

Proposal for creating an International Legislative Policy and Drafting Program

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Boston University

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INTERNATIONAL LEGISLATIVE POLICY AND DRAFTING PROGRAM

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September 7, 1994

**PROPOSAL FOR CREATING AN
INTERNATIONAL LEGISLATIVE POLICY AND DRAFTING PROGRAM**

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EXECUTIVE SUMMARY

Established under BU Law School's existing International Program Office, the proposed International Legislative Drafting Program would take advantage of the Law School's unique legislative drafting capacity to fill a rapidly expanding international need. As the words 'policy' and 'drafting' in its title suggest, in addition to teaching the linguistic and similar techniques that a drafter needs to know, the proposed Program would focus on the relationship between well-drafted legislation and the implementation of appropriate development policies. It would teach the theory and methodology required to enable government personnel (primarily but not exclusively lawyers) to translate policies into legislative programs. The Program would contribute in several respects to the Law School program by:

- 1) strengthening the Law School's international programs;
- 2) opening new opportunities for BU law professors for first-hand contact with the drafters' home-countries' laws and experiences in their fields of specialization;
- 3) broadening the experience and international contacts of BU law students by enabling them to work closely with other countries' drafters in studying comparative law and the theory and methodology of legislative drafting;
- 4) providing an immediate FTE increase of students enrolled in the law school as part of the International Program's intake; and
- 5) potentially increasing the Law School's regular budget.

Several unsolicited requests to BU's faculty for assistance testify to the need to train legislative drafters capable of translating policies into law as the basis of the democratic Rule of Law. The UNDP's China office has assessed as its most successful the program under which BU law school faculty members have trained some 40 drafters in legislative drafting a theory and methodology while drafting 22 priority economic laws (See Appendix I for draft article, Drafting Legislation for Development: Lessons from a Chinese Project, for description of the project). An opportunistic survey of almost 100 lawyers world-wide has indicated that no other law school has the capacity for as successfully

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fulfilling the growing international demand for legislative drafting training.

Over time, establishment of an LLM program in Legislative Policy and Drafting would fill an on-going need for senior drafting personnel and third world university teaching staff, as well as ensure that BU's Law School remained at the cutting edge of developing international legislative drafting theory and methodology to facilitate the maintenance and growth of a democratic Rule of Law.

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INTRODUCTION

Today, two and a half years after the initiation of the United Nations Development Programme (UNDP)/Bureau of Legislative Affairs (BLA) program in China¹, the Boston University Law School's international legislative drafting program has reached a new stage. It seems very likely that UNDP/China will expand the program to encompass three major new areas of legislation. In addition, we have received a number of other enquiries about the possibility of assisting in developing legislative drafting capacity. This raises a question, whether the Law School should establish a more formal program on a permanent basis, with an office and a more organized and formal administrative structure. This proposal considers, first, the existing situation and the demand for training drafters; second, BU's comparative advantage in teaching drafting; third, the constraints on enlarging the program as it presently operates; fourth, a proposal for taking advantage of the opportunities offered to expand and institutionalize the program; and, last, the costs and benefits of implementing that proposal.

I. THE DEMAND FOR A LEGISLATIVE POLICY AND DRAFTING PROGRAM

World-wide, today, a shortage of adequately trained drafters exists. This section explores the extent of that shortage and the reasons for it. It concludes that a strong market exists for training in legislative drafting.

A. THE DEMAND

¹. Entitled "TO DRAFT 22 PRIORITY LAWS AND REGULATIONS AND STRENGTHEN THE CAPACITY OF THE BUREAU OF LEGISLATIVE AFFAIRS IN THE 1990s," sponsored by the United Nations Development Program together with the Bureau of Legislative Affairs of the State Council (the equivalent of the United States Cabinet).

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1. The demand for aid in drafting. World-wide, an unprecedented demand exists for well-trained legislative drafters capable of helping to create the legal framework for a democratic rule of law. The indicators of this demand include the number of foreign consultants sent overseas actually to draft laws for third world countries and for the former socialist states; the interest of the Chinese authorities in enlarging the scope of the BU China program; and in the interest expressed by other government agencies of other countries in BU's drafting program.

a. The demand for foreign consultants in drafting. In the past five years or so, the extent of foreign involvement in drafting the laws of other countries has risen exponentially. USAID has an extensive program for drafting laws of Western Europe, mainly relying upon the ABA, which farms out draft proposals to US practitioners for review. The Asia Foundation has sent numerous US consultants to draft laws for Cambodia, Thailand and elsewhere. The number of American law professors who have advised Eastern European and Asian states on laws seems legion. The University of Houston had an extensive program for drafting Russia's Petroleum Code. At its forthcoming annual meeting, the Law and Economics Society will include a panel on law and development in Latin America .

All this activity suggests the felt insufficiency of third world and Eastern European drafters to meet their own drafting needs. As to that, BU's own experience bears retelling. We discuss, here, first our experience with the China Project and the Chinese authorities' interest in expanding that project, and, second, the new proposals that are in contemplation.

b. The interest of the Chinese authorities in increasing the scope of the UNDP/BLA China program.² The UNDP/BLA program has completed its second year. That program has three objectives: (1) to draft 22 priority laws, specified in the current Chinese Five Year Plan; (2) to use the occasion of drafting these laws to train Chinese drafters both in technical skills, and in an analytic theory appropriate for transforming often vague statements of political policy into implementable legislation; and (3) in the process, to teach them not only the foreign law and experience relating to their bill's subject-matter, but also to teach them how the drafting process can benefit from foreign law -- that is, how they may avoid the dangers of either blindly copying law, or ignoring other countries' experience.

² We will leave a few copies of the Project Document in the 10th Floor Lounge; it seems too bulky to warrant adding to this proposal.

