Draft memorandum of law: Affirmative Action in South Africa

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A DRAFT AFFIRMATIVE ACTION LAW FOR SOUTH AFRICA:
THE MEMORANDUM OF LAW

I. Introduction:

A. New South African government due at elections April 27 this year:

1. need to prepare legislation as basis of exercise of democratic state power to transform all aspects of apartheid system from one that serves minority to meet basic needs of majority;

2. little preparation:

a. democratic movement lawyers have no experience with legislative drafting:

(1) spent years seeking to protect clients in courts against impact of apartheid laws and the institutions they shaped;

(2) little knowledge of how to draft legislation to change institutions; not taught in South African law schools

(3) We have urged begin training drafters now, but everyone swamped with Constitutional negotiations and elections

b. Danger: existing corps of official legislative drafters, along lines of British model,

(1) operate on myth that policy-makers make policy, they only do technical drafting job to translate policy into law;

(2) reality: operate in secret, make detailed decisions that determine policies effected

(3) experience in Zimbabwe: drafters formulated laws that turned government policies on head - eg re labor, land reform (discuss later if asked)
B. About two months ago, asked us to draft affirmative action law:

1. learning from Chinese experience, we urged using occasion of drafting to train local drafters; but they said had no time for that now

2. Asked us to come for three weeks after Christmas, draft law, and discuss it at a workshop with democratic movement lawyers and others concerned with issues.

3. The only directions we received consisted of
   a. the request to draft the law,
   b. a copy of the Interim Constitution which refers to the need for affirmative action,
   c. a set of papers from a 1991 conference on affirmative action, including US, Canadian and Malaysian law and experience; and
   d. the observation that it would have been preferable if it had been possible to use a participatory process for drafting the law.

II. Drafting the memorandum of law:

A. A memorandum serves two primary interrelated purposes:

1. provides explanations backed by evidence, reason informed by experience, to justify the bill as drafted
   a. Cannot just look at bill, on face, and know it will effectively overcome social problems

2. helps to structure analysis of the evidence in a way that seeks to ensure that the bill effectively addresses the causes of social problems
   a. Because the memorandum justifies the bill in terms of reason informed by experience -- and not by 'values' or authority -- it also lays the only basis for structuring a democratic participatory process for drafting, implementing and evaluating legislation

3. For these purposes, following a problem-solving methodology, the memorandum should employ a research agenda appropriate for drafting laws designed to effectively change the repetitive patterns of behavior
that comprise problematic institutions like those imposed by a half century of apartheid;

B. With this in mind, we drafted a 60 page memorandum structured along the lines of the four steps of problem-solving:

1. Step I: Described the nature and scope of the difficulty -- institutionalized discrimination that has disadvantaged the black majority and women in South Africa -- and sought to identify whose and what behaviors comprised that difficulty

a. The first task involved defining the social problem the affirmative action law should seek to address;

(1) Some democratic movement analysts talked only of affirmative action in employment; others extended the concept to cover all aspects of apartheid affecting everything from land distribution to labor relations;

(2) We concluded the law should address discrimination as it appeared in five areas:

(a) in employment, training and promotion;

(b) in provision of services to different population groups;

(c) in procurement of government contracts;

(d) in appointment of personnel in policy-making positions in all sectors;

(e) in the formulation of an agency’s mission (eg was the education department’s stated mission as to the goals of education appropriate to the needs of the new society?)

a. In our first draft of the memorandum, we began to outline the relevant evidence relating to the employment, training and
promotion of personnel, only some of which we had, in the education field;

(1) clearly, we needed a great deal more evidence to show the detailed consequences of discriminatory employment practices in four major fields -- public services, parastatals, quasi-government agencies (quangos), and private employment of all kinds:

(2) tables of evidence required for education alone illustrated the difficulty of getting all the required information for every sector and agency:

BG, see Tables 1 and 2

(3) Just trying to write this section of the memorandum to describe the difficulty underscored the necessity of including in the bill a process of gathering the essential information to document the nature and scope of the difficulty

b. For each field, we had to identify whose and what behaviors (what 'role occupants') seemed to comprise the institutionalized discrimination the draft law should address:

(1) See diagram of relation of law to behaviors of role occupants (some of you have seen it before; will explain in discussion if you like)

(2) A few minutes reflection show that many different role occupants operate in many different contexts; again, this underscored the necessity of creating an information-gathering process as an integral part of the draft law.

1. Step II: Using the research agenda appropriate for drafting legislation, we began to generate explanatory hypotheses for the central role occupants' behaviors

a. Seven categories encompass all possible
explanations: include Rule, Opportunity, Capacity, Communication, Interest, Process, and Ideology (ROCCIPI helps to remember them); help to spark off educated guesses.

b. Taking the problem of discriminatory employment practices of hiring personnel in the Ministry of Education as one example, we began to generate possible explanations for their discriminatory behaviors.

(1) See attached list.

c. Again, we had insufficient evidence to test these hypotheses,

(1) we did discuss them in the workshop on the bill, and those present did say they coincided with the facts as they knew them (several were social science researchers)

(2) This again underscored the necessity of using the law to introduce a process of structured fact-finding.

2. Step 3: considering social costs and benefits of alternative solutions logically directed at overcoming causes of the difficulty:

a. Transformatory laws must ultimately address social behaviors (institutions) in considerable detail. That calls for detailed explanations for a myriad of behaviors of a myriad of role occupants;

b. Since the available evidence proved inadequate to design detailed affirmative action measures -- and it proved impossible at this stage to conduct the necessary research -- the (bill) had to provide some kind of authority to gather the necessary information, design and implement those measures.

c. Two alternatives seemed possible:

(1) An agency that had the power to conduct the research, design the affirmative action measures and enforce them across the board;
(2) An agency with carefully designed powers, limited by specified criteria and procedures, to engage relevant role occupants, including those affected by discriminatory practices, to:

(a) engage in a process of gathering information, designing the necessary affirmative action plans, and implementing and evaluating them;

(b) the authority would guide, supervise and ensure implementation of all aspects of the process.

d. Weighing the social costs and benefits, the second proved more feasible and desirable:

(1) The first approach required far too many financial and human resources; in the second, relying in the first instance on the people involved, the authority could do the job for far less;

(2) By engaging those affected in a learning process, might change their attitudes to provide a sounder ongoing foundation for needed changed behaviors; and empower those affected to work on improving their own status.

e. The US Contract Compliance program and the Canadian Equity in Employment law and experience provided some ideas about how the proposed authority might work; but underscored the necessity of ensuring adequate guidance, supervision, and enforcement mechanisms.

3. Step 4: Implementation and evaluation:

a. Bill is now under consideration by the leadership of the mass democratic movement, and (hopefully) elections take place on April 27, so can't yet evaluate impact;

b. Tried to write into bill as much of a
participatory process involving those affected as possible, including in their opportunity to take part in an on-going evaluation exercise leading to recommendations for improving the process.