

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

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**A PROPOSAL TO INSTITUTIONALIZE  
A LEGISLATIVE DRAFTING PROGRAMME JOINTLY MANAGED BY  
UNIVERSITY OF WITSWATERSRAND SCHOOLS OF LAW AND  
PUBLIC AND DEVELOPMENT MANAGEMENT**

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Transformation: That word encapsulates South African and Third World dreams of development and democracy. Poverty and authoritarianism lie rooted in a country's institutions. Building development and democracy requires transforming those institutions. This Proposal aims to establish a Training Programme at Witswatersrand University in South Africa to strengthen South African and other third world governments' capacity to formulate and enact legislation to implement that essential transformation.

To transform institutions, governments must invoke the legal order<sup>1</sup> to produce new, transformatory laws that both prescribe institutional changes and ensure their own effective implementation. Only then can those governments create the conditions essential for good governance and the democratic rule of law: accountability, transparency, widespread public participation in on-going governmental decision-making. As third world experience everywhere reveals,<sup>2</sup> however, to draft transformatory laws, governments require appropriately-trained personnel: ministry officials who can conceptualize the translation of their policies into effectively implementable laws; legally-trained officials competent to work with those officials to prepare those laws in clear, technically precise language; and legislators with sufficient knowledge of the law's potential uses, as well as its limits, to assess and enact appropriately transformatory bills.

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<sup>1</sup> Broadly construed, the legal order here includes all forms of law and its implementation -- including not only state-promulgated rules (formally enacted national and provincial legislation, subsidiary legislation, departmental regulations, Cabinet memoranda, municipal ordinances, appellate court decisions, etc.) but also the institutions that enact them (Parliaments, Presidents, Cabinets, Ministers, Local Councils, military juntas, courts) but implementing agencies (courts, ministries, police, public corporations, 'quangos', even dogcatchers).

<sup>2</sup> See Ann Seidman, Robert B. Seidman and Thomas Waelde, **Making Development Work: Legislative Reform for Institutional Transformation and Good Governance**, Kluwer, forthcoming.

This year, to contribute to the necessary training, the University of the Witwatersrand's ('Wits') School of Law, with financial assistance from the Gauteng Province's<sup>3</sup> Department of Welfare, introduced two legislative drafting courses.<sup>4</sup> This Proposal envisages building on the foundation laid by those courses to establish a Wits Programme in legislative drafting for transformation and good governance. The School of Law and the Graduate School of Public Administration and Development Management ('P&DM') will jointly administer and teach the Programme.

The proposed Programme aims to help meet a widespread demand in South Africa, the SADCC countries and indeed all the Third World and transitional countries for new laws to transform institutions and strengthen good governance. Few of their governments have sufficient national capacity to do the job. Many must rely on international finance to import foreign lawyers to fill the gap. Most aid agencies, however, recognize that supplying foreign personnel, rather than assisting governments to build their own capacity, hinders attainment of the kind of national self-reliance essential for on-going development.

The participants in the proposed Wits Programme will consist primarily of public officials, government lawyers, and NGO personnel from South African and other African and third world countries. Selected Wits students -- including students from other countries in Africa and elsewhere -- may also attend. The Programme will equip these participants to draft the laws their countries need, and to work with their colleagues in their own countries to build their nations' drafting capacity. Over time, it aims to strengthen South-South ties among government officials, legally-trained personnel, and relevant training institutions in order to deepen and improve the existing legislative theory and methodology to foster increasingly effective institutional transformation.

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<sup>3</sup> The new Government of Gauteng Province, established under the 1994 Constitution in South Africa's rich industrial Transvaal region, has embarked on an ambitious programme to employ law to transform the inherited institutions of apartheid that persist in many aspects of provincial life.

<sup>4</sup> To teach the new courses, the School of Law recruited Professor Robert B. Seidman and Professor Ann Seidman, Co-Directors of the Boston University School of Law's Program on Legislative Drafting for Social Change; see Annex I for their curricula vitae, and Annex II for the six draft Welfare Department laws and research reports the Departmental officials produced during the course.

As John Stuart Mills long ago declared,

"There is hardly any kind of intellectual work which so much needs to be 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." <sup>5</sup>

The remainder of this Proposal first briefly reviews the South African and world-wide demand to build capacity to draft and assess legislation; second, describes the proposed Programme and justifies its location at Wits; and, finally, outlines the budget for the seed-money required to get it started.

