Beyond contested elections: the processes of bill creation and the fulfillment of democracy's promises

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BEYOND CONTESTED ELECTIONS: THE PROCESSES OF BILL CREATION AND THE FULFILLMENT OF DEMOCRACY'S PROMISES
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"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."
-- John Stuart Mill⁴

Long before 1996, earlier promises of 'development' had splintered into a million shards. Development -- defined as the use of state power to bring about social, political, and economic change in favor of the mass of the population -- almost everywhere had seemingly imploded.⁵ Babies in the poorer countries could expect to live from ten to thirty years fewer than those born in industrialized countries.⁶ By the late 1980s,

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⁴ Quoted in Ernst Freund, "The Problem of Intelligent Legislation", xx PROC. AM. POL. SCI. ASSOC. 69, 70 (19xx)
⁶ Life expectancy, reflecting as it does a number of quality of life factors (for example, nutrition, health care, housing, and the duration and quality of labour) serves as a useful measure of quality of life. WORLD BANK, CHINA -- LONG-TERM DEVELOPMENT ISSUES AND OPTIONS: A WORLD BANK COUNTRY ECONOMIC REPORT (1985). In the OECD, life expectancy in 1991 was about 75 years; in sub-Saharan Africa, about 52 years. WORLD BANK, WORLD DEVELOPMENT REPORT 1991: THE CHALLENGE OF DEVELOPMENT (1991).
the average African's real income had slipped 20 to 25 per cent from its level at Independence, twenty-odd years earlier. War, ethnic cleaning and anarchy added grim increments of horror.

Very few countries' inhabitants experienced an improved quality of life. From time to time a few countries' rates of growth seemingly rocketed upwards, only to fizzle: Argentina in the 1950s, Kenya and Ivory Coast in the 1960s, Brazil and South Africa in the 1970s. In the 1970s and '80s, Asia's 'little dragons' GNPs also soared. Mostly, however, 'development' remained not even a grim jest. That reality obtained without discrimination; it affected as well highly authoritarian as 'democratic' states.

Commonly, commentators ascribed these dismal results to leaders' personal failures, or to legislators' venality. A contrary view holds that more than individual disasters, institutions blocked the changes that development required.

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7 In 1989, OECD income averaged about $19,000 per capita; in Africa and Southern Asia, less than $1000. World Bank, World Development Report, 1989.

8 They benefitted from exceptional circumstances unlikely to benefit most third world countries; Seidman & Seidman, n., Ch.2.

10 Franz Fanon, The Wretched of the Earth (1963).

11 See generally, Ann Seidman and Robert B. Seidman, State and Law in the Development Process: Problem-Solving and Institutional Change in the Third World (1994). Leadership venality and institutional failures do not exhaust the explanations for the failures of development. Among a certain segment of scholars concerned with issues of law and development, an alternative proposition has a certain current cachet: The explanation for the failure of polities to enact development oriented laws that in
article focusses on a central set of those institutions, those that create the laws. Part I preliminarily discusses this article's foundation proposition: That in the development effort, third world countries mainly failed appropriately to use government's principal tool in directing social change: the legal order.

Adopting a problem-solving methodology, Part II specifies whose and what behaviors constitute the social problem addressed --

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here, the failure of elected legislatures to enact laws that advance the interests of the majority that elected them. It demonstrates that in most countries, despite democracy's constitutional premise, deficiencies in legislative output reflected weaknesses not only in the legislative but also in the executive branch.\(^{14}\) In contrast to the mythical world of constitutional lawyers, in the real world the executive branch exercised monopoly power over legislation. Not the sound and fury of an elected parliament, but, de facto, the administrations' silent, secretive bill-creating processes became the critical site of law-making.\(^{15}\) In most polities, not the elected members of the polity's "most powerful collective decision-maker", but many appointed and and a few elected officials in the executive branch became the key actors: the ministerial civil servants who developed the legislative programs; the ministerial and central drafting office lawyers who actually embodied those legislative programs in

\(^{14}\) In this article we use 'bill-creating' to mean the processes by which an idea becomes a bill presented to the legislature; 'law-enacting', the legislative process proper, and 'law-making' to mean both combined and, in some systems, approval by the executive. In the Anglo-American tradition, the term 'bill-drafting' has come to signify only the processes by which drafters, almost exclusively lawyers, put other peoples' ideas into 'legal' form, that is, a part of what we subsume under 'bill-creating'. See below, text at n. xx).

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statutory language;\textsuperscript{16} and the ministers who at least in constitutional theory supervised their work.\textsuperscript{17} Those officials time and again failed to produce any development-related bills. When enacted into law, the few bills they wrote that might conceivably relate to development too often failed to induce the behaviors they prescribed, or privileged elite, not mass interests.

Problem-solving's arguably most important step\textsuperscript{18} requires elucidating the causes of existing problematic behaviors. Part III accordingly offers two sets of explanations for the problematic behaviors of the relevant executive branch officials. First, it explains the failure of laws' frequent failure to induce the prescribed behaviors, mainly by the inadequate research on which the drafters grounded their bills, reflecting not only their own limits, but those of the drafting institutions within which they

\textsuperscript{16} In this paper, we denote these two sets of officials collectively as 'drafters'.

\textsuperscript{17} That these functions frequently overlapped, see below text at n. xx.

\textsuperscript{18} A bill provides a solution for an existential social problem. Unless it addresses that problem's causes, at best it can merely poultice symptoms. The search for explanations -- causes -- constitutes a key step in problem-solving, for without it, small chance exists of basing legislation on reason informed by experience. Sede Seidman and Seidman, supra n. xx, at 76 ff. What some authors denote as 'problem-solving' omits this key step, see House, etc.; Robert Cox, "Social Forces, States and World Order Beyond International Relations Theory," in ROBERT O. KOEPHANE, (ED.), NEOREALISM AND ITS CRITICS (1986), and converts them either into ends-means or incrementalist methodologies. See below, text at n. xx.
worked. Second, it explains the prevalent elite biases of the bills generated mainly in terms of the structural biases of those institutions' input, feedback and conversion processes.

As its third step, problem-solving calls for generating proposals for solution designed to alter or eliminate the causes of responsible actors' problematic behaviors. Part IV proposes various ways of restructuring the existing institutionalized bill-creating processes. 19

I.

LOCATING THE DIFFICULTY: THIRD WORLD GOVERNMENTS' FAILURE TO USE LAW IN AID OF DEVELOPMENT

As a foundation for the later discussion of bill-creating institutions, this Part discusses (1) the legal order's function in the development process; (2) the law-makers' general failure to employ the legal order as an instrument of development; and (3) the limits of the contestation-centered definition of 'democracy' and its focus not on bill-creating, but on law-enactment.

A. LAW IN THE DEVELOPMENT PROCESS.

Even if only to ensure appropriate conditions for optimal

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19 The fourth and final step of problem-solving consists of implementation and monitoring the effectiveness of the proposed solution -- a step beyond the reach of this paper.
market functions, development requires the use of state power. Typically, government leaders declared that they would eradicate perceived social, political or economic difficulties. These difficulties invariably constituted social problems -- i.e., problematic repetitive patterns of behaviors (or institutions).

20 See [Big Bang article]; xx Shihata, ....

21 Cf. Harry M. Johnson, Sociology: A Systematic Introduction (1960) 639; Harry V. Ball, George Eaton Simpson and Kiyoshi Ikeda, "Law and Social Change: Sumner Reconsidered," 67 Am. J. Soc. 532 (1967). For example, the perceived difficulty of polluted underground water constitutes a social problem, in that it results from the repetitive behaviors of defined sets of people: Farmers whose agricultural fertilizers runoff into underground water courses, or industrial managers whose factories do the same with equally poisonous wastes.

22 George Casper Homans, The Nature of Social Science (1967); Norman Uphoff, xx. This definition is contested. Cf. Sven-Erik Sjostrand, "On Institutional Thought in the Social and Economic Sciences", in INSTITUTIONAL CHANGE (Sven-Erik Sjostrand, ed., 1993), 9 ('institution' means 'a human mental construct for a coherent system of shared (enforced) norms that regulate individual interactions in recurrent situations'; 'institutionalization' means "the process by which individuals intersubjectively approve, internalize and externalize such a mental construct"); Douglass C. North, supra n. xx ('institution' consists of 'formal rules, informal constraints (norms of behavior, conventions and self-imposed codes of conduct) and the enforcement characteristics of both.' North distinguishes institutions from 'organization': "groups of individuals engaged in purposive activity. The constraints imposed by the institutional framework (together with other constraints) define the opportunity set and therefore the kind of organizations that will come into existence.... The agent of change is the entrepreneur, the decision-maker(s) in organizations." At xx. ); Harry M. Johnson, Sociology: A Systematic Introduction (1960) 22 ('social institution' means a "complex normative pattern that is widely accepted as binding in a particular society or part of society."") The behavioral definition seems more useful for analyzing the law-making enterprise: Law always addresses behaviors; law can only transform institutions by changing behaviors. Problem-solving holds that the key question becomes, why do those behavioural patterns exist? See supra, n. xx. A drafter ought to count as important not merely the clarity and
Underdevelopment reflects the interactions of a whole forest of sometimes conflicting institutions that, together, grind out poverty and oppression.\textsuperscript{23}

Policies alone, however, rarely change institutions; that task constitutes a law-job.\textsuperscript{24} At most, policies usually change only the climate of discourse. Until enacted into a law that ensures that behaviors change in a way likely to effectuate the policy, it amounts to no more than statement of intentions.

elegance of a bill's words, but its likely effectiveness in bringing about its prescribed behaviors, and their probable effectiveness in resolving the social problem at which the law aims. To serve a drafter's needs, the definition of 'institutions' ought to reflect that requirement -- not merely to change the rules, but to change behaviors. Those utilitarian considerations suggest two reasons for the definition of 'institution' used here: (i) Because solutions build on causes (or explanations), to build into the definition of 'institution' only one possible explanation for repetitive patterns of behavior (for example, that the normative pattern is 'widely accepted as binding', Johnson, op. cit. this note) tends to limit the investigation of explanations for those repetitive patterns, and thus contracts the range of possible legislative initiatives to change them. (ii) To confine the definition of 'institution' to the rules that prescribe the behavior (as does North, loc. cit.) can lead only to focussing on the rules as distingished from the behavior they will likely induce in the given circumstances; that is, it neglects the American Legal Realists' observation that the law-in-action systematically differs from the law-in-the-books, see Karl Llewellyn, "Some Realism about Realism". That ignores the potential use of law to change institutions and thus to foster development. See below, text at n. xx.

\textsuperscript{23} Seidman and Seidman, supra n. 10; see ... [NIE writings on development and institutions; see especially Joel Trachtman on law and economics and law and development]; Antoni Z. Kaminski and Piotr Stralkowski, "Strategies of Institutional Change in Central and Eastern European Economies", in Sjostrand, ed., supra n. xx, at 139; James G. March and Johan P. Olsen, Rediscovering Institutions: The Organizational Basis of Politics (1989); Douglass North, "Institutional Change: A Framework of Analysis", in Sjostrand, supra this note, at 35, 44 ("Third world countries are poor because the institutional constraints define a set of pay-offs to political/economic activity that do not encourage productive activity.")

\textsuperscript{24} Karl Llewellyn, The Common Law Tradition???
Development-related policies usually proclaim desired changes in resource allocations. For example, inflation appears to the economist as too many dollars chasing too few goods. How to stop those insubordinate dollars from their inflationary pursuits? Government has no tool that can accomplish that directly. Its principle tool for social control is the law.²⁵ Law, however, cannot command those dollars to cease and desist, or those recalcitrant goods to multiply. It can only address behaviors. To draft a bill likely to overcome that social problem, a drafter must analyze the apparent social problem into its constituent actors and their behaviors: Those in the Central Bank who issue money; those in commercial banks who make loans; employers who pay higher or lower wages; and all the other actors who to one extent or another influence the money supply;²⁶ or, on the supply side, the behaviors of those concerned with the production and distribution of goods and services: Raw materials suppliers, transporters, manufacturers, energy suppliers, wholesalers and retailers. Only then can the drafter devise a legislative program likely to alter the factors that cause those behaviors.

Government's employment of the law as its instrument of

²⁵ [Douglas Black on the sociology of law]

²⁶ ZHAO HONGCHENG REFORM OF THE FINANCIAL SYSTEM AND INFLATION IN CHINA (unpublished MS, 1990)
social change does not arise out of government's perverse fixation on law. Despite its limits, besides the legal order, broadly conceived, what other instruments does government have to carry out policy? Until a policy becomes effectively implemented law, the institutions that shape the difficulties at which the policy aims of course constantly change, but in ways determined by the interacting, often conflicting behaviors of a mob of actors, not by government. The legal order comprises governments' primary tool for altering the whole system of interrelated institutions that perpetuate their underdevelopment and poverty.

A country's inability to achieve sustainable development reflects the failure of its government, no matter how 'democratic', to use its legal order to transform relevant social, political and economic institutions. As an underlying premise, the western

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27 'Legal order' here means more than the written words of the laws. It includes not only the texts of laws, regulations and other norms promulgated by the state, but also the law-making and law-implementing institutions -- i.e., the entire normative system in which the state has a finger. See Seidman and Seidman, supra n. xx, at 41.

28 As one alternative, Chairman Mao argued that if everyone had the correct ideology, everyone would know what to do. [Cite?xx] That directed government to use not law but ideology as an instrument of social change. Mao tried that in the Cultural Revolution, with results that hardly recommend it as a model for social change.

29 Seidman and Seidman, supra n. xx, at xx. That does not deny that, albeit without formal authority or sanctions, non-governmental actors change institutions: 'Entrepreneurs', see North, supra n. xx, NGOs, seexx; army coups; and others. Government, however, operates primarily through the legal order. For it, law becomes ineluctably the tool of choice.
concept of democracy seemingly implies that elected officials, using state power, would seek to enhance the majority's quality of life -- else, why bother? On their laws' successes rested the very essence of a democratic 'development'. By and large, in this most third world government badly tripped.

