Legislative drafting for democratic social change in South Africa

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A PROPOSAL FOR FUNDING A PROGRAM FOR TRAINING SOUTHERN AFRICAN LEGISLATIVE DRAFTERS AND LAW-MAKERS IN DRAFTING AND ASSESSING LAWS DESIGNED TO INSTITUTE DEMOCRATIC SOCIAL CHANGE

EXECUTIVE SUMMARY:

This proposal requests $383,500 for a two year Pilot Project to produce the legislation required to improve and coordinate the national and regional legal frameworks of SADC member countries; and, in the process, to strengthen the region's legislative drafters' and law-makers' capacity to draft and assess legislation designed to facilitate democratic social, political and economic change. This proposal consists of a request for:

(1) An grant of $203,840 for an initial two year Project to train eight well-qualified Southern African personnel in selected SADC-member states to institutionalize in their home countries an on-going learning process designed to enable drafters and lawmakers to learn to draft and assess legislation in the course of preparing quality bills for national and provincial legislatures;

The term 'drafters' here subsumes not only those who in the process of preparing legislation put pen to paper, but also the civil servants who usually conduct the initial investigations that underly proposed legislative programs. In practice, especially for transformative legislation, these two tasks overlap to such an extent that both groups require much the same knowledge and skills.

The budget here proposed provides for eight trainee teachers per year from four institutions. For reasons discussed in the text, it may be desirable to increase that number by adding additional trainee teachers from the public service and schools of
fundamental tasks. Beyond that, outmoded national legal orders too often block rather than facilitate the expanded regional markets and coordinated resource use required to enable regional populations to benefit from modern technological advance. As when Llewellyn wrote, in the rest of the third world and in the former socialist countries' transitional economies, so in the SADC member states today: Governments still confront the task of using law to restructure institutions so as to strengthen national and regional cohesiveness while, at the same time, unleashing social energies to improve their majorities' quality of life.

Institutions consist of repetitive patterns of behaviors. To change institutions, SADC member states must seek to change dysfunctional behaviors. For that task, for lack of an alternative, the legal order remains every government's instrument of choice. Law does not -- cannot -- directly address the

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7 That is not to say that governments can solve every social problem through the use of the legal order; obviously not. It does say that besides the legal order governments have precisely few tools with which to address social problems. Nor does it imply that governments can only introduce command tactics to address social problems. Frequently, governments best 'unleash' creative social energies by using law to remove barriers to individual economic decision-making.
resource allocations that perpetuate world poverty. It only can try to change the repetitive behaviors that produce those resource allocations. (Law cannot command polluted water to unpollute itself; it can only prescribe changes in the behaviors that cause the pollution. In the same way, laws cannot command SADC member nations to cooperate; it can only try to change the relevant national social actors' repetitive behaviors in ways likely to foster that cooperation.) SADC member states need to develop the capacity to produce laws to achieve their fundamental task.

No matter whether SADC member states, as nations and through SADC, aim to build their economies primarily through market or on state-driven forces: Each requires an appropriate institutional infrastructure. No substitute exists for the exercise of state power as the engine for purposive institutional change. Like governments everywhere, SADC's member states can only exercise their individual and collective state powers to attain democratic sustainable development through their legal orders. In Southern Africa, as throughout the world, they have no alternative way of accomplishing law's fundamental task.

Populist, democratic and free-market rhetoric notwithstanding, however, in Southern Africa as elsewhere, the responsible social actors, on a national, not to mention the regional, level, have encountered difficulties in their efforts draft and enact effective transformatory laws directed to sustainable development. Those
insufficient trained drafters; old traditions that seemingly relieve drafters of the responsibility for providing for a bill's implementation; and for legislators' subservience to the executive, the executive's enormous advantages in staff, and its near monopoly of information; imperatives of Party loyalty; backbencher political ambitions and consequent servility to the demands of Party leadership; and the weakness of most legislative committees.\textsuperscript{11}

This proposal, however, focusses on only one set of causes: The drafters' limited capacity for producing effectively implementable, transformatory bills to advance majority interests; and legislators' limited capacity for assessing bills on which they must vote.