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Financed by United Nations Development Programme (UNDP), in the 1992 and 1993 fall semesters, some 32 Chinese participated in a legislative drafting training program in the Law School of Boston University; at least ten more, possibly closer to twenty, will participate in the fall, 1994, program. At BU, the visiting Chinese drafters participated in a program that consisted of the following elements:

- (1) The Law and Development Seminar that we conducted which this year included 20 JD students who met in two sections with the Chinese drafters. That seminar teaches the theory and methodology of legislation that underpins the entire Chinese project. Each BU student wrote a paper explicating the law and experience of some country other than China in connection with one of the bills that the Chinese drafters had under consideration; copies of their papers have been sent to China for the use of the Chinese drafters. As indicated by the comments they made in their evaluations (see Appendix III), the BU students, too, found the seminar interesting and useful.
- (2) A weekly seminar in the techniques of legislative drafting taught by Bob Seidman designed especially to meet the Chinese drafters' requirements.
- (3) A weekly workshop we conducted in which the Chinese drafters systematically critiqued each other's draft bills and draft memoranda of law. Experience in the China project, as well as in the BU Legislative Services program, has proven that critiques of this sort constitute an excellent method of teaching legislative theory and methodology.
- (4) A few of the Chinese audited courses in the Law School related to the subjects of their bills. Several attended the critique sessions in Bob Seidman's Legislative Services program.
- (5) Working in teams of two, under the supervision of a BU law professor (in two cases, from the BU School of Education and from the University of Massachusetts-Boston) they read intensively in the comparative law and experience in their respective fields.³

³ The Boston University Law School professors who supervised the Chinese trainees included (the title in brackets indicates the trainees' particular bills):

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- (6) Under the supervision of their major professor and ourselves, each team prepared a memorandum of law and a draft bill. The memorandum provided the explanations and evidence necessary to justify their proposed bills. These memoranda incorporated the information relating to the relevant foreign law and experience that they obtained in the course of their reading.⁴

Prof. Tomar Frankel (banks; stock exchanges). Prof. Frankel also served as a consultant for 3 weeks in the 1992 summer workshop in Beijing.

Prof. Joe Brodley, (fair competition). Prof. Brodley, too, served as a consultant for 3 weeks in the 1992 summer workshop in Beijing.

Prof. Dan Partan (foreign trade);

Prof. Stephen Marks (group enterprise; liquidation of foreign enterprises);

Prof. Michael Baram (nature reserves; underground water utilization);

Prof. Mark Pettit (consumer protection).

Prof. Robert B. Seidman (foreign investments in mining; administrative regulations; legislative drafting regulations);

Prof. Ann Seidman (agricultural investment; agricultural extension education; macro-economic planning);

Professors from outside the Law School have also supervised Chinese trainees' readings in foreign law and experience: Prof. Charles Glenn, School of Education (education law), and Prof. Morton Myers, McCormack Institute, University of Massachusetts-Boston (budget law).

⁴ In the summer of 1992, Professors Frankel and Brodley went to Beijing as consultants. Professor Marks, Pettit, Foote, W. Miller, Park and Barram could have gone to Beijing in the past as

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The program has made attained significant success in achieving its objectives. It has helped to break the log jam that delayed the passage of many of China's priority bills for ten years and sometimes even longer. Already, China has already enacted several of the bills, including the agricultural technology extension bill; the nature reserves bill; the consumer protection bill; and the fair competition bill.⁵ The banking, budget, education, planning, securities, foreign trade, and liquidation of foreign-owned enterprises, mining bills and others will likely receive legislative approval before the end of this year.

The UNDP/BLA program has received favorable reviews from, the Chinese participants and from UNDP. Initially it had a scheduled five year term, during the first three of which some 40 trainers would come to BU. The participants' evaluations from the first two years proved generally positive (see Appendix IV). The UNDP/ Chinese government annual evaluations for 1992 and 1992 have been extremely favorable. The UNDP deputy China regional director stated at the March, 1994 evaluation that this program was the most successful of all their programs (their five-year budget amounts to \$415,000,000). That the overall program has had an impact on legislative drafting in China is indicated by the gradual institutionalization of the general theory that underpins it. Prime Minister Li Peng gave a speech in late 1993 at a conference on law generally adopting that theory; BLA (China's principal drafting agency) will likely shortly amend its regulations to require all bills to come accompanied by a memorandum of law written pursuant to that theory; BLA has received the China UNDP office's support for its plans to establish a Legislative Research and Drafting Center to teach

consultants for the summer program, but were unable to fit it into their schedules.

⁵ In addition to the four month BU Law School program for the 40 Chinese trainers, the UNDP/BLA project included two other components:

- 1) three one month summer workshops in Beijing for all members of the drafting teams for all the bills (in all, about 60 Chinese drafters each summer) in which, as Chief Technical Advisors to the project, we taught legislative drafting theory and methodology, and foreign experts in relevant fields of law served as resource persons; and
- 2) two to three week study tours to other countries by the drafting team members who did not participate in the BU training program.

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that theory to the thousands of drafters China will need to draft the national, provincial and local laws and regulations that will make possible the Rule of Law. In August, 1994, the Secretary General of the State Council stated that this program constituted State policy.

China has shown its appreciation for the program concretely. The Ministry of Labor is sponsoring six drafters this semester at BU, drafting legislation to create schemes for old age and disability pensions, workmen's compensation, and unemployment insurance; next semester, it proposes to sponsor a senior drafter working on health care legislation. The BLA will send at least ten drafters to BU next year, an extension beyond the 44 originally contemplated, dealing with five bills added to the original schedule. In addition, UNDP has indicated that it will fund a new, five year program.

