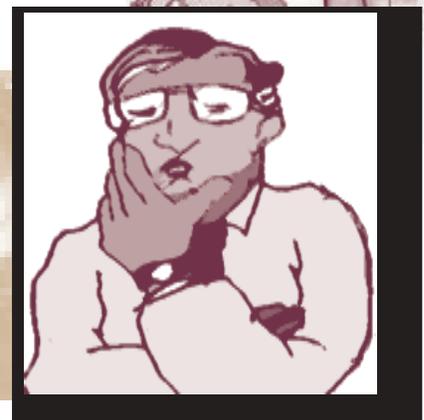
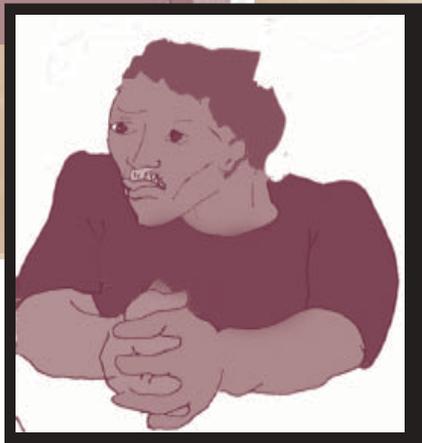


# ASSESSING LEGISLATION

- a manual for legislators



Ann Seidman  
Robert Seidman  
Nalin Abeysekere  
with drawings and layout by Judy Seidman

## **ASSESSING LEGISLATION - A MANUAL FOR LEGISLATORS**

Assessing Legislation - A manual for legislators written by Ann Seidman, Robert Seidman, and Nalin Abeysekere with drawings and layout by Judy Seidman

February, 2003

Boston, Massachusetts

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## **FORWARD AND ACKNOWLEDGMENTS**

This Manual aims to equip legislators to assess and, when necessary, to initiate legislation to foster democratic social change in their own countries. It reflects what we have learned over several decades about the use of law to facilitate the kinds of institutional transformation that constitute both development and transition.

This Manual rests on the legislative theory and methodology set out in *Legislative Drafting for Democratic Social Change: A Manual for Drafters* (London: Kluwer Law International, 2001). It carries forward the work of Boston University School of Law's Program on Legislative Drafting for Democratic Social Change (visit [www.bu.edu/law/lawdrafting](http://www.bu.edu/law/lawdrafting)).

In every country that we have visited in the developing and transitional worlds, the members of their national legislatures have impressed us — their idealism, their intelligence, their genuine desire to advance development and transition. Despite those excellent qualities, the way most of those deputies have used their legislative power has ended, not in improving the quality of their peoples' lives, but a bare miserable existence for most of the world's peoples. This book arose out of the conviction that that sad outcome resulted, not — as much of the popular press supposes — from the legislators' cynicism and corruption, but from their lack of capacity to utilize the legislative power. Developing and transitional world legislators win elections for all sorts of reasons, most of them related to merit. They do not, however, win because they know how to assess a law in terms of its likelihood to induce beneficent social change.

We would like to express our appreciation to all those who have and are helping us to write and distribute this Manual, especially those who have participated in the Program described in website cited above; the officials of the United Nations Development Programme (UNDP) who suggested that, to ensure its widest possible availability, their country offices would download and distribute the Manual free of charge; and all the other donor agencies who have agreed to make it available through their web-sites. We particularly want to acknowledge the moral support given by Associate Dean Stephen Marks of Boston University School of Law; Professor Cynthia Barr, a rock in connection with the entire Program; and colleagues on the BU faculty, who gave much-valued critiques and advice about the entire Program on the several occasions that we presented the material. This Manual elaborates a paper we gave at a World Bank seminar in 2001; we thank Professor William J. Chambliss for inviting us to that seminar. During the writing of this Manual, Stephanie Rosander and Wei Chen served as our research assistants and as the administrators for the entire program, which gave us more time to write it. Finally, we owe a great debt of gratitude to Sue Morrison, an able, devoted and an altogether wonderful office helpmate, who makes things happen. Obviously, none of these fine people have any responsibility for mistakes. As to that, any mistake was the other guy's fault.

- Ann Seidman, Robert B. Seidman, Nalin Abeysekera, and Judy Seidman

### **About the Authors**

More than forty years ago, when they began teaching in the University of Ghana, Ann and Bob Seidman first began to develop an interest in law and development. They taught for twelve years in six African countries, and one in China. Increasingly, Bob centered his attention on the use of law to facilitate development. An economist, Ann realized that, unless developing and transitional country governments changed dysfunctional inherited

institutions, research directed to improving resource use could do little to end developing countries' poverty. Working together, they focused more and more on drafting legislation to foster social transformation.

After 1966, in the University of Wisconsin, Ann and Bob co-taught seminars for third world students concerned with law and development. Then, for the next quarter of a century, at Boston University, Bob taught a clinical legislative drafting course in which students drafted bills for the state legislature. He developed teaching materials that, in part, they used in teaching drafting for African and other students abroad. In 1980, in Zimbabwe, Bob and Ann first jointly taught a seminar in legislative drafting for southern African lawyers. Over the next two decades, in China, Lao PDR, Sri Lanka, Bhutan, Nepal, Kazakhstan, South Africa, Indonesia, Vietnam, Cambodia, Guyana, and elsewhere, they steadily improved the 'learning-by-doing' process to help drafters, by engaging in drafting real bills, to learn legislative drafting theory, methodology and techniques. In Mozambique, after the civil war ended, they conducted two workshops for that country's newly-elected national legislators. They came to understand the need for a Manual, not only for drafters, but for legislators who must assess the drafters' work, and for concerned citizens who must work together with the deputies to ensure enactment of laws that foster democratic social change. That experience planted the seeds from which this Manual grew.

Called to the English Bar from Lincoln's Inn in 1964, Nalin Abeysekera joined the Legal Draftsman's Department in Sri Lanka in 1971. He studied further in the Indian Law Institute (1975), and as a Fellow of the Australian Institute of legal Drafting in 1980. After serving briefly as the Legal Draftsman of the Seychelles, he became the Legal Draftsman for Sri Lanka in 1984, a post that he held until he retired in 2000. He added to his duties those of President's Counsel (1990), and member of the Law Commission of Sri Lanka. A founder member of the Commonwealth Association of Legislative Counsel, he served as a member of its Council (1986-96 and again from 1999 to the present).

In 1998, at Nalin's request, the UNDP asked the Seidmans to come to Sri Lanka as consultants, in the context of efforts to devolve power to the provinces, to help formulate and implement a program to strengthen provincial drafting capacity. Working together, the three of them introduced a UNDP-funded learning process that enabled its Sri Lankan participants to multiply its impact. Nalin agreed to join Ann and Bob to write "Legislative Drafting for Democratic Social Change \_ a Manual for Drafters" (Kluwer, 2000). That Drafters' Manual, designed to serve academics as well as drafters, documented in detail the sources from which the authors culled the ingredients for this Manual's underlying legislative theory, methodology and techniques.