1. Drafters. A large part of the explanation for the failure of drafters to prepare bills likely to perform the law's 'fundamental task' consists of the drafters' all but universal lack of an adequate legislative methodology and theory. For a law to work, the drafters must design it to take into account the time- and place-specific resources and constraints likely to influence social actors' behaviors. Unless the law fits snugly into each Southern African country's unique circumstances, it will not induce the relevant social actors to behave as desired. Implementation becomes impossible.

\textsuperscript{11} See Appendix x.
that seems remotely relevant. Foreign legal consultants frequently encourage this tendency. Like national drafters, without any guide for their task, most tend to conduct research, not in studying their clients' countries' social realities, but in their home-country law library, seeking appropriate models to adopt. Since no country's circumstances replicate those of any other, however, copying law will only serendipitously induce in another country the same sorts of behaviors it induced in its country of origin. The resulting laws too often remain unimplemented, or at best produces strange and unanticipated results. 13

(b) Absent a theory relating law to behavior, many drafters merely set out norms prescribing the desired behaviors, and impose criminal penalties on those who violate them. Usually, however, law can change social actors' behaviors only by changing the

13 Consider the following examples:

(1) China copied parts of its 1986 environmental law from U.S. models, including a requirement for environmental impact statements. In the United States, citizens' groups, through the courts, have found this an effective instrument to compel administrators to take environmental considerations into account. In the US, to carry on the requisite litigation, numerous non-governmental environmental organizations (for example, the Sierra Club) exist. In China, neither analogous citizens' groups nor an adequate court infrastructure exist to ensure the law's enforcement.

(2) In Lao PDR, a UNDP-World Bank project brought foreign consultants to draft 17 laws based on foreign models. The Lao legislature enacted only one of them (and that one under serious World Bank pressure), apparently because it did not see how they could work in Lao's unique conditions. The Indonesian government, too, simply did not pass a similar number of laws drafted by foreign consultants in the context of the USAID ELIPS project.

(3) Extensive efforts by foreign consultants to provide laws based on foreign models for countries that emerged out of the former Soviet Union have failed to foster equitable, democratic social change (cite).
constraints and resources inherent in the physical, social and psychological milieus that influence their decisions of how to behave. Criminal penalties change only one small factor among those constraints and resources. They rarely succeed in changing problematic behaviors. As a result, world-wide, people moan that 'We have good laws but bad implementation;' and academics write learned articles claiming that law cannot influence behaviors.

(c) Without theory-based procedures that enable drafters to rest their bills on reason informed by experience (that is, logic and facts relating to country-specific circumstances), they tend everywhere to respond to pressures exerted by those with power. Cabined by endemic bureaucratic secrecy,¹⁴ in practice drafters typically receive inputs only from the elites whose status grants them access to the halls of power. Too often, drafters' decisions respond disproportionately to those inputs. (Academics then write more learned articles that tell us that all legislation inevitably responds merely to interest-group power.)

In short, absent an adequate legislative theory to guide them, Southern African drafters, like those in most other countries, have little or no viable alternative but to write supposedly transformatory laws that at best prove symbolic, at worst, merely reflect the dictates of powerful interest groups.

¹⁴ Often reinforced by Official Secrets Acts that impose draconian penalties on those who violate their terms.
That negates democracy's promises.

2. Legislators. Why do most Southern African legislators -- like those elsewhere -- so lamentably fail adequately to assess bills or the resulting laws' social consequences, far less to participate in initiating more appropriate legislation? First, reflecting their lack of understanding of the imperatives of basing their bills on country-specific data, ministries usually accompany their bills by a mere one or two page memorandum that does no more than restate their ostensible objectives. Legislators usually have no information beyond their own experience for assessing the bills' likely social impact. That may serve to assess a simple bill -- for example, one prohibiting spitting on a sidewalk. It cannot serve for complex laws -- for example, laws to restructure the central bank, set up a securities and exchange commission, revamp the education system, privatize state-owned industry, or protect underground water from pollution -- that is to say, transformatory laws.