A. GOVERNMENT'S FAILURES TO USE LAW FOR DEVELOPMENT.

Whether or not fairly denoted 'democratic', many, probably most, polities' laws looking to change institutions to foster development (however defined) did not work as intended.30

30 See Neva Seidman Makgetla and Robert B. Seidman, "Legal Drafting and the Defeat of Development Policy: The Experience of Anglophonic Southern Africa", 5 J. LAW AND RELIGION 421 (1987). Or consider land reform initiatives in Latin America: The land reform law adopted in Venezuela -- a country that after 1958 had eight honest and highly competitive elections -- benefitted only a few communities; critics claimed its greatest achievement lay in giving enough peasants just enough land to forestall widespread support for the local guerrilla movement. DANIEL C. HELLINGER, VENEZUELA, TARNISHED DEMOCRACY (1991) 104-07. In Chile in 1967, democratically-elected President Frei promised that land reform would "change the lives of 1,000,000 peasants," but, by the end of his term, only 20,000 peasants had received land. CHILE: Agrarian reform at last, Latin Am. Newsletters, July 28, 1967 at 108; see also LOIS HRICT OPPENHEIM, POLITICS IN CHILE (1993) 24 (outlining earlier failed efforts at land reform in Chile). In Colombia, the elected government's land reform installed only 290,000 families on only 1% of the arable land, while the richest four percent of all landholders still occupied sixty-seven percent. ???: [Brad cites COLOMBIAN AUTHORITIES HAVE INTRODUCED DRAFT AGRARIAN LEGISLATION, ANDean GROUP REGIONAL REPORT, Oct. 5,; but, since the legislation was apparently introduced in 1984, that cannot be right.]
Unimplemented, many laws remained merely symbolic, or merely denounced unwanted behavior on pain of criminal penalties. As a result, some academics wrote learned papers in unread law reviews about overcriminalization; others wrote equally learned and equally unread papers about how law cannot change society; and, world-wide, ordinary people voiced a familiar lament: "We have good

31 In the former French colonies, following French tradition, typically the elected legislatures enacted laws that, until implemented by an executive decree, remained purely symbolic. E.g., the Lao P.D.R. enacted the Law on Foreign Investment in 19xx, but has thus far failed to enact an implementing decree; the law remains a dead letter. The same obtained in Vietnam; (It is said that in Vietnam, the legislature typically enacts a law that is so vague and general that it says nothing; thus democracy abdicated. CHECK!!!. At date of writing, Indonesia had enacted a xx law and an xx law, but has not enacted any implementing decree for either.

32 Not only third world governments enacted laws that at most remained symbolic. See, e.g., Eric J. Gouvin, "Truth in Savings and the Failure of Legislative Methodology", 62 UNIV. OF CINCINNATI L. REV. 1281 (1994); Edward Rubin, "Legislative Methodology: Some Lessons from the Truth-in-Lending Act," 80 GEORGETOWN L. J. 233, 240 (1991); and see generally MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964) (unimplemented law frequently arises because the legislature enacted the law precisely for its symbolic, not instrumental uses.)

33 See text below, at n. xx.

34 See, e.g., ....

35 Robert L. Kidder, Connecting Law and Society: An Introduction to Research and Theory (1983) xx (all but impossible to know the impact of law on behavior); John Griffiths, "Is Law Important?" 54 N.Y.U.L. REV. 339 (1976) (law only carries out a political decision; that decision, not the law, counts as important); James M. Buchanan, "Politics, Property and Law: An Alternative Interpretation of Miller v. Schoene," XX J. LAW AND ECONOMICS 439 (1972) (if law remains stable for a sufficient time, following the Coase theorem, parties will bargain their way around the law to reach the same allocations of goods and services -- whatever the law in force); Lawrence Friedman, "Legal Culture and Social Development," 4 LAW AND SOCIETY REV. 29 (1969) ('values and attitudes' determine what laws and institutions work, and which do not); J. P. Roche and M. M. Gordon, "Can Morality be Legislated?" NEW YORK TIMES MAGAZINE, May 22, 1955) (values and attitudes as primary if not sole explanation for addressees' failures to obey the law.); Brian Z, xx. [review article in Am. J. Int'l L., 1995]
laws but they remain badly implemented."

Perhaps most frequently, most states's legislatures did not consider, let alone enact, many laws that purported to aim at mass-directed development. They seldom defeated development either by enacting anti-developmental laws, or refusing to enact development-oriented laws. For the most part, they simply made 'non-decisions'; save very rarely, transformatory laws did not come before them for a vote.

Consider a recent case, post-apartheid South Africa. More or less democratic elections marked the end of the apartheid era, giving the liberation movement led by the African National Congress the Presidency and clear majorities in both houses of the National Assembly. Before that land-slide vote, apartheid laws structured all South African societal institutions, ensuring that ethnicity determined not only social groupings but also economic class. At the time of writing, three years later, most of these laws remained. The South African legislature had considered only a thimbleful of bills that arguably aimed even marginally to transform the inherited institutions.\[37\] The Ministry of Land Policy

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37 The Land Restitution Law aimed to restore land title to those who held it prior to removal by apartheid measures; but most of those removed had not previously held title in a way recognized by the national legal system, and hence could not
had begun preparation of some transformatory bills.\textsuperscript{38} Most of the other ministries, however, seemingly did not even perceive the imperative for transformatory legislation.\textsuperscript{39} South Africa's mirrored the situation in most countries: No matter how democratically elected, everywhere legislatures not only failed to enact many laws looking to institutional transformation; they did

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claim under the new bill. [CHECK!!!] A labor bill proposed changes in industrial relations institutions; and regulations with respect of housing also tended towards institutional change. A Police Act significantly changed decision-making about police policy. The Land Tenure (Agricultural Labourers) Act [CHECK NAME OF ACT!!!] made it difficult to evict some sharecropping tenants, but did not change the basically feudal relationships embodied in those tenures. See xxx.

\textsuperscript{38} The Land Ministry's initial "Land Policy: Framework Document Paper" stated in no uncertain terms the need for 'fundamental change' to 'improve the opportunities of all South Africans to access land for beneficial and productive use.' Community demands from the bottom, not government initiatives from the top, would drive that change; it would rest on participation and accountability. The 'priority...is to address the needs of the poor', and especially those of women. It recognized the connections between land policies and agriculture, nature conservation, water supply, forestry and mining. It proposed eight major goals: (1) The restitution of land to persons deprived of it by past racial policies; (2) the redistribution of land to benefit the disadvantaged and the poor; (3) security of tenure for all South Africans under diverse forms of tenure; (4) the rationalization, simplification and decentralization of the day to day land administration systems; (5) the development of a cadastral system for land registry; (6) the transformation of the system for managing state land; (7) facilitating an improved land development mechanism; and (8) improving the skills and enhancing the capacity of participants in the land reform programme. See Department of Land Affairs, "Land Policy Framework Document" Draft: May 11, 1995. As of the date of writing, however, only relatively minor elements of the first and third of these had been reduced to bills.xx

\textsuperscript{39} RDP White Paper; [CITE!!!!] (the Reconstruction and Development Program office asked each ministry to write its proposals for carrying out reconstructo and development in its sphere of interest; under the heading of 'proposed legislation' most ministries answered 'none', and most of the legislation actually proposed seemed trivial.) In one provincial Arts and Cultural Ministry, for example, when asked to implement the RDP, the civil servants claimed they already did so by issuing booklets and radio programs directed to women on subjects such as How to Set the Table, Formal and Informal Dining, How to Make Ironing Enjoyable, Embroidery, etc. (Authors' interview with a Ministry consultant, August, 1995).
not even consider them. That failure raised questions about the utility of the contestation-centered definition of 'democracy'.

C. THE CONTESTATION-CENTERED DEFINITION OF 'DEMOCRACY' AND ITS IMPLIED FOCUS ON THE BILL-ENACTING PROCESSES.

Legislators' widespread failure to pass the transformative legislation required for development occurred in the face of a world-wide trend towards competitive elections and therefore, according to many U.S. lawyers and political scientists, towards 'democracy'. Samuel Huntington, for example, characterized a political system as democratic "to the extent that its most powerful collective decision-makers are selected through fair, honest and periodic elections in which candidates freely compete for votes, and in which virtually all the entire adult

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40 Four years[????] after Zimbabwe's independence in 1980, it was possible to write that it had enacted only a single, non-symbolic law that one might fairly denote as transformative, creating a new set of primary courts applying customary law. Since repealed, that law transferred local power from chiefs appointed by the old regime to a new magistracy appointed by the new regime. See R. B. Seidman, xxxx.

41 Other cultures use different definitions; c.f. Fred Schaffer, "The role of Culture, Language, and Translation in the Study of Democracy: The Case of Senegal." Paper delivered at the Walter Rodney Seminar, African Studies Center, Boston University, Oct. 16, 1995. The difference has become a major area of contestation in international law, in which some of the sometime socialist states of Asia assert a definition of 'democracy' that emphasizes not process but substantive outcomes in favor of the majority, see, e.g., xxx; and a minority view even in the United States, that emphasized communitarian definitions, see xx.

population is eligible to vote."  

In recent years, in the Third World, in this sense country after country became 'democratic'. Yesterday, in countries as different as Kenya, Zambia, South Africa, Nicaragua, Brazil and Panama, governors' power derived sometimes from a mere 'Ja' vote, sometimes from the vote of a minority electorate, sometimes from the barrel of a gun. Today, elected governments and legislatures hold power through processes certified by international organizations (not to speak of Jimmy Carter) as 'democratic.'

Huntington's notion of democracy constitutes a definition by stipulation. His declaration that democracy means popular elections says nothing about the 'essence' of the concept of democracy. It cannot because, as in the case of words like 'truth' or 'God' or 'beauty,' the essence of democracy must lie in the eye of the beholder. Huntington's definition, however, has a function

43 Huntington, supra n. xx [Democracy's Third Wave], at 44.

44 In the very near past, this seeming tendency towards contested elections, greeted only a short time ago as proof positive that third world countries were returning to the democratic fold, has begun to reverse itself. In Zimbabwe, President Mugabe was returned to office by a vote where no one stood against him; Kenya seems to incline increasingly away from genuinely competitive elections; Algeria's military canceleled elections when it appeared that a Muslim fundamentalist party would likely win them, and excluded that party from competing in the next election; in Nigeria, the military cancelled the results of an election that went against its candidate, and imprisoned the winner. Se generally, Samuel Huntington, "xxxxx".

45 Some definitions define words by describing the referent. Others, like this one, only stipulate what the word means. OGDEN AND RICHARDS, THE MEANING OF MEANING.
beyond mere clarification of meaning. It purports to separate the wheat of 'democratic' polities from the chaff of the undemocratic. By implication, it purports to identify which governments will likely act in favor of the people, and which will not. A definition that certifies as 'democratic' governments that do not act to benefit the majority that elected them, however, does not winnow out the wheat of people-centered polities.46

Yet as in many older Third World prototypes, so in these new democracies: The promise that popularly-elected governors would better the lot of the majority too often remained empty. To explain that seeming paradox, and conformably to the contestation-centered definition of 'democracy', at least since Bentley's seminal 1908 work,47 political scientists have focussed attention on the processes by which legislatures enact bills into law.48 Constitutional fiat granted elected representatives the legislative power; they must bear responsibility for the legislative output. To study why laws do or do not come into being, should not research start with the legislature? 49

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46 The test of a descriptive definition lies in its accuracy. The test of a stipulative definition depends on its utility. Id. at xx.


48 See, e.g. xx; but see xxx and David Browder [*on the Clinton health bill; thatg apparently discusses the drafting process at length!!!!*]
As a corollary to its principal claim concerning the importance for development of the law-making and especially the bill-creating processes, this article also contests the notion that competitive elections constitute the sine qua non of a democratic polity. In major part, the fatal obstacle to enacting laws likely to bring about institutional transformations in favour of the mass lay in major part in the bill-creating segment of law-making -- the portion of the law-making process furthest removed from the control of the elected representatives. By ignoring that reality, definitions that made elections democracy's touchstone seemed insufficient.

The first Part provides evidence to locate the behaviors that in moist countries comprise the difficulty this article examines: the critical moment of the law-making process occurs, not when the legislature enacts a bill, but in the bill's voyaging across the seas they must sail to reach the legislature's shores. In those stormy, poorly charted seas jut up the rocks on which, too often, transformatory laws founder.

II.
THE DIFFICULTY: AN ANTI-DEMOCRATIC BILL-MAKING PROCESS

The sub-text of Huntington's election-centered definition affirms the all but universal constitutional premise that a legislature constitutes the democratic polity's apex of power, its
"most powerful collective decision-makers" 50 According to most constitutions, in an country laying claim to the appellation of 'democratic', legislative power -- presumably the apex of power -- resides in the legislature. The elected legislature enacts the laws; appointed bureaucrats have only the power given them by law.51 In principle, no member of the executive branch, elected or appointed, may lift an official finger without the justification of an enabling law duly enacted by the legislature.52 Thus do elected representatives presumably control not only presidents and ministers and whole cabinets, but also -- improbably -- whole armies of appointed bureaucrats.53 A reality check suggested a different picture. In very few polities did the legislature drive the legislative process. With few exceptions -- famously,

50 Huntingdon, supra n. xx, at 44. Huntington's definition leaves vague whether by "the most powerful collective decision makers" he means the decision-maker with the greatest power de jure or the greatest power de facto. After all, one might argue that democracy exists if by fair elections the majority of the electorate chose the legislature, and then the legislature chose a triumvirate to rule the country by decree for the term of office of the legislators. In that case, one might argue, Huntington's definition would characterize the country as 'democratic': the triumvirate would count as the most powerful collective decision maker, selected "through" contested elections. No matter how fair the elections, would Huntington characterize as democratic a polity in which the electorate could choose its dictator every four years. Cf. Schumpeter, supra n. xx.

51 Cite???? see any recent work on democracy

52 Cf. Hans Kelsen, General Theory of Law and State (1949) xx (all laws fit into a hierarchy subsumed under the 'Grundnorm' -- roughly, the Constitution); see [any US case holding an administrative action unconstitutional because ultra vires].