In addition to the BLA, a number of Chinese governmental agencies (including the Ministry of Labor, the Department of Customs and Excise, the Environmental Protection Committee of the Standing Committee of the National People's Congress and the Law Society and Legal Committee of the National People's Congress) have expressed an interest in expanding the present project to include new bills of wide-ranging scope (and with them, additional drafters to come to BU):

- 1) laws to ensure the effective implementation of China's environmental protection program (probably in connection with a project financed by the Asian Development Bank);
- 2) a variety of environmental laws, of which the Environmental Protection Committee of the National people's Congress has so far specified flood control and solid waste management laws;
- 3) for the Ministry of Labor, occupational safety and health legislation;
- 4) criminal and other laws to prevent financial misconduct; and
- 5) legislation to deal with bribery and corruption in the administration of the customs laws.

At the request of UNDP, BLA, the Labour Ministry, the National Environmental Committee of the NPC, and the Vice-Chair of the Legislative Committee of the NPC, we have given written reports on some of these bills and how we and BU might contribute to their drafting and to training the drafters working on them.

The form these projects take depends mainly upon funding,

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and the resolution of inter-agency conflicts within the UN and the Chinese government, but significant BU participation appears reasonably assured. The funding for the social security and workers' safety projects, for example, seems in hand. These projects lie within the competence of the International Labor Organization (which does not believe that drafters need any training at all; they really believe that all a drafter in China need do is to copy the ILO model laws!). The China UNDP office, however, controls the purse strings, and its officials have told us that even if ILO resists, UNDP will send the drafters to BU. The environmental legislation now seems to rest on financing from the Asian Development Bank; its RFP stated that the successful bidder had to indicate how its program would liaise with ours.

(c) New Programs in negotiation or anticipation. A number of new programs are in anticipation or actual negotiation.

(1) Africa. More than 50 African countries that have attained independence since the end of World War II are now engaged in efforts to democratize their inherited institutions. To achieve this requires legislative drafting on a massive scale. The potential seems very great, especially in light of Boston University's African Studies Center's and the Seidmans' long-time connections in Africa.

(a) South Africa. In May, 1993, we led a workshop in Johannesburg designed to lay a basis for translating the South African future government's rural development policies into law. In January, 1994 the Community Law Center of the University of Western Cape in South Africa invited us to Cape Town to draft a bill and a memorandum of law on affirmative action, and to lead two one-day workshops on these. In March, 1993, in Johannesburg, we participated in a workshop on rural transformation, drafting a bill to create a task force to accomplish the legal changes required to transform the rural institutions imposed under apartheid; and held workshops on relevant issues at the Department of Sociology at the University of Witwatersrand, and at the Development Bank of South Africa. In August of this year, at the request of UNDP, we served as a Mission to draft a proposal for UNDP financing of a program (modelled in part on the Chinese one) to draft 50 priority bills over the next five years. That would call for up to thirty drafters to be trained here over the next two or three years. That proposal is presently under active consideration by the Minister of Justice in South Africa.

(b). Ethiopia. BU's African Study Center has had a long-term commitment and specialization in Ethiopian studies. The African Studies Center will develop a program, again

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modelled on the Chinese one, to help Ethiopia draft priority legislation. This, too, would involve bringing Ethiopian drafters to BU.

(3) Cambodia. The Asia Foundation has been in correspondence with us to help with drafting problems there; it seems probable that, with Professor Aucoin, we will go there to discuss this further over Thanksgiving Week. In addition, an official at the Cambodian Field Office of the United Nations Center for Human Rights, who published an article in the BU Journal of International Law, wrote to the journal stating that he had heard that some individuals at BU were concerned with drafting in China, and requesting their names. The editors turned the letter over us; that remains an active interest, although it does seem that that office will let the Asia Foundation take the lead.

(4) Poland. The Associate Dean of the Faculty of law of the University of Wroclaw [Warsaw], Poland, recently wrote requesting an institutional connection with BU to develop a program for teaching legislative drafting at his University. Since then, the professor to whom he delegated the matter has expressed an interest in sending a member of staff here to study with us for a semester or perhaps longer, and for us to go to Warsaw to help them get a legislative drafting program underway. With our Polish counterpart we are now exploring funding sources. Through the ABA CEELI program, we have been discussing a similar program for Belarus.

(5) Belize. The Director of the Corruption Commission in Belize, Dr. Adelbert Tucker, contacted us, and asked us to put together a program that would involve our going to Belize to work on drafting and perhaps bringing some drafters to BU for training.⁶

(6) Laos. Last week we received an invitation from the UNDP Laos office to go there for two to three weeks this quarter to work on issues of drafting and training drafters in connection with a joint program with the World Bank. (We might be able to go not this quarter, but over Christmas holidays).

All of these projected projects have come about without any aggressive publicity or selling of BU's legislative drafting program. Their number, together with expressions of interest from the Asia Foundation, USAID, USIA personnel, and others,

⁶ We were scheduled to go there in February, but the timing proved impossible given our commitments in China and South Africa.

suggests that a very large potential market exists for instruction and other services in connection with legislative drafting. This demand appears to have increased exponentially in the past several years. Why this sudden increase in demand?

B. EXPLANATIONS FOR THE INCREASE IN DEMAND

The sudden growth in demand for training and other services in connection with legislative drafting has four major explanations, one long-standing, the others arising out of contemporary history: The chronic lack of legislative drafters; the move towards market economies; the move towards democratization; and the increasing realization that for good or ill, only the state acting through the legal order can create the conditions required to achieve them.

1. The chronic lack of drafters. At least since 1962 (when we first went to Africa) we have heard complaints about the lack of trained drafters. In response to those complaints, in Zimbabwe, we ran two six-month seminars for drafters from all the nine Southern Africa Development Community countries (funded by Ford and the EEC).