Only a rare legislator anywhere even has the capacity to acquire the necessary information by asking relevant questions. Without any legislative theory, except for 'common sense,' they have no guide for their enquiries.  

\[15\] For example, a study of US Congressional hearings showed that legislators' questions to those who voiced support or opposition focused, not on the bill's substance, but on how many backers they claimed to represent (See Edward Rubin, "Legislative Methodology: Some Lessons from the Truth-in-Lending Act," 80 GEORGETOWN L. J. 233, 240
matters, common sense notoriously makes an erratic guide. Legislators end up by voting on bills with literally no relevant information about the bills' subject-matter -- except their Party's instructions about how to vote.

Second, even if the legislators receive the requisite information, they usually have precious little intellectual framework to guide them in using that information to assess bills. For that, they need a theory to enable them to use reason informed by experience to determine whether and how the proposed laws will likely alter the existing problematic behaviors. Otherwise, they have little choice but to substitute the interests of party, faction or interest group for the public interest. Elected to Parliament not because of their legislative expertise, but because of their roles in the political arena, almost invariably with no training in how to assess a bill, with no information about complex transformatory bills' subject-matters, what else can legislators do?

By definition, development means the appropriate use of state power to accomplish the fundamental law-job: To arrange and adjust people's behaviors so that the society functions, and "gets enough energy unleashed and coordinated to keep on with its job as a society." At heart, drafters and legislators' inability to prepare and enact laws to accomplish that basic task lies in their lack of

an adequate theory and methodology.

That innocence makes impossible the discourse that must underpin a meaningful democracy. Without drafters who systematically provide adequate justifications for bills, without sources of information, incapable of using Parliamentary questions or the Committee structure to ferret out the necessary facts, no country's law-making engine can become a forum for democratic discourse grounded in reason informed by experience directed to public interest. Instead it must resort to factional interest and power. Those hardly fulfill democracy's imperatives.

This request for funds would finance a program addressed to strengthening SADC member states' drafters' capacity to prepare, and their legislators' capacity to assess draft legislation likely to foster democratic sustainable national and regional development. Except for the actual word-pushing techniques, legislators need training essentially identical with that required by drafters.

II. THE PROPOSED SOUTHERN AFRICAN LEGISLATIVE DRAFTING TRAINING PROGRAM

The Program here proposed aims to produce SADC member state legislation directed to the attainment democratic sustainable national and regional development; and, in the process, to strengthen the capacity of Southern African drafters and
legislators to draft and assess transformatory legislation. It discusses first the proposed Project strategy and pedagogy, and then its four components.

A. THE PROJECT'S STRATEGY AND PEDAGOGY

The general strategy behind this proposal consists primarily of training trainers in the course of preparing actual bills. Self-evidently, the proposed Project cannot readily train all the drafters and legislators in the four participating countries. Its central strategy, therefore, consists in training trainers (see below for details as who might become these trainers).

The pedagogy adopted for the program rests on learning-by-doing. The trainers cannot become competent teachers of drafting unless they have done a considerable amount of drafting themselves. Experience teaches that nobody can train drafters by engaging them in preparing hypothetical statutes. Drafters learn to pay the close attention to detail required for competent drafting when they must draft statutes for submission to a minister or other responsible government official. Both in training trainers, and in training drafters and legislators, no substitute exists for engaging them in drafting real bills. The workshops planned as part of the Project will engage the participants in working on real priority bills solicities from the relevant ministries or legislative committees on the national and provincial levels.
B. THE FOUR COMPONENTS OF THE PROGRAM

The proposal stands on four legs: (1) An introductory two to four week workshop for staff and advanced students of each participating law school; (2) a brief (one or two day) workshop in the selected SADC-member states for senior law professors and senior law administrators and, if possible, provincial and local government leaders (senior civil servants and drafters from the Ministry of Justice, and other leading civil servants and Ministers); (3) sending two members of each of the selected SADC-member state law schools' teaching staffs to the University of Boston's School of Law's four month Program for Drafting for Democratic Social Change (this might be expanded to four to include drafters and lecturers in local Schoolsof Administration\(^\text{16}\)); and (4) institutionalizing an on-going legislative drafting program in the selected SADC-member countries' law schools in cooperation with and to meet the needs of ministries and law-makers. The next sections discuss each of these four in turn.