53 Seidman and Seidman, supra n. xx, Ch. 9.
the United States\textsuperscript{54} -- not the legislature but the executive exercised a de facto legislative monopoly over the bill-creating process, and hence over law-making. That capsized the notion of democratic government. First, this section examines the reality: That, in most countries, legislative power de facto lay, not in the parliamentary chambers, but behind the closed doors where anonymous executive-branch officials drafted the bills to which, all but invariably, Parliament voted its assent; and that those processes usually constituted a principal site for the exercise of elite and ruling class influence. Second, this section proposes some hypotheses to explain this shift in legislative power. Finally, it specifies whose and what behaviors shaped the third world bills that, when enacted into laws, so often proved inadequate to accomplish developmental goals in favor of the majority that, presumably, had elected the legislature.

A. EXECUTIVE DOMINATION OF THE LEGISLATIVE PROCESS AND ITS CONSEQUENCES\textsuperscript{55}

Notwithstanding constitutional injunctions to the contrary, in

\textsuperscript{54} The overwhelming majority of the world’s political scientists come from the United States. There, the relative independence of the Congress gave at least a semblence of reality to a model of democracy that elevated the legislature as the supreme power, and thus justified the contestation definition of ‘democracy’. It may well be that the contestation definition in fact amounts to no more than an extrapolation from the U.S.’s circumstances, demonstrating yet again the dangers of assuming that the Third (or any other) World modeled itself on the United States. Cf. [any recent work on modernization theory].

most if not all countries that met Huntington's definition of a democratic polity, the executive exercised a de facto monopoly in setting the legislative agenda, and in exercising legislative power. The tiny country of Belize, in Central America, exemplifies this difficulty.\footnote{This section is based on information gathered in the course of a recent consultation in Belize.} Formerly the British Honduras, Belize received its independence from Great Britain in 1981. It has a bicameral legislature, and well-institutionalized regular elections. It has freedom of speech and press and reasonably independent courts, and none of the patent horrors of the non-democratic state (for example, preventive detention by administrative fiat). Three times since Independence in hotly-contested elections power has shifted between its two parties -- peacefully. Its Constitution plainly lodges legislative power in the Parliament. By any measure, it meets Huntington's definition of a democratic polity.

Nevertheless, the Belize government still did not meet the poor's basic needs. Neither government's nor civil society's institutions have changed significantly. Belize City has become a city of tourist palaces\footnote{Belize lies just landward of one of the world's greatest coral reefs; its beaches are justly renowned; its weather salubrious; its ancient Mayan ruins unique. The hotels that face the beach meet and exceed international standards for tourist luxury.} and squalid huts. Elected governments alternated between the nominal Left and Right (in what one Belize
official dubbed 'my turn democracy'). None undertook a significant initiative to transform the country's institutions to favor of its poor majority.

Belize's experience exemplified an almost world-wide condition. In many, likely most, governments that Huntington's definition would classify 'democratic,' practice turned over legislative power, not to the elected legislature, but to the executive.\textsuperscript{58} Parliament served at best as a forum for the opposition to voice objections. MPs slanged each other across the aisle. At the end of the day, however, Cabinet got what Cabinet wanted.

That practice capsized the power relationships Huntington's definition presumed. That had two principal consequences, both making mince out of a democratic theory focussed exclusively on electoral contestation: First, as in Belize, that practice made parliamentary law-making processes largely symbolic, and, therefore, Parliamentary elections almost\textsuperscript{59} equally symbolic.

\textsuperscript{58} See, e.g., Newell M. Stultz, "Parliaments in Former British Black Africa", 2 J. DEVELOPING AREAS 479, 489 (1968) (In Ghana, Nigeria, Kenya, Uganda, Zambia and Tanzania "parliaments. . .have been executive rubber stamps. No important piece of legislation has been refused; indeed, much legislation has been enacted not infrequently with unseemly haste. Moreover, legislative initiative has rested almost entirely with the executive."

\textsuperscript{59} In Parliamentary systems, of course, Parliament does elect the Government. (Cynics have suggested that in most countries, parliament might meet to elect Government, then pack its bags not to return for four years; see Schumpeter[?]). In Presidential systems, most Parliaments did not enjoy even so much power.
Cabinet set the law-making agenda.\textsuperscript{60} Parliament approved whatever bill Cabinet presented.\textsuperscript{61} That implied that the critical processes by which particular laws took their ultimate shape occurred within the hidden bureaucracies that translated government policies into the finished bills that Cabinet forwarded to the Parliament long before the bills ever saw the light of the parliamentary day.

As a second, anti-democratic consequence, in most countries, the law-making processes that occurred before bills went to the legislature typically granted elite and ruling-class views and interests a disproportionate influence. In the British tradition, inherited by practically every formerly British colony or dependent territory, prior to submitting their bills to cabinet, the civil servants consulted 'interested parties'.\textsuperscript{62} Almost everywhere, senior civil servants perceived themselves as part of the elite, with its other members roaming the halls of power.\textsuperscript{63} The parties

\textsuperscript{60} In South Africa, the Senior State Counsel, a man with some forty years in the Government service, told us that in his recollection, Parliament had enacted only two Private Members' Bills.

\textsuperscript{61} [Can we get some data on countries that in xx years, rejected a Government bill either zero, or very little? Tanzania (I believe) has rejected exactly one government bill since Independence (a bill to raise Ministers' salaries!)]

\textsuperscript{62} Robert B. Seidman, "Law, Development and Legislative Drafting in English-Speaking Africa," 19 J. MOD. AF. STUD. 133 (1981); A. Kean, "Drafting a Bill in Britain" 5 HARV. J. LEG. 253 (1968)

they deemed 'interested' rarely included the poor and disinherited.

A Zimbabwe case illuminates the results. At Independence in 1980, after long years of guerilla war, a populist government wrested power from the repressive, white minority regime. A newly-appointed deputy secretary in the Ministry of Labor asked one of the authors to draft a bill to replace the old regime's harsh, anti-labor Industrial Relations Act. Following established procedures, the deputy secretary sent the draft to the Permanent Secretary, then still a hangover from the old government. In turn, under the cover of the Official Secrets Act, he sent it to 'interested parties': The Anglo-American Corporation (then and still far and away the most important private economic actor in Zimbabwe), the Chamber of Commerce, and the Chamber of Zimbabwe Industry. Notably, he did not send it to any trade union organization. Anglo-American's lawyers drafted a substitute bill, if anything even more restrictive and pro-employer than the old regime's Act. The Permanent Secretary presented to the Minister not the original bill, but Anglo-American's version. Extraordinarily, the Minister -- no lawyer -- then brought the bill out from behind

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64 From 1980 to the end of 1983 the authors taught and conducted research at the University of Zimbabwe.

65 In Zimbabwe, in most cases, draft bills came into daylight only when submitted to Parliament.
the veil of government secrecy, proudly announcing it in the press as the new populist government's contribution to a democratic Zimbabwe. At that late date, expressing vigorous opposition, trade unions and academics managed to obtain a few small concessions. Nevertheless, when presented, Parliament, backbenchers included, dutifully voted 'Yes'.

A bill-making process monopolized by the executive, denigrating the legislature into a forum for airy-fairy debates and the applause of an automatic claque, while behind the scenes those with power and privilege exercise undue influence: That constituted the reality of most third world law-making (to say nothing of the first world). No wonder that so third world laws responded to the claims and demands of the disinherited!

B. WHY EXECUTIVE DOMINATION OF LAW-MAKING?

Executive domination did not always reflect ministers' lust for power (of course, that helped). It mainly existed for four institutional reasons: Party discipline; in some countries, the high proportion of ministers in parliament; in parliamentary (as opposed to presidential) systems, the consequences of a negative vote on a government bill; and parliament's low level of expertise.

66 At a workshop for legislators in 1982, backbenchers frankly explained to the authors that they could not speak or vote against a Cabinet bill without endangering their political careers.
and lack of staff competent to deal with legislation. 67

First, political party discipline constrained legislative independence. Typically, party chiefs punished members of their parliamentary party factions who voted in opposition to their expressed will. 68 The extent to which party discipline affects particular legislators primarily depends on the size and strength of their personal local political bases. If, as sometimes happens in the United States, a legislator has a constituency independent of the Party leadership, that legislator need not fear party reprisal. Never mind the high command; the legislator’s seat

67 It also helped that constitutional language frequently granted the legislature legislative power in the vaguest of terms. See, e.g., Constitution, Zambia (1973) ("69. The Legislative Power of the Republic shall vest in the Parliament of Zambia which shall consist of the President and the National Assembly."); Constitution, Swaziland (1968) ([Art.] 62(1) Subject to the provisions of this Constitution, the King and Parliament may make laws for the peace, good order and government of Swaziland"); Interim Constitution, South Africa (1993) ("The legislative power of the Republic shall, subject to this Constitution, vest in Parliament, which shall have the power to make laws for the Republic in accordance with this Constitution.") With such vague language, a cabinet can easily snatch the reality of legislative power from the parliament, leaving it only a formalistic shell. The Cuban Constitution (1976) expressed itself in language that took into account the realities of diminished legislative power:

"Article 73. The National Assembly of People’s Power is vested with the following powers:

- * * *
  - b) approving, modifying and annulling laws after consulting with the people when it is considered necessary in view of the nature of the law in question;

- * * *

- d) annulling in total or in part the decree-laws issued by the Council of State."

68. See n. __ supra.
remains solid.\textsuperscript{69}

In most countries, however, party chieftains held the reins of power.\textsuperscript{70} Many countries followed the British system in which the party central committee nominates the candidates.\textsuperscript{71} An MP who voted against the Party likely found him- or herself a non-candidate. Even where the constituencies nominate the candidates, the Party chiefs holds most of the cards: Patronage, budgetary favors, office assignment, committee posts, ministerial positions, plain pork -- both for the elected representatives and their constituencies.\textsuperscript{72}

Second, in surprisingly many countries, cabinet rules

\textsuperscript{69} The independent political power of many legislators in the United States (exemplified by its unique system of primary elections for party nomination) probably best explains US exceptionalism from executive domination of the law-making process. [Any evidence out there? Try browsing through standard US political science texts on the Congress. I have read articles asserting that even in the US the executive dominates law-making; remember the years of Nixon’s 'imperial presidency'?]

\textsuperscript{70} [Cite?]

\textsuperscript{71} [Cite?]

\textsuperscript{72} That party discipline fosters executive legislative monopoly embodies a paradox inherent in the democratic ideal of parliamentary sovereignty. A central premise of democracy posits that elections concern matters of principle, presumably expressed in the party platform, which the newly-elected legislature and government pledge to enact and enforce. That premise assumes party discipline and responsibility: Voters cast their ballots, not for individuals, but for party policies. Hence the paradox: Party discipline wars with democracy by making legislative supremacy improbable; party undiscipline wars with democracy by making elections all but meaningless. Because of the independent constituencies of the members of Congress, the Executive does not invariably dominate the United States Congress; on the other hand, because some of the Party’s delegation in the Congress vote against it, a program of the majority Party does not invariably win. To resolve that paradox calls for more than electoral contestation. See, e.g., xx.
parliament because members of the government -- ministers, vice-ministers, deputy ministers, ministers of state and so on -- comprise a very large proportion of the Parliamentary majority. 73 In Belize the Assembly has 24 Members. 74 In 1995, of the ruling party's majority of 14 in the Assembly, 11 held cabinet posts. In 1966, in Kenya, 59 Ministers and Assistant Ministers comprised 39% of the representatives in Kenya's lower house. 75 In 1964, 37 out of 98 members of Tanzania's National Assembly held ministerial posts, 10, as Regional Commissioners, 3, as Area Commissioners, and one as Deputy Speaker. 76 In pre-coup Nigeria, government gave cabinet posts to some 88 MPs 77; of course, they always voted for cabinet bills.

Third, in most parliamentary systems, a vote against a government bill amounts to a vote of no confidence, requiring

73 Stultz, supra n. xx at 490 (In the middle of 1966, 59 ministers and assistant ministers constituted 39% of the representatives in Kenya's lower house); WILLIAM TORDOFF, GOVERNMENT AND POLITICS IN TANZANIA (1967) (in 1964, 37 out of 98 members of Tanzania's National Assembly held office as Ministers or Parliamentary Secretaries; and additional ten, as Regional Commissioners, three as Area Commissioners, and one as Deputy Speaker.)

74 Constitution, Belize....

75 Stultz, supra n. xx, at 490.

76 WILLIAM TORDOFF, GOVERNMENT AND POLITICS IN TANZANIA (1967) xx.

77 cite???
government to resign, and hold a new election. By voting against a government bill, MPs put their own seats at risk. Only a very rare third-world legislator found any bill so distasteful as to require political self-immolation.

Finally, the executive always had some in-house expertise for preparing legislation (usually in the civil service). In contrast, parliamentarians usually had little, more often, none. Without special training, lawyers have little expertise in assessing, let alone drafting bills. Ordinarily, as a result, third world legislatures had no way to initiate legislation.

Party discipline, legislatures swamped in a sea of ministers, the consequences to MPs of defeating a government bill, and an all

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78 Examples?

79 In South Africa, in 1995, the State Attorney's chambers in the Ministry of Justice housed some 30 lawyers. In Laos, the Ministry of Justice's central drafting division had six lawyers. In Mozambique, the equivalent had some 20 lawyers. In Zimbabwe, in 1980-83, the Solicitor General's Chambers had some eight trained drafters. By contrast, China's Bureau of Legislative Affairs had some 265 employees, more than half professional staff. That even these staffs tended to be inadequate, see below, text at n. xx.

80 For example, in 1996 the National Assembly of South Africa had no technical drafting staff. It had one lawyer assigned to it, but he focussed his attention on problems of internal Parliamentary governance, and had no capacity to draft bills for MPs. The legislature of the Lao P.D.R. had one lawyer assigned to it; in Mozambique, none. In 1980-83, Zimbabwe's Office of Parliamentary Counsel had one lawyer and no supporting staff. By contrast, in China, the Standing Committee of the National People's Congress had a substantial legislative drafting office that produced about 20% of the bills presented to the National Assembly in an year. In the United States, legislative committees had ample staff; so did individual congressmen and senators; and the Congressional Drafting Office had a high degree of competence. See [any text on the staff 'on the hill'].