Judy Seidman, an artist who works in South Africa, provided the layout and pictures. These make the Manual accessible to the elected legislators and concerned citizens. In the course of doing that, she creatively edited the entire Manual, adding to it many new ideas and formulations.

February, 2003

Boston, Massachusetts

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<http://www.iclad-law.org/Downloads/Table.html>

## INTRODUCTION:

*As an elected legislator working with your colleagues, this manual aims to help you to use your constitutionally-granted power to enact laws in the public interest.*



After you have read this manual and completed the exercises it contains you will have increased your capacity to exercise the legislative power, that is —

- ***to read and understand*** bills presented to your legislature;
- ***to assess*** whether those bills will advance the public interest;
- ***to ask questions to get the facts you need*** to debate whether those bills' detailed provisions will serve the public interest;
- ***to oversee the administration of the laws*** in order to ensure that the laws as enforced advance the public interest; and
- ***to communicate meaningfully with your constituents*** about the kinds of laws they need to improve the quality of their lives.

The discourse about legislation rests on many considerations. Many books discuss how legislation arises out of the competing claims of interest groups, of Party, of constituency, speaking in the voice of power. This manual, by contrast, focuses on the claims in title of the public interest, speaking in the voice of reason and experience.

In short, this manual aims to empower you, as one of a small handful of people, constitutionally-entrusted with your nation's legislative power, to carry out the law-jobs essential for transforming the existing institutions. Appropriately exercising that power constitutes the secret key to conquering poverty, vulnerability and poor governance. Knowledge and skill in using state power and law to bring about beneficent institutional change thus constitutes the key for winning the fatal race.

## THE PLAN OF THIS MANUAL

Part I addresses your task in facilitating social, political and economic transformation. Chapter 1 suggests that law constitutes a government's instrument of choice for implementing policy. Chapters 2 through 4 provide a general framework for assessing a bill. Chapter 2 introduces a legislative theory as a guide for assessing whether a proposed law has a high probability of bringing about transformatory institutional change in the public interest. Chapter 3 briefly outlines the scope of another preliminary question: how should you, as an elected legislator, participate in deciding the order of priority for drafting and enacting essential transformatory legislation? Finally, Chapter 4 discusses the most basic skill of all: how to read a bill.

Part II focuses on practical issues of assessing a bill's overall design, or 'legislative plan.' It shows you how to determine whether the draft bill's details will likely overcome the causes of behaviors that comprise the existing social problem. Chapter 5 discusses how a problem-solving methodology combines with legislative theory to provide a menu of relevant questions to ask about a bill. How effective will it likely prove in accomplishing its claimed purposes? Chapter 6 directs your attention to the kinds of information you should request to determine whether the government agencies assigned by the bill will effectively implement the bill's detailed provisions. Chapter 7 reviews the kinds of issues you should consider in assessing the validity of the evidence the bill's drafters give in response to your questions.

Part III focuses on assessing a bill's technical sufficiency. Chapter 8 gives you the tools you need to assess whether the form and the techniques used in drafting the bill likely ensure that those who will use it fully understand the bill's prescriptions for behavior – the first and essential step to effective implementation. Finally, Chapter 9 discusses how to assess a bill's potential to reduce the dangers of arbitrary governmental decision-making, and especially corruption.

*Masai women vote, for a new government, 2003*



# **PART I:**

**Your task in facilitating  
social, political and  
economic transformation**

*"Seek ye first  
the political  
kingdom, and all  
else shall  
follow."*

# CHAPTER I: THE IMPORTANCE OF LAW-MAKING



*Dr. Kwame Nkrumah*

## INTRODUCTION

This chapter poses some of the key issues underlying the task of elected representatives in voting for legislation: the basic interaction of the state and the law, on the one hand, and social and economic development most countries and people aspire to meet. The chapter examines:

- A. An introduction to the role of state and the law in the struggle for prosperity, economic and social development;
- B. How society's governance and institutions shape its relative poverty and wealth;
- C. The conflict between aims and capabilities of newly independent governments, and their inherited structures - the fatal race.

## A. STATE, LAW AND THE FATAL RACE

In the heat of the anti-colonial struggle, Ghana's first President, Kwame Nkrumah proclaimed, "Seek ye first the political kingdom, and all else shall follow." State power, he implied, could transform a former colony into a modern, prosperous state. That cry swelled to a world-wide chorus.

A half century later, as the new millennium dawned, both in the former colonial countries and the former Soviet Union, populist forces ruled. In effect, the people had seized the political kingdom.

All else, however, did not follow. Tyranny's fall did accomplish important improvements in human dignity. In South Africa, blacks could attend schools that earlier had barred them. In Czechoslovakia a newspaper columnist could criticize the government of the day.

Prosperity and good governance, however, still eluded almost all the new nations. Some 80% of the world's population received less than 20% of the world's output of goods and services. In the poor countries, a wealthy few waxed rich and powerful. The vast majority – especially women, children, old folk, the disabled, and ethnic minorities – lived on survival's edge. For many, the quality of life – even life expectancy – actually declined from its level at Independence. Diseases (especially HIV/AIDS), ethnic conflicts, and civil wars engulfed much of the developing and transitional worlds.



*Despite winning the political kingdom, most of the world's people remained poor, vulnerable, and subject to execrable governance. In the fatal race between the old institutions and the new populist governments, by and large the old institutions won. The people lost.*



## **QUESTION FOR DISCUSSION**

What do you consider the most important social problems that confront people in your country?

## **B. WEALTH, POVERTY, GOVERNANCE AND INSTITUTIONS**

### **1. Behaviors, institutions and resource use**

To compare 'rich' and 'poor' countries, economists cite statistics. Those statistics reflect, not the potential of a country's underlying resource base, but the nature and pattern of the country's use of resources.

Resources do not allocate themselves, however. To understand how they do get allocated, we begin with the simplest picture of society. It consists of *people acting in repetitive patterns* – that is, in *institutions* .

## DEFINITION

### THE MEANING OF 'INSTITUTION'

Definitions of 'institution' differ. Some emphasize the *rules* that govern the behaviors of the people who constitute the institution, some the participants' *mental orientation* towards those rules. All include the concept of *repetitive patterns of social behaviors*. In this manual's definition of 'institution,' that constitutes the entire definition: "*Institution*" means *a set or interrelated sets of repetitive patterns of social behaviors*.