a. The Introductory Workshop. Because legislative drafting has not usually been included among the courses taught at law schools in Southern Africa,\(^\text{17}\) a workshop to introduce the subject to the staff and student body constitutes a necessary foundation

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\(^{16}\) See footnote XX above.

\(^{17}\) As the main exception, the Seidmans taught two six month courses for SADCC government officials while they were teaching in the University of Zimbabwe, 1980-83.

John Stuart Mill, who wrote that "There is hardly any kind of intellectual work which so much needs done, not only by experienced and exercised minds, but by minds trained to the task through long
and laborious study, as the business of making laws." As a principal objective, the introductory workshops will introduce the Law Faculty family to this new and important area of legal education and possible research. Without that, many faculty members may not give the new program the support without which it will not likely take root.

(b) Beginning training drafters and drafting teachers. As a second objective, the introductory workshop will teach the law school faculty, some students, and, if possible, some civil servants, drafters, and legislators something about legislative theory and methodology. That is, it will begin the process of teaching legislative drafting in law school curricula (and possibly into in-service civil service training courses), and giving legislators the tools they need to assess proposed legislation.

(c) Starting to draft selected priority bills for provincial and local government. In conformance with the Project's learning-by-doing pedagogical method, the introductory workshop participants will bring to the workshop specific bills that require drafting, preferably ones suggested by local, provincial or national governments. An important outcome of the workshop will consist in -- very preliminary -- draft bills and associated research reports.
(ii) **Participants.** Each workshop's participants will number perhaps twenty or more. They will include not only the members of staff tapped to go on for further training in Boston University (see c. below), other members of staff with an interest in learning something about drafting; perhaps some relatively senior students; and if possible, some provincial and national ministerial drafters, legislative staff, and legislators.

(iii) **Syllabus and pedagogical method.** The introductory workshops will consider primarily legislative theory, methodology, and some legislative techniques. They will center instruction around the bills the participants bring with them. The participants will work in groups of five to ten people, each group drafting a single bill and research report.

b. **Short-term workshops for senior academics and officials.** In an effort to bring senior academics and senior provincial and local government officials by explaining to them the nature of the Project and especially sketching the theory and methodology that underpin it, the Seidmans will conduct a one or two day workshop for them at the same time as the introductory workshops take place.

c. **The BU training Course.** Each of the selected SADC-country law schools would sponsor two candidates for the BU training course, described in Appendix I. There, they will deepen their understanding of legislative theory and methodology; learn how to
utilize foreign law and experience to improve their draft bills; study teaching methods and prepare materials appropriate for their law school's legislative drafting curriculum, and for engaging their countries' drafters and legislators in a learning-by-doing legislative drafting process; and acquire enough familiarity with social science research methods to assist drafters and legislators to assess the evidence available for incorporation into research reports purporting to ground bills in logic and facts.

In the expanded program, in addition to the academics, the participants in the BU course will include some drafters and civil servants, and legislative staff members.

d. Institutionalizing an on-going legislative drafting learning process in each selected SADC-member country:

On their return, each set of trainers will assume responsibility for working with the responsible authorities in their own countries to: (i) introduce a legislative drafting training program in their law schools; (ii) run workshops for provincial and national ministry personnel to strengthen their drafting capacity while producing high quality priority bills; and (iii) assist provincial and national legislative staff and legislators improve their capacity to assess and when necessary initiate legislative proposals.

i. Law School legislative drafting programs:
For each of the selected SADC-country law schools, as part of their work in the BU Program, the faculty members will prepare materials and syllabi for appropriate for introducing a learning-by-doing legislative drafting program into their law schools' curricula. On their return home, they will introduce that program in their faculty for law students and perhaps students taking related subjects like public administration. They will be encouraged to solicit topics from national and state legislatures as well as civic groups on which they will prepare initial bills accompanied by research reports that provide the necessary factual background.18

ii. Workshops for ministry drafting personnel and legislators:

In each SADC country, the BU trained faculty members will provide workshops for teams to draft specific priority bills. These teams will consist of national and provincial ministry personnel and country personnel from the universities and private sectors with expertise relevant to the bills. In the process of working on the bills and accompanying research reports, the faculty members will help the team members acquire the legislative theory and methodology required to draft further legislation, including

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18 One of the BU Program's co-directors has, for 20 years, taught such a program centered on preparing about 40 bills each year for the Massachusetts State Legislature (see appendix xX for a description).
legislation related to regional coordination. If desired by the workshop participants, the Project coordinators will find foreign consultants to act as resource persons to provide evidence relating to foreign law and experience in relevant areas.

iii. In each country, the BU trained faculty members will arrange workshops to equip national and provincial legislators with the necessary theory and methodology to assess and, as necessary, to initiate legislative programs. Again, upon request, the Project coordinators will provide consultants to assist the participants learn from the relevant foreign law and experience.

III. EVALUATION

At the end of two years, two highly qualified evaluators, together with the Project participants in each country, will undertake a structured evaluation of the Pilot Project's results. They will assess the Program participants' experience in the initial workshops, the BU Program, and in institutionalizing the proposed on-going learning process in their home countries. On this basis, the evaluation will determine whether it seems justified to extend the Project for a further three years and to include the remaining SADC member countries. They will also recommend changes and improvements in the Project design. In particular, they will focus on further measures to strengthen the Project's contribution to the drafting, enactment and
implementation of legislation to foster greater regional coordination.

IV. SADC-MEMBER COUNTRY LAW SCHOOLS PROPOSED TO PARTICIPATED IN THE PILOT PROJECT

The Pilot Project will focus on SADC-member countries and law schools which have already indicated a serious interest in strengthening their legislative drafting capacity to produce high quality legislation for sustainable development. These include the law schools in the University of the North in South Africa and the Universities of Namibia and Zimbabwe which have joined in presenting this request for funds for the proposed Pilot Project.\(^{19}\) The Pilot Project will cooperate with and build on the experience of the legislative drafting Project, already underway in Mozambique.\(^{20}\)

IV. PROPOSED BUDGET:

Two week introductory workshops at each of four participating institutions:

\(^{19}\) See Appendix XX for a description of each of the proposed participating institutions' interest and capacity for introducing the proposed Project.

\(^{20}\) See Appendix XX describing the US AID-funded Project, administered by SUNY, to strengthen Parliament, which includes a legislative drafting component conducted by the BU Program's co-directors; and describes the role of a participant in the 1995 BU Program in implementing that drafting component.
Lunches for all participants, and
transport, room and board for
participants from out of town @ $10,000

each.................................................$40,000

Honorariums for Seidmans (@$250/diem each)
plus subsistence @ $80/diem each, for
two weeks @ $7,400/workshop............$23,840

Travel: Boston to SA and return, x 2 @$4000/
2 workshops\textsuperscript{21}..............................$8,000

Two-day short courses at each of the participating institutions
(essentially included in costs above)

Training at BU for two faculty members from each participating
institution:

- includes tuition @ $10,500, room and board at
  $1000/month for four months, and travel @ $2000
- @ $16,500 for each faculty member..............$1

32,000

Costs of institutionalizing learning process in each of four

\textsuperscript{21} It will probably not be possible to hold all the workshops
consecutively at the same time; therefore two round trips have been
included in this budget.
participating institutions:

Participating institutions will cover costs of introducing legislative drafting program in their curricula; ...........................................00,000

Three week workshops at four participating institutions of 20 participants each to prepare four bills in each

20 participants, lunch, travel, room & board
@$1 5,000/ country..........................$60,000

4 foreign consultants/bill for two weeks
(honorarium $250/day, per diem $80, travel $2000) @ $5,700 each......................... $87,360