81 Stultz, supra n. xx at 489
but total absence of staff: No matter how democratically elected
the legislators, in most law-making systems -- certainly in
parliamentary systems -- these institutional features assured the
ruling party and government an automatic legislative majority, and
de facto executive subversion of the legislature's de jure law-
making primacy. Once parliament elected government (or at least
ratified the earlier selection of government by the majority party
or a party coalition), its members might as well pack their bags
and go home to wait for the next election.82

Law-making involves two intertwined and interdependent tasks:
Formulating appropriate policies, and incorporating the details
required to implement those policies in legislation (and the devil
really does lie in the details.)83 Effective democracy demands both
that the pre-legislative processes which determine a bill's
details become transparent, accountable and participatory, and
that, before enacting, rejecting or amending it, elected
representatives engage in transparent, active, and critical
consideration of it and its details. In most countries' practice,
however, the critical law-making processes take place, not in the
legislative hurly-burly, but in the secret and silent bill-creating

82 Schumpeter, supra n. xx, once said the same about the United States..

83 See [Robert B. Seidman, lawmaking as interface between policy and
implementation]
activities of faceless bureaucrats.

C. WHOSE AND WHAT BEHAVIOR CONSTITUTES THE DIFFICULTY?

That in practice parliament typically enacts every bill that government presents to it makes critical the law-making processes that occur before the bill reaches the legislature. This section describes those processes and identifies their principal actors.

As already shown,\textsuperscript{84} for government to use state power to foster development, it must employ law to change the repetitive behavior patterns -- the institutions -- that perpetuate underdevelopment.\textsuperscript{85} It therefore becomes essential to penetrate the mysteries of the process of creating the bills that determine the law's operative details.

Every drafting system comprises many stages, each involving specific sets of actors whose behaviors determine the answers to six questions: (1) How do ideas or suggestions about new legislation enter the system -- and from whom? (2) How do these ideas get preliminarily explicated -- and by whom? (3) Who decides, and by what criteria and procedures, to to spend scarce drafting resources on some bills -- and not others? (4) What procedures ensure that the bill meets the formal standards, and

\textsuperscript{84} Supra, text at n. xx.

\textsuperscript{85} Seidman & Seidman, supra n. xx, at xx.
that its content does not contradict other laws? (5) Who does what kinds of research to determine the bills' details? Finally, (6) how do input and feedback institutions grant to some, and not others, the options of supplying information to those preparing bills -- about facts, various theories, and various groups' claims and demands? Drawing on examples from quite different third world governments, the rest of this section explores the processes by which drafting systems generally shape the answers to the first five of these questions; Part III, below, includes an analysis of the sixth.

1. Origins. Everyplace, most bills originate in the public

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86 The way the bill-creating system meets these challenges cannot be viewed in isolation from the treatment the legislature accords a bill after receiving it. If the legislature has a committee system which allows free access to persons interested in a bill, the fact that the pre-presentation institutions bar them access has a different thrust than where the legislature has no working committee system, and no institutionalized method to enable interested parties to make formal and complete presentations of their information or claims. This article primarily considers the problem as it appears in the vast majority of countries, where in practice the Cabinet has usurped the legislature's constitutional legislative power.

87 Three former British colonies, Zimbabwe, Zambia and Belize; a former French colony, the Lao PDR; a former Dutch colony, Indonesia; a former Portuguese colony, Mozambique; South Africa; and China. With the exception of Britain, to our knowledge, little in the literature explores these countries' bill-drafting systems. The statements here rest on research conducted by the authors at various times in these countries. See Robert B. Seidman, "Law, Development and Legislative Drafting in English-Speaking Independent Africa," 19 J. Mod. Af. Studies 133 (1981); Ann Seidman and Robert B. Seidman, "Building Post-Apartheid Rural Institutions: Transforming Rural Reconstruction and Development Policies into Law," in Daniel Wiener and Richard XX, YY (forthcoming); Ann Seidman and Robert B. Seidman, Lessons from China, Am. J. Comp. L. (spring, 1996); for Indonesia, the authors are indebted to Prof. Louis Aucoin.
service. Most make only incremental changes in existing law; in administering laws, public servants learn their rubs. Occasionally, bills spring from other sources: Political parties, non-government organizations, or individual constituents who ask legislators' assistance in solving social problems. The political leadership's adoption of a proposed new policy, however, constitutes the critical step. Almost invariably couched in generalities, political leaders, in proposing policies, rarely do more than identify difficulties, or state broad policy objectives; only occasionally do the politicians even outline very general means for accomplishing the stated goals. Almost always, a policy proposal ends up on the desk of some public servant who tries to translate it into an implementable legislative program.

2. The concept paper. Wherever originated, the second phase of the process culminates either in a memorandum from public servants, describing the proposed program in some detail, or a 'layman's draft' bill. In Belize government officials call this a 'concept paper', an accurate phrase. The concept paper constitutes the nodal point at which policy turns, however

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89 That is, any draft bill not prepared by the central drafting office. See Kean, supra n. xx.
tentatively, into its operative, legal form. It constitutes the first cut at a legislative program.

In principle, a concept paper's scope differs between countries with British rather than French legislative traditions. In practice, little difference exists. In principle, in the former all law has a binary thrust, one to its primary addressees, and one to the agencies charged with implementing it.\textsuperscript{90} In that context, an adequate concept paper must not only formulate the substantive legislative program, but also propose methods and agencies to implement it. The legislation goes into effect at the time stated in the bill, or, if no time appears, at the time determined by the country's Interpretation Act.\textsuperscript{91}

By contrast, in the French legislative tradition, the legislature enacts laws that consist mostly of 'principles'; the legislators do not consider implementation. The laws become operative only after the executive promulgates decrees that specify

\textsuperscript{90} For example, the rule that commands the citizen not to commit murder instructs the policeman to arrest someone whom he believes committed the crime, and a judge to convict and sentence. Hans Kelsen called the law addressed to the principal addressee the 'secondary' form of the rule, and that addressed to the implementing agency, its 'primary form'. Hans Kelsen, General Theory of Law and State (1949) 61. Professor Hart essentially reversed those terms. H.L.A.Hart, The Concept of Law (1961) 35 et seq. See Fig. 1, below.

\textsuperscript{91} Usually, the Interpretation Act provides that a bill becomes operative on the day of enactment, the day of assent by the executive, the day of publication in the Gazette, or (as in Australia), a fixed time after assent. G.C.Thornton, Legislative Drafting (2d ed., 1979) 155-158.
the means of implementation. That makes easy what unfortunately too often happens in the British tradition: The drafters write bills without considering the question of implementation; that comes later.

In both former French and British colonies, the concept paper or 'layman's draft' typically goes next to a specified government agency for prioritization.

3. Prioritization. Everywhere, drafting services remain in short supply. Unless some government institution prioritizes requests for legislation, too easily revisions of relatively unimportant, tedious laws will swamp available drafting capacity, while urgent laws looking to institutional change go on hold. Prioritization -- or the lack of it -- may constitute the principal form which in effect determines government's legislative programs.

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92 See text at n. xx. That in practice the U.S. federal system increasingly approaches the French, see Edward Rubin "Law and Legislation in the Administrative State", 89 Col. L. Rev. xx; Colin S. Diver, "The Optimal Precision of Administrative Rules" 93 YALE L.J. 65 (1983) (many federal laws have become increasingly 'intransitive'. They contain mainly statements of principle, and, to give them meat, lodge power in an administrative agency to enact specific regulations. Those include the terms of implementation.)

93 Cf. the motor vehicle law in Belize; see text at n. xx.

94 In Zambia during the 1970s, before being drafted a bill without any special priority often had to wait in the queue for as many as five years.

95 In recent years in many countries -- especially, those seeking to transit the gap between command and market-driven economies -- the development of an entire legal system has become an urgent priority. Many of these countries -- China, the Lao P.D.R., Vietnam, for example -- entered that transition period with practically nothing by way of a formal legal order. In these countries, more often than not no law at all existed on subjects as fundamental as education, the national budget,
Some countries therefore lodge the prioritization decision mainly with political leaders. In those countries in the British tradition\textsuperscript{96} (and in the former German PDR\textsuperscript{97}), in a Cabinet Committee on Legislation, made up of members of Cabinet, decide which bills to promote. In the Lao PDR, in the early 1990s the Minister of Finance made those decisions; more recently, a committee under the Ministry of Justice, composed of the Minister and a small handful of experienced lawyers from Government or the National Assembly, undertook the task. Other governments seemingly regarded prioritization as a mere gatekeeping function, and assigned it to appointed officials: In China, to the Bureau of Legislative Affairs (BLA) of the State Council (the equivalent of cabinet); in Indonesia, to SEKNEGB, the equivalent of China's BLA.

4. **Drafting the bill.** In every country, once the relevant officials gave the green light, the bill went to final drafters. In the British tradition, to Parliamentary Counsel (in most of the

corporations, land law, the environment, health, social security, industrial relations. These countries needed to draft a veritable blizzard of bills whose importance nobody questioned. In such a case, government exercised its policy function not so much by deciding what laws it needed -- it needed all of these -- but by prioritizing its needs. Frequently, however, those priorities responded to conditionalities imposed by the World Bank or bilateral aid agencies. (In the Lao P.D.R., the World Bank conditioned a \$17,000,000 tranche on enactment of a cheque law). Sometimes the resulting priorities seemed curious. A USAID-funded project in Indonesia drafted 15 priority laws -- including one on integrated circuits. See the ELIPS self-evaluation, 1996 [get cite]

\textsuperscript{96} Kean, supra n. xx, at xx.

\textsuperscript{97} See below at n. XX,
former colonies, in the person of the Solicitor General, in South Africa, to the Senior State Law Advisor); in China, to the BLA; in Lao PDR, to the same committee of officials that decided the bills' priority.

In a principle grounded primarily in myth, these final drafters performed only technical tasks: To ensure that the bill's language contained no ambiguities to cloud its message; that neither word nor substance contradicted government policy, the existing corpus of the law, or the constitution; and that the bill did not invade 'vested rights'. In practice, bills frequently violated these technical requirements. For the most part, however, the causes of legislation's failure to foster development lay, not its form, but in its substance.

In practice, of course, the final drafters could not avoid engaging up to their necks in substantive decisions. Sometimes, the originating ministry only stated the need for a law covering a particular area. In Belize, for example, a ministry requested a highway traffic act. The Solicitor General assumed the entire task of developing a legislative program and drafting the bill. In

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98 See texts on drafting -- especially the country regulations.

reality, he simply copied foreign legislation that he thought appropriate (that explains why, although Belize has no weighing station, Parliament enacted a law with a provision stipulating the maximum weight of trucks on the highways\textsuperscript{100}). Sometimes the drafting office in consultation with the originating ministry had little choice but to engage in substantive decision-making.\textsuperscript{101} More often, their substantive interventions remained sheltered behind the myth that they simply tidied up the final drafts. The concept paper they received from the originating ministries frequently remained too broad. The central office drafters had to supply the details\textsuperscript{102} -- and in came the devil. In most systems, after the originating ministry approved their final draft, the bill went directly or via the Cabinet Committee on Legislation to the cabinet.

\textsuperscript{100} Supra, text at n. xx. Precisely the same phenomenon occurred in Lesotho. R.B. Seidman, State, Law and Development (1988), xx.

\textsuperscript{101} In Kenya, the \textit{total} instructions to the official who drafted the anti-mini-skirt law told her to "Draft an anti-mini-skirt law." Seidman, supra n XX at 44 [SLD]. In Zimbabwe, the relevant minister asked one of the authors to draft a land reform bill. When asked for more detailed instructions, the Minister responded, "You are the expert. You tell me!" The problem becomes compounded when the ministry uses foreign consultants as drafters. Typically, literally, the only instructions the consultant receives consists of the proposed bill's title: a cheque law, a mining law, a foreign investment law.

\textsuperscript{102} The Senior State Law Advisor in South Africa, based on his 40 years' experience, stated in so many words that while drafting the State Attorneys had to make many substantive decisions (authors' interview, Jan. 1994).
Research. The civil servants in the originating ministry typically conducted the empirical research -- whatever its form -- which supposedly underpinned the bill. The central drafting office lawyers rarely if ever investigated anything but what they could find in a law library, primarily domestic and other countries' legislation.

The kinds of bills that emerged from the bill-creating processes, in other words, resulted from the coordinated activities of civil servants in the originating ministries, the prioritizing authority (frequently but not always ministers) and the central drafting office. As shown above, in the third world, these actors seldom produced bills that even aimed at attaining development favoring the mass of the population, or, if an occasional bill did have good intentions, too frequently it remained merely a paper tiger that failed to induce its prescribed behaviors.

Adequate solutions require measures that address the difficulties' causes. How to explain these officials' seemingly perverse behaviors?

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103 That might include available documents, articles and books relating to the problem, as well as inputs and feedbacks from various social groups; see the next section.

104 Every third world drafting office the authors have visited had in their libraries the statute books of many other countries, but literally never a volume anywhere on how those laws worked in practice.
II  
EXPLANATIONS

All the actors in the lengthy bill-making process behaved within a cage of laws and regulations that purported to prescribe their behavior: Constitutions, statutes, cabinet memoranda, and civil service regulations. Given this regulatory cage, why did those actors so often produce bills that did not improve the electoral majority's lot? This section first offers a general explanation as to why people behave as they do in the face of law; and then uses that model to propose hypotheses as to the causes for the drafters' seeming inability to produce development-oriented laws that induced the prescribed behaviors.