## I.

### **THE DEMAND FOR BUILDING GOVERNMENTS' CAPACITY TO DRAFT AND ASSESS LEGISLATION**

This section of this Proposal describes (A) the world-wide demand for new legislation to ensure institutional transformation and good governance; (B) the importance of training, not only government officials, but also NGO personnel to participate effectively in the process of producing and assessing effective transformatory laws; (C) the world-wide dearth of appropriate training programmes; and (D) the growing demand for courses in legislative theory, methodology and drafting techniques -- the core of the proposed Wits Programme.

#### **A. THE DEMAND FOR TRANSFORMATORY LAWS THAT SIMULTANEOUSLY ENSURE GOOD GOVERNANCE**

Why the demand for improved use of law to facilitate transformation and good governance? Four decades into the development era, in large parts of the world, implacable socio-economic crises endanger orderly development processes and good governance. The persistent and widespread disarray affecting many countries' efforts to attain development and good governance reflects, at least in part, their newly-established governments' difficulties in formulating and enacting legislation designed to thwart those crises' disruptive impact.

Although endowed with rich material and potentially creative human resources, too many countries suffer resource misallocations that impoverish most

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<sup>5</sup> Quoted in Ernst Freund, "The Problem of Intelligent Legislation", ?? PROC. AM. POL. SCI. ASSOC. 69, 70 (19??)

of their peoples -- not only in South Africa, but throughout most of the third world. Those misallocations do not just happen. They result from political, economic and social institutions, many imposed by centuries of minority, mostly foreign, rule. As at least government rhetoric acknowledges everywhere, efforts to transform those inherited institutions must remain at the heart of the development process.

Institutional transformation means behavioural transformation. Institutions consist of repetitive patterns of behaviours.<sup>6</sup> Development requires the use of state power through law to induce appropriate changes in the behaviours -- the institutions -- that perpetuate poverty and oppression. Bitter experience teaches that without development, erupting popular resentment may destroy government; without good governance, kleptocrats may hijack development. Without sensible, non-arbitrary decisions, that is, decisions made pursuant to rules by participatory, transparent and accountable processes -- all central elements of the Rule of Law -- economic development stumbles. An appropriate drafting process must produce new laws that facilitate development and nurture good governance.

Governments wield state power through the legal order. No matter how clearly and powerfully a government states a policy, until translated into a rule backed by state power -- that is, as law<sup>7</sup> -- policy alone seldom induces either officials' or citizens' new behaviours; that is, it rarely induces transformation. To induce changed behaviours, a policy requires the legitimacy which only formally-enacted law can provide. Neither citizens nor officials owe obligations to Party or government policy pronouncements, but only to laws. As an essential step in law-making, the orderly change of institutions requires the translation of policy into well-drafted laws.

Nor can legislators, even the most politically astute and attuned to peoples' needs, simply vote for policy declarations and expect those declarations to implement themselves. Policy does not spark institutional change; at best, it sparks the drafting exercise. Law alone, however, does not 'cause' development. It does constitute the form into which government must translate its policies in order to ensure that its officials implement activities likely to induce the new behaviours that

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<sup>6</sup> Cf, Homans, George Casper. *THE NATURE OF SOCIAL SCIENCE*. N.Y.: Harcourt, Brace and World, 1967.

<sup>7</sup> See n. 1 above.

comprise institutional transformation. In that sense, law constitutes government's principal instrument for development and good governance.

Three decades ago, experts declared that mandate impossible. Good governance, they argued, requires closely cabined discretion; development demands unbounded governmental power to experiment -- which in turn requires unbounded discretion. Yet unbounded discretion breeds everything the Rule of Law promises to prevent: Corruption, abuse of power, arbitrary rule. Politics, these experts claimed, could have either the Rule of Law and good governance, or change and development, but not both.<sup>8</sup>

Today, almost 40 years of experience has persuaded the development community and many governments that that proposition errs. Successful democratic development requires transforming institutions to implement both development *and* governance. The legal order must underpin both. As a necessary (although not sufficient) condition, both require competently crafted laws. For that, governments need to translate usually vague transformatory policies into concrete, implementable legislation that not only prescribes but actually induces citizens and officials to behave in appropriate new ways consonant with good governance.

New, transformatory laws have lagged far behind governmental policies and 'visions'. A principal explanation lies in a widespread lack of capacity to design and write transformatory bills. Responsible officials in countries as different as China, South Africa and Sri Lanka now understand that they need competent drafters.<sup>9</sup> The Wits course itself came about through the initiative of Gauteng government officials with government financial support. Perhaps less well understood, the law-making process also requires legislators and organizations of civil society competent to assess bills and therefore empowered to participate meaningfully in law-making.

