Two day workshop in Estonia on developing skills to improve the legislative process

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Dear Michael,

Sorry we did not get back to you sooner on your proposed agenda. It looks very good, as do your four proposed themes. We look forward to participating in the conference.

We do have a few questions and some thoughts on both the themes and the agenda.

1. On the THEMES:

   ✓ a. We like your formulation of theme 1 relating to the role of theory: Law as the Command of the sovereign or as a problem solving tool? That puts it neatly into a nutshell and in the context of the history of jurisprudence.

   ✓ b. Using a problem-solving approach (and thinking of the conference in that context) might it not prove more helpful to start, not with the 'goal of the conference', but instead, as they appear in Estonia, the problems of the law-making process which the conference aims to overcome? In some ways this is a mere difference in terminology: To say that the conference has as an objective overcoming the problems of Estonian law-making is only the inverse of the statement that the conference focuses on the law-making problems of Estonia. On the other hand, the essence of the difference between problem-solving as a methodology and ends-means lies in how the 'objective' is arrived at. In ends-means, the 'end' determined by the decision-makers' values, constitutes beginning of the research. Given the positivist separation of values and facts, that approach assumes that one cannot do research on 'ends'. In problem-solving, solution is the goal results out of the research process. To state the theme as an 'objective' may lead to people discussions about an ideal-type Estonian law-making process, without much regard to the facts of specific Estonian circumstances. To begin with a description of how law-making takes place in Estonia today and its perceived frailties seems to us a somewhat better way to state the theme of the conference, which we take as a process to begin to discover how to improve the law-making process in Estonia's unique conditions.

   ✓ c. Your formulation of themes 2 and 3 leave us a little puzzled. That puzzlement arises because of ambiguity in the word 'policy'. In 2, what do you mean by 'development of policy choices'?

      (i) One meaning might relate to the issue of how law-makers prioritize the social problems they will tackle in the course of formulating an (annual or longer term) legislative program. (We tried to deal with that issue in Chapter 3 of the Manual; we realize now that we did not do it very well. Basically, we see prioritization as a political question: Which social problems law-makers -- given the many problems confronting the country and the resources available for resolving them -- should tackle first, and which later. Deciding on the legislative program would undoubtedly affect the choice of priority transformatory laws on which participants in your proposed legislative drafting program might work. As for who in what institutions should make the prioritization decisions, that again depends on specific country circumstances -- a Cabinet Committee? a Parliamentary Committee? others? Probably, in most countries, Parliament, as the people's elected representative body, should have the final say on the overall legislative program. Civic organizations can and should influence the prioritization
decisions through the members of parliament.)

(ii) Or the development of policy choices' might mean the alternative possible designs of a bill aiming at a specified social problem. (Suppose government drafts and sends to Parliament a bill for financing small, medium and micro-enterprises (SMMEs). That government drafted the bill demonstrates that it has decided to give priority to the lack of low-cost finance for SMMEs. Suppose that the bill provides for loans to individuals as owners of SMMEs, and does not provide for loans to small-scale cooperatives as owners of SMMEs. In some vocabularies, that also constitutes a policy choice'. In our Manual, we denote that question as a question of the bill's design'.)

The questions involved in developing policy choices in the sense of prioritizing bills, and the questions involved in making detailed choices about a bill's design, seem to us very different. We suspect that in your second theme you referred to prioritization; but we are unsure. Hence our puzzlement over the meaning of the word policy' in Theme 2.

d. Your theme 3, on translating policy choices into law, goes to the heart of the problem of drafting effectively implemented legislation. Most of our Manual focuses on the legislative theory, methodology and techniques essential for that task. Presumably, too, your proposed long term program would aim to strengthen Estonian capacity by giving the relevant personnel (in government, Parliament, and civil society) the tools -- theory, methodology, and techniques -- through a learning-by-doing process of drafting bills to resolve the social problems identified in the prioritization process.

That calls for a consideration at least of the institutions of the bill-creating and the law-enacting process, and the capacities of the personnel in each of those two sets of institutions. With respect of the first: Our experience suggests that in many countries the best way to draft priority bills has seemed to be to establish a team of drafters, including ministry personnel with expertise in the particular problem area; one or two people with legal training; and perhaps one or two people from non-government organizations and/or universities with relevant expertise. As an essential component of the drafting process -- the KEY QUALITY CONTROL -- the team should prepare a research report, structured by the problem-solving method. They should do this for three reasons: To ensure that â

1) the drafting team has formulated the bills details, logically taking into account all the available evidence;

2) the legislators have the necessary information to assess the bill (see the attached article); and

3) the media can obtain and publish that information to facilitate public participation in deliberating the proposed bill in light of reason informed by experience.

e. As we understand it, theme 4 will constitute part of the discussion throughout the conference:
Description and analysis of the current Estonian situation forms the basis of a search for the solution of identified problems in the bill-creating and law-enacting processes. We take it as given that whatever the outcome, it must include a learning-by-doing process to empower Estonians, themselves, to draft and enact their own bills, and to ensure their high quality.

2. The AGENDA: If we have correctly interpreted your 4 themes, then we have a few suggestions for the agenda. Incidentally, it might help if you could xerox off at least chs 1-5, and 8-10 of the Manual (either the English or the Russian version, or both) so participants could read them in advance. Those chapters cover the bulk of the points we propose to discuss under the headings you suggest.