A. WHY ACTORS BEHAVE AS THEY DO IN THE FACE OF A RULE OF LAW

Legislation can only serve to solve social problems by changing the behaviors that comprise them. Unless implemented in ways that alter or eliminate the problematic behaviors' causes, legislation purporting to transform institutions usually does no more than normatively describe the desired new behaviors,\(^{105}\) as

\(^{105}\) Eva von Benda-Beckmann (1989), supra n. XX ("The idea of legal engineering, of achieving social and economic shape through government law, still ranks foremost in the arsenal of development techniques. Law as a desired situation projected into the future is used as a magic charm. The law-maker seeks to capture desired economic and social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law-enforcement, or expressed more generally, to the implementation of policy.") To the extent that most drafters have any legislative theory, its methodology tends to remain ends-means, see Rubin, supra n. XX. Because that methodology skips the crucial explanatory stages (see supra n. XX), it too
often as not backed by thounderous but largely ineffectual threats of criminal punishment.\textsuperscript{106} Not surprisingly, laws of that kind rarely induced the behaviors prescribed.

Competent legislation must rest on an understanding of why people behave as they do in the face of a rule of law. Confronted by a rule of law that calls for radically new behavior (always the case with rules looking to development), actors decide how to behave \textit{deliberately}. They choose.\textsuperscript{107} In making those choices, they likely consider not only the law's promises and threats, but also all the constraints and resources imposed by their own particular circumstances.\textsuperscript{108} Only if its drafters take into account all the factors, non-legal as well as legal, internal as well as external to the addressee, will legislation induce the behaviors it prescribes. (A law that requires a notary public to validate a contractual obligation will go unenforced if the country has no easily lures drafters into writing bills that in effect merely denounce the social problems addressed.

\textsuperscript{106} Kalman Kulcsar, Modernization and Law (1992) 255. As an extreme example, seeking to induce Tanganyikan peasants to move from subsistence to market agriculture, the British colonial overlords enacted an ordinance that required every farmer to grow at least two hectares of cash crops, under pain of a sh. 500 fine or six months in prison. \textit{CITE!!!}

\textsuperscript{107} This does not constitute a 'rational choice' claim. Cf. Jensen and Meckling, "The Nature of Man", 7 J. APPLIED CORP. FIN. 4 (1994) (man viewed as a rational, evaluative maximizer, maximizing a basketful of values according to inindividual priorities.)

notaries. Manufacturers, faced by a law that forbids discharging toxic wastes into the groundwater, will likely evade it unless they know of alternative disposal techniques.) Figure 1 provides a model that purports to capture this analysis of the factors likely to influence people's choices as to how to behave in the face of a rule of law.109

Fig. 1 about here

Figure 1 illustrates that proposition: In the face of a rule of law, in choosing to behave as they do, the relevant social actors -- 'role occupants'110 -- not only consider the written rule but two additional sets of causal factors: (a) their unique social, political, economic and physical environment (combined, these comprise their 'arena of choice'); and (b) the probable

109 This model derives from the dictates of the American legal realist school of jurisprudence. They expressed the core of their teaching in the proposition that a systematic divergence exists between the law-in-the-books and the law-in-action, between rules and behaviors. See Llewellyn, "Some Realism About Realism." The sociological school reached much the same conclusion. See Erhlich, supra n. XX.

110 Following the sociological vocabulary, the model uses the term 'role occupant' to denote the class of persons whom a rule addresses. Role occupants may consist of every member of society ("Thou shalt not commit murder"), a defined class of non-officials ("No director of a corporation may use insider knowledge for private benefit"), or government officials ("The Public Utilities Commission shall prescribe fair and reasonable rules for the generation and distribution of electricity").
sanctioning behavior of the implementing agency -- itself a function of the rule addressed to the agency and its arena of choice. That proposition implies that drafters cannot simply conduct library research as to the existing state of the law. They must make empirical investigations of causal factors in two arenas of choice: Those likely to affect the primary role occupant's behaviors and arena of choice; and those that influence of the implementing agency's behaviors.\[111\]

That drafters must make those investigations argues that, for two reasons, a bill must come accompanied, not by the usual flimsy memorandum that merely restates in layman's language the bill's obscure legalisms, but by a full report describing that research.\[112\]

\[111\] As its principle category for investigation, the New Institutional Economics focusses on 'transaction costs.' See, e.g., Trachtman, supra n. XX. It adopts as ts model of human behavior the rational value-maximizer, see Jense and Merkeley, supra n. XX; Douglas North, supra n. XX. Like the meaning of 'value' in the rational choice model, see supra n. XX, the definition of 'transaction costs' seems either too narrow or too broad. It if means what Ronald Coase originally suggested, see Ronald Coase, "The problem of Social Cost", XX (1962) -- i.e. the actual costs of making a deal -- it seems too narro to comprehend all the difficulties of development; if it means what the New Institutional Economics school seems to mean -- i.e., anything that stands in the way of useful social cooperation, see XX, it too becomes so broad that, as a guide to empirical research, it becomes trivial. [cite many articles that discuss this XX].

First, except for the simplest bill, no Minister, Cabinet or MP can evaluate a bill on its face. (How, on its face alone, does one evaluate a bill concerning the reorganization of the Central Bank?) Without a report that provides facts as to the causes of relevant social actors' behaviors, how can responsible political authorities logically infer that the bills' proposed measures will likely alter or eliminate those causes? Second, the quality of a bill depends on the quality of the research on which it rests. An adequate research report provides a bill's principal quality control. By specifying the report's contents, the authorities can specify the research that drafters must accomplish. Thus they can make it more likely that drafters will ground their bills on reason informed by experience.

Figure 1's 'arena of choice', however, remains too large and ambiguous to guide the empirical research drafters must undertake. They need the more precise guidance which legislative theory may provide by unpacking the 'arena of choice' into seven more narrow categories: The Rules of law; the actors' Opportunities and Capacities to behave as they do (or otherwise); whether the authorities have Communicated the rules to them; their own Interest; the Process by which they decide how to behave; and

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111 If limited to choice among material incentives, that model of man confuses human nature in general with the motivations of a small shopkeeper, cf. KARL
their domain assumptions\textsuperscript{114} or Ideologies\textsuperscript{115}. Each of these categories may serve to inspire hypotheses to explain the problematic behaviors at issue.\textsuperscript{116}

The next two sections searches these categories of possible causal factors to formulate plausible hypotheses to explain two sets of behaviors that too often prevented bill-creating processes from producing effective transformative legislation: (1) When, MAR.XXX CAPITAL XX (18XX), and lacks empirical warrant: People seek to achieve many values besides material gain. If 'individual priorities', however, include non-material incentives, then the model becomes non-falsifiable and trivial. See John Adams, "The Emptiness of Peasant 'Rationbality': 'Derationality' as an Alternative." 16 J. EEC. ISSUES 663, 663-67 (1982); Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Programs_ A Critique," 33 STANFORD L. REV. 387, 398-400; Thomas C. Heller, "The Importance of Normative Decision-Making: The Limitations of Legal Economics as a Basis for Liberal Jurisprudence," [1976] Wisc. L. Rev. 385, 405 (1976); Richard B. Stewart, "The Development of Administrative and Quasi-Constitutional Law in Judicial Review of Environmental Decision-Making: Lessons from, the Clean Air Act," 62 IOWA L. REV. 713, 747.

\textsuperscript{114} ALVIN GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY (1970) (the baggage of valuations and propositions all individuals carry around in their heads, part of their personalities, which purport to describe and explain the world the world).

\textsuperscript{115} This category includes the actor's subjective 'values and attitudes' see n. XX supra. Thus it seeks to capture what some have called the 'embeddedness' of economic decision-making. Cf. Mark Gronovetter, "Economic Action and Social Structure: The Problem of Embeddedness", 91 AM. J. SOC. 481 (1985).

\textsuperscript{116} The first letters of these categories form the mnemonic ROCCIPI. These categories function to stimulate the researcher to generate hypotheses as to the factors likely to cause each set of role occupants' behaviors; those hypotheses guide the research drafters must conduct required to attempt to falsify them. KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY (rev. ed., 1968). In any particular case, of course, one or more of these categories may prove an empty box. For example, government officials usually know the law addressed to their positions. As a source of hypotheses to explain the behaviors of high government officials, therefore, the category "Communication" (of the law) usually does not inspire any useful explanatory hypotheses. See generally, Seidman and Seidman, supra n. xx; but see Robertson and Teitlebaum in Wisc. L. Rev. (even some judges remain ignorant of a new Massachusetts law giving judges the power to sentence to a drug rehabilitation center in lieu of jail).
infrequently, officials (here collected under the term 'drafters') actually formulated bills aimed at development favoring the mass, the resulting laws only rarely induced the behaviors prescribed; and (2) most officials seldom, if ever, even tried to draft the kinds of transformatory bills required for socially-beneficial development.

**B. WHY THE FAILURES TO PRODUCE WORKABLE BILLS?**¹¹⁷

Figure 1 suggests that laws can induce social actors to behave as desired only if they alter the factors that caused the initially problematic behaviors. That so many laws did not induce the behaviors desired argues that the drafters did not conduct the research necessary to identify all those causal factors accurately. Why? Or (which says the same thing), why did so few polities have in place effective procedures that required drafters to accompany their bills by an adequate research reports?

a. **Rules.** Like all other role occupants, third world drafters

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¹¹⁷ The explanatory hypotheses here proposed derive from the research described in n. XX, supra. They appear generally substantiated by third world country evidence. As a basis for formulating appropriate drafting regulations for a particular country, of course, would require testing them against that evidence available as to that country's specific circumstances, and, in light of that evidence, developing and testing more time-and-place specific hypotheses.
too behaved in the context of a cage of rules.\textsuperscript{118} The substance of those rules, their relative precision, the scope they left for discretion: All these affect and to that extent explain their behaviors. The regulations that defined the bill-making process had particular implications for the research the drafters undertook.

Most governments specified the process by which an idea should become a bill in (typically unpublished) regulations (in the former British colonies, usually in a cabinet memorandum).\textsuperscript{119} Those regulations invariably did no more than prescribe the route a bill should travel before its submission by cabinet to parliament.\textsuperscript{120} Seldom if ever did they prescribe the sort of research required, or detail the structure of the reports with which drafters should accompany their bills. In effect, they typically left the kinds of

\textsuperscript{118} In addition to all the rules specifically aimed at the behaviors in question, this category includes all other related state-promulgated rules. For example, to understand a farmer's behavior with respect to irrigation law, one must look not only at the law labelled 'irrigation law', but likely also at the laws labelled 'water law', 'property law', 'contract law' and, where the farmers whom a ditch services collectively control its flow and allocation, cf. ELEANOR OSTROM, \textit{The Governance of the Commons} (1990), the laws labelled 'unincorporated associations' or 'cooperative societies'-- and their related regulations and subsidiary legislation. To understand drafters' behaviors, no doubt one ought to examine not only the drafting regulations, but also the civil service regulations and laws, and those concerning Cabinet and the legislature.

\textsuperscript{119} See, e.g., xx

\textsuperscript{120} [See pamphlet describing BLA.]
research to the drafters' discretion. As a result, the quality of accompanying memoranda varied with the drafters' own notions of what seemed appropriate. If the rules permitted officials to decide what research, if any, to undertake, why so frequently did they neither conduct the sorts of research nor write the kinds of research reports necessary to ensure their bills' likely effective implementation? Where a law endows officials with uncabined discretion, the ROCCIPI agenda suggests they may exercise it not simply in accord with the public interest, but also with their own opportunities and capacities, their personal interests, the bureaucratic routines in which they function, and their domain assumptions.

b. Opportunity and capacity. Few third world civil servants had the capacity to conduct the social science research necessary to warrant hypotheses purporting to explain role occupants' behaviors. No more than in the first world did third world civil servants or legislative drafters have any theory of legislation.

121 That is the case with the United States Congress: With almost no prescriptions detailing the content of a Committee Report on a bill, the quality and scope of the reports varies with the particular committee staff person who writes it. See Seidman, "Justifying Legislation", supra n., xx, at xx.

122 As Chief Technical Advisors for a large UNDP-sponsored project in China, and a much smaller one in the Lao P.D.R., while searching for potential
let alone one that required them examine the factors likely to influence social actors' behaviors. Without a theory to guide research, the investigator becomes like a rat in a maze, butting its head at random against the walls.

Even in the unusual case in which drafters understood the need for empirical investigations, they rarely possessed the skills to consult to those projects in the past few years we have had occasion to speak to over a hundred non-Chinese experts in various fields, mainly lawyers, and many with vast experience in consulting about legislation. Not one claimed to have any theory to guide the bill-making process. Most theories that deal with the legislative process focus on factors that influence legislators' decisions, not those likely to cause the problematic behaviors of laws' addresses. See Ann Seidman and Robert B. Seidman, "The Present State of Legislative Theory and a Proposal for Remedying its Sad Condition," [1995] J. LEGISLATION RESEARCH 219 (Seoul, Korea, 1995)

If third world civil servants had searched the literature to find relevant legislative theories, they would have discovered remarkably little. What theories existed fell into one or another of two camps. One, based on interest group theory, taught that drafters should seek out the claims and demands of different interest groups, see, e.g., SUSAN L. BRODY, JANE RUTHERFORD, LAUREL A. VIETZEN AND JOHN C. DERNBACK, LEGAL DRAFTING (1994), and urged that procedures produce a 'level playing field'. Cf. Edward Rubin, xx, in ROBERT B. SEIDMAN AND ANN SEIDMAN, LESSONS FROM CHINA: A REPORT ON A PROGRAMME FOR DRAFTING LEGISLATION IN SUPPORT OF THE REFORMS AND OPEN POLICY (PORTHCOMING, 1997). The other followed the dictates of classical republicanism. In republican theory, "Legislators are motivated to solve those [social] problems [as identified by the citizenry] out of a sense of civic duty. They do not make special deals for themselves or act solely to ensure their reelection." Eric J. Gouvin, "Truth in Savings and the Failure of Legislative Methodology", 62 Univ. of CINCINNATI L. Rev. 1281, 1344 (1994). Most neo-republican writers, however, formulated no explicit theory for developing legislation, apparently relying on 'practical reason' -- common sense mixed with zeal for the public good. See C.A. Sunstein, "Beyond the Republican Revival," 97 Yale L. Rev. 1539 (1985); C.A. Sunstein, "Interest Groups in American Law," 38 Stanford L. Rev. 29 (1985). A few authors in the spirit of American Legal Realism saw the importance of examining the non-legal constraints and resources within which law operates. Before World War I, Ernst Freund "... sought to devise means to assure a higher level of professional competence in drafting statutes. He argued that the use of social science should come as a predicate to enactment, insisting that regulatory legislation should come at the end of an analytical process." See Paul D. Carrington, "The Missionary Diocese of Chicago," 44 J. Leg. Ed. 467; ERNST FREUND, PRINCIPLES OF LEGISLATION 19xx). Roscoe Pound spoke of the use of law as a tool for social engineering. Roscoe Pound, .... That vision pretty much disappeared sometime between the wars. Recently, a few writers seized the waters of Law and Economics for a theory; the most promising followed the emerging tradition of the New Institutional Economics. Trachtman, supra n. xx, at yy.
undertake it. Most ministries had personnel who knew how to investigate all aspects of the resource allocation patterns relevant to their own ministry portfolio. For example, if policymakers desired legislation to reduce underground water pollution, the Ministry of Water Resources usually had hydrological engineers who could provide extensive data about the nature and scope of the pollution, the water flow, and so forth.¹²⁴ A law likely to end water pollution, however, could not simply command the water to stop being polluted; it had to change the behaviors of the polluters. The drafters needed more than information about the flows of poisons and water; the needed facts as to the causes of the polluters' behaviors. Yet only a rare Ministry of Water Resources had on staff social scientists competent to investigate those behavioral causes as a predicate for designing effective legislative measures to halt pollution.