Defining an 'institution' as its constitutive sets of repetitive patterns of social behaviors focuses attention on the central problematic of this manual:

*Why, given the existing rules, do people behave as they do?*



Through their society's repetitive patterns of behavior – their institutions – people shape the uses of their country's resources. Banks, schools, courts, family structures, prisons, farms, social clubs, legislatures, industries, welfare systems: these and a myriad of other institutions make up your country's political, social and economic system.

Historically-shaped institutions define a country. Their institutions and how they work distinguish the United States from Uruguay, Norway from Nepal, Canada from Kazakhstan.

*Your country's institutions determine the relative wealth and income levels of your country's population, and of the groups and classes within it. They also determine the quality of its governance.*



**INSTITUTIONS AND HISTORY: RAILROADS IN THE UNITED STATES AND AFRICA**

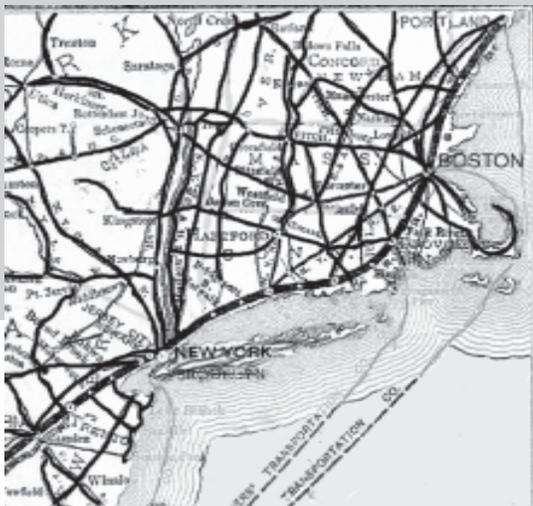
Consider the railroad maps of the United States and Africa. The United States map shows a spider web of lines reaching almost every part of the country. The African map shows a number of relatively short lines starting at a place in the interior and making directly to the nearest seaport. Few interconnections exist.

Deliberate government action shaped the institutions that built these railroads. In the United States, they responded to 19th century demands for a link between the West’s gold mines, forests and rich black earth and the already-settled East. Congress by law offered enormous tracts of land to companies to build transcontinental railroads.<sup>3</sup> The US government used law to induce immigrant workers (mainly from China and Ireland) to build its railroads. Those railroads played a vital function in creating an internal market for the country’s agricultural and manufactured goods.

Colonial governments built railways primarily, not for the people’s benefit, but for that of their own investors. In Africa, running from Africa’s mines, forests, and commercial farm areas to the nearest port, those railways enabled investors to export Africa’s minerals, timber and agricultural products for processing in their home-country factories. The colonial rulers imposed tax laws to coerce Africans to work for colonial firms and settlers – and to build railroads — for wages roughly a quarter of those paid to workers in the more industrialized world. They did not build internal railroad linkages. Not surprisingly, even to this day, African countries have not developed much of an internal market.

The two railroad maps reflect not merely a system of tracks and different resource uses. They also reflect the way governments used law to shape the institutions that built them.

A 1896 map of railroads criss-crossing New England; note the land area covers less than Cape Town to Port Elizabeth on the opposite map.



This map of all railway systems in Southern Africa in the 1890s shows that routes took goods from the interior to the main ports; and migrant labour to the mines; shipping raw materials overseas, and bringing in manufactured goods from Europe.

## 2. Institutions and governance.

A country's institutions shape, not only its resource allocations, but the quality of that country's governance. The *institutions of governance* define a government's capacity to manage social and economic resources to facilitate development or transition. *Poor governance* consists of ineffective, *arbitrary* government decision-making processes – that is, ineffective decision-making by non-transparent, non-accountable, non-participatory (and frequently corrupt) processes.

### THE CONCEPT OF 'GOOD GOVERNANCE'

First using it in 1989, the World Bank later defined good governance as “the manner in which power is exercised in the management of a country's economic and social resources for development.” The Bank's General Counsel identified governance with

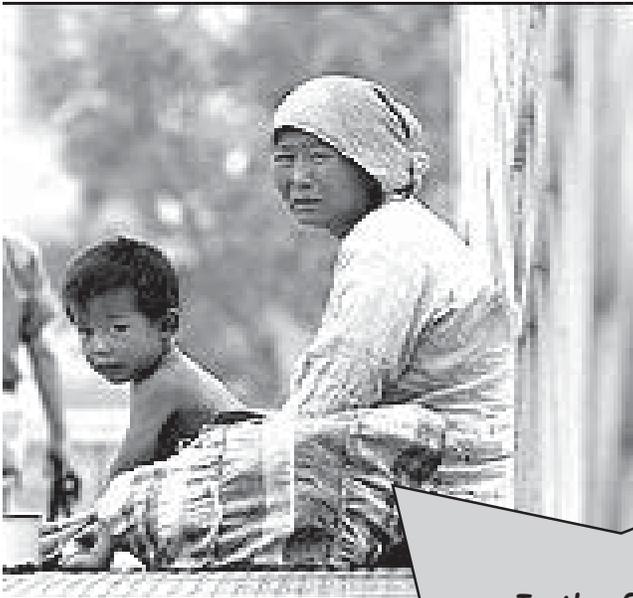
“... ‘good order’, not in the sense of maintaining the status quo by the force of the state (law and order) but in the sense of having a system, based on abstract *rules* which are actually applied and on functioning *institutions* which ensure the rules' application. Reflected in the concept of ‘the rule of law,’ this system of rules and institutions appears in different legal systems and finds expression in the familiar phrase, ‘government of laws and not of men.’”

These characteristics reduce to two: *effective government* and *decisions that emerge from a non-arbitrary decision-making process*. Four elements characterize those processes:

- *Governance by rule*: Decision-makers decide, not pursuant to the decision-maker's intuition or passing fancy, but according to agreed-upon norms *grounded in reason and experience*;
- *Accountability*: Decision-makers justify their decisions publicly, subjecting their decisions to review by recognized higher authority, and ultimately by the electorate;
- *Transparency*: Officials conduct government business openly so that the public and particularly the press can learn about and debate its details; and
- *Participation*: Persons affected by a potential decision — the stakeholders<sup>7</sup> — have the maximum feasible opportunity to make inputs and otherwise take part in governmental decisions.

Together, these characteristics tend towards maintaining the rule of law, and ensuring *representativeness and predictability* in state action.

Corruption typically indicates poor governance. In all its forms, corruption violates the Rule of Law, and hinders effective development. Widespread corruption does not persist merely because of weak individuals or a 'culture of corruption'. It persists mainly as a result of weak *institutions* – that is, institutions that give officials opportunities and capacities to behave corruptly (see Chapter 9). ***A country's institutions define a country's relative poverty and vulnerability, but also the quality of its governance.***



Women and child in Asia, 2002

***In the fatal race to change the institutions that define your country's poverty, vulnerability and governance, you as a law-maker play a crucial role.***



## **EXERCISE: INSTITUTIONS**

Using the definition that this manual assigns to 'institution,' describe your country's legislature *as an institution*. By what criteria did you choose the characteristics included in your description?

