Legislative drafting for democratic social change in South Africa

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http://hdl.handle.net/2144/19017

Boston University
1. Beginning the week of Monday, 20 April, this class will no longer meet in a single large class on Thursday afternoon at 2:00 p.m. Instead, it will meet in three Critique Sessions (see Critique Sessions for assignments). Paragraph 2 describes the general function of the Critique Sessions. Paragraph 3 sets out the responsibilities of the members of the Critique Sessions in terms of their weekly Critique Session assignments. Paragraph 4 indicates the membership of the three Critique Sessions, and the dates their drafts become due. Paragraph 5 details the responsibilities of their individual members for critique at the different Critique Session meetings. (Note: After the critiques begin, except for the regular Wits students, the participants will no longer need to attend the 4:00 PM Thursday classes; the Wits students, however, will meet at that time to critique each other’s term papers which comprise the equivalent of research reports for legislative proposals in parallel problem areas.)

HOW CRITIQUE SESSIONS WORK: IN GENERAL

2. Critique Sessions constitute the core of this course. They operate in general as follows:

a. Ten days before the assigned date, the authors whose bill and research report the Critique Session will critique submit a complete draft of their research report and bill to Ann and Bob. Within two days, the Seidmans return it to the authors accompanied by their comments. The authors revise the research report and bill in light of their comments, producing the 'Critique Session Draft'.

b. The authors duplicate the Critique Session Draft of the bill and the research report in enough copies to provide one for each member of the Critique Session, and one each for Ann and Bob.

c. The authors ensure that the members of the Critique Session and Ann and Bob receive their copies of the Critique Session Draft not later than 24 hours before the scheduled Critique Session. The importance of meeting this schedule
cannot be overemphasized. The whole critique session process depends upon people receiving a complete critique session draft in time for them to prepare their own critiques of the draft bill and research report. [Given the differences in the composition of the participants, each Critique Session will make its own arrangements for distributing the Critique session drafts.]

d. All members of a Critique session will read and critique the Critique Session Draft, noting comments on the margins.

e. In addition, each member of a Critique session will receive individual assignments that vary from week to week as indicated on the attached schedule. The responsibilities involved in these assignments, and the assignments themselves, also appear below, in paragraph 3. Note that in most weeks, each Critique Session member will have two assignments: one with respect of the research report and one with respect of the bill.

f. As assigned, each Critique session member will prepare a written critique -- usually a page or so of comment. The member MUST complete the critique in time to hand it to the author of the Draft at Critique session meeting; that is, usually only 24 hours after the member receives the Critique Session Draft from its authors.

g. At each Critique Session, the person assigned to a particular topic first makes his or her comments. Other members of the group then contribute their remarks. At the end of the session, the members give the authors of the bill and research report BOTH their written critiques, and their marked-up copies of the research report and bill.

3. The assignments for each Critique Session member consist of the following:

a. Summary schedule of responsibilities:

   Research Report

   i. Introduction; difficulty (i.e., the social problem that the bill addresses; substance only).

   ii. Explanations for problematic behaviours identified in the Difficulty section (substance only).

   iii. The proposed legislative solution for the identified difficulty (implementation excepted; substance only).

   iv. The means devised for implementing the bill, and for monitoring and evaluation the bill's social consequences (substance only).

   v. The form and style of the research report.

   The Bill

   vi. The bill's ordering and grouping (that is, its general structure; the sections of the bill)

   vii. The bill's general principles and other devices for interpretation.

   viii. The bill's sentences.

   ix. Horizontal check for consistent use of words.

   x. Formal sections (enactment clauses, coming-into-force provisions, amendments to other Acts); drafting within limits.

b. Detailed responsibilities at critique sessions.

   People assigned to make comments on the topics listed in Paragraph 3 have the following responsibilities:

3. The Research Report

   Note: For all thee assignments, consult the MANUAL as indicated.

   i. Introduction and difficulty: (See Model Outline, MANUAL, p. 44)

      (a) Does the Introduction --

         (1) begin with a startling anecdote or statistic to grab the reader's attention?

         (2) place this bill in the general context; especially, if the Department has a legislative programme, does it show where this bill fits in?

         (3) describe the history of the social problem involved, where it might help the reader to understand the social problem at which the bill aims?

      (b) Does the Difficulty section --
(1) adequately describe the nature and scope of the superficial manifestations of the social problem at which the bill aims? Does it provide sufficient data to substantiate its description of that difficulty?