## **B. THE POTENTIAL ROLE OF COMMUNITY PARTICIPATION**

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<sup>8</sup> See Schaffer, B. B. *The Deadlock in Development Administration*. In Leys, Colin, ed. 1969. *POLITICS AND CHANGE IN DEVELOPING COUNTRIES: STUDIES IN THE THEORY AND PRACTICE OF DEVELOPMENT*. Cambridge: Cambridge Univ. P.. 1969 at p. 177.

<sup>9</sup> For South Africa, see letters attached; for China, see Ann Seidman, Robert B. Seidman, and Janice Payne, *Legislative Drafting for Market Reform - Some Lessons From China* (Macmillan, 1997); and for Sri Lanka, see Project Document, United Nations Development Programme (1998) for a Legislative Drafting Programme for Sri Lanka.

South African civil society's vital contribution to the struggle against apartheid underscores what many people everywhere have come to realize: Good governance requires community participation, not only in periodic elections, but in the on-going, day-to-day processes of government -- and no place more importantly than in law-making. The informed, effective participation of non-government organizations (NGOs) in mobilizing and providing inputs into laws' formulation, and feedback as to the consequences of elected and administrative officials' decisions as to laws' implementation, proves essential to ensuring that those laws will likely achieve transformation's goals.

This implies that NGO personnel, too -- whether or not legally-trained -- must acquire more than the skills necessary to assess laws politicians propose. They must learn to help their members to participate in the process of conceptualizing and translating their demands into effectively implementable laws. Whether at the local, provincial, or national level, they must acquire the necessary theoretical and methodological tools to participate in drafting teams to use reason informed by experience to prepare and argue persuasively for transformatory bills likely to meet their members' needs.

That South Africa realizes the necessity for community inputs into the law-making process evidences itself in the extensive processes of consultation now institutionalized in formulating governmental Green and White Papers. Today in South Africa, however, at the critical stage of translating White Papers' generalities into the detailed rules of law that actually determine the policy's content, that democratic process tends to abort. Not only in South Africa, but everywhere, the bills that emerge from the too-often undisclosed drafting process find expression in arcane phrases and tangled language that neither ordinary folk nor most legislators can barely construe, let alone understand. As a result, the world around, most legislators too often do not deliberate, but merely vote at their Party's beck and call.

Despite the need to improve capacity, not only to draft, but also to assess transformatory legislation, however, as the next section shows, almost nowhere in the world can country nationals acquire the essential training.

### **C. THE ABSENCE OF APPROPRIATE TRAINING FOR DRAFTERS**

Development and good governance require that ministerial and elected officials, drafters in the central drafting office, and civil society's leaders acquire

the theory and skills required to translate policy into transformatory bills. Those charged with the drafting task -- ministerial or departmental officials, lawyers in the central drafting office, and, increasingly, NGO personnel -- need two sorts of skills. First, they need the capacity to devise laws that will induce the institutional changes required for both transformation and good governance. For that, they need a working knowledge of legislative theory and methodology. Second, they need the craft skills involved in drafting understandable, unambiguous, legally correct, and elegantly-written laws -- that is, legislative drafting techniques. Yet almost no place in the third world can drafters acquire the first, and almost nowhere in the world can they learn the second.

A tiny handful of legislative drafting courses in the English-speaking world offer instruction in drafting techniques. In the United States, Tulane University (New Orleans) and the International Law Institute (Washington, D.C.) offer short-term courses for third world government drafters. So does the International Development Law Centre in Rome. The British Commonwealth Secretariat offers a distance training course and, intermittently, a six-month course in Barbados. In the past, it also occasionally mounted shorter but essentially similar courses in Ghana and in Zimbabwe. The University of London apparently offers higher degrees in legislative drafting, but no short-term courses. All these courses, however, focus primarily on teaching government drafters the forms and techniques of writing out proposed laws' provisions. None offer drafters a legislative theory or methodology for conceptualizing -- let alone undertaking -- the process of translating transformatory policies into effectively implementable laws.<sup>10</sup>

As far as is known, Boston University (BU)'s School of Law alone offers drafters an opportunity to learn how to translate governments' developmental transformation policies into effective legislation. Its short-term (four month) course not only equips participants with drafting techniques, but also the legislative theory and methodology they need to bridge the gap between governments' policy

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<sup>10</sup> A widespread myth, rooted in 19th Century British history, underpins legislative drafting tradition throughout the English speaking world: Ministry personnel should formulate policies, and leave it to drafters to translate their details into the technical language of law. This myth ignores the reality: The law's details determines the policies' details and how officials will likely -- if at all -- implement them. (R.B.Seidman, "Parliamentary Drafting in SubSaharan Africa" *Journal of Modern African Studies*; see also the Introduction of the **Manual** used in the Wits drafting course, Annex III.)

statements and implementable transformatory legislation.<sup>11</sup> The Wits Programme here proposed aims to transplant the four month BU drafting programme to Wits, establishing the only training programme in the English-speaking world centred not only on drafting techniques, but also on legislative theory and methodology.

