A proposal to institutionalize a legislative drafting programme jointly managed by University of Witswatersrand Schools of Law and Public and Development Management

http://hdl.handle.net/2144/19018

Boston University
March 2, 1998

A draft proposal to facilitate institutionalization of a legislative drafting programme at the University of Witswatersrand School of Law

To implement the transformation to a democratic society, the new South African government, at all levels, must transform a large number of the inherited institutions. Governments mainly change institutions through law. To accomplish transformation, therefore, Government must redraft a wide range of existing laws and regulations, and introduce a host of new ones. Those laws will only succeed in accomplishing transformation, however, if they create the conditions for good governance, accountability, transparency, and widespread public participation in ongoing governmental decision-making. To begin equipping new generations of lawyers to contribute to this task, this year, the University of Witswatersrand School of Law utilized visiting staff to introduce courses in legislative drafting theory, methodology, and techniques.

This proposal requests funds to provide training for two members of the School of Law staff to institutionalize and teach an on-going legislative drafting programme. It first outlines the reasons for institutionalizing a legislative drafting programme in the Wits School of Law; second, it describes the proposed training for the two School staff members; and, third, it outlines the required budget.

I. WHY A LEGISLATIVE DRAFTING PROGRAMME IN THE WITS SCHOOL OF LAW

To implement its proposed democratic transformation in a context of good governance, South Africa's national, provincial governments and local governments require extensive drafting and redrafting of laws and regulations. In South Africa, as throughout the developing world, law comprises governments' primary tool for implementing social change. Experience throughout Africa as well as elsewhere, however, suggests that, to fulfill the South African peoples' hopes and aspirations, the new legislation must accomplish two objectives simultaneously: It must actually ensure its own implementation to achieve the changes prescribed, and it must induce government officials to do so in ways consonant with good governance.

Three decades ago, development seemed at odds with good governance. Development, they said, required unbounded governmental discretion to experiment; good governance required
confined discretion. Polities could have change and development, or the Rule of law, but not both. That proposition errs. Today, the unhappy experience of development efforts world-wide has persuaded the development community that without both effective and appropriate institutional change and good governance, development cannot succeed.

Self-evidently, as a necessary (although plainly not sufficient) condition, both transformation and good governance require a well-crafted legal order. That requires a corps of drafters capable of transforming government’s high-minded but usually vague policies for change into concrete, implementable laws that induce new behaviors both by citizens and officials. Those new behaviors must meet a dual set of demands: for appropriate institutional transformation, and for the accountability, transparency, and participation that comprise good governance.

In the past, the few South African drafters trained -- none of them from historically disadvantaged groups -- supposedly learned ‘on the job.’ Until this term, no South African law school had introduced a course in legislative drafting. Most law school courses throughout the nation focus on teaching future lawyers the skills and techniques that, taking existing laws as given, they need to defend their clients in the courts. None purport to teach students how to conceptualize, far less draft, laws to translate transformatory policies into laws, let alone draft new laws that simultaneously make more probable good governance. The scarcity of well-trained drafters has forced many government departments, at great expense, to contract out for proposed legislation. The resulting laws and regulations have not always appropriately addressed South Africa’s unique realities. Too often, they have comprised little more than statements of policy, written in legal form. World-wide experience teaches that, except serendipitously, laws so written achieve neither development nor good governance.

This term, for the first time, using as instructors two visiting academics, the University of Witswatersrand School of Law in cooperation with the Gauteng Provincial Government initiated a legislative drafting training program. Participants include 18 university students and several faculty members, together with provincial and national governmental officials responsible for preparing bills; two dozen officials from the Gauteng line departments and the Department of Legal Services; the Leader and four members of the Gauteng legislature; and a number of national officials. In addition to learning legislative drafting theory and techniques, the government officials have all accepted assignments to produce bills, accompanied by research reports, that will help to meet their departments’ legislation requirements. In the course of learning the theory and methodology, the Wits law students will also contribute to the officials’ preparation of the
research reports and bills.¹

It is anticipated that the institutionalization of the Wits School of Law programme will contribute to training, not only of existing and potential officials concerned with producing legislation, but, ultimately, additional legislative drafting teaching staff for other South African universities.

II. THE PROPOSED TRAINING PROGRAMME FOR TWO SCHOOL OF LAW STAFF MEMBERS

This proposal requests funds to send the Wits School of Law faculty members to take part in the four month Program on Legislative Drafting for Democratic Social Change, conducted by Professors Ann and Robert B. Seidman, (the two visitors now teaching these courses at Wits), at the Boston University School of Law in the United States. Now in existence for six years, that Program provides training for drafters both in using a legislative theory to guide them in their task of transforming policies’ broad generalities into legislation’s detailed prescriptions; and in the mechanics of writing clear, unambiguous legislation consonant with good governance. The Program has proven useful in strengthening drafting capacity in China, the Lao P.D.R., and other countries.²

Having completed four months in the BU Program, the two Wits Law faculty members will play a leading role in institutionalizing and teaching legislative drafting in the Wits School of Law. That programme will aim to equip national, provincial and local government drafters with legislative theory and techniques to translate their governmental policies into legislation likely to induce both appropriate change and good governance; and, in the process, engage them in drafting the many bills and subordinate legislation needed at all levels of government.

