONNAIRE TO BE ANSWERED IN PREPARING A MEMORANDUM AS THE BASIS FOR DRAFTING A BILL.

(The purpose of this questionnaire is to enable you to determine whether or not there ought to be a new law on the matter before you, and, if so, what its scope and effect should and would likely be. Before answering any of the following questions read all of them, treat them as constituting a unit, and answer each in its relation to the others.)

1. What is the subject matter of the proposed new law, i.e. with exactly what phases of human affairs, economic, social, or political is the proposed law concerned?

2. What reliable data, literature, expert opinion and advice on the present problem in its economic, social, and political aspects are available? What is their accumulative effect?

3. What is the present law of this state (or country) on the subject?

4. What is the broad objective of the proposed new law?

5. What are the specific fact situations for which the present law is alleged to provide an inadequate or undesirable solution?

6. Does the alleged defect actually exist?

7. If so, is the situation unique to this state (or country), or has the same or a similar defect in the law been dealt with by the legislature of any other state or country?

8. If another state or country has dealt with such a defect, what statutory remedy did it devise?

9. What has been the experience of such other state or country in applying its statute judicially and administratively? Have any theoretical and practical difficulties been encountered? If so, what means have been taken to overcome them?

10. Have the above mentioned statutes of other states or countries been judicially or administratively construed?

11. Have the governmental officers charged with the administration of such statutes any criticism or suggestion for improving them?

12. Has the legislature of this state (or the Congress) ever considered or enacted legislation in any phase of human affairs essentially related to the subject now under consideration? If so, what has been its general policy? Would any statutes be in pari materia with the proposed new law? If so, how would they interplay? Adapt and answer questions 9 to 11 to any statutes included in question 12.
13. What specific solution do you recommend to remedy the defect you are now considering?

14. Does your solution involve legislative administration or law making in the sense of laying down rules of general application?

15. If the latter, what is the immediate and specific object or purpose of the new law that you propose?

16. What are the likely economic, social, and political results and implications of your proposed solution?

17. What are the various sanctions and other devices available for use in obtaining the objects of your proposed law?

18. With particular reference to question 17, does the subject matter of your proposed law indicate that it will be self-executory, or must administrative machinery be utilized?

19. What modifying effect, express or implied, will your new law have on presently existing law, both common and statutory?

20. Is there any question concerning the constitutionality of your proposed law:
   (a) under the federal constitution;
   (b) under the constitution of this state?

21. In the light of careful appraisal of your answers to the foregoing questions, do you recommend the enactment of a new law? If so, draft the necessary bill.

A FIRST-CUT AGENDA

I. What is the difficulty?
   A. Whose behavior constitutes the difficulty? (i.e., who is the role-occupant?)

   B. Evidence that the behavior actually exists?

   C. Cui bono?

II. What explanations for the difficulty exists?
   A. What law presently structures the choice of the role-occupant? (State, federal, municipal, including not only law directly connected with the matter, but more general areas of law).

   B. What constitutes the non-legal constraints and resources (i.e., the arena of choice) of the role-occupant?

   C. What conformity-inducing measures does the law presently include?

   Interlude 5
D. What constitutes the behavior of the law-implementing institutions in applying those measures?

E. What explains the behavior of the law-implementing institutions?
   1. What law presently governs their behavior?
   2. What constitutes the non-legal constraints and resources in their arenas of choice?

F. What feedback exists between role-occupants and law-implementers?

III. What solutions does the legislation propose? Will they work? At what cost?

A. What alternative solutions to the problem exist?
   1. Comparative legislation elsewhere, and how well it works there.
   2. Other solutions that you can devise?

B. Which of these alternatives address the causes revealed in the explanation?

C. Costs and benefits of alternative solutions (always including doing nothing as one possible alternative).

D. If no feasible solution develops, ask the questions deriving from Lindblom’s "dodges", supra, pp. II-49 to II-52.

IV. Devices for feedback and monitoring of the implementation.
I. What is the difficulty?

A. Whose behavior constitutes the difficulty? (i.e., who is the role-occupant?)

B. Evidence that the behavior actually exists?

C. Cui bono?

II. What explanations for the difficulty exists?

A. What law presently structures the choice of the role occupant? (State, federal, municipal, including not only law directly connected with the matter, but more general areas of law).

1. How wide a discretion does that law leave the role occupant?

2. How well does its language communicate to the role occupant what the law requires of him?

B. What constitutes the non-legal constraints and resources (i.e., the arena of choice) of the role-occupant?

1. What opportunity does role occupant have to obey?

2. What capacity does she have to obey?

3. Does role occupant know of the law (i.e., has it been communicated to her?) By channels that make it likely she will understand and take it to heart?

4. Would an ordinary person think it in the role occupant's interest to obey (taking into account material and non-material benefits and costs, including possibilities of sanctions)?

5. By what process does the role occupant come to decide, whether or not to obey?
6. How does the role occupant perceive her obligation under the law, and how does she weight its costs and benefits? (i.e., what constitutes her ideology so far as it relates to the law in question?)

C. What conformity-inducing measures does the law presently include?

D. What constitutes the behavior of the law-implementing institutions in applying those measures?

E. What explains the behavior of the law-implementing institutions?
   1. What law presently governs their behavior?
   2. What constitutes the non-legal constraints and resources in their arenas of choice?

F. What feedbacks exist between role-occupants and law-implementers?

III. What solutions does the legislation propose? Will they work? At what cost?

A. What alternative solutions to the problem exist?
   1. Comparative legislation elsewhere, and how well that legislation works there.
   2. Other solutions that you can devise?

B. Which of these alternatives address the causes revealed in the explanation?

C. Will these alternatives likely lead to conforming behavior by the role occupant and the relevant implementation agency?
   1. [Here ask the ROCCIPI questions as to each].
D. Costs and benefits (broadly conceived) of alternative solutions (always including doing nothing as one possible alternative).

E. If no feasible solution develops, ask the questions deriving from Lindblom's "dodges", supra, pp. II-49 to II-52.

IV. Devices for feedback and monitoring of the implementation.
NOTES

1. Compare and contrast these three checklists. Which seems the more useful? Why? What criteria did you use in making that assessment?

2. Agendas such as these obviously structure thought. They identify what counts, to what data and theories we should attend. They serve as criteria of relevance. Self-evidently, we cannot think without criteria of that sort, for we cannot consider everything. Rational thought requires limits; all thinking involves *bounded rationality*. By what criteria should we assess these various agendas for thinking about legislation?