What holds true world wide of course holds true in the Southern Hemisphere. Except for the two Wits School of Law drafting courses this term and the occasional Commonwealth Secretariat course, neither in South Africa nor anywhere else in the third world do law schools offer instruction even in conventional legislative drafting techniques. None offer courses in legislative theory and methodology.<sup>12</sup> The relatively few English-speaking third world drafters (until very recently in South Africa, none from historically disadvantaged groups) mainly learn legislative techniques on the job. A few learn them in Commonwealth Secretariat courses on drafting techniques. None have opportunity to study how to bridge the gap between policy and law. Those who do study at one of the few existing courses abroad must travel huge distances at considerable expense to their sponsors.

That nowhere do law schools teach legislative theory and methodology to facilitate transformation probably reflects history. Established, western polities saw no need to use law to transform their institutions. They primarily viewed drafting as the task of government officials seeking to employ laws to make mere incremental changes. Most law schools boasted that they taught their students to 'think like a lawyer': Taking existing laws as given, to represent their clients in court, and to advise them about matters conducted in the court's shadow. Traditionally, public administration schools primarily aimed to teach government officials -- not members of civil society -- how to formulate policy, not how to translate it into effective legislation.

Without an adequate theory of the role of law in effectuating social change, drafters everywhere tend to fall back on one of three inappropriate drafting

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<sup>11</sup> In addition, BU's School of Law and Graduate Department of Political Science have recently introduced a Masters and a Doctoral programme for those wishing to deepen their understanding of legislative theory and methodology as the key to further enhancing the use of law both for transformation and good governance.

<sup>12</sup> The Seidmans briefly offered a six month course for drafters from the SADCC countries in Zimbabwe in the early '80s, but it ended with their departure in 1983.

practices. First, driven by the scarcity of well-trained drafters, government departments at great expense out-source proposed legislation to local practitioners or to foreign consultants. Too often, these consultants have no particular expertise in legislative drafting. Most frequently, they merely copy some other countries' laws. The resulting new laws generally fit the host country's unique realities only by accident. They seldom transform the institutionalized behaviours that perpetuate inherited power inequities and mass poverty.

Second, too often drafters write purportedly transformatory bills that comprise little more than statements of policy, written in legal form. To ensure conformity, they then impose heavy criminal sanctions on those who do not obey. Criminalization, however, seldom -- if ever -- effectively engenders institutional transformation.

Third, drafters sometimes merely collect competing interest groups' views as to what proposed laws should contain. The drafters then write what they deem an appropriate compromise. That seldom represents anybody's idea of adequate law, and mainly reflected the bargaining groups' relative power. The results tend to resemble the legendary committee-designed horse -- that is, a camel.

Laws drafted in any of these three ways seldom achieved either good governance or development. In both South Africa and world-wide, experience underscores the need for improved legislative drafting training.

#### **D. THE GROWING DEMAND FOR TRANSFORMATORY DRAFTING SKILLS**

World-wide concern with institutional transformation to attain both development and good governance has generated demands for building drafters' capacity to bridge the gap between transformatory policies and effectively implementable legislation. As evidenced by the letters attached to this proposal, that included a growing recognition of the need for training in legislative theory and methodology, as well as techniques. Building on the foundations laid by the two law courses introduced at Wits this year,<sup>13</sup> the Wits Programme proposes to

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<sup>13</sup> See Annex II for the syllabi for the two courses that comprise this initial Wits legislative drafting programme, and the list of participants as well as the bills they have undertaken to draft.

help to meet that demand.

The participants in the two courses included a number of university students and several faculty members, together with provincial and national governmental officials responsible for preparing bills: Two dozen officials from the Gauteng line departments and the Department of Legal Services, the Leader and four members of the Gauteng Legislature, several municipal officials, and a number of national ones. In addition to learning legislative drafting theory and techniques, the government officials all undertook assignments to produce bills accompanied by research reports -- 18 in all<sup>14</sup> -- designed to meet their departments' priority legislative needs. In the course of learning the theory and methodology, participating Wits law students also contributed to the preparation of these bills and research reports.