Each staff member will bring to the BU Program a proposal for a specific priority national or provincial bill. As the core of their work in the BU Program’s learning-by-doing process, each will draft that bill and an accompanying research report to justify its

¹ See the attached syllabi for the two courses that comprise this initial legislative drafting programme.

² It underpinned a 5 year UNDP project to help Chinese drafters prepare 22 priority bills to implement the Reforms and Open Policy; an on-going UNDP project to help the Laotian Government build a National Legal Framework for its New Economic Mechanism; and an aspect of the USAID project to assist Mozambican legislators assess and, when necessary, initiate legislation.
contents. While at BU, they will attend five seminars tailored to build the specific skills they need to help institutionalize an effective legislative drafting programme in the Wits School of Law. Those seminars include:

*Seminar in Law and Development*, which trains the participants to use legislative theory as a guide for translating policy into effectively implementable legislation consonant with good governance;

*Seminar in Legislative Drafting Techniques*, in which, while learning the technical aspects of drafting bills, the participants write highly structured research reports and prepare draft bills;

*Seminar in Methodologies of Social Science Research*, in which, to develop capacity to ground bills on reason informed by experience, the participants learn to make competent assessments of available social science research;

*Seminar on Methodologies for Non-formal Education*, which equips the participants as trainers to teach legislative theory and techniques not only to Wits students, but also to governmental officials sometimes far removed from academic pursuits;

*Tutorials in Areas of Foreign Law and Experience relevant to their particular priority bills*; in these weekly tutorials, they confer with professors who supervise their research and discuss other countries' laws and experience in the area relevant to the participants' own bills.

**THE BUDGET**

<table>
<thead>
<tr>
<th>Item</th>
<th>Cost</th>
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<tbody>
<tr>
<td>Tuition for 2 Wits faculty members at BU for 4 months @ $10,285/trainer x 2</td>
<td>$20,570</td>
</tr>
<tr>
<td>Room and board @$5000/4 months x 2</td>
<td>10,000</td>
</tr>
<tr>
<td>Airfare: 2 faculty members x $1,500 (round trip)</td>
<td>3,000</td>
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<tr>
<td>Health insurance @ $250/each x 2</td>
<td>500</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>$34,070</strong></td>
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If available, an additional stipend per participant would enable the two Wits School of Law faculty members to visit

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As an underlying premise, the BU Program recognizes that no one can learn to write competent legislation without actually drafting bills and accompanying reports on the research that undergirds those bills. Those reports become the basis on which the government officials and legislators can assess the bills' likely social consequences.
Washington and New York to study United States law-making institutions as well as the very limited array of other law school legislative drafting programmes.
A 'DO IT YOURSELF' SEMINAR IN LAW AND DEVELOPMENT

PURPOSE, ORGANIZATION, READINGS AND TERM PAPER

Purpose: This seminar aims to give you an opportunity to study the uses of state and law in the processes of development in South Africa and the third world. The seminar has a dual focus.

First, it will give you an opportunity to assess the role of theory of law in the process of social, political and economic development in South Africa and the third world. "Theory of law and development" does not refer to anything airy-fairy, but rather to theory as a practical guide to how to do research to facilitate the use of law to change institutions to foster increasingly productive employment opportunities and an improved quality of life for all citizens.

Second, the seminar aims to give you practice in using legislative theory as a guide for translating policy into effectively implementable legislation. For this purpose, each of you will identify a social problem of concern in South or Southern Africa, and, guided by legislative theory, conduct research and write a paper to justify your proposal for legislation designed to resolve that problem.

THE ORGANIZATION OF THE SEMINAR.

In the first half of the term, you will all take turns leading debates concerning aspects of the nature and role of legislative theory in the development process (see 'The Learning Process,' below). At the same time, each of you will conduct an investigation and write your research report to justify detailed recommendations for revised legislation designed to overcome the causes of the social problem you have selected (see 'Term Paper,' below). Wherever possible, you should try to introduce evidence you have gathered to illustrate or contradict arguments made during

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1. This is denoted a draft because as we work together during the term, we will undoubtedly want to revise it. Please, at any time, make any suggestions you think will help to improve it.
the debates.

In the second half of the term, you will present your report to the class for a detailed critique. (See below under readings and outline of seminar for weeks VIII through XIV.)