2. The transition to market-oriented economies. Following the collapse of the centralized planned economies of Eastern Europe, these countries turned toward market-oriented solutions for their economic problems. For a variety of reasons, so did a number of developing countries that had maintained various forms of direct governmental interventions. These countries quickly came to understand a central teaching of law and economics: Market-oriented economies of whatever sort require a legal framework. The disasters of many of the Eastern European countries, which have tried to develop market-oriented economies without first establishing a legal framework, testifies to the truth of that proposition. (China, by contrast, which has made great efforts to create a legal framework for its market economy, seems far more successful). Moreover, increasingly scholars and practitioners have come to realize that many different possibilities for market economies exist; the sort of legal framework adopted tends to shape the economies in one or another direction. In making their choice of legal framework, governments must choose between one or another sort of market economy.

3. The New Democracy movement. The world around, efforts to move from more authoritarian governments to ones more or less democratic has become a well-recognized phenomenon. The most elementary notion of free government recognizes that it must rest upon the Rule of Law. Without an adequate legal framework, the

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Rule of Law becomes an empty phrase. In this century, legislation constitutes the typical mode of creating laws.

4. Bringing the State back in. In the 1980s, the collapse of command planning and the rapacity of many Third World states bred a perception of the State not as part of the solution but as part of the problem. By the 1990s, a variety of factors had reversed that perception: The failure of "big bang" marketization strategies in Eastern Europe; the New Democracy movement; revisionist studies of the four "little dragons" of Asia that understood them not as unrestricted free market but as guided market economies; and the rediscovery that not only planned but also market economies need an appropriate legal framework. Many governments learned through experience that an adequate legal framework constitutes a necessary if not sufficient condition for democratically-oriented economic development.

That lesson has powered a world-wide demand for drafters, and for help in training them and in drafting new laws. As the next section shows, BU has a comparative advantage in that field.

II. BU'S COMPARATIVE ADVANTAGE IN TEACHING LEGISLATIVE DRAFTING

That the demand for legislative drafting and training exists does not, of itself, demonstrate that BU ought to try to meet it. This section, however, explains why, among American law schools, BU stands in a unique position to try to capitalize on the demand. Here we discuss, first, the BU experience with drafting, and, second the lack of competition offered by other US or foreign law schools.

A. BU'S COMPARATIVE ADVANTAGE

BU's advantage flows not only from its almost unique experiences in teaching law and development and legislative drafting, but -- perhaps most important -- that it has staff that has developed a legislative theory and methodology appropriate to the tasks faced by Third World and Eastern European drafters.

1. **Legislative theory and methodology.** The British and US tradition in drafting focuses on technical verbal skills. The conventional myth holds that politicians make policy; the drafters merely write it out in precise legal language. In fact, no where does that myth match reality. In practice, almost all decision-makers define a social problem and indicate roughly the resources available. They then ask the drafters (including in that term all the people who work on a bill) to devise a workable legislative solution for the identified difficulty. The very act of writing requires the drafter constantly to make decisions

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about details -- and policy secretes itself in the details.

Policy-makers rarely define the social problems they seek to address in terms of the precise human behaviours that comprise them. They mostly define them in terms of resource allocation: Inflationary price increases, resulting because too many dollars chase too few goods, reduce real living standards; too many people do not receive adequate health care; dangerous chemicals pollute underground water. Drafters, however, can only write laws that address the behaviours that comprise those resource patterns; they cannot write laws that command goods-hungry dollars to stop chasing the scarce goods; or tell health care to improve itself; or command the chemicals to stop polluting the water. To draft a legislative program requires unpacking the identified social problem into its component human behaviours, and then, within the parameters of the available resources, writing provisions in a bill likely to change those problematic behaviours.

To do that in particular cases requires considerable empirical research. Empirical research without a theoretical guide resembles the rat in the maze. Without a theory relating law and behaviour, it becomes impossible for drafters to conduct the necessary research to ensure their proposed laws will likely change the factors that cause the specific problematic behaviors.

The BU legislative drafting program rests on a theory and methodology appropriate to guide the research required to draft effective implementable laws. It developed out of a seminar in sociology of law. From the beginning, it focussed not only on teaching technical skills, but also on formulating and improving the necessary theory and methodology. These have formed foundation elements steadily honed and strengthened in courses on Third World law and development that we taught in Zambia, Zimbabwe, and, for the last decade and a half, in BU's legislative drafting program. They undergird the China Project (see Appendices I and II). They have successfully guided the drafting of effective, implementable bills accompanied by adequate memoranda of law using reason informed by experience to justify their particular provisions. That experience forms the basis of the BU legislative drafting program's attraction for the Polish University of Wroclaw, the democratic forces of South Africa, the Human Rights Organization in Cambodia and the Belize government authorities.

To the best of our knowledge only BU seriously attempts in connection with drafting to teach a theory of legislation. The reason for this may lie in the conjunction of the myth that drafters have nothing to do with policy with a second piece of conventional (but unhelpful) wisdom, namely, that, while reason

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dominates the judicial process, power dominates the legislative process. Of course, power constitutes an important variable in explaining why particular laws (and not others) emerge from the legislative process. That reality, however, offers no guide to drafters who confront the task of formulating particular bills; they have no other recourse than to use reason informed by experience, carefully described in their memoranda of law, to convince law-makers and the public of the likely effectiveness of their proposed legislation. Nevertheless, conventional wisdom appears to have discouraged law schools from attempting to mount drafting courses that use reason and experience to draft competent legislation. In our search for consultants for the China project, we have talked to almost 100 scholars, not only in the US, but around the world;⁷ none have reported any information about a legislative drafting program anywhere that has developed a theory of legislative drafting for transforming policy into law. On that, BU's is the only game in town.