At the outset, the two courses received little publicity. Nevertheless, they attracted wide attention through word-of-mouth. As late as half way through the term additional officials and NGO representatives requested permission to join, bringing with them more bills they wished to draft. The Legal Resources Centre and the Financial and Fiscal Commission invited the Seidmans to teach workshops on translating policies into implementable transformatory legislation. Aid agencies asked them to put on two day workshops in several provinces to equip legislators with the theory and methodology required to assess transformatory bills.

Recent questions in South Africa's national Parliament also highlighted the need of the provinces (whose small legislative output we earlier noted) for a Programme like the one here proposed. One identified cause lay in the lack of provincial staff qualified to draft priority bills.<sup>15</sup>

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<sup>14</sup> The bills addressed a wide range of social problems: Restructuring Gauteng's Department of Welfare (see Annex II) and Department of Health to serve the needs of the Province's historically-disadvantaged majority; establishing a system of community tribunals to resolve minor community disputes; reducing the corrupting influence of officials' potentially conflicting interests; strengthening the provincial legislators' oversight of subsidiary legislation; providing credit to foster small enterprise; and strengthening municipal governments' capacity to promote employment.

<sup>15</sup> "Efficiency of provincial governments is questioned," Business Day, March 24, 1998, p. 2.

The demand for more legislative drafting training evidenced itself in several ways.

- + To lessen ethnic conflict, both Sri Lanka in 1987, and South Africa in 1994 introduced constitutional provisions purporting to devolve extensive power upon provincial governments. In both countries, 'housekeeping' laws like the budget aside, these countries' provinces per year have enacted on the average of only *two* laws.
- + Gauteng Province in South Africa has retained private lawyers to draft 85% of its bills, without spectacular success; even the national government has encountered difficulties in trying to find qualified outside drafters to prepare its proposed new legislation.
- + Every year since the late 1980s, when first the World Bank and later other international agencies began to emphasize the importance of law in transforming societies, the number of governments adopting programmes to draft laws for transitional and developing polities has multiplied almost exponentially. These ranged from those in China (where the United Nations Development Programme <UNDP> and then the Asian Development and World banks introduced multi-million dollar programmes to draft new laws to foster the Reform and Open Policy) to Lao P.D.R. (where the UNDP and the World Bank cooperated to finance development of the Lao legal framework) to Indonesia (where USAID has embarked upon a new phase of the ELIPS programme which spent some \$15 million to draft 17 new laws), and to all the transitional economies of Eastern Europe (where the World Bank, UNDP, USAID, French and Swedish, and German donor agencies have actively financed drafting projects). The UNDP African Bureau proposes to allocate some \$500 million to fostering good governance programmes throughout Africa.<sup>16</sup> That most of these programmes depended almost entirely on foreign consultants

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<sup>16</sup> After the Seidmans conducted a workshop for the New York UNDP Africa Bureau staff, the Bureau leadership indicated an interest in sending officials from other African countries to a Programme on legislative theory, methodology and techniques, but indicated their preference for sending them to one located in an African country. John Ohiorhenuan, the former Director of the UNDP African good governance programme -- now head of the UNDP South-South Bureau -- indicated some interest in helping to find funds to support a South-based Centre of the kind proposed for Wits.

testified to the need for training centres to build national drafting capacity.

- + The experience of the BU Program on Legislative Drafting for Democratic Social Change also underscores the need to expand legislative drafting training. The Program originated in a five-year UNDP project, for which the Seidmans served as Chief Technical Assistants<sup>17</sup> that helped Chinese drafters to prepare 22 priority bills to implement the Reforms and Open Policy. It sent some 50 Chinese drafters to BU for an intensive four-month programme. At BU, each pair of drafters drafted a priority bill and an accompanying research report. In that context, they not only strengthened their capacity to draft technically competent bills to transform policy into implementable legislation; ultimately, they actually drafted the bills and accompanying research reports.<sup>18</sup> On returning to China, the Program participants also helped to equip other officials in their ministries with legislative theory and methodology that enabled them to draft additional bills. Building on that experience, the BU Program also trained Lao and Mozambican drafters, and expects to play host to 12 Sri Lankan drafters in the Fall Semester, 1998.<sup>19</sup>
  
- + A year ago the BU Program sent out 1,500 copies of a brochure about the existing Boston University (BU) Program to international agencies

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<sup>17</sup> It also drew on the theory and skills developed by the Seidmans over some 30 years of work in law and development, 11 of them while teaching and doing research in African universities; and materials and experience gained by R.B. Seidman in teaching a legislative drafting course for BU students who drafted research reports and bills, many of which the Massachusetts State Legislature has enacted.