Only rarely did lawyers or other civil servants within the ministries ever have an opportunity to learn the skills to investigate the causes of problematic behaviors. Most third world civil servants have only completed their first degree, frequently

¹²⁴ The foreign consultant underground water law in the UNDP-China project asserted that, on demand, the ministry's engineers could produce a report specifying the location and chemical content of every cubic meter of underground water in China. He probably exaggerated only slightly.
in a or humanities discipline like history or literature. Conventional educational traditions held that undergraduates should not engage in any research, but should mainly study substantive information; only graduate students 'knew enough' to undertake research. As a result, most civil servants had almost never had an opportunity to study social science theories or research methods. Relatively few, if any, had acquired them later.

Some of the civil servants who prepared the concept papers, and practically all the drafters who wrote bills their in final form, did have a legal education, mostly at the undergraduate level. In the English-speaking world at least, that education made no pretense of teaching the students social science theory, far less social science research methodologies. No wonder that the research they did in preparing their bills generally focussed, not on real world causes of the bills' addressees' misbehaviors, but what might be dredged up in the law library!

c. Interest. Few responsible civil servants had much

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125 We taught for 11 years in universities in former British African colonies where this tradition frequently blocked efforts to enable undergraduate students to learn-by-doing through research concerning their countries' circumstances. In addition, in our legislative projects work with civil servants from several countries, only rarely have we met one with competent social science research skills. With respect to China, see Ann Seidman and Robert B. Seidman, supra n. xx ['Lessons']; see also....xx

126 With respect to Chinese law schools, see William P. Alford and Fang Liufang assisted by Lu Zhifang, Legal Training and Education in the 1990's: An Overview and Assessment of China's Needs (MS) (World Bank, 1994).
interest in conducting the necessary social science research. Without a theory that called for that research, far less one to guide it, few saw no need to spend either their own time or their ministries' resources on extensive investigations of role occupants' circumstances.

d. Ideology. Instead, implicitly if not explicitly, most third world drafters adopted an ideology that blinded them to the need to analyze the role occupants' arenas of choice. If they had any theory about the law-making process at all, it almost invariably followed the ends-means agenda in light of the pluralist dictum: Legislation results from bargaining between interest groups, a process which reflected not reason informed by experience, but power. Whether formulated in terms of pluralism, public choice, or Marxism, interest group theory

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128 Mark Kesselman, "The State and Class Struggle: Trends in Marxist Political Science," in Bertell Ollman and R. Vernoiff, The Left Academy (1982) 82, 85, reprinted in Louis J. Cantori and Andrew Ziegler, Jr., eds., Comparative Politics in the Post-Behavioral Era (1988) 112 (pluralism "minimized the importance of class, racial and sexual divisions. Furthermore, the losers in the pluralist game had no one but themselves to blame. Dahl observed, 'By their propensity for political passivity the poor and uneducated disenfranchise themselves.'" At 85).


130 See Seidman & Seidman, supra n. , Ch. 5.
tells drafters that only power counts. They need only to identify the relevant power vectors and discover a legislative compromise among them that reflected not empirical data as to factors likely to influence their behaviors, but their relative power.

Summary. The root cause of the bill-makers' minuscule efforts to undertake empirical research before drafting bills or regulations lay rooted in their (usually unstated) legislative theory's inadequacy. Legislation can at most try to change the behaviors that comprise the social problems at which it aims. Unless a law addresses the causes of those behaviors, it will rarely do more than poultice symptoms. Uncovering the causes of behavior requires empirical research as to those causes. Absent a rule requiring a research report with a specified content, drafters

131 The rules that governed the bill-creation process in Britain and its former dependencies, for example, did not require its managers to do any empirical research. It did require them to consult 'interested parties', see Kean, supra n. xx -- plainly a reflection of at least an inchoate interest-group theory.

132 Interest group theory resonates with philosophical positivism which insists that 'values' and 'facts' occupy discontinuous arenas; one cannot prove the Ought from the Is. Values are incommensurable; one cannot be sure that a rich man who wants scarce milk for his poodle will not suffer more by its denial than will a mother who wants scarce milk for her rickets-afflicted child -- or even than will the child (see Paul Samuelson, Economics: An Introductory Analysis (13th ed., 1989) xx). The law always involves an 'ought' proposition; it therefore always involves 'values'. Since reason informed by experience cannot help a lawmaker measure which group's 'values' should outweigh another's, a drafter cannot resolve a dispute about a bill's content by reason and facts. Power controls. The only research necessary becomes to discover interest groups' claims and demands, and those groups' relative power (see _______).
remained free to do as much -- or as little research as they thought desirable. Without a theory to guide as well as require them to conduct social science research, and little capacity to undertake it, few drafters attempted to do any. Some (sometimes unconsciously) adopted interest group theory which persuaded them that a bill's content appropriate depended, not on facts, but power.

For want of a conceptualization of how to conduct time-and-place specific behavior research, bills too frequently flew wide of the mark. That proposition, however, addresses only half of the problem. An equally if not more pressing question remains: Why did so many seemingly populist governments rarely even attempt to draft and enact transformatory bills likely to meet the majority of their citizens' minimal demands?

C. THE FAILURE TO WRITE BILLS IN THE INTEREST OF THE MASS OF THE POPULATION

Democratically-elected governments seldom proposed bills designed to implement institutional transformations to fulfil the majority's needs. To explain that phenomenon, this section first proposes a model of decision-making processes characteristic of complex organizations like government agencies; and second, based on that model, offers some explanatory hypotheses.

1. A Model of Decision-making in a Complex Organization.
Bill-creation always takes place within complex governmental
decision-making processes of existing government institutions. Too
frequently, people speak of a complex institution as though it
consisted of a single rational actor\textsuperscript{133} (for example, 'The
government drafted an incompetent bill.') That language misleads.
In today's world, as shown above,\textsuperscript{134} government decisions on bills
come at the end of very complicated decision-making processes in
which not one 'rational actor,' but many actors (some no doubt not
perfectly rational) participate. In exploring the several ROCCIPI
categories to generate hypotheses as to how and why those actors'
behaviors combine to block formulation of transformational bills,
'Process' frequently proves the most fecund.

An input-output process model captures the main features of
complex decision-making systems.\textsuperscript{135} It demonstrates that

\textsuperscript{133} G\textsc{raham} A\textsc{llison}, \textit{E}\textsc{ssence of D}\textsc{ecision}: \textit{E}\textsc{xplaining the C}\textsc{uban M}\textsc{issile C}\textsc{risis}. \textit{(B}\textsc{oston:}
L\textsc{ittle, Brown}, 1971).

\textsuperscript{134} Supra, text at nn.s xx -yy.

\textsuperscript{135} Seidman and Seidman, supra n. xx, Chapt. 7. The model evolved from one
proposed by Robert Dahl, \textit{W}\textsc{ho G}\textsc{overns?} (1961). He argued that an existing decision
found its proper explanation in the inputs and feedbacks that led to that decision.
Bachrach and Baratz (1962) supra n. xx, criticized that model for its failure to
explain 'non-decisions' -- i.e., why some and not other issues entered the system
and came to decision. (That constitutes a principal problem this section seeks to
explain: Why so few bills come before legislatures that even purported to address
development issues?) By emphasizing not particular decisions, but \textit{process}, the
revised model here proposed shows why a complex organization may produce 'non-
decisions' -- in this case, development-oriented bills' exclusion from the the
drafters' consideration. Cf. Allison, supra n. (suggesting two alternative models,
of 'bureaucratic politics' and 'process'; of these, his 'process' model comes very
near to that urged here); \textsc{Bachrach and B}\textsc{aratz} (1963), supra n. XX, at
655 (like decisions, non decisions occur "when the dominant values,
the range of decisions produced by a complex organization depends upon: (i) the input processes that determine whose and what facts and arguments the decision makers consider; (ii) the feedback processes that determine what the decision-makers learn about their decision output's impact; \(^{136}\) and (iii) the conversion processes, that is, the way the decision-makers combine these inputs and feedbacks to produce their decisions (or outputs). \(^{137}\)

To change patterns of decisional outputs, legislation must restructure all three sets of process. These determine whose and what complaints and difficulties law-makers hear about, and whose and what facts and explanations and solution they will consider. To explain whose interests the system's decisional outputs favors requires investigating who has access to the input and feedback channels. Combined with the ROCCIPI agenda, the model helps to


\(^{137}\) Seidman and Seidman, supra n. xx, Chapter 7.
generate useful hypotheses as to why, in most countries, the bill-creation system's outputs favored, not the majority -- as 'democracy's contestation-centered definition predicts -- but those with power and privilege,

2. Explanations for the decisional output: Senior civil servants.

If bills (the bill-creating system's outputs) systematically favor the rich and mighty, then Figure 2 suggests that the system somehow privileged their inputs and feedbacks. Looking at the decision-making behaviors of the senior civil servants who control the bill-creating system's input and feedback channels, this section proposes to explain their systematic tendency to favor the rich and mighty. Ostensibly, rules existed to govern the system. The ROCCIPI agenda helps to identify explanatory propositions, in the face of those rules, senior civil servants so often did not produce transformatory legislation.

a. The rules. Two sets of rules usually determined to whom the drafters would likely attend -- otherwise put, determined who had access to the bill-making system's input and feedback channels, and thus the sets of facts and theories the civil servants considered: Those concerning official secrecy, and rules as to whom drafters should consult. In most countries, both granted the drafters very broad discretion as to whom they should open the
system's input and feedback channels.

(i) Officials Secrets Acts. In effect, in many if not most third world countries, Official Secrecy Acts excluded from the bill-making processes all except those whom the drafters chose to admit. Few governments' laws anywhere required public notice inviting all interested parties to comment on proposed bills.\textsuperscript{138} Even less often do they require drafters to hold public hearings about proposed legislation or regulations.\textsuperscript{139} Instead, in many countries, on pain of draconian penalties, Official Secrets Acts on their face made it illegal for civil servants to reveal anything to a lay person about a bill under consideration, or even the fact that it was under consideration.\textsuperscript{140} In fact, however, the Acts

\textsuperscript{138} As an exception, in the United States the rules governing the introduction of administrative regulations make this a central requirement (citeXX) Swedish laws go even further in opening up all government actions to public scrutiny; see n. XX below.

\textsuperscript{139} As earlier mentioned, the drafting regulations in the German Democratic Republic provided that the originating ministry would suggest a schedule of inouts procedures to the Cabinet Committee on Legislation, which had the final decision. Supra, text at n.xx.

\textsuperscript{140} See ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT (1978) XX In Zimbabwe, on its face the Official Secrets Act carried a maximum penalty of twenty-five years in prison for revealing to a person not authorised by law a fact that the defendant had learned in the course of official employment. Literally read, that subjected a sweeper to twenty-five years in prison for telling a stranger to the ministry how to find the toilet. A Zimbabwean official in one ministry once took one of the authors to task for revealing in all innocence to another minister that he was working on a particular bill. Both the minister of the ministry for which he was drafting the bill and the minister with whom he discussed the bill belonged to the same political party, sat on the same Party executive committee, and served in the same Cabinet. In Zambia, on grounds of official secrecy, a Treasury official refused to disclose to an MP, the chair of a parliamentary committee on price control, the basis for some
typically granted civil servants great discretion to reveal government documents to those whom they decided to admit to the input process.\textsuperscript{141}

(ii) \textit{Drafting Regulations}. In almost all countries, the rules that controlled the drafting process\textsuperscript{142} also granted civil servants broad discretion to decide which 'interested parties' obtained access to their input and feedback channels.\textsuperscript{143} Inevitably, like all public servants, they exercised that discretion on the basis of controlled prices.

\textsuperscript{141} See, eg, pp. above. On one occasion in Zimbabwe, shortly after Independence, the Minister of Urban Development and Housing asked one of the authors to help draft some bills which he urgently wished to present to Cabinet. It took less than half an hour to drive from the University to the Minister's office. On arrival, the Minister apologized: In the interim, he had consulted with his Permanent Secretary (a holdover from the old regime), who advised him that under the Official Secrets Act, unless a consultant had taken the civil service oath, the consultant could not see official documents. That, of course, made the drafting exercise impossible. (In fact, the Permanent Secretary plainly misinterpreted the Official Secrets Act, which permitted a 'person in authority' in his discretion to reveal otherwise protected information. The Minister, in his post only a few short and incredibly frantic months, apparently felt compelled to accept the Permanent Secretary's interpretation of the Act.) The proposed bill never did get drafted. The same civil servants, however, could and frequently did, discuss the bill with non-official 'interested parties.'