People in Kenya  
celebrate newly  
elected government -  
2003



## C. THE FATAL RACE

### 1. How the existing institutions win the race.

After independence, many newly-elected populist law-makers did enact laws aimed at development. In many countries, new *laws-in-the-books* purported to extend benefits to the poor, providing education, health, transport, water, investor protection, social security. In practice, many – perhaps most – of the new laws-in-the-books proved ineffective. For the poor, the *laws-in-action* – how the laws-in-the-books worked out in practice – neither produced services, nor fostered the reinvestment of nationally-generated surpluses to create new, more productive jobs and higher incomes.

Populist governors and law-makers held the reins of formal power. Their countries, however, remained basically defined by the old, colonial or command-economy institutions. That provided the setting for a fatal race.

The new, populist governors might try to use state power to change existing institutions to achieve national development to satisfy their peoples' basic needs. Where they lagged, the existing institutions held out lures that too often seduced the governors into perpetuating the *status quo* – and their initiatives died in birth.

Almost everywhere, the new, populist governors lost the first lap of the fatal race. Few new governments enacted laws to foster institutional transformation to increase productive employment. Few new institutions augmented domestic incomes that could finance expanded social services. They did little to restructure the public service, land tenure systems, or the large firms, banks and financial institutions that chained their nations' productive sectors to foreign inputs and markets. Instead, at most, they spent government's scarce revenues and borrowed abroad to expand consumption in the form of social services such as schools, hospitals, roads.



*Not what it used to be: man exchanges deflated currency bills for newly introduced bills - Kabul, 2002.*

More: because the new populist governors did not build institutions designed to ensure good governance, government decision-making often remained arbitrary. Too often, a universal lament moaned, “We have good laws, but they are badly implemented.”

In the late 1970s and ‘80s, most developing and transitional countries’ terms of trade collapsed. The populist governors found themselves overwhelmed by foreign debt. The IMF, the World Bank and many donor agents promised rescue; but only while dictating neo-liberal policies that relied on ‘the market’ as the all-but-universal problem-solver. The value of currencies fell. Inflation soared.

Despite worsening conditions in the broader community, the new governors often found that they enjoyed the benefits afforded those at the top of the old institutions. In time, many dropped their populist rhetoric. Cynicism and eventually corruption corroded their behaviors.

Almost everywhere, the old institutions seemed to win. Instead of populist governments transforming retrograde institutions, too often the institutions seemed to have transformed the governors. Populism seemed to lose the fatal race — not with a bang, but a whimper.

At the end of the ‘80s, a new lap in the race seemed about to begin. The international aid agencies discovered that even markets need rules, and that kleptocrat governments make poor investment climates.<sup>1</sup> ‘Good governance’ emerged as a leading theme. That required non-arbitrary government decisions that reflected, not whim, but the **rule of law**.

Law and the legal order assumed priority on the development agenda. Aid agencies sent armies of lawyers to help third world and transitional governments strengthen the courts and draft new legislation on the development agenda. To ensure market efficiency, foreign donor agencies imposed their own ‘model laws’ as a condition for their aid. They urged new ‘business legislation’. This included new contract and companies law, secured transactions law, intellectual property law, check law and banking law. The neo-liberals promised that as new business tides lifted everyone’s boats, the benefits would trickle down to the poor.

Yet still development lagged. No more than the earlier spate of populist lawmaking did new laws looking to develop neo-liberal institutions lead to development in favor of the poor majority. Not only within 'third' world and transitional countries, but also between these countries and the industrialized 'first' world, the 'have'-'have-not' gap yawned ever more widely. Doubts arose: *Could* the populist governors ever win the fatal race?

## 2. The road ahead

This manual argues that, to win that fatal race, you and your colleagues must devise ways to change the institutions that fasten poverty, vulnerability, and poor governance onto your fellow-citizens. The kinds of laws that you and your colleagues enact can play a principal role in ensuring good governance that facilitates transition and development.



This manual aims to help you, as a legislator, to help enact laws that effectively change those institutions, and thus help to win the fatal race.

Some view 'underdevelopment' simply as a misallocation of resources. Farmers do not produce enough food crops, so people go hungry. Too much money chases too few goods, so inflation balloons. Savings accumulate at too low a rate, so few people invest. Pollutants enter the water system, so people get cancer. Deforestation proceeds too rapidly, so soils and forests degrade and disappear. In that view, 'development' simply requires allocating resources in a more desirable manner.

As legislators, however, you cannot effectively command food crops to feed hungry people, dollars to stop chasing goods, savings to increase themselves, pollutants to stop invading the water supply, or forests to replant themselves.



*But you can enact laws to create an enabling institutional environment, one which facilitates the efforts of relevant social actors to develop and use resources in more desirable ways.*

## BOX: INTERVENTION

### STATE INTERVENTION CAN TAKE DIFFERENT FORMS

The key to successful development consists in using law and state power to constitute an enabling institutional environment. This does not mean that government must employ law to "micro-manage" the economy. As a legislator, you may enact laws designed to facilitate development or transition by different kinds and degrees of state intervention:

- direct government management of an agency – for example, the post office, prisons, the courts;
- through indirect measures – for example, laws providing training for cooperative officers, changes in land tenure rules, or financing research in new products and markets;
- through the creation of a framework of rules within which individual actors supply the moving force — for example, contract laws.

What degree of intervention the law should adopt in a particular circumstance depends not on ideology but the specific facts of the particular social problem the law attempts to solve.

*SA teachers union demonstrates for better education and against privatisation. October 2002*



*You and your colleagues can facilitate change by enacting laws that create the appropriate enabling institutional environment. Properly designed, those laws can induce people to behave in ways likely to foster institutional changes that benefit the entire nation.*



## SUMMARY

To sum up this chapter's argument:

1. A society's relative wealth and poverty and its quality of governance reflect its institutions — that is, its repetitive patterns of behavior.
2. Its institutions define a country's relative poverty and vulnerability, and also the quality of its governance.
3. After independence, a 'fatal race' ensued between populist governors looking to development, and the inherited institutions: Which would change the other first?
4. By and large, in that race the inherited institutions have — so far — come out ahead. They did not change substantially. Many governors, on the other hand, did change. They abandoned their earlier populism.
5. You and your colleagues can help to win the fatal race by enacting laws likely to transform the institutions — the repetitive patterns of behavior — that keep your country's people relatively poor and vulnerable.