<sup>18</sup> Of the original 22 bills, the Project helped draft 21 (after research, the Chinese authorities decided not to press for the remaining two. The Chinese added three bills to the Project, concerning unemployment insurance, industrial accident, and health care. The Chinese have not drafted all three.

<sup>19</sup> Following the Seidmans' Mission, funded by UNDP, to help the Sri Lankan government formulate a strategy to improve provincial drafting capacity, the UNDP in Sri Lanka agreed to send a dozen drafters to BU, including Central Drafting Office officials, provincial ministerial personnel, and university law school lecturers (who, on their return, will mount drafting courses in their university). In principle, if the Wits Programme gets underway in time, the UNDP has agreed to send another seven officials to participate in it during the first term of 1999.

and national drafting offices. As an indicator of the growing world-wide demand, the Program received many enquiries and applications for admission, not only from individual drafters, but also from attorneys-general and Chief Parliamentary Draftsmen throughout the world -- from Nigeria, Tanzania, Zambia, Zimbabwe, Namibia, Brazil, Papua-New Guinea, Vietnam, Khazikstan, and elsewhere.<sup>20</sup>

- + The growing number of academics engaged in legislative drafting consultancies in third world and transitional countries, has fostered an increasing academic interest. Macmillan recently published not only the Seidmans' 1994 book, *State and Law in the Development Process*, but also an edited book on the Chinese project.<sup>21</sup> A leading English law publisher, Kluwer, has agreed to publish another edited book<sup>22</sup> on legislative theory and methodology, and also to initiate an academic journal focussing on that subject.

All this suggests a widespread and growing recognition of the need for appropriate legislative drafting training programmes. These must teach concerned government officials to understand how to conceptualize, assess and implement the process of translating transformatory policies into effective law. Potentially, the proposed Wits Programme could play a central role in meeting that demand.

## II. THE PROPOSED WITS PROGRAM

Initially, the Wits Programme will build on the BU Program on Legislative Drafting for Democratic Social Change. As South Africans increasingly take over the teaching and administration of the Wits Programme, and more third world drafters participate, however, the Wits Programme will inevitably grow and change.

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<sup>20</sup> Almost none of the many individuals, who expressed interest in coming, could find sponsors to pay BU's high tuition, room and board (\$18,000 per visiting scholar, plus travel costs). To date, most of the BU Program's participants have come from countries where the Seidmans have worked with donor agencies to set up drafting projects.

<sup>21</sup> A. Seidman, R.B. Seidman, and J. Payne, eds. Legislative Drafting for Market Reform - Some Lessons From China (1997)

<sup>22</sup> Edited by the Seidmans together with Professor Thomas Waelde, Director, the Centre for Petroleum and Mining Law, Dundee University, and containing contributions, *inter alia*, from the General Counsel of the Asian Development Bank, senior lawyers from the World Bank, and leading U.S., Polish, German and British academics.

This section first outlines the assumptions that underpin the current BU Program and, at least initially, will inform the Wits Programme. It then describes the proposed Wits Programme's substantive content. Finally, it explains why Wits constitutes a particularly appropriate venue for training third world legislative drafters.

### A. THE UNDERLYING ASSUMPTIONS

The Wits Program will centre on five basic principles:

First, as its ruling perspective, the Wits Program will focus on building capacity to produce legislation that simultaneously facilitates institutional transformation for social justice and good governance (that is, the Rule of Law).

Second, the Wits Programme will assume that in translating government policies into law, drafters inevitably participate, not only in determining proposed legislation's form, but also in detailing its content. For that they need training in both drafting techniques and legislative theory and methodology.

Third, as its intellectual foundation, the Wits Programme will underscore the importance of grounding transformatory legislation on the use of reason informed by experience. To accomplish that, it will require drafters to accompany major bills with full-dress research reports that explicate the bills' underlying logic and evidence. Only then can political leaders, legislators, stakeholders and the public-at-large assess whether their facts and reasoning will likely ensure the bills' quality as instruments for desired social change.

Fourth, far from a mere academic exercise, the Wits Programme will aim primarily at people who will either do or teach drafting theory and skills -- frequently both. That they can only learn, not through the typical lectures and exams or even seminar debates of academia, but by engaging in the actual process. Just as, to learn to ride a bicycle, the trainee must actually get on the bicycle, drafters can only learn to draft by actually doing drafting. The Wits Programme will require each participant to bring to Wits an actual priority transformatory bill to draft. Once a day for two hours all the participants will meet in workshop-like seminars -- to study different aspects of the drafting process by helping each other to improve their bills and research reports. At every point in the four-months course, the participants will learn, not through lectures, but through *doing* drafting.