2. BU's comparative advantage: teaching drafting. Competent legislative drafters need three sorts of knowledge and skills: How to use drafting to manipulate the legislative process (a service their legislator clients frequently require); how to chain words together to form clear, unambiguous rules; and how to devise a legislative program apt to solve the defined social problem within the resource limits set by the policy-makers.

Knowledge and skill in dealing with the legislative process depends upon a deep knowledge of the legislative process. A great number of universities teach this, mainly in political science courses, but occasionally in law schools. BU teaches it in Professor Feld's course on the Law of the Congress.

BU legislative drafting offerings to regular BU students now consist of only one clinical course, Legislative Services. (In earlier years, the Legislation course taught legislative theory and methodology as a first year elective). With an adjunct professor (Professor Husid), Bob teaches Legislative Services in each semester. Each drafter has a real-world client with a

⁷. The UNDP/BLA document requires that we, as Chief Technical Advisors, submit three names of experts for each bill, from which the BLA may select the one they will invite as consultant to the one month summer workshop. Insofar as possible, we have been asked to submit names from other countries than the US. Since we have talked to more than three people in finding names to submit for each of the 22 bills, we have undoubtedly talked with almost 100 scholars concerned with legislative drafting.

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drafting project -- usually a Massachusetts legislator, but not infrequently a Massachusetts governmental agency or even a non-governmental organization like the Audubon Society. Each drafter has assigned to him or her a student editor who has already served as drafter. The drafter and the editor produce a first draft of a memorandum of law detailing the research done and justifying their bill, and a draft bill. Those drafts come before a highly structured critique session of five other drafters, two editors and one of the two professors who teach the course. After the critique session, working under the editor's supervision, the drafter rewrites the memorandum and bill, which receives a review by two other editors, the Editor-in-Chief and Bob, after which it goes to the client. Either as drafter, critique group member, editor, or reviewing editor, a student who becomes an editor for the usual two semesters will have considered in detail some forty bills in the course of his or her career as a drafter at BU.

The legislative drafting course at BU is, so far as we know, unique in teaching a theory and methodology of drafting that trains drafters not only to chain words together, but also to devise legislative programs. Unlike any other US law school, moreover, BU combines the legislative drafting program with a seminar in law and Third World development.

3. Law and social engineering in the new nations. Third world countries today face the task of learning to use law to resolve the mass of social problems that have condemned their peoples to poverty and oppression. Dean Roscoe Pound long ago called the process of using the law to solve social problems, 'social engineering through law.' Third world societies do not, however, constitute clean slates, on which their policy makers and drafters can write their programs free of history's restraints. They all entered the independent era, and now enter the era of building democratic structures and market-oriented economies with a whole set of institutions and laws defining and bolstering them. Those social institutions comprise the social problems their new laws must resolve. The theory and methodology devised at BU provide a way of thinking about how to use the legal order to transform the institutions that constitute those problems. In addition, we have introduced a Law and Development seminar that reflects what we have learned in our 31 years of work in and writing about third world countries.

In sum, BU's comparative advantage in meeting the suddenly increased demand for drafting services in the new nations consists of: (a) a developed and tested theory and methodology of legislation useful for training drafters to devise legislative programs to address social problems -- that is, to use law as a system of social engineering; (b) a well-defined method of

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training drafters not only in that theory but also in the word-pushing aspects of drafting; and (c) an accumulated store of knowledge and experience in teaching about the legal and economic problems of the third world.

B. OTHER DRAFTING PROGRAMS

In the United States, so far as we know, no other program for training drafters has a thrust towards (a) training drafters from the new nations, or (b) teaching drafters a theory and methodology of transforming policy into a legislative program -- i.e., how to use law to address social problems. Georgetown has a graduate program in legislative drafting that focusses on drafting assignments for the federal government; as we understand its thrust, it primarily aims to teach by apprenticeship (we need more information about this). Indiana has long had a legislative drafting course, taught by the late Professor Dickerson; as his text indicates, that course focusses narrowly on technical skills.

Ever since the end of World War II, the Commonwealth Secretariat has taught legislative drafting at different sites all over the Commonwealth. (We were once asked to teach one of these). These teach exclusively technical skills.

Two private institutions have tried to teach legislative drafting to third world students, drawn from around the world. The International Development Law Institute in Rome for some years has taught a course "for development lawyers" that has included a small unit on law and development and legislative drafting. (Bob taught it for four years). Since then, IDLI has reverted to teaching techniques of drafting. The International Law Institute in Washington has twice attempted to teach a course for third world drafters (we taught a day's unit in each of them). We have a copy of the teaching material ILI used the second time it ran the course; it contains only problems concerning technical drafting -- and those limited to US Congressional forms! (The student's evaluations of the second of these courses called for centering the course around the theory and methodology that we taught in our cameo appearance).

Summary. A strong demand exists in general for drafting services and for training in drafting, and especially in the use of law in countries seeking to emerge from various varieties of authoritarian or colonial economies. The demand for BU's services to help in drafting and training drafters has grown greatly in the past several months, both in China and elsewhere. In meeting this demand, BU has a clear comparative advantage, really all but a monopoly. How ought it take advantage of the

opportunity thrust upon it?

III. A PROPOSED PROGRAM FOR BU

This section discusses (A) BU Law School's general policy with respect of international programs; (B) the constraints on expansion imposed by the existing staffing and organization of the China program; (C) a way to institutionalize and expand that program to meet the growing demand; and (D) the costs and benefits of expanding the program.