## EXERCISES:

1. This chapter has identified three overriding problems in practically every developing and transitional country: poverty, vulnerability, and poor governance. Consider your country's most pressing social, political or economic difficulties: Do they fall under the general reach of one of those three overarching problems?
2. Every country, of course, has additional pressing but more specific problems; for



## **EXERCISES (continued)**

instance, the environment; the treatment of women; the treatment of ethnic minorities; corruption; the treatment of children; education; health. Are these adequately subsumed under the more general problems of poverty, vulnerability and poor governance?

3. In connection with development and transition, how effective have your country's laws proven? Identify at least one law in your country of which one might say "It is a good law, but badly implemented."
4. What do you understand by the phrase 'the fatal race'? Has your country undergone a 'fatal race'? How has that 'race' manifested itself?

# CHAPTER II: YOUR ROLE AS A LEGISLATOR



To transform the institutions that lock your country's poor majority into poverty, vulnerability and poor governance, you must understand your tasks as custodian of the legislative power.

This chapter discusses those tasks in four subsections:

- A. To facilitate democratic social change, you as a legislator must do more than pronounce inspiring policies. You must enact **effective** legislation.
- B. That task requires you to perform three law-making jobs: enacting legislation, overseeing its implementation, and communicating with constituents. Whether you contribute to all three tasks depends on your capacity to **assess** a bill in the public interest.
- C. To assess a bill in the public interest requires that you as a 'trustee for the public interest' assess it on the basis of **reason informed by experience**.
- D. To do that – and thus to exercise the legislative power effectively – you must answer a central question: **Why do people behave as they do in the face of a rule of law?**



*Why must governments use law to induce deliberate change? Can it use the legal order to do so?*

## A. WHY POLICIES BECOME LAW?

### DEFINITIONS

#### DEFINITIONS: 'LAW' AND 'THE LEGAL ORDER'

In this manual:

- (1) 'A law' means a rule *promulgated by the state and implemented by state officials*. A law may take many forms: statutes, local ordinances, subsidiary legislation, ministerial rules, administrative regulations, a military junta's decrees;
- (2) 'The legal order' means *the entire normative system in which the state has a finger*. It includes, not only the laws themselves, but also the institutions that *make* the laws (legislatures, independent agencies, ministries, and courts) and that *implement* the laws (courts, ministries, the police) (others sometimes call this 'the legal system').

### 1. To maintain social order and induce purposeful social change, societies must create governments that enact and implement rules.

Without laws, government cannot govern. A handful of policy-makers – including you – must figure out how to use state power to transform problematic institutions. To do that, that small handful of policy-makers who comprise government must channel the behaviors of swarms of governmental employees and the citizenry at large along desired paths. To influence the behaviors of millions, this small handful of policy-making officials must formulate, enact and implement rules.



*Why does government invariably use law to implement seriously intended and publicly avowed policies?*

To change behaviors, politicians' policy declarations and exhortations have their place. However, for seriously intended, publically avowed policies, government must use the law, for two reasons: **Legitimacy** and the '**ultra vires**' rule ('*ultra vires*' means 'beyond the power').

**Legitimacy:** In most countries, citizens and officials do not feel morally obliged to comply with a mere policy statement. They do feel more obliged to comply with a law. When you and your fellow deputies enact a rule as *law*, you give it **legitimacy**. The more legitimate a rule, the more citizens will obey it, and officials enforce it. They do so because they feel **obligated** to do so. Without a considerable degree of legitimacy, governments cannot govern; the State fails.

## LEGITIMACY AND GOOD GOVERNMENT

Max Weber early suggested that, to win legitimacy, government could invoke either the *charisma* of a leader (a George Washington or a Lenin), *traditional or sacred authority* (the British monarchy, or the Ayatollahs of Iran), or what he called *legal-rational means* (now-a-days we call it 'good governance'). A government seeking legitimacy cannot easily create charisma or a sacred tradition. It can only act to build **legal-rational legitimacy**. To do that, law-makers have but one option: to strengthen legitimacy, **government must strengthen the institutions that make and implement good governance.**

LEGITIMACY

**Ultra vires.** The *ultra vires* rule holds that, without authorization by a law, in an official capacity a government official may do nothing. In effect, that rule tells officials that they need not obey a mere policy statement; they need obey only **laws**.

To change institutions and thus have a hope of winning the fatal race you and your colleagues **must** enact your policies in the form of **laws**. 'Must' implies 'can', or the word has no meaning.

For most of the world's history, those with power and privilege used law in their own interests. Their own interests usually favored preserving the institutions that underpinned their power and privilege. Law served to prevent social change, not to encourage it.

Law has, however, no *inherent* conservatism. Since the fall of colonialism, most developing countries have frankly sought to use law to change their societies – mostly, with less than spectacular success. That has led 'contrarians' to argue that a government CANNOT use law to accomplish deliberate social change. You should weigh their arguments, and the answers.

Can you use law for democratic social change?



## CAN LAW INDUCE DELIBERATE SOCIAL CHANGE? THE ARGUMENTS PRO AND CON



**Contrarian's argument #1.** Society makes law; law constitutes an artifact of society. How can society's artifact change the society that made it?

**Answer:** 'Society' does not make law. Law-makers – like yourself – make law. Within the limits of law, law-makers can use law to bolster existing institutions, or to change them.



**Contrarian Argument #2.** The ruling class controls both the law-making system and the economy. The ruling class will never introduce laws that disadvantage the ruling class.

**Answer:** In every country's history, moments occur when *opponents* of the class that controls the economy control the law-making machinery. Immediately after the defeat of colonialism, giant colonial companies often still held controlling economic power. New, populist parties held political power. These new parties had an opportunity to use law to change the inherited economic institutions. (Too often they failed – but that is another story.)



**Contrarian Argument #3.** Many laws do not achieve their stated goals, not due to accident, or law-makers' inattention, but because using law to induce social change *cannot* work.

**Answer:** Sometimes, law works. Before an income tax law, nobody paid income taxes. Without a national election law, people cannot vote in national elections. Sometimes law does not work. In no country does a law forbidding sexual intercourse between unmarried people achieve 100% conformity to its commands. The problem is to discover what makes some laws work and others fail, and then to use that knowledge to write *effective* laws.



**Contrarian argument #4.** Law's function concerns dispute settlement. The laws declare rights and duties to instruct judges how to decide cases. It has no function in behavioral change.

**Answer:** Law has many functions. Among them, it decides disputes. To facilitate development and transition, law serves as government's principal instrument to change problematic social behaviors.



**Contrarian argument #5.** The post-modern school of literary criticism – 'deconstructionism' – holds that a "text" (the words on their face) has no inherent meaning. A reader's own perceptions and values shape its meaning. A law's readers – its addressees – similarly interpret its text to suit their convenience – and never mind what the law-maker intended.



**Answer:** Words constitute more than silly putty. Society exists because we can and do communicate with each other. We can draft a law sufficiently precisely to convey its core meaning to its addressees.