The Wits Programme will, as an important objective, seek to ensure that its participants produce competent, effective priority legislation for their countries.

Finally, skills transfer will lie at the heart of the Wits Programme's mission. It will aim to ensure that most participants will return home, not only to draft new laws themselves, but also to help train other drafters.<sup>23</sup> For that reason, it will include a weekly workshop in how to teach legislative drafting theory, methodology and techniques to other drafters by involving them in actually drafting new legislation.

To meet the requirements of South African and South-South realities, the proposed Wits Programme will flexibly adapt and develop these underlying principles.

## B. THE CONTENT OF THE WITS PROGRAMME

The Wits Programme will teach legislative theory, methodology and the craft skills to South African and overseas personnel engaged in designing and drafting transformatory legislation;<sup>24</sup> legislators who must assess whether complex draft bills will likely attain their stated objectives;<sup>25</sup> and regular Wits students of law

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<sup>23</sup> Over the years, the BU Program participants included two persons specifically designated to lead a proposed centre for legislative drafting in the Bureau of legislative Affairs of the State Council, as well as a Professor at the Faculty of law of the University of Political Science and law, and a Professor at the Faculty of Law, Fudan University; the former Associate Dean of the Faculty of law and Eduardo Mondlane University, Mozambique; and the Associate Dean of the Vientiane Law School in the Lao P. D. R. The Sri Lankan delegation that is attending BU in the 1998 Fall Semester includes two academics, one from the University in Colombo's School of Law, and one from the Sri Lankan Institute of Development Administration (SLIDA).

<sup>24</sup> These will include both legally- and non-legally trained government officials as well as central drafting office lawyers; see section I-B above.

<sup>25</sup> Simply by reading the texts of complex bills on which they must vote, legislators -- indeed, no one -- can determine whether they will achieve their stated goals. To prescribe specified behaviours anticipated to resolve social problems, bills comprise carefully crafted ordering of substantive sections written in precise language designed to facilitate interpretation by those who must implement them. On their face, however, bills never provide any explanation of the complicated logic and essential evidence upon which drafters supposedly ground them. For that reason, the Wits Programme will require drafters to prepare research reports to

and public administration who, on graduation, may have the opportunity to fill either of these roles. The Wits Programme faculty will also engage in research designed to strengthen legislative theory and methodology, and improve the law-making process, legislative drafting techniques, and the use of social science research methodologies as they relate to legislative drafting.

At the outset, the proposed Wits Programme will include two kinds of courses. One will comprise a certificated four month intensive, residential programme for South African and foreign drafters, most of whom will return to their home governments or universities to initiate further training in legislative drafting while producing their countries' much-needed new legislation. That programme will include five seminars. As part of their regular course work, Wits law and public administration students may receive course credit for their participation in the four month components' seminars.

The second component of the Wits Programme's curriculum will consist of shorter or part-time workshops -- ranging in length from two days to four weeks - - for officials and legislators from national, provincial and local South African governments, and perhaps from neighbouring countries.

1. **The four-months, full-time residential course.** This course will primarily cater to full-time participants who plan to return to their own governmental services, local universities and training institutions to draft new legislation and to train other drafters. Each participant will bring to the Wits Programme a proposal for a specific priority bill. As the core of their work in the Programme's learning-by-doing process, each will draft that bill and an accompanying research report designed to justify the bill's contents.

Most participants will attend five weekly seminars, tailored to build the specific skills they need to draft implementable transformatory bills, and to teach those skills:

\*Seminar in Law and Development. This will equip the participants to use

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accompany their bills, thus providing the information legislators and other need to assess them. As part of the Wits Programme, short courses will provide legislators an opportunity to learn the theory and methodology that lie behind those research reports to enable them to determine whether, in fact, they adequately justify the bills.

legislative theory as a guide for translating policy into effectively implementable legislation consonant with good governance;<sup>26</sup>

\*Seminar in Legislative Drafting Techniques. To learn the technical aspects of drafting bills, in this seminar the participants will write carefully-structured research reports and prepare draft bills;<sup>27</sup>

\*Seminar in Methodologies of Social Science Research. To develop capacity to ground bills on reason informed by experience, in this seminar the participants will learn to make competent assessments of and utilize available social science research as evidence to substantiate the explanations that underpin their research reports;

\*Seminar on Methodologies for Non-formal Education. This seminar will equip the participants to serve as trainers to teach legislative theory and techniques, not only to students in other South African institutions, but also to governmental officials typically far removed from academic pursuits;

\*Tutorials in Areas of Foreign Law and Experience relevant to their particular priority bills. These weekly tutorials will enable participants to confer one-on-one with professors who will supervise their research and help them review other countries' laws and experience in areas relevant to the participants' own bills.