\textsuperscript{142} In the British tradition, usually in the form of Cabinet Regulations.

\textsuperscript{143} See Kean, supra n. xx, at yy (Great Britain). In China, bills usually originate in a ministry. After preliminary drafting of the Chinese equivalent of the 'concept draft', the bill goes to the State Council, which as of course sends it to BLA. After redrafting and consultations with the originating ministry, BLA sends it for comment to those to whom BLA in its discretion thinks should receive it: mostly government units, but not infrequently the trade union organization, the women's organization, and the like; occasionally, BLA publishes the bill and invites public comments. BLA officials then redraft the bill in light of these comments. After obtaining the originating ministry's, BLA then sends the bill together with such of the comments from the public as BLA decides to include to the State Council for action (authors' research). For German Democratic Republic, see above, text at n. xx.
their own opportunities and capacities, ideologies and interests.

Consider the Zimbabwe case: 144 There, as elsewhere in Anglophonic Africa, and in South Africa 14 years later, the underlying compromise that led to the 1980 elections permitted blacks to contest elected offices, but guaranteed that the existing public servants (almost all white) could stay in office. 145 Black victory at the polls did nothing to change the bill-making system. For some years after Independence, the same civil servants who crafted the bills that enforced the former Rhodesian regime's version of apartheid continued to draft most of the new

144 While in Zimbabwe (see n. xx above) the authors several seminars whose participants included the government's legislative drafters. In many respects, Zimbabwe's bill-making system resembled that of South Africa's shaped by almost half a century of apartheid rule and still in place after the 1994 elections (authors' interviews with South Africa's State Law Advisors in the Ministry of Justice, August, 1994).

145 The Anglophonic, Independence constitutions accomplished this mainly through the device of the independent civil service commission. In England, the 'mother of parliaments' ensured that at least in constitutional principle, a senior civil servant held office at the pleasure of the Minister. That ensured that the official followed government policy. J. F. GARNER, ADMINISTRATIVE LAW (1970) 34. The African Independence constitutions, in contrast, created independent civil service commissions. Not the minister, but these commissions had the power to discipline senior civil servants. See, e.g., CONSTITUTION, ZIMBABWE, (1979) ART. 74 In most of the Independence constitutions, the requirements for appointment ensured that a senior former civil servant with long service chaired the commission. See id, sec. xx (Chair of Independent Civil Service Commission required to have xx years service as a senior civil servant). Since the Colonial Service had all but exclusively white faces, the Independence Constitutions ensured that in the new government's formative years, the Civil Service Commissions mainly served to protect the carryover, almost entirely white civil service from the new, elected black politicians. See Seidman, supra n. xx [State, Law and Development] xx. Precisely the same sorts of provisions existed in South Africa's 1994-6 Interim Constitution. See INTERIM CONSTITUTION, SOUTH AFRICA, Arts. xx.
government's bills. They exercised much the same powers under much the same written and unwritten rules that determined who had access to their bill-making system's input and feedback processes. The same laws imposing official secrecy, the same regulations controlling drafting remained in place. These granted to senior civil servants practically uncontrolled discretion to decide to whom to grant access to the system's input and feedback channels.

Discretion implies choice, that is, the power to decide one way or another. In American society, an individual has close to unlimited discretion to choose a spouse on any grounds he or she wishes. In contrast, the law grants public officials discretion to make decisions, not in light of private-viewing, but of public-

146 The same individuals who had constituted Rhodesia's core of drafters remained in office for many years after Zimbabwe's independence. Many of these drafters had great technical ability; some, at least, patently sought as best they knew how to serve 'the government of the day'. Equally patently, none had an real capacity to develop transformatory legislation with a high probability of inducing the desired new behaviors, let alone change-oriented legislation in favor of the mass of the population. In Independent South Africa, in August, 1995 [4? check!] the Senior State Counsel (the chief legislative drafter), with had forty years of service to the apartheid regime, likewise continued to serve the new government whose principal election platform (the Reconstruction and Development programme, or RDP) called for massive institutional changes. He admitted he did not know how to draft transformatory bills (author's interview, 1994).

147 At least for the first three years after Independence, the Zimbabwe Cabinet had made no changes in the Cabinet Memorandum that controlled drafting procedures. No more had the South African Cabinet, three years after the newly elected government took office in 1994.

viewing considerations.\textsuperscript{149} Properly drafted laws therefore seek to limit official discretion in a variety of ways.\textsuperscript{150} Unless otherwise specified, however, officials will decide, at best, on the basis of their personal notions of the public interest, at worst, on the basis of private-viewing considerations\textsuperscript{151} -- and nobody the whit wiser.\textsuperscript{152}

In many if not most countries, the two sets of rules that directly affected the bill-creating process (the Official Secrets Act and the Cabinet Memorandum on Drafting) gave officials almost unlimited discretion to decide whom to consult. How they exercised their discretion reflected their particular capacities, interest and ideology.

c. Opportunity and Capacity. That the civil servants worked behind official secrecy's thick cloak facilitated elite access to

\textsuperscript{149} Id. at xx. (An act may limit official discretion by stating the considerations properly taken into account, by requiring procedures that limit discretion, by requiring that the authority adhere to precedent and publish its decisions, xx [complete].

the bill-making system's inputs and feedback processes. In part, senior public servants' exercise of discretion in favor of the elite reflected their own opportunities and capacities: Senior civil servants swam in the same social waters as the powerful and privileged: they came from the same elite schools, they attended the same universities, they went to the same Embassy parties, they drank sundowners at the same (usually formerly colonial) clubs.

Even if public servants wanted to consult the representatives of the poor, frequently they could not. At least from 1962 and the Unilateral Declaration of Independence and the 1980 elections, for

In restating Pareto's and Mosca's concept of elite, Bottomore emphasizes this reality:

"[I]n every society there is, and must be, a minority which rules over the rest of society; this minority -- the 'political class' or 'governing elite', [is] composed of those who, occupy the posts of political command and, more vaguely, those who can directly influence political decisions. . . ." T.B.Bottomore, Elites and Society (1964) 12.

That is, the concept of access -- i.e., of influence in political decisions -- constitutes an aspect of the definition of an elite. Everywhere, the working rules of the administration gave businessmen and other elite members easy access to the civil service, while excluding the mass. See Charles Bettelheim, India Independent (1971) 116; Ferrel Hady, Public Administration: A Comparative Perspective (1966) 69; A. L. Adu, The Civil Service in New African States (1965) 14. [NB this needs some more recent cites!xx]

example, Zimbabwe faced insurrection; none of Zimbabwe's senior civil servants had any opportunity to communicate with the liberation forces. They had no experience or knowledge about ways to encourage black participation in the bill-making process. In contrast, they had no such difficulty in getting both formal and informal inputs and feedbacks from white, upper-class and elite individuals and organizations. Their interest conspired to welcome these ties.

d. **Interest.** In countries where the rules directed senior civil servants to select 'interested parties,' four sets of their personal interests frequently persuaded them to consult those with power and privilege. First, busy government officials always viewed their own time as a scarce resource. It made sense to spend that scarce resource on chiefs rather than followers. A drafter

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155 Not all governments always lack this capacity. Compare the bill-drafting systems in the former German Democratic Republic, supra, text at n. xx, and the policy-making system in Maoist China, cf. J. Gardner, "Political Participation and Chinese Communism," in G. Parry (ed.), **Participation in Politics** (1972) 218 ("... all correct leadership is necessarily from the masses to the masses. This means: Take the ideas of the masses (scattered and unsystematic ideas) and concentrate them (through study turn them into concentrated and systematic ideas); then go to the masses and propagate and explain these ideas until the masses embrace them, as their own, hold fast to them and translate them into action.... And so on, over and over again, in an endless spiral, with the ideas becoming more correct, more vital and richer each time."); Michael Oksenberg, "Methods of Communication within the Chinese Bureaucracy", 57 China Quarterly 1 (1974) (to determine prices for fish, fifteen higher-level cadres stayed in a fishing village for a month, worked on fishing boats daily, talked constantly with villagers as well as their leaders, and ate and boarded with common folk. What they learned they summarized in their report.)

156 See D.K.Leonard, "Communications and Decentralization", in G. Hyden at al., eds., supra n. xx, at 93 ("the time available for communication is short,
concerned with a mining law could always point to good reasons for consulting, not the miners at the pit face, but the mine's manager.

Second, as reference group theory teaches,\textsuperscript{157} civil servants -- like other people -- tended to favor members of their own reference group, i.e., the group to which they believed they belong or aspired to join. Everywhere senior civil servants tended to perceive themselves as part of the elite.\textsuperscript{158} In choosing interested parties to provide inputs and feedback to the bill-creating process, they favored members of their own reference group.

Third, everywhere elite access did not come about only by operation of implacable social forces; the rich and powerful made special efforts to achieve it. Immediately after Independence in 1980, for example, Zimbabwe Chamber of Commerce members privately

\textsuperscript{157} ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE (1957) Ch. 9; HARRY M. JOHNSON, SOCIOLOGY; A SYSTEMATIC INTRODUCTION (1960) 39-46.


In the British tradition, not the Minister but the senior civil servant has the title, "The Head of the Ministry". Typically, his office is as large as the Minister's, has equally luxurious furnishings and as much oak paneling, and in many ministries sits directly across the hall from the Minister's office. At the end of a career in the civil service, senior civil servants in England almost always receive their baronetcy. The salaries of very senior civil servants matched their dignity. In South Africa, today, a Principal Director (the head of a ministry) received R.xxx; a minister received R. yy.
and systematically wined and dined, in turn, each of the new
government's individual ministers and permanent secretaries. 159

Fourth, as elsewhere, bribery, both naked and disguised (for
example, campaign contributions), too often served to buy access.

e. Ideology. Whatever the civil service morality of 'serving
the government of the day' 160, at least in the third world, few old-
line civil servants ideologically supported the new populist
governments. As in Zimbabwe in the '80s and South Africa today,
civil servants' values and attitudes tended to cemented their
interests, not to those of the mass of the population, but the
elite. 161 Small wonder that they seldom initiated bills to
transform institutions in favor of the mass!

That the appointed mandarins of the civil service exercised
their discretion in favor of the elite and not the mass hardly
raises eyebrows. That elected officials whose position depended
upon votes from the mass of the population too frequently did the
same thing seems more surprising.

3. Elected Officials.

Why did newly elected, nominally populist officials so seldom

159 Through a misunderstanding, a permanent secretary of a ministry, a friend
of ours, asked us to come to one of these as his guest. (The Chamber of Commerce
hosts, obviously embarrassed, asked us to leave).

160 Garner, supra n. xx, at 34.

161 Supra, text at n. xx.
propose transformational laws, or not insist that civil servants
draft them? Why did the committees that prioritized drafting
requests -- usually composed of cabinet members -- so seldom
prioritize laws to implement transformational, not merely
incremental changes?

Some claim that official populism seldom constituted more than
election-year rhetoric: Office-seekers cynically mouthed populist
slogans only to win achieve high offices and their delicious
fruits. That explanation defies empirical falsification; the
only evidence for a proposition purporting to describe secret
motivations comprises the act it seeks to explain. Pluralist
theories hold that public officials have no agenda of their own;
the State constitutes a mere neutral framework for interest group
bargaining. Outcomes reflect interest group power, not officials' predelictions.
Public choice theories make officials themselves
an interest group, a set of piranhas eternally snapping money and
electoral support. Review of the ROCCIPI agenda suggests three
more viable hypotheses.

162 Franz Fanon, The Wretched of the Earth (1963).
163 Popper, supra n. xx, at yy.
164
165 Edcward Rubin....
166
a. Capacity. Few elected officials understood the imperatives for institutional transformation. Whether of the Left or Right when they first came to power, most conceptualized the independence revolution as self government and welfare payments to the poor.\textsuperscript{167} They had little capacity to develop a detailed legislative program likely to transform inherited institutions, far less to draft effectively implementable laws.\textsuperscript{168} In the event, they remained captive to their civil servants. The civil servant's obsequious "Yes, Minister," concealed the power to do precisely the opposite of what the minister requested. These inverted the formally prescribed power relationships: Rather than ministers controlling civil servants, too often civil servants manipulated ministers.\textsuperscript{169}

b. Interest and Ideology. Over time, too often rot set in. Once in office, populist ministers began governing through inherited authoritarian, class-drenched institutions. A fatal race ensued:

\begin{flushright}
\textsuperscript{167} Seidman and Seidman, supra n. xx, at yy.
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\begin{flushright}
\textsuperscript{168} In South Africa and in Zimbabwe, for example, prior to Independence, no black lawyer had ever worked as a drafter; none had ever drafted a law. Seemingly, the new, populist governments there had little choice but to rely on entrenched officials to produce their bills.
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\textsuperscript{169} See Seymour Martin Lipset, Agrarian Socialism (1950); O. Odinga, Not Yet Uhuru (1967) 247 ("The Civil Service, I found, could frustrate the best plans of the best intentioned government. Given a chance, top civil servants can direct a minister, not the other way about. An inexperienced, naive, or unconscientious minister can be committed to a policy in flat contradiction to the overall policy of his government.")
\end{flushright}
Would the ministers transform the institutions, or vice versa? Transformation delayed, for two reasons self-interest too often motivated the ministers to join the elite establishment. First, crudely, some responded to corruption's corrosive seductions. Their decisions favored those wealthy enough to bribe -- inevitably excluding the mass of the population. Less crudely but equally powerfully, as they rapidly acquired power and privilege, other elected officials responded to the status quo's siren songs: Having won entry into the elite, why change the institutions that served them so well?

Second, too soon, self interest transmuted itself into an ideology that rationalized at most incremental change. For many, probably most third world elected leaders, social change came to mean welfare payments to the poor. These rapidly exhausted their countries' reserves and then their credit; the IMF and the World Bank imposed conditionalities and SAPs; soon even the welfare payments disappeared. Many third world leaders then embraced market-driven ideologies that justified the growing gap between

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170 Seidman and Seidman, supra n. xx, Chs. 8, 9; Robert B. Seidman, "The Fatal Race", xxx.