**Contrarian argument #6.** Only the rule's underlying political decision counts, not the technical process of stitching words together into a law. Design good policies, and legal technicians will draft good laws. Study policy, not law.



**An answer:** Of course a government must have sound policies. A policy, however, does not enforce itself. You must ensure that a bill sufficiently translates its generalities into the operative commands, prohibitions and permissions of the law.



**Contrarian argument #7.** Behaviors reflect multiple causes. Of these, the law constitutes only one. These causes interact in ways so complex that nobody can say whether or how law causes behavior. Unless one can do that, one cannot use law purposively. The law and development project becomes a mission impossible.



**Answer:** Behavior never has a single, determinative cause. In addition to a law's words, other non-legal factors do influence behaviors (see Section E below). In assessing a bill, you must understand not only its words, but also the non-legal constraints and resources that will affect the behavior of its addressees. By changing the causes of problematic behaviors, however, law can induce more desirable o...



The contrarians overstate the case. Law works sometimes (income tax, election law); it does not work other times. The problem becomes to understand the factors that produce in one case effective law, and in another, merely symbolic law. Before doing that, we take a brief side excursion to discuss your tasks as a law-maker.



## B. YOUR THREE TASKS, AND WHY THEY REQUIRE YOU TO ASSESS BILLS

### 1. Why do you need to assess a bill?

As a member of your legislature, in addition to law-making, you do many things. You provide the grease for individual constituents' interactions with government bureaucrats; on behalf of your district, you lobby for government goodies (schools, clinics, roads); you prepare for the next election; you give speeches and, in some countries, open new bridges and new supermarkets. This manual aims only to strengthen your capacity to tackle the three tasks essential to your exercise of legislative power:

- Initiating, assessing, amending and debating bills;
- Overseeing executive implementation of the laws; and
- Building and maintaining two-way communication channels with the members of civil society – the 'stakeholders'.

To accomplish any of these tasks you must know how to assess a bill.

### ASSESSING BILLS

**a. *Debating and voting on, and (sometimes) initiating bills.*** The central legislative task imposed on the holders of the legislative power – yourself and your fellow law-makers – consists in enacting (or refusing to enact) a bill.

To legislate wisely you must assess the evidence about how earlier legislation works. You have two channels for acquiring that information.

**b. *The oversight function.*** In exercising their oversight responsibilities, deputies usually may summon government ministers before the full house for questioning. In some countries, legislative committees may do so. (If legislative committees do not exist, or lack the power to do so, you may wish to consider enacting regulations to create them, and empower them to require ministry officials to answer more detailed questions.)

**c. *Maintaining two-way communications channels with constituents.*** As a second channel for learning how the laws work, you learn from your constituents. As part of your *representative* function, you need to inform them about the implications of new legislation. As part of your *oversight* function, you must solicit facts from them as to how the laws affect their lives.



The elite invariably have at least informal – and usually quite formal – access to the politically powerful. To represent all your constituents, you should make special efforts to open communication channels with the poor and vulnerable.

How competently you and your colleagues exercise the legislative power — that is, how competently you perform your three law-jobs — crucially determines the outcome of the fatal race. To perform those law-jobs competently, you must know how to assess whether and why a particular law does or will serve the public interest.



## EXERCISE: YOUR ROLES

As a member of a legislature, you play many roles: law-maker, overseer of the administration, representative of your constituency, politician, committee member, aid and helper for constituents in their contacts with government bureaucracy. To play those roles, you do a variety of tasks.

**Make a list** of the various tasks you have done **in the last week** in connection with your various roles as a member of the legislature. Which ones involve exercise of your constitutionally-delegated legislative power in the public interest?

### C. ASSESSING A BILL: POWER VS. FACTS AND REASON

The arguments a law-maker makes for or against a bill reflects the law-maker's understanding of how to assess a bill. Those arguments everywhere consist of a mix of arguments relating to *power*, and arguments resting on *reason informed by experience* (or 'facts and logic').

Which of these predominate depends upon what role the law-maker plays in representing constituents. In doing their law-jobs, sometimes legislators play the role of **agent** for a constituency, a party, or interest group. At other times, they play the role of **trustee** for the public interest. Most deputies juggle the two roles. Each role, however, has its own mode of argument and therefore its own mode of assessing a bill.

**OF COURSE MY JOB IS  
TO SPEAK FOR THE  
PEOPLE.....**



## YOU AND YOUR PARTY

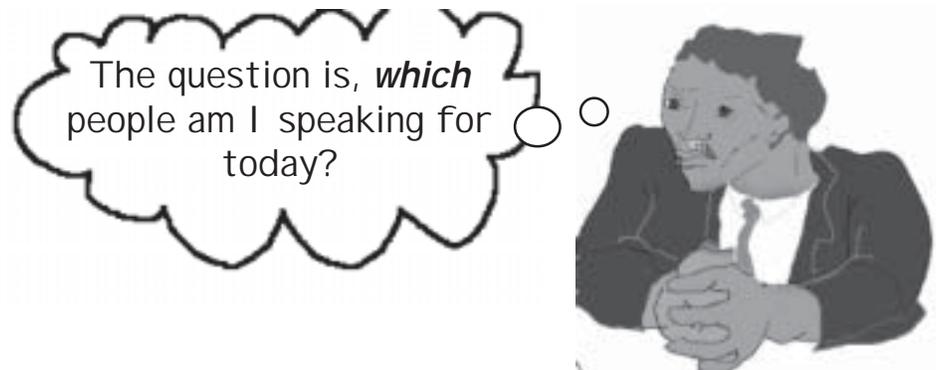
In nearly every country (particularly in the developing and transitional worlds) newly elected legislators exercise only limited independence. Long ago, Gilbert and Sullivan made great sport of the English MP who “...always voted at his Party’s call, and never thought of thinking for himself at all.”

To exercise independence does not mean that you should divorce yourself from your party. Of course, you will listen to your party’s position on a bill, discuss it, ponder it, and debate it within the party and if necessary elsewhere. How you vote in the end, however, should depend, not on your party’s, but on ***your own understanding of the logic and facts of each set of particular circumstances.***

To behave as *agent* you need only appeal to your own supporters. That requires only arguments of power. To justify your role as a *trustee* for the public interest, you must appeal not only to your own supporters but to the public at large. That requires arguments based on reason informed by experience – logic and facts.

Arguments grounded on power typically aim to mobilize supporters. They appeal to prejudice, ethnicity, party loyalty, religious affiliation, memories of battles fought long ago. For instance, in the debate over rules at the opening session of the new Mozambican Assembly, Renamo objected to the procedure of open voting for the Assembly’s President, calling instead for a secret ballot. Instead of offering reasons for this proposal, the Renamo delegates proclaimed their own party’s democratic antecedents, and raised objections to the Frelimo nominee’s character. This launched a slanging match over personalities.