## **2. Part-time and shorter courses for South and Southern African drafters.**

As indicated above, a strong demand exists in South and Southern Africa for on-the job training for drafters. To meet this demand, the proposed Wits Programme faculty will mount part-time courses for officials (like the two mounted

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<sup>26</sup> At BU, and in the two courses held in 1998 at Wits, regular university law students participated together with government officials. The resulting cross-fertilization proved useful to both. Often, the students conducted research that provided valuable information about other countries' legislation and experience in problem areas similar to those addressed by the officials' bills. In turn, the students learned a lot about the use of theory and methodology to resolve complex real-life difficulties through law.

<sup>27</sup> It is anticipated that qualified Wits law and public administration students may elect to participate in this course for credit as they do in the BU course that drafts bills for the Massachusetts legislature (see note 26 above).

this semester at the School of Law).<sup>28</sup>

**3. Other courses.** As part of its on-going mission, the proposed Wits Programme faculty will service additional demands for capacity building for legislative drafting and for assessing bills. Given the enormous diversity of country demands, they will tailor new offerings to the drafting needs of requesting government units and legislatures.

### C. WHY WITS?

For five reasons, Wits constitutes an appropriate venue for the proposed Programme. In no particular order, these include: its proposed mission to bridge the perceived gap between academia and its social surround; the depth of its academic resources; its location; its existing infrastructure for mounting the four month course and shorter workshops; and, compared with BU, its relatively low cost.

**1. Serving the community.** In his inaugural address, Wits's new Vice Chancellor, Professor Colin Bundy, emphasized that the University should respond affirmatively to demands that the academy become more closely linked to the society that nourishes it. In tomorrow's university, he forecast, "curricula and research agenda will be directed by priorities established in the broader society." He concluded that Wits should be "deeply involved in the social, political and economic restructuring of our society' and that it was superbly located to play an active and leading role in Africa."<sup>29</sup> In accord with the principles underlying its establishment, the proposed Wits Programme should make an important contribution to bridging the academia-society gap.

**2. Academic capacity.** This proposal anticipates that the Wits Programme will become self-sufficient not later than the end of three years.<sup>30</sup> From the

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<sup>28</sup> On request in the past, the Seidmans have conducted several two day to three week courses elsewhere in South Africa, both for drafters and legislators.

<sup>29</sup> WITS REPORTER, 6 April 1998, p. 1.

<sup>30</sup> For the next three years, that Program's co-directors (See Annex I for the Seidmans' curricula vitae) have agreed to serve in the proposed Wits Programme as Visiting Professors.

outset, many Wits Law School faculty members -- several of whom already have served as consultants in drafting legislation for the national and provincial governments -- have demonstrated enthusiasm for the Programme. Seven faculty members participated in various aspects of the two pilot courses introduced in 1998.

Some Wits faculty have indicated an interest in undertaking the BU a Ph.D. programme in legislative drafting. In a relatively short time, therefore, the Programme will have sufficient local staff to teach it without external visitors or consultants.<sup>31</sup>

Concerned with problems of public policy formulation, P&DM's staff has long understood that public policy formulation must take into account the processes by which policy becomes legislation, and the necessity of teaching its students about that process. It has already employed a law teacher to initiate courses for that purpose. With her assistance, the proposed Programme will fit comfortably within P&DM's mission. P&DM will also send a faculty member to the fall 1998 BU Program as part of the Programme's foundational teaching staff.

Together, the Law School and P&DM, as well as the larger Wits community, boast a world-class faculty. Among its members, or in university and research institutions in the Johannesburg area, the Programme will readily find supervisors with substantive expertise to supervise participants in reading in applicable foreign law and experience and to assist them in the drafting projects they bring to the Programme.

3. **Location.** Many writers have underscored the desirability of South-South cooperation.<sup>32</sup> A Programme at Wits obviously meets that criterion. Moreover, Wits exists in the heart of a large metropolitan center. That will facilitate finding solutions to problems of housing and general living for visiting participants from other provinces and countries.

4. **Infrastructure.** The Wits Graduate School of Public and Development Management (P&DM) has a long history of conducting relatively short term programmes for officials and others. It has a strong organization, fully capable of handling the proposed Programme's administrative and housekeeping aspects,

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<sup>31</sup> This does not obviate the potential benefits of inviting guest lecturers from time to time to enrich the Programme's offerings, especially relating to other countries' laws and experiences relating to specific priority issues.

<sup>32</sup> See footnote 16, above.