171 Hochheimer on corruption (corruption part of the sociology of power.)

172 Seidman and Seidman, supra n. xx, Ch. 10.
poor and rich: continued poverty resulted from the implacable operation of faceless market forces, that governments changed at their peril.

Recapitulation. For the most part, neither civil service rules nor practices facilitated inputs from the mass of society, but secretly opened the doors of inherited bill-creation processes to the elite. The civil servants' incapacity to produce transformatory bills, combined with the limited access of those interested in transformations, thwarted the drafting of bills likely to fundamentally alter the institutional legacy. Ministerial dependence on the civil service, and the rapid incorporation of newly-elected officials into old elites too soon emasculated ministerial ability and desire to implement transformatory legislation. That in the fatal race institutions so often coopted even elected officials further demonstrated the futility of hinging the definition of 'democracy' solely on electoral contests.

In short, the negation of liberation promises resulted did not reflect mere personal failings of fallible and corrupt humans. Fallible and corrupt institutions made it almost inevitable. The solution did not lie in merely improving officials's quality; it lay in fundamentally restructuring the institutions through which they governed. Bills responding to mass interests seemed likely to
emerge only if the bill-creation process itself underwent transformation.

III

SOLUTIONS

To recapitulate the argument: Whether in a post-colonial, post-apartheid, or post-Communist state, attainment of democracy's promises requires laws that transform the old, authoritarian regime's institutional legacy. Yet the new, populist governments that had emerged by the end of the 'short twentieth century'\textsuperscript{173} singularly failed to transform those institutions. To do so required laws carefully crafted to induce the behavioral changes that composed institutional transformation. For that, competitive elections alone proved insufficient. In practically every 'democratic' country, not the legislature but the executive still wielded legislative power. In practice, the executive branch typically shaped the bills the legislature enacted. There, the key actors included the political figures who prioritized the bills, and the civil servants who originated, elaborated and drafted them. The causes of their problematic behaviors lay not in perverse individual actors, but in the drafting institutions, that is, in --

(1) legislative drafting regulations that required neither empirical research nor justifications for bills grounded in reason informed by experience;

\textsuperscript{173} Eric Hobsbawm, The Age of Extremes (1994).
(2) politicians' and civil servants' ignorance of how to use law to bring about the behavioral changes transformation required, an ignorance reflected in legislative theories that emphasized interest groups' power, and inadequate social science research capacity necessary for investigating specific in-country circumstances;

(3) a pervasive ideology that frequently opposed to populist measures;

(4) the deep secrecy enshrined in the Official Secrets Acts that normally cloaked the bill-making processes;

(5) the typical bill-making processes admission of inputs and feedback by those with power and privilege, excluding those of the poor majority; and

(6) over time, the old regime's hierarchical, authoritarian institutions' gradual cooptation of the once-new political governors.

Of these causal factors, this article takes the cooptation of politicians not as a cause but as a condition. The cooptation of politicians by authoritarian institutions over time seems likely to prove less probable if the new governments rapidly implement effective legislation to transform those institutions to serve the people. Only if new governments change the old institutions before the old institutions change their leaders, can the people win the fatal race.

174 That is, this article does not purport to address all the causes of the development of a bureaucratic bourgeoisie, see Seidman and Seidman, supra n. xx, Ch. 9 (to control the development of a bureaucratic bourgeoisie requires not only (i) electoral democracy and (ii) transparency and accountability in government, but also (iii) popular participation in on-going governmental decisions, and (iv) a vigorous civil society.) This article focusses, instead, on ways of developing transparency, accountability and popular participation in only one crucial aspect of government, the bill-creating process.
Governments can transform the bill-creating institutions only by promulgating and effectively implementing new rules to alter or eliminate the identified causes of civil servants' and ministers' problematic behaviors. Some of those causes seem easily eliminated. To replace the Official Secrets Act, for example, governments can immediately enact a Sunshine Law that expressly rejects secrecy and requires openness in the bill-creating process. Recruit new civil servants with the requisite skills and instituting in-service education to equip them with an adequate legislative theory and appropriate social science skills can help to eliminate ignorance about the uses of law to bring about behavioral change.

Enacting a rule requiring drafters to accompany their bills with a research report structured by an adequate legislative theory could have two critically important consequences. First, it would help to ensure that drafters conducted the empirical research necessary to demonstrate that their bills would likely prove effectively implementable and thus alter or eliminate factually

175 The Swedish Constitution provided that citizens should have free access to official documents, "subject only to such restrictions as are demanded out of consideration for the maintenance of privacy, security of person, decency and morality." Under that provision, reporters have, on occasion, even examined the ministerial mail before the minister had opportunity to do so. E. Cam, bell, "Public Access to Government Documents", 41 Australian L. J. 73 (1967). The Swedish government did not in consequence totter.

176 Robert B. Seidman, supra n. xx, at yy. ["ustifying legislation"]
warranted causes of problematic behaviors. Second, it would assist legislators to use reason informed by experience to judge whether the proposed bills seemed likely to contribute to the desired institutional transformation.

Above all, the formulation and implementation of laws likely to achieve essential institutional transformation requires new rules that ensure popular participation in providing inputs and feedback in the bill-making process. Only such rules will likely overcome the two interlinked causes that motivated many government officials' delay in pressing for essential transformatory legislation: (1) many if not most civil servants' authoritarian ideology; and (2) the institutionalized tendency for elected officials' interests and ideologies to merge with those that perpetuate the status quo. The one is the flip side of the other: As analysis of decision-making systems (Fig. 2) suggests, unless civil servants and politicians receive popular inputs, their legislative outcomes will favor, not the populist cause, but power and privilege.177

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177 Our intuitive model holds that first a person has 'values', and then behaves in accordance with those values. Cognitive dissonance holds that the contrary also holds: That where a person must perform particular activities, in time the actor comes to develop values that tell him that that behavior is right and proper. Cognitive dissonance would hold that if the polity insists on popular participation in bill-creating, time civil servants will come to believe that popular participation is right and proper. See L. Festinger, A THEORY OF COGNITIVE DISSONANCE (1957).
Nor more than a country can copy another's rules to transform other institutions can it adopt them to facilitate participation in its bill-making processes. Nevertheless, other governments' experience with efforts to open up that process may offer valuable lessons. In the United States, for example, legislators' independent political bases combine with the absence of party discipline to endow legislators with potentially effective legislative power. House and Senate legislative committees hold hearings at which the public can provide inputs to legislative decision-making. In principle, members of Congress rely mainly on these and staff investigations to determine the facts concerning the unique circumstances in which bills must nestle. In

178 That party discipline fosters executive legislative monopoly embodies a paradox inherent in the democratic ideal of parliamentary sovereignty. A central premise of democracy posits that elections concern matters of principle, presumably expressed in the party platform, which the newly-elected legislature and government pledge to enact and enforce. That premise assumes party discipline and responsibility: Voters cast their ballots, not for individuals, but for party policies. Hence the paradox: Party discipline wars with democracy by making legislative supremacy improbable; party undiscipline wars with democracy by making elections all but meaningless. In the United States, because of the members of Congress' relatively independent constituencies, the Executive does not invariably dominate the Congress; on the other hand, programs promised by the majority Party do not invariably win in the Congress because some Party members, although presumably elected on that platform, vote against it. That paradox underscores the need for more than electoral contestation.

XXNOTE: IF THIS FOOTNOTE GOES HERE (AND I THINK IT SHOULD) THEN IT SHOULD BE ELIMINATED IN THE FIRST PART, (NOW AT THE END OF THE SENTENCE "- BOTH FOR THE ELECTED REPRESENTATIVES AND THEIR CONSTITUENCIES." (ABOUT P. 27) WHERE THE FOOTNOTE SHOULD READ, "SEE NOTE N. XX BELOW."

179 Rubin, supra n. xx.
practice, however, in most instances the committees' staff and key congressional legislative aides have significantly structured the hearings by determining whom they invited to testify. Furthermore, these hearings sometimes did precious little to develop facts.\textsuperscript{180} Instead, they merely became opportunities for supporters and opponents to register their support or opposition to proposed bills, while committee members engaged in bargaining with affected interests.\textsuperscript{181} All too often, the resulting bills reflected not reason informed by experience, but interest groups' relative power.\textsuperscript{182}

The United States experience does not argue that legislative

\begin{footnotesize}
\begin{enumerate}
\item Rubin, supra n. xx; Gyuvin, supra n. xx.
\item Ibid.; Gouvin
\item In the US as in the third world (see supra, pp. ) most legislators and their staff seemed to adhere to one or another version or another of interest group theory (see Carnoy, 1984:9). From that theory, drafters might infer two principal injunctions: Their bills should ensure (1) formally 'fair' procedures, and (2) respond to the claims and demands of all the stakeholders (Brody, Ruterford, Vietzen and Dernbach, 1994). Nevertheless, in the US as elsewhere, Schattschneider (1960:35; cf Mill, 1851) described the consequences bluntly: "the flaw in the pluralist heaven is that the heavenly chorus sings with a strong upperclass accent." If all law comes from bargains dominated by the powerful, those forces in effect hold the state captive (Bachrach and Baratz, 1963).
\end{enumerate}
\end{footnotesize}

In fact, interest group theory almost seems limited to a description of the problems posed by the US legislative system. Implicitly adopting an ends-means methodology, its adherents seldom seek to explain why, as long the legislative process merely provides an opportunity for stakeholders to present their claims and demands, it almost inevitably simply papers over inherent inequalities, rather than contributing to an increasingly effective use of logic and facts,
hearings cannot create the conditions to ensure popular participation in the law-making process, but it does suggest that hearings alone do not suffice. Permitting public access to the input and feedback processes will likely only serve to improve legislative output if the lawmakers adopt a legislative theory that guides them in substituting reason informed by experience for interest group pressures or the lawmakers' own 'values.'

On the federal level, the US Administrative Procedure Act at least required notice and opportunity for interested persons to comment on proposed administrative regulations. These comments could provide information as well as interest groups' claims and demands. Apparently, administrative agencies generally did regard these comments as opportunities to learn about the facts from people intimately involved in the areas of concern.

An appropriate legislative theory and methodology should serve to guide empirical research (see supra n. XX). At committee hearings on bills, legislators may conduct a kind of empirical research by asking questions concerning facts required to falsify alternative hypotheses. Without an appropriate theory, however, their questions will at best reflect their intuitions as to how legislation may affect social change. As Keynes once remarked of economists (cite XX), a legislator without an explicit legislative theory remains in thrall to long dead political theorists -- a reality underscored by the Gouvin and Rubin studies (see n. XX supra).

APA state have state APAs. ASee, e.g., ...

cite XX. This article's underlying thesis suggests that the more consistently the rules explicitly required those agencies
The former German Democratic Republic adopted another system that seemed to hold some promise for ensuring adequate stakeholders' and others' inputs. A ministry must accompany every concept paper it sent to the Cabinet Committee on Legislation with a second paper describing the proposed drafting process: Who would serve on the drafting committee, what hearings they would hold, and where, and a recommended timetable. Since not every bill requires full popular participation, these procedures provided a flexible device for shaping the participation processes to match the bill's subject-matter. The political leadership, represented by the Cabinet Committee on Legislation, retained responsibility for the final decision about whom to consult. An investigation of how this system worked in practice might assist in assessing its potential advantages and disadvantages. Again, an important question remains: What explicit theory -- if any -- structured the rules as to the participants' presentation of facts to employ an adequate legislative theory to structure their analysis of the facts, the more likely they would focus their attention on evidence relevant to ensuring their regulations would really serve to overcome the causes of social problems. Research concerning the practice under these existing rules might offer a useful test of this proposition.


187 A bill designed to regulate the safety provisions of high tension electrical lines probably need not have the same processes for public participation as a new law concerning health care.
to ensure their relevance to overcoming problematic behaviors?

Whether officials receive popular inputs and feedbacks depends in large part upon their understanding of the legislative process. If they adhere to a theory of legislation which holds that legislation merely responds to interest group pressures, then popular participation will likely become meaningless; the powerful and privileged can always mount greater pressures on government officials than can those less well-endowed. Only if the lawmakers adopt a legislative theory that directs drafters to rest their bills on reason informed by experience can popular participation become much more than an attempt by the mass of the population to lick up the few crumbs that fall from the table. A theory that finally rests on experience -- on data -- says that whoever has better data holds trumps. That constitutes the necessary (if not sufficient) condition for meaningful popular participation.

CONCLUSION

All over the third world, populist elected governments seemed to have failed miserably to carry out their promises to improve the majority's quality of life. Why? As a minimum, this seems to disprove the utility of a definition that identifies 'democracy' with competitive elections. Elections seem likely to help improve the majority's lot only if the elected representatives have real,
not merely nominal power to make laws. In most countries, they do not; the executive has usurped the constitutional legislative power. To explain the frustration of populist dreams of people-oriented development required examining the not the law-enacting, but also the bill-creating processes that too often take place behind a thick curtain of bureaucratic secrecy.

The available evidence suggests three reasons why the bill-creating processes generally failed to produce bills capable of transforming institutions in favor of the mass: (1) the civil service had insufficient capacity to draft transformatory bills and too often adopted anti-populist ideologies; (2) forced to rely on the civil service, existing elitist institutions too often co-opted elected officials; and (3) exclusion from the bill-creation processes frustrated those groups in civil society who sought to win change. To resolve those difficulties requires a legislative theory to guide civil servants and elected officials in formulating and assessing legislation on the basis of reason informed by experience, coupled with popular participation in the bill-creating process. Alone, neither will serve. An adequate legislative theory can at most ensure that the bills drafted will likely induce the behavioral changes needed to transform institutions. Only active mass participation in providing the relevant facts and logic
in the context of an open, accountable bill-making process will likely help to ensure that those institutional changes will benefit the mass.

Democracy obviously does require competitive elections, but it requires more than that to ensure that government actually exercise state power on behalf of its popular constituencies. It requires processes that ensure popular inputs and feedbacks to government decision-making about bills, and a habit of mind of government that ensures that bills bottom themselves on reason informed by experience.