A. BU LAW SCHOOL'S POLICY TOWARDS INTERNATIONAL PROGRAMS

Dean Cass has stated on several occasions that his policy aims at strengthening BU's international law programs and its contacts with foreign law school. The faculty has approved a program for teaching foreign lawyers American law, aimed at slotting foreign students into our regular BU programs as an effort to improve the quality of our US student body by reducing its size. (The tuition charged the foreign students will make up the income lost by reducing the regular BU class size.) To that end, it has appointed Professor Aucoin Director of Foreign Programs. The first intake of foreign students is expected in September, 1994.

A continuing and perhaps expanded program of training foreign drafters would seem to fit neatly into the law school policy of expanding its international programs.

B. THE ADMINISTRATION OF THE CHINA PROGRAM, AND THE CONSTRAINTS IMPOSED ON EXPANSION

This section discusses the administration of the existing China program; teaching staff; the degree structure; and the constraints that that organization imposes on expansion.

1. The administration of the China program. The administration of the program for training drafters at BU Law School involves the following tasks:

a. Negotiating and drafting a contract between BU and the Chinese authorities. This we have done (with welcome assistance from Ralph Kidder and Diane Smith), subject to approval and signature by the Dean.

b. Arranging for the requisite documentation by BU for the Chinese scholars. BU's Office for International Students and Scholars has done this, with perhaps two or three days' additional work by the Suite 1120 secretaries, and by Diane Smith

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and Irene Moustakas.

c. Arranging for housing for the Chinese scholars. This has proven an unending headache which we have unfortunately undertaken, with some assistance from Ralph Kidder in negotiating with University authorities over the possibility of using BU graduate housing (an option rejected by the Chinese drafters).⁸ We believe that we have now arranged for the Chinese scholars to take over the major burden of finding their own housing. (We will prepare a list of possible apartments before they arrive, requiring perhaps two or three days' work in late August; and host someone elected by the group to find appropriate lodging).

d. Arranging for BU and other professors to serve as supervising professors on specific bills. Thus far, we have managed to persuade BU law professors and others to undertake supervision of the Chinese drafters on a no-cost basis. Because our colleagues have proven exceptionally generous and forthcoming, this has not taken a great deal of time to arrange. (Below, we urgently propose a revision of this cost-free system).

e. Arranging for occasional lectures by BU professors in specific topics. Professor Beermann and Marks gave lectures in, respectively, administrative law and Law and Economics. Thanks to their generosity, this took hardly more than a few moments to arrange.

f. Accounting and money management. This Ralph Kidder and Diane Smith have done. In addition, Diane Smith has been very helpful in doing a variety of tasks, from getting keys made to arranging for ID cards for the drafters.

g. Library. The library staff gave the scholars a small room in the basement, and BU (through Ralph Kidder) installed two computers there with Chinese language programs on them. In addition, the staff gave a Lexis demonstration to the scholars, and has helped them find their way around the library with unremitting generosity.

h. Student affairs. Attending to problems which would ordinarily fall on the plate of the Dean of Students took a fair amount of time: arranging get-togethers with the American students, helping people get ID cards and keys (again, Diane

⁸ They rejected the option first because of the requirement that they spend a specified amount in BU restaurants for American-type food for which they had little liking; and the relatively high total cost which they reduced by renting their own apartments and buying and preparing their own meals.

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Smith did a lot of this), and so forth took a fair amount of time.

2. Teaching staff. The teaching staff consists of the two of us, and all the BU and outside professors who have so kindly consented to supervise the drafters. We discuss each of these in turn.

a. Constraints on the two of us. As presently constituted, we find it impossible adequately to deal with more than twenty students in a semester. Last semester, we were stretched flat-out to deal with the twenty we had, and to take care not only of their educational but administrative needs. Three problems exist.

(i) The administrative aspects of our work hinders the educational aspects. If someone else dealt with the administrative functions, we could, we think deal with closer to thirty students a semester, not a maximum of twenty.

(ii) We cannot at once scramble for grant money and also teach and write. To maintain the program and the profile necessary to attract new students and funding, both are necessary. Third world students and students from the former socialist states of Eastern Europe -- our principal potential source of students for the program -- almost invariably depend upon USAID, UN, or private foundation funding for overseas education. If the faculty decides to approve a more or less permanent program (as suggested below), that program will need a staff person to pursue grant money. The African Studies Center has agreed to take on the administrative tasks in respect of African students, but if the program extends beyond Africa, it would help to have at least a part-time administrator.

(iii) Because Bob is emeritus, the University will pay him no more than a part-time salary. That apparently precludes his teaching in this program in both semesters. Perhaps if the university's rules changed, or the finances provided by the students' tuition went directly to finance his and Ann's salary, the program could extend to the full two semesters, doubling the potential student intake and financial return.

b. Constraints on other members of the teaching staff. This program rests on the willingness of BU teaching staff to supervise the drafters in working on bills in their respective fields of expertise. We do not know how to teach legislative drafting except in the context of drafting a law. No more than one could teach another to ride a bicycle through lectures alone can one teach drafting through lectures alone. In both cases, so to speak, the student must get on the bicycle. A program

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for training third world drafters must require that each drafter come with a law they will draft. The China program has flourished in large part because of the devotion of a few professors, each of whom has supervised a pair of Chinese drafters in the readings relating to the foreign law and experience relevant to their bill. All of the Chinese drafters speak warmly, enthusiastically and fondly about their major professors. That constituted a major part of their educational experience.

We would hope that, as the program expands, each drafter (or, as often as possible, each pair of drafters) will work with a BU professor, as have the Chinese. Yet, it seems most unfair to impose on our colleagues by asking them to give of their time without recompense. BU cannot pay them, for the University has a policy against paying teaching staff extra for teaching. That situation cannot long continue; the program will shortly wear out its welcome. Our teaching staff is entitled to do a limited amount of outside work for pay. We must find a way of paying the staff for supervising foreign drafters as outside work.