**Term Paper.** Choose a problem area of interest to you and write a research report in accordance in which (see Seidmans, ch. 4), you:

1) identify the nature and scope of the social problem you have selected, and identify whose and what behaviors comprise it, providing evidence to support your analysis;

2) using the ROCCIPI research agenda, tease out of available grand theor(ies) a set of interrelated, testable, middle-level propositions to explain the problem (ie, your explanatory hypothesis) and show they seem consistent with the available evidence;

3) propose the elements of an appropriate legislative solution (including its implementation), providing evidence as to its likely social costs and benefits in the context of your country's constraints and resources; and

4) formulate a plan for evaluating the social impact of implementing your proposed legislative solution.

On the following dates, you should submit four papers on your particular problem. Together, these will comprise the first draft of your research report:

[Note: you can only really think through your proposed bill by writing out a justification for it -- and rewriting it in light of others' comments and further thought.]

1. **First draft paper, due the second week of term:** 3 or more pages providing evidence as to the nature and scope of the social problem you have selected, and whose and what behavior constitutes that problem.

2. **Second draft paper, due the fourth week of term:** about 10 pages setting out the middle level hypotheses that you have generated to explain the behaviors that comprise the social problem you have identified, showing that they appear consistent with the available evidence.

3. **Third draft paper, due on the sixth week:** 10 pages (more or less) describing your proposed legislative solution for the country you have chosen (including proposals for implementation and evaluation). Show how, logically, it addresses the causes you have identified for the problematic
behaviors that comprise the problem, and provide evidence that its probable social benefits outweigh its probable social costs.

4. Draft term paper, due a week before your presentation to the seminar: This draft, comprised of the combined three draft papers, revised in light of your own reconsideration in light of the seminar debates, as well as of our comments (we will return the first three drafts -- we pledge promptly -- with our comments and suggestions), will form the basis for a structured critique by all the seminar participants (see course outline for weeks VIII through XIV, below).

5. Final term paper, due one week after examinations: Ordinarily, this final paper, incorporating your four draft papers revised in light of our comments and the critique sessions, will comprise 20 to 35 pages in length (although we will not stop reading at page 35!).

Pursuant to Faculty regulations, your grade will depend upon the term paper as finally submitted, plus or minus one grade for your performance in the seminar.

The seminar’s learning process: One of the best ways to learn is by thinking through issues in light of all the competing arguments. As participants in this seminar, you will have an opportunity to take part in a series of debates on issues relating to the role of law in social change and the development process.

For each debate on the propositions listed below, two seminar participants will provide initial presentations, pro and con. That means each of you will need to sign up, either as advocate or opponent, for at least two debates. (Do not sign up to give a pro or con position because you now favor or oppose the statement in question. Frequently, you will learn most by articulating the arguments in favor of a theoretical position with which you disagree.) The readings aim to provide arguments on both sides of these debates, and you may yourself be able to think of additional ones.

As participants, you will be expected to question, comment on, and criticize the pro and con presentations.

READINGS AND COURSE OUTLINE

Texts:
Ann Seidman and Robert B. Seidman, State and Law in the Development Process - Problem-solving and Institutional Change in the Third World (Macmillan, 1994)

Readings compiled for Law and Development. [Note: these readings include materials from different authors and relate
to laws dealing with different kinds of problems in different countries. This should give you an opportunity to think through what and how you can learn from foreign law and experience, as well as various authors' theoretical insights into the potential for using law for social change.

Recommended readings: At various points, we have listed recommended readings. If we had more time in this seminar, we would of course have included these in the required readings; but time limitations force unpleasant choices upon us all. At least if you are presenting one or another point of view, you will likely find it useful to consult the additional recommended readings. Recommended readings are on Reserve in the law library.

Procedures:

All the seminar participants should read the required readings for each session and be prepared to comment and critique the reports given by those assigned to specific topics.

Assignments:

Each participant should sign up to present at least two weekly assignments in the course of the term (Sign your name in the blanks below. Remember to note the name of the other presenter so you can consult together if you so desire).

*As part of the assignment, you should prepare for distribution to the class an outline (a page or less) of the main points of the argument you plan to make.

*It will undoubtedly improve the discussion if you meet in advance with your counterpart to discuss your presentation of your arguments.

*Feel free to come in advance to discuss your argument with either one of us.