(2) state the foreign experience concerning the nature of that social problem?

(3) identify the social actors (role occupants) whose behaviours constitute the social problem, providing evidence as to different groups among them (as appropriate; e.g., by social class, ethnicity, sex; or, in the case of different collectivities, their size and purpose)?

(4) describe the features of those social actors' behaviours that make them problematic, substantiated by sufficient evidence?

(5) state who benefits and who suffers from the present situation, with evidence?

ii. Explanations (Model Outline, MANUAL, p. 45):

(a) Does the Explanation section review the possible implications of foreign experience as to possible causes of the problematic behaviors in South Africa?

(d) Using the ROCCIPI check list to identify possible causes in South Africa, does the Explanations section generate sets of interrelated, testable propositions to explain the problematic behaviours of each set of role occupants identified, supported by evidence? i.e., does the Explanations section --

(1) state the existing law -- the Rule -- as it presently bears on role occupants' problematic behaviors identified in the difficulty section?

(2) describe the opportunity and Capacity of role occupants' to behave (or not behave) as they do, supported by evidence?

(3) assess the role occupants' knowledge of the existing law (i.e., has the law been communicated to them)?

(4) declare the actor's Interest (or incentives, including the threat of sanctions or rewards) to behave as they do?

(5) describe the Process by which the role occupants decide whether and how to behave?

(6) the role occupants' Ideology (i.e., their values and attitudes relating to the social problem area)?

(a) Does the Explanation section offer an adequate set of hypotheses with respect of the ROCCIPI factors to explain the behaviours of relevant implementing agencies?

The author of a research report must take care to discover all the legislation (from the Constitution through legislation enacted by national and provincial legislatures to administrative regulations) that bear on their particular problem. That legislation does not necessarily bear the same name as the bill under discussion; for example, to understand the legal framework within which actors behave with respect to pre-natal care, laws bearing on nutrition, housing and primary health care may have a bearing, as well as laws labeled 'pre-natal health care'.

This calls for using the same check list for causal factors for the behaviours of the decision-makers in the implementing institutions. Because these institutions always comprise complex organizations, this requires special consideration of the implementing institution's decision-making processes.
(d) Does it state who comprise the winners and losers under the preferred solution?
(e) Does it state the costs and benefits of the preferred solution compared with:
   (1) alternative solutions (or at least the leading candidates), including making no changes in the status quo; and
   (2) foreign experience with costs and benefits of analogous laws?
(f) Does it state the consequences of the bill with respect to women, children, the poor, and historically disadvantaged people, and the environment?
(g) Does it state the opportunities for corruption that the bill poses, and the measures the bill includes to lessen corruption's likelihood?

Implementation

(a) What agency does it propose to implement the preferred solution? Does the research report persuade you that the proposed implementing agency has the resources (time, finance, and human) to implement the bill successfully?
(b) What feedback mechanism does the research report state that the bill will adopt to monitor and evaluate the implementation of the bill? How do you evaluate the criteria and procedures proposed? whether it will prove adequately participatory?

Form and style?

(a) Does the research report generally follow the Model Outline, MANUAL, p. 44?
(b) Does it have adequate 'signposts' (MANUAL, Chapter 4), especially --
   (1) in the Introduction, a Methodology paragraph and a 'Table of Contents' paragraph?
   (2) mini-introductions and conclusions to each major section?

(3) a conclusion to the entire Report?
(4) adequate connectives linking sections of the Report?
(5) adequate headings and subheadings?
(c) Does the author (MANUAL, Chapter 4) --
   (1) avoid the passive voice and the verb 'to be'?
   (2) place the most important concept at the end of the sentence?
   (3) avoid placing subordinate or adjectival clauses between subject and verb, or verb and object?
   (4) avoid 'throat-clearing' expressions?
   (5) keep sentences short, avoiding run-on sentences?

Ordering and grouping; sections.

(a) Does the bill order and group by discernible principles? Do any Chapters, Parts or Sections seem misplaced? (MANUAL, pp. 66-69)
(b) Does each section contain one, and only one idea or concept? (MANUAL, p. 111)

Aids to interpretation; substance.

(a) Do the bill's preamble (if any), findings of fact (if any), general principles, definitional sections and other internal aids to interpretation seem sufficient? (MANUAL, Chapter 7)
(b) Does the bill faithfully carry out the research report's description of the preferred solution?