3. Degree structure. We have no way of giving an LLM, let alone an SJD, for graduate students specializing in drafting. (We do give our Chinese colleagues a certificate stating that they have attended Boston University Law School for a semester, and studied law and development and legislative drafting here). Recruitment of foreign drafters would be enormously enhanced if we could award the LLM for a year's study here. (That bears repeating: We cannot overemphasize how much BU capacity to grant an LLM in legislative drafting would add to its capacity to attract students).

What might an LLM program look like? Recognizing that most, if not all, third world university law programs teach undergraduates only, the proposed LLM program could provide senior drafters and university law school teachers with graduate level courses specifically tailored to their needs. In addition to the courses outlined above for the one term program, the LLM program might consist of:

1. A course in social science research methods to enable the participants to become well-qualified consumers of the social science research required to formulate, implement and evaluate legislative programs. This course would a) enable senior drafting personnel to formulate terms of reference for university and research institute investigations to provide the background information essential for drafting effectively implemented legislation, and b) enable university staff members to participate in designing and

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teaching interdisciplinary courses to give future legislative drafters enough social science background to perform their tasks effectively.

2. A course in appropriate educational methodology for teaching legislative drafting, drawing on the two decades of BU legislative drafting teaching experience.⁹ This course would provide third world university staff members with the knowledge of pedagogical theory they need to design and teach legislative theory and drafting.

3. More in-depth study of foreign law and experience relating to specific fields of study, including further supervised reading, and carefully chosen existing BU courses: for example, in the International Banking Program, or related to health, securities markets, and so forth.

4. Each participant would fulfil the LLM writing requirement by drafting a bill addressed to a particular problem in their own country, accompanied by a completed draft research report included the relevant evidence relating to foreign law and experience.

Structuring that degree program would seem fairly easy. The curriculum seems obvious, and the bill and its accompanying memorandum that each will work on could readily meet the writing requirement.

Summary

The present organization and degree structure of the China program imposes constraints on expansion. We need administrative help, both in administering the program and in preparing grant applications. That would enable the program to deal with thirty students a semester, compared with the twenty that is its present outside limit. We need capacity to teach the program in the second as well as the first semester, which would double the potential student in-take. We need to be able to pay the professors who participate in the program for their

⁹ A World Bank-commissioned report, by Professor William Alford and two Chinese legal academics, describes the common lecture-exam system of legal education in China, a description that might also apply to almost any other third world country. The UNDP/BLA project has illustrated the benefits of engaging the participants in learning legislative theory and methodology through a process of drafting and critiquing each others' bills and memoranda of law, a system qualitatively different from that utilized by most third world university law teachers.

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teaching above their normal work load. Finally, if at all possible, an LLM capacity would make the program far more attractive for full time participants, especially for senior drafting officials and university lecturers who will set up legislative drafting programs in their universities.

C. A PROPOSAL FOR AN EXPANDED PROGRAM

We here assume the faculty agrees to institutionalize a drafting program for foreign students, and to make a concerted effort to attract up to thirty students per semester. We make no assumptions concerning a one-semester or two-semester program, since in either event the organization of the program would remain the same. Initially, each participant would come for a full term, with 20 to 30 participants each term, producing a Full-Time Equivalent (FTE) of 20 to 30 students.

First, we propose that the program come under the International Programs Office headed by Professor Aucoin. We further propose that that office take on the administrative and fund-raising functions earlier mentioned.

Second, we propose that that office (and, to the extent required, ourselves) aggressively sell the program overseas and pursue funding opportunities with USAID, UNDP, and other funding agencies. As we have earlier suggested, we believe that great opportunities exist for BU, but they will not fall into our lap like overripe apples. We must pursue them.

Third, we have considered whether the program would best take the form of a program or a center. The latter would have greater capacity for attracting independent funding, especially for research efforts. For the moment, however, a program might serve the immediate purposes adequately, with fewer problems in its creation. If it proved successful, the question of independent quasi-corporate existence might then be addressed.

Fourth, so also with the question of additional teaching staff: With the absolutely necessary participation of BU staff as supervising professors, we can handle, we think, up to thirty people per semester. Expansion beyond that number would require increasing the teaching staff. To the extent that he can find time, we would welcome Professor Aucoin's participation in the teaching program. Perhaps another staff member might show an interest in participating, or the law school might provide one or more teaching assistant. If the faculty agrees, these possibilities warrant further exploration. We caution that it may take a little time even for another faculty member to prepare him- or herself to teach theory, methodology and drafting techniques.

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Fifth, with respect to governance: We propose that an advisory committee composed of one of the Associate Deans ex officio, and the faculty members who have been involved in the program have a general advisory responsibility to the program, including issues of admissions, curriculum, etc..

D. THE PROGRAM'S POTENTIAL FUTURE

Finally, three interrelated factors will likely influence the program's future potential: a continued demand; the introduction of an LLM; and the hiring of additional teaching staff. First, the present demand for professionals capable of transforming policy into legislative programs reflects a growing recognition of the necessity of creating new legal frameworks to facilitate democratic development processes. That initial demand will likely persist for at least a decade. In Africa, alone, over 50 countries require personnel trained in legislative theory and drafting. In Asia and Latin America, as well as Eastern Europe, the demand seems likely to expand as it becomes increasingly apparent that creation of a democratic rule of law constitutes an on-going process that takes into account development's ever-changing realities. Over time, of course, increasing numbers of countries will -- and should -- introduce legislative policy and drafting courses into their universities.