By contrast, arguments grounded on reason informed by experience require *that you estimate a bill’s social consequences.* Power arguments appeal to your own side. Arguments based on logic and facts appeal to a rational sceptic sitting either on your own side, or across the aisle.



### THREE KINDS OF LEGISLATIVE ARGUMENTS

To enact a bill that you support, you must win the votes of fellow legislators. To do that, legislators make three kinds of arguments, based on consensus, interest contestation, and reason informed by experience.

**a. Consensus: arguments based on ‘core values’.** Assuming that all the citizens of a political unit agree on their core values, a representative should support legislation based on that core value-consensus. Values, however, vary widely. In Nigeria, a Fulani nomad on the Sahara’s edge lives in a completely different world from that of an Oxford-trained civil servant in Lagos. Both may speak Hausa and worship in mosques, but their webs of life – and with them, their ‘domain assumptions,’ their core values – fundamentally differ. If no ‘core values’ exist, arguments appealing to them cannot reliably persuade a bill’s opponents. Argument addressed to non-existent ‘core’ values rank with the other arguments of power. They do not appeal to the rational sceptic; they do not invoke facts and logic.

**b. Interest contestation: arguments based on power.** Interest contestation theorists agree that no core values exist. At the same time, they hold, ‘facts’ and ‘values’ occupy different universes; we cannot measure or compare ‘values.’ As Schumpeter put it, “no such thing (exists) as a uniquely determined common good that all people could agree on . . . by the force of rational argument.”

Interest contestation theorists come in two varieties: pluralist and public choice. *Pluralist* theorists hold that, as interest group representatives, legislators enact into laws the bargains they make with each other. *Public choice* theorists assert that, bent on reelection, like so many pirhanas snapping at money and votes, elected officials ‘auction’ off laws to the highest bidders. Especially where parties nominate ‘lists’ of candidates, legislators typically vote as agents for their parties. Both sets of theorists argue that a law-maker has no choice but to act as an interest-group agent. For that, law-makers make arguments resting, not on facts and logic, but power. You reach agreement not by *persuading* the other side, but by *compromising* with them. You assess a bill only in terms of what it will do for your preferred constituency.

**c. Problem-solving: arguments based on facts and logic.** Unlike pluralism, problem-solving rejects the divide between ‘facts’ and ‘values’. Arguments about what the law *ought to be* properly flow, not from prolonged contemplation of one’s ‘values’, but logic reflecting on the available evidence, that is, reason informed by experience (see Chapter 5). In this mode, you appeal to the rational sceptic through appeal to reason, not emotion. You assess bills on the same basis.

You and your colleagues cannot simply *ignore* the discourse of power, but it need not dominate. The world around, most legislative debates have focussed on the discourse of power. The laws that emerged from that discourse resulted in the people losing the fatal race. Only if you and your colleagues systematically assess bills in terms of facts and logic do you have much chance of winning that race.

To assess how a bill will likely ‘work’ in your country’s unique circumstances, you should demand evidence relating to two sets of questions: will the bill’s details induce the behaviors prescribed? Will those behaviors likely ameliorate the identified social problem, at not too great socio-economic costs?



To answer those questions, you need to understand *why people behave as they do in the face of the existing rule of law*. Only if you can give a tenable answer to that question can you confidently assert that, government *can* use law to transform society.

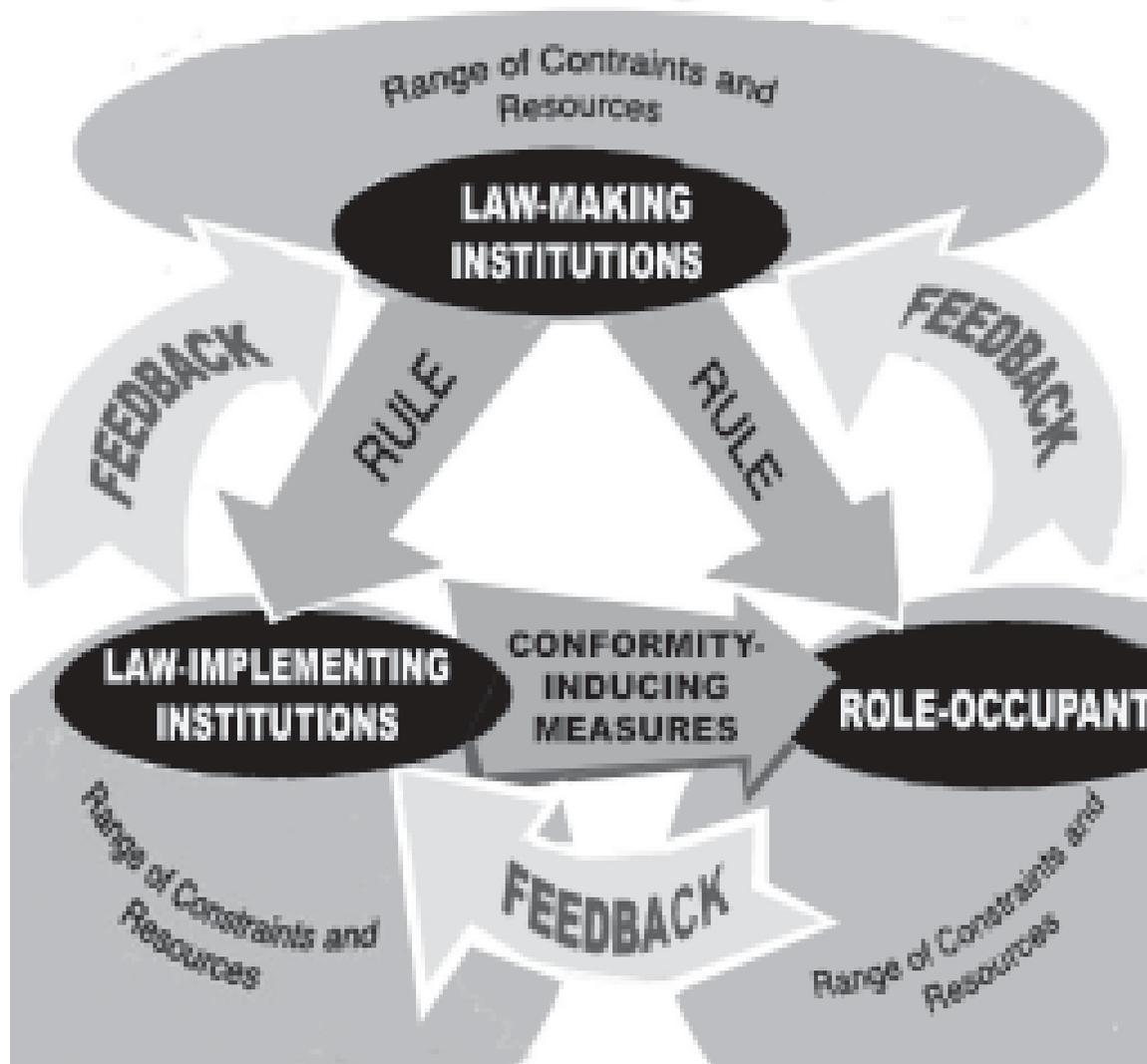
## D. WHY DO PEOPLE BEHAVE AS THEY DO IN THE FACE OF A RULE OF LAW?