Week I: The underlying social problem which transformatory laws should address: Poverty and oppression

Seidmans, Chapter 1

Week II: Law's potential as organized society's primary instrument to overcome poverty and oppression

Seidmans, Chapter 2
Readings: Chapters 1
Recommended Readings:
Assignments: Using the 1985 Chinese resolution on Acquainting Citizens with Basic Knowledge of Law and the Tanzanian Range Management and Development Act as examples, argue for the following authors' claims as to the factors that determine laws' social consequences (all the seminar participants should be prepared to critique these arguments):

1. Kidder (I:pp.22-39)
2. Griffith (I:pp.61-87)
3. Williams (I:p.61-76)
4. Seidman (I:pp.61-87) and Seidman & Seidman, Ch. 2

Week III: The 'laws' of non-transferability of law and of the reproduction of institutions

Seidman, chapter 2 revisited
Readings, chapter 2

Assignment: Debate: Copying law from one country will not likely produce the same results in another:

pro: ______________________________________
con: ______________________________________

Debate: The laws a country adopts do not matter; only good men make good governments:

pro: ______________________________________
con: ______________________________________

Week IV: What agenda of steps (methodology) will facilitate the design of laws to transform the institutions that impose poverty and oppression?

Seidman, Chapters 3,4
Readings, chapters 3

Assignments: Debate advantages and disadvantages of the following methodologies for designing legislation to restructure the Development Bank of Southern Africa (DBSA); the person who presents the pro should be sure to outline the research design the methodology would suggest:
(1) Ends-means (starting with a Vision?):
pro: ______________________
con: ______________________

(2) Incrementalism (tackling small difficulties in the existing law?):
pro: ______________________
con: ______________________

(3) Problem-solving:
pro: ______________________
con: ______________________

Week V: What role does grand theory play, if any, in designing legislation?

Seidmans, chapter 5
Readings, chapter 4
Recomended readings:


Assignments: Debates: The law-makers' grand theory will likely affect their decisions concerning the appropriate law relating to:

(1) attracting foreign investment;
pro: ______________________
con: ______________________

(2) patent protection.
pro: ______________________
con: ______________________

Week VI: What categories of possible middle-level explanations ('vocabularies') should a legislative theory incorporate to help a researcher generate hypotheses to explain specific problematic behaviors; the case of high level bribery

Seidmans, Chapters 6, 8
Readings, Chapter 5

Assignments: Both the below assignments will use the South African Green Paper as a case study --

(a) Assess the sets of categories offered by the following theories in terms of their utility for suggesting hypotheses to explain why officials behave in a corrupt manner:
(1) Max Weber and analytical positivism:
Assessor: ____________________________

(2) Legal realism:
Assessor: ____________________________

(3) 'sociological models:'
Assessor: ____________________________

(4) law and economics:
Assessor: ____________________________

(5) Marxist:
Assessor: ____________________________

(b). For the Institutionalist explanatory category for which you sign up below, present as many explanatory hypotheses for senior civil servants' and important elected officers' corrupt behavior as you can generate, and identify the facts you now have or need to gather to warrant your hypotheses:

(1) Rule: Presenter____________________

(2) Opportunity: Presenter____________________

(3) Capacity: Presenter____________________

(4) Communication: Presenter____________________

(5) Interest: Presenter____________________

(6) Process: Presenter____________________

(7) Ideology: Presenter____________________

Week VII: In designing a law, what factors should law-makers consider in order to ensure the law's effective implementation?

Seidmans, Chapter 7, 9
Readings, Review Chapter 5, read Chapter 6

Assignments: In seeking to reduce the dangers of corruption in government (defined as a set of complex decision-making institutions) debate the possible advantages and disadvantages of relying on:

(1) the courts:
pro  _______________________________________
con _______________________________________

(2) ombuds:
pro  _______________________________________
con _______________________________________

(3) democratic elections:
pro  _______________________________________
con _______________________________________

(4) requiring open, accountable decision-making in every government agency:
pro  _______________________________________
con _______________________________________

(5) ensuring those affected have an opportunity to provide inputs and feedback into government agencies' decision-making processes:
pro  _______________________________________
con _______________________________________  

Week VIII through XIV: The remaining sessions will provide an opportunity for a detailed critique of each participant's research report in terms of its adequacy for justifying (and assessing) the measures for incorporation in the bill that participant proposes to overcome the causes of a particular social problem.

The participant will provide sufficient copies of the draft research report in the week preceding the date of presentation. Each seminar participant will receive an assignment to critique the report in terms of its:

* Introduction;

* Description, supported by evidence, of the social difficulty, the relevant social actors (including the existing implementing agencies), and their behaviors which comprise the difficulty;

* The explanations as to the causes of the problematic behaviors of the relevant social actors, with facts proving those explanations seem consistent with the available evidence;

* The likelihood that the measures in the proposed bill logically will overcome the causes of the relevant problematic behaviors, supported by evidence that, of all
the possible alternatives, they will do so with the least possible social costs and the greatest possible social benefits;

*Form, which must use mini-introductions and conclusions for every section to make its logic clear;

*Style, including sentence structure.