Sentences and the use of words. (MANUAL, Chapters
5 and 6). Does the bill --

(a) avoid argument and description, and manly specify who does what? (MANUAL, p. 125)

(b) include the necessary directions to the necessary actors ('walking through -- see MANUAL, Chapt. 6, p. 125)?

(c) cover all the contingencies you can imagine (the 'what if?' game -- see MANUAL, Chapt. 6, p. 125)?

(d) avoid the passive voice? (MANUAL, p. 115)

(e) generally use the singular form? (MANUAL, p. 116)

(f) avoid sexist pronouns? (MANUAL, p. 117)

(g) use appropriate language to impose a duty or a power to act or not to act? (MANUAL, pp. 119-121)

(h) direct action under certain conditions using appropriate language properly placed in the sentence? (MANUAL, pp. 121-122)

(i) use the appropriate tense for its verbs? (MANUAL, p. 123)

(j) contain vague or ambiguous words? (MANUAL, p. 135)

(k) use squinting or other ambiguous modifiers? (MANUAL, p. 139)

(l) use 'and' and 'or' clearly? (MANUAL, p. 141)

(m) use short sentences? (MANUAL, p. 142-

(n) use tabulations correctly? (MANUAL, pp. 144-149)

(o) draft in the positive, not the negative? (MANUAL, p. 150)

(p) avoid the verb 'to be'? (MANUAL, p. 152)

(q) place subordinate clauses correctly (MANUAL, p. 121, 151)?

(r) avoid legalisms? (MANUAL, p. 153).

(s) honour the maxims and principles of statutory construction? (MANUAL, p. 194 ff.)

Horizontal check. Does the bill rigorously use the same word for the same concept, and different words for different concepts? (MANUAL, p. 137)

Formal provisions; drafting within limits.

(a) Does the bill adequately provide for its enactment? Its date of going into force? (MANUAL, pp. IX-3, IX-5)

(b) Does the bill adequately provide for necessary amendments to other bills? (MANUAL, p. X-12 ff.)

(c) If required, does the bill have adequate transitional clauses? (MANUAL, p. IX-8)

(c) Are the bill's schedules (if any) in proper form? (MANUAL, p. IX-11)

(d) Does the bill raise any constitutional problems? (MANUAL, p. 183)

(e) Does the bill honour the judicial maxims and principles of statutory construction? (MANUAL, p. 193 ff.)

(f) Does the bill take adequate precautions against the potential for corruption? (MANUAL, Chapter X). In particular, does it carefully limit each potential exercise of discretion? (MANUAL, pp. 83, Chapter X)

1. SCHEDULE FOR SUBMITTING Critique session DRAFTS

[Note: The lists below include only the chairpersons responsible for each bill and report; each group responsible for a bill may decide how to allocate responsibilities for the following assignments among its members.]
**GROUP 1**  
**Tuesdays, 2-3.45 p.m.**

<table>
<thead>
<tr>
<th>Name</th>
<th>Submit papers to Seidmans</th>
<th>Deliver to members</th>
<th>Critique session presenter</th>
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<tr>
<td>1. T. Ratshitang</td>
<td>8 April</td>
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<td>2. A. Valli</td>
<td>17 April</td>
<td>27 April</td>
<td>28 April</td>
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<td>3. S. Schneider</td>
<td>24 April</td>
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<td>4. C. da Silva</td>
<td>1 May</td>
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<td>5. C. Loots</td>
<td>8 May</td>
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<td>6. F. Cachalia</td>
<td>15 May</td>
<td>25 May</td>
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<tr>
<td>7. [Municipal bylaws?]</td>
<td>22 May</td>
<td>31 May</td>
<td>2 June</td>
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*This should be delivered on Wednesday because the following week is a holiday and we will likely travel; for us to return it in good time the paper should be in our hands by Wednesday.*

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**GROUP 2**  
**Wednesdays, 2-3.45 p.m.**

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**GROUP 3**  
**Thursdays, 2-3.45 P.M.**

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*See note 3.*
### ROTA FOR CRITIQUE ASSIGNMENTS

Note: These assignments are given in terms of day and month; the roman numerals on the left refer to the assignments discussed above.

**GROUP 1**

Name: Ratshitango Valli Schneider da Silva Loots Cachalia

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**GROUP 2**

Name: Rammutla Rees Pillay Davids Seheri Naidoo

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**GROUP 3**

Name: Dwingel Makau Tsele van Heerden Ludin Smith

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