November 7th:

9:30-10:15. In our first session, we would try to set the stage by discussing legislative theory, and particularly and the proposition that we consider key to answering how to use law as an instrument of democratic social change: that the law constitutes government's tool of choice for changing the behaviors (institutions) that comprise social problems. We would mention the issues of law-making institutions and the capacity of drafters, deputies and others acting in those institutions, focusing on the way a policy gets translated into a law. Because of time constraints, we would do no more than mention issues of prioritization. (see Manual, chs. 1-3) (Do you agree with that subordination of the prioritization issue?)

10:30-11:45. We suggest that the panel presently scheduled for 2:00 p.m. be moved to this time. It might help to enlarge the subject slightly, by changing the title of the topic of the 2:00-2:45 panel from "Current Setting for Estonian Policy Development in State Institutions' to 'How Estonian State Institutions Now Develop Policy, and then Translate Policy into Law.' That panel on current Estonian practice would provide the essential factual framework for all the subsequent proceedings. It would give all the participants (ourselves included) a deeper understanding of Estonia's existing system of policy-making and drafting, especially about how Estonians now translate policy into law. On that revised schedule, the Case Study, now scheduled for 12:00 to 1:00, would go over until 2:00 to 3:00 p.m (but see suggestion about the Case Studies, at the end of this Agenda, below).

11:15-12:00. We could then talk for 45 minutes here on "Developing Policy in the Legislative Context (Institutions and Legislative Tools)" (now scheduled for 10:30-11:15). Instead of having a separate session on Nov. 8th, we would here discuss 'Preparing Comments on Draft Law' in the context of preparing a research report to justify a bill. (Just as in law school American students study judges' opinions, justifications for decisions, as a way of teaching students to learn how to make decisions within an existing set of laws, so do we work with students to write justifications for a law as a process for learning how to decide what the law should be). We consider writing a research report, using facts structured according to legislative theory's problem-solving logic, THE KEY TO QUALITY CONTROL. (Indeed, for priority transformative legislation, we would recommend institutionalizing the requirement that a well-structured research report accompany every bill.) (See Manual, Chs. 4, 5)
12:00-1:00. "Experiences from Sweden in Transforming Law and controlling the Quality of Law" (Judge Schader) would provide further evidence of another country's approach to translating policy into law, with discussion focusing on what Estonia might learn from that experience.

1:00-2:00. Lunch.

2:00-2:45. Case study (we remain unsure about the kind of case study you have in mind).

3:00 - 3:45. How to Understand Civil Society Participation in the Policy Development Framework. (Are we right in construing this to mean 'Civil society participation in the process of bill-drafting' -- that is, the bill's detailed provisions required to translate a policy in effectively implemented law, as well as in formulating the policy? )

3:45-4:30: Examples of Civil Society Participation in Policy Formation.

4:30-5:00. Panel discussion "Comparing Estonian and Western Experiences" (Are we right in construing this to mean: 'What can be learned from comparing Estonian and other countries' experiences in translating policy into effectively implemented law?')

November 8th:


9:30-10:15. "The Purpose and Content of Drafting Standards'. We would add a subtitle: "the relationship between form and content"). Here we would focus on the materials in the Manual, chs. 8-10, emphasizing the importance of careful consideration of the way a bill's form affects its substance; the necessity of ensuring that the bill's substantive details set out a complete system for bringing about its desired behaviors; organizing the form logically to facilitate its usability; and emphasizing WHO does WHAT to ensure the implementation of the bill's detailed provisions. (Some of this discussion involves careful consideration of the use of language. We can make general observations about language use, but of course only experts in the Estonian language can comment on detailed questions of the applicability of those observations to drafting in Estonian.)

10:00 - 11:45. Estonian legislative drafting standards (Raigo Solg). It would be a real contribution if the speaker could critically compare those standards with the ones we have suggested in the Manual; to what extent do they differ, and with what potential consequences for substance? (Perhaps s/he could spend a few minutes commenting on the issue Estonian language use, mentioned in connection with the previous panel.)

11:45-12:30. Experiences from Finland in Transforming Law and Controlling the Quality of Law (Niils Jaaskinen)

12:00-1:30. Lunch
1:30-2:45. Case Study (we remain unsure of the kind of case studies you have in mind)

3:00-4:45. Panel discussion - what needs to be done in Estonia? As we see it, the panel members would reflect on what they considered as the important implications of the two days discussion, and the conference participants would raise additional questions and discussion (see suggestion for organizing the participants in groups to facilitate their participation and contribution to the general discussion, below.)

4:45-5:00. Summing up

As we write this, we realize we do not know how many people will participate, or what their backgrounds are. Presumably, however, all the participants should have an opportunity to provide their input into the conference discussions. In our own experience, if there are more than 20 participants, it might be well to divide the participants into groups, each sitting around a table (8 people at a table; in workshops in Indonesia and China, we have involved as many as 80 participants in this kind of exercise), and after each speaker, ask each group to discuss the issues raised and to elect one person to report back to the plenary session. We do think it essential to provide time for participants to discuss and think through the implications of the points made by the speakers. Perhaps the agenda could be juggled to provide time for group discussion and reports back, perhaps after each speaker or panel, perhaps by lengthening the day's session, perhaps by having an evening session. What do you think?

One last question: What shall we do about getting a ticket? Do you want to buy it, or shall we? As we see it, we should arrive some time on the 6th in order to have some rest before the conference begins; presumably that means we will have to leave some time on the 5th. And shall we assume that we will leave the day after the conference?

Anyway, we are excited about coming, and look forward to hearing from you further.

Sincerely,

Ann & Bob