Evaluation of two year Pilot Project - costs of two evaluators:
(Honoraria $250/day each for 25 days; per diem in 4 countries: 30 days @ $80/day; transport @$2500 each)...............................$32,300

GRAND TOTAL for two year Pilot Project............$383,500
GRAND TOTAL for expanded two year Pilot Program...$587,340

22 At option of participants.
23 See footnote 2.
In 1996, on foundations laid over the preceding four years, Boston University's School of Law established the Program for Legislative Drafting for Democratic Social Change. That Program undertakes to train trainers to institutionalize on-going national programs to equip their countries' drafters and legislators with the theory and methodology required to draft and assess transformatory legislation.

(1) THE FOUNDATIONS

Over the last 30 years, and especially in the last six years, the Program's co-directors have developed a program to enable country nationals to acquire the legislative theory and skills required to introduce learning programs in their countries. Experience, most recently with Chinese, Lao and Mozambican drafters and legislators, demonstrates that the Program does equip participants to produce effectively implementable legislation and in the process strengthen the national drafting capacity. At the same time, they learn to teach legislative theory and methodology to drafters and legislators in their own countries in the course of engaging them in producing and assessing bills.
For 11 years in African universities, beginning in 1962, the Program's Co-Directors taught and conducted research relating to law and economic development. In 1982-3, they co-taught a legislative drafting programs in Zimbabwe for drafters from the SADC countries. In 1988-9, as Fulbright scholars, they taught sociology of law and legislative drafting in China's Beijing University. That led to their appointment as Co-Chief Technical Advisors for a United Nations Development Programme (UNDP) legislative drafting program in China. Subsequently, they assumed the same role in a similar UNDP project in Lao PDR, and worked as subcontractors in a USAID program to assist Mozambican MPs learn to assess legislation.

In 1992, the Co-Directors initiated at the BU School of Law a program mainly, at first, to enable some 50 Chinese drafters acquire the knowledge and skills to give leadership to creating an on-going learning process for ministry personnel while drafting transformatory legislation designed to 'work' in China's unique circumstances. In 1995, this program was expanded to train four 

24 Professor Ann Seidman and Professor Robert B. Seidman; see Appendix xxx for their curriculum vitae.

25 See Appendix xxx, "Lessons from China" which describes that program.

26 About half of these consisted of members of ministry Department of Legal Affairs who had received legal training after China's universities reopened their law schools in 1986 following their closure during the Cultural Revolution. The other half comprised ministry officials with expertise in fields relevant to the priority bills their teams drafted (see 'Lessons from China,' Appendix xxx).
Laotian officials: two from the Laotian Ministry of Justice, a member of the National Assembly, and the Deputy Dean of the Law School. These worked together as a team to design syllabi in drafting for workshops and courses for the ministries, parliament and the law school. They also produced a legislative drafting manual (the first law book in the Lao language!) to facilitate development of a Lao learning process to strengthen Lao drafting capacity while drafting priority legislation. In addition, the former deputy dean of Eduardo Mondelane University Law School in Mozambique participated. He then helped conduct workshops in Mozambique to enable MPs to assess and when necessary initiate legislation; and, in the process, helped other law school faculty members begin to acquire the skills to teach drafting to their students.

B. The BU program.

Tailored to meet individual participants' needs, the BU Program today consists of five components:

1. **Law and development**, a seminar which deals with legislative theory and methodology;

2. **Legislative drafting techniques**, a seminar which focuses on the techniques required to prepare a research

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27 See BU program brochure in Appendix xxx.
report, grounded in reason informed by experience, to justify the measures included in a bill;

3. **Social science research methods**, a seminar for gathering facts required for preparing a Research Report as the basis for an effectively implementable bill;

4. **Educational methods**, a seminar for teaching future drafters to learn-by-doing -- ie drafting actual bills and accompanying research reports.

5. **Foreign law and experience**, a carefully-supervised independent reading course in foreign law and experience that relates to the bill on which the individual participant is working.