Nevertheless, a significant demand will remain for legislative policy and drafting programs for senior drafting and law-making personnel and well-qualified staff members equipped with adequate legislative theory and methodology to teach in the country programs. Increasingly, personnel at that level will require access, not only to the continually-improving body of international knowledge relating to legislative theory and methodology, but also up-to-date information relating to the changing international context in which they must shape their countries' legal frameworks. Already, the China UNDP/BLA program is beginning to move in this direction.¹⁰ The proposed Boston University Law School program will undoubtedly need to grow to serve this changing demand structure.

¹⁰. The UNDP has approved the BLA's proposal to establish a Center for Legislative Implementation Research and Drafting to train the thousands of drafters China, with a fourth of the world's population, requires for its national, provincial and local level administrative units. The UNDP and BLA are now considering sending at least the director and one other staff member to BU for further training directed towards establishing that Center.

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Second, this changing structure of demand suggests the potential benefits of introducing a one-year LLM legislative policy and drafting program, as we have earlier discussed

Third, this program should plan over time to develop additional teaching staff, as earlier mentioned. Under the circumstances that seems necessary to ensure program continuity.

E. THE COSTS AND BENEFITS OF EXPANDING THE PROGRAM

What are the benefits and costs of regularizing and expanding the present China program? We discuss this under four headings:

I. One-semester course. A. 20 students.

1. **Costs.** (a). Financial. Bob teaches half time in BU's regular program (Legislative Services and the Law and Development seminar), but receives two thirds salary. Chargeable to this program, therefore, is 1/6 of his full salary. For administrative convenience, however, his entire salary is charged to this program. Ann receives the pay of an adjunct professor, nominally for a single course. (For that, this past semester she shared the teaching of two sections of Law and Development with twenty students [10 Chinese, 10 BU] in each and two weekly seminars of the Chinese students, and supervised two sets of drafters, one dealing with the bill on agricultural investment, the other, economic planning. If the course were put on a permanent basis, consideration must be given to increasing her salary). In addition to these teaching expenses, the program might properly charge against income faculty overbase and honorariums for participating non-BU faculty of [REDACTED] for each pair of students, plus support services and student assistance, totally in all for salaries [REDACTED] plus salaries for the Seidmans. In addition, operating expenses properly chargeable to the program would amount to [REDACTED], including [REDACTED] for travel and [REDACTED] for capital equipment. Total expenses would therefore amount to [REDACTED].

(b). Non-quantifiable costs. Additional, non-quantifiable costs include the use of classrooms and library.

2. **Benefits.** (a) Financial. Assume that over the years the program averages twenty students per semester. Also assume that each student's sponsor pays BU on account of that student current tuition less [REDACTED], plus [REDACTED] to the student's major professor as consultant to the government with respect to the student's drafting assignment. At current tuition costs of [REDACTED] per semester, plus a [REDACTED] expense supplement on the Chinese

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contract, for a one-semester course BU will receive gross income of [REDACTED], and the professors involved a total of [REDACTED].

3. **Net return to BU:** If Ann's salary remains as at present, the net to BU would be [REDACTED].

II. One semester course. B. 30 students

Gross income increases plus operating supplement increases to [REDACTED]. Faculty overbase and outside supervisors increase to [REDACTED], and student salaries to [REDACTED], increasing total costs to [REDACTED].

Net return to BU: [REDACTED].

III. Two-semester, LL.M. course. A. 20 students

Gross income increases to [REDACTED]. Total salaries increase to [REDACTED], including [REDACTED] for faculty overbase and for outside consultants; total operating expenses, to [REDACTED].

Net return to BU: [REDACTED].

IV. Two-semester, LL.M. course. B. 30 students

Gross income increases to [REDACTED]. Total salaries increase to [REDACTED]; total operating expenses remain the same for a total expenses of [REDACTED].

Net return to BU: [REDACTED].

b. Non-financial returns. (i) International recognition. To date, representatives of governments from six countries have indicated an interest in developing legislative drafting capacity. To the extent that the Law School can help them to develop this capacity, it will enhance its image as a center of international law.

(ii). Improvements to BU education and community life. The Chinese program has enriched the Law and Development seminar, which had twenty BU students in attendance last semester (ten in each of two sections). The approval rating from BU students was very high.

Like any program that brings foreign students to BU, the proposed drafting program has a real potential for enriching BU student life. BU has so far realized only a part of its potential. The International Law Association held a successful reception at Professor Partan's house for the Chinese scholars. A number of BU students socialized a good deal with the Chinese,

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and a few met them regularly for conversations in English.

(iii) Benefits to participating faculty. The more countries that become involved in the project, the more opportunities will exist for BU professors to go overseas as consultants. Most of the professors who have participated in the two summer workshops in Beijing have regarded them as high points in their professional lives. Most of the professors who have served as volunteer major professors for Chinese drafters here have found the experience exhilarating.

CONCLUSION

Fueled by the transitions from planned to market economies and from authoritarianism to democracy, there exists a worldwide demand for trained drafters and for assistance in drafting. BU has a marked comparative advantage -- indeed, something approaching a monopoly position in the field. We propose that the program become institutionalized as an International Program in Legislative Drafting, under the newly-created Office for International Programs. Assuming that BU attracts twenty drafters per semester for two semesters a year, the annual net cash inflow to BU is [REDACTED]; if thirty drafters attend in each semester, that rises to [REDACTED]. In the former case [REDACTED], in the latter, [REDACTED] becomes available to recompense BU professors or other consulting faculty for their assistance in supervising drafters. Other costs seem fairly minimal, and do not involve increased cash outflow. In addition, the program would likely provide some intangible values to BU: Increased recognition for BU as a center for international legal studies, some measure of enrichment for the BU student body and academic life, and some interesting opportunities for concerned faculty.