Unless you can estimate a law’s potential real-world outcomes, you cannot use law to induce deliberate social, political and economic change. Without more or less reliable prediction of outcomes, *purpose* becomes impossible. (Because we can predict the consequences, we plant seeds, not stones) To estimate a new law’s probable outcomes, you must investigate the law’s potential impact on society.

‘Out there,’ in the real world, lie uncountable ‘facts.’ To assess a new law’s probable social impact, which should you examine? Save with respect of the simplest bills, without a guide about what facts to investigate – that is, *what detailed questions to ask* – you cannot know where to begin.

Legislative theory holds that, confronted by a law, social actors behave within time – and place-specific constraints and resources of the environment within which they live and work. Among these, the law (and its threats of punishment and promises of rewards) constitute only one.

# A Model of the Legal System



Legislative theory's model of the legal system shows that, faced by a rule of law, a person – a role occupant – behaves in response to (1) the rule's words, (2) the relevant implementing agency's expected behavior, and (3) all the non-legal constraints and resources that characterize that person's specific environment. (This manual discusses these factors in much greater detail in Chapters 5 and 6). By investigating those three categories, you can make a more or less reliable prediction of a law's social consequences.

That is the necessary predicate for using law as an instrument of social change. *Learning to use legislative theory and methodology becomes a condition for using the legislative power wisely in the public interest – and thus for winning the fatal race.*



## SUMMARY

We summarize this chapter with a series of propositions:

1. The duty to exercise the legislative power imposes three tasks upon a legislator: To debate and vote on bills, to oversee government functions, and to communicate with constituents. To do any of these, you must know how to assess a bill.
2. How you argue for or against a bill reflects your understanding of how to assess it.
3. Arguments of power appeal to narrow interests of party or ethnicity, not facts and reasoned judgment. Arguments in the public interest appeal to reason informed by experience – facts and logic.
4. To win the fatal race, you and your colleagues must assess whether laws will likely *effectively* help to resolve your country's urgent social problems. You must make a shrewd estimate — an assessment — of a bill's social, political and economic consequences.
5. To make that assessment, you need a guide. Our model of the legal system suggests a first step in answering the question, ***Why do people behave as they do in the face of a rule of law?***

Before we examine the answer to that crucial question in further detail, we must examine, first, issues of prioritization and, second, how to read a bill.



## EXERCISES

1. Does your government invariably promulgate policies that it makes public, and seriously intends, as ***rules of law*** (in the broad meaning of the term used throughout the manual)?
2. Many people assert that, for a variety of reasons, no matter how well or expertly used, law inherently does not have the capability of changing society. Do you agree or disagree? Why? Give an example of a law that in your country has changed some particular aspect of society. Give an example of a law that attempted a degree of social change, but failed to accomplish its objective.
3. In connection with your constitutional duty to exercise the legislative power, you have two additional tasks: to ***oversee*** the implementation of the laws; and to maintain ***two-way communication channels with your constituents***. In what way does skill in assessing a bill become relevant to these two tasks?

# CHAPTER 3: PRIORITIZING PROPOSED BILLS

Every day, you hear demands for new laws. Government never seems to have enough resources for drafting, enacting and implementing them all. To avoid wasting time and money on relatively unimportant bills, **you as law-makers, the executive and the legislature, working together** must determine the order in which to draft, debate and enact transformatory legislation – that is, you must *prioritize* them..



## MISUSE OF CAPACITY

### MISUSE OF CAPACITY

A recent workshop in a developing country illustrated many law-makers' difficulties in deciding which bills to draft first. Most of the country's inhabitants confront a grossly inequitable distribution of land; widespread unemployment; obscene gaps between rich and poor that reflect long-standing ethnic cleavages; and grossly inadequate schooling, health facilities and housing. The new populist government had won elections by promising a dramatically improved quality of life.

The workshop organizers had requested the participants from government ministries to bring with them their ministries' priority drafting projects. Senior officials from the Ministry of Trade and Industry — presumably responsible for planning transformation — brought three projects: to license highway tow trucks; to permit corporations to buy in their own shares; and to repeal the usury law (which prohibited charging interest of more than 29% per year). Surely no one could claim these as central social problems!

### This chapter looks at:

- A. How prioritization works in most countries, and your role as a legislator in the process;
- B. General criteria as guides to prioritization of alternative legislative proposals; and
- C. Prioritizing proposed laws likely to affect the people's job opportunities and quality of life.

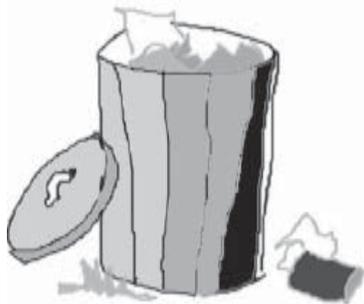
## A. HAPHAZARD PRIORITIZATION

Developing and transitional countries' processes for deciding priorities of proposed legislation often seem haphazard. In reality, too often, those processes permit the beneficiaries of the *status quo* to press for unimportant, incremental measures that leave intact the institutional causes of a growing 'have-have not' gap. That seems to reflect the skewed nature of the the prioritizing institutions.

### 1. The institutions for prioritizing drafting: An overview

In most countries, most bills originate in the executive branch, mainly in the ministries, as government bills. While implementing existing laws, ministry officials frequently identify new problems that call for new legislation. Occasionally, parliamentary committees or staff members or a legislator prepare a bill's initial draft.

Ministries usually submit their proposed legislative projects to some body that prioritizes all the country's drafting proposals. In some countries, ministries submit their projects to a Cabinet Committee on Legislation, composed of senior ministers, which determines priorities. In others, ministries simply forward them to the central drafting office, which allocates its scarce resources to bills its staff considers important. In effect, then, the office determines the bill's priority.



Whatever the institutional structure, in practice prioritizing frequently seems completely haphazard. (In the United States, a leading article on prioritizing practice bore the title, *A Garbage Can Model of Organizational Choice*.<sup>2</sup>) Taking advantage of the unsystematic prioritizing process, political leaders not infrequently press hardest for bills supported by powerful interest groups. Those with the best channels to decision-makers – **almost everywhere, those with power and privilege** – usually win priority for bills that advance their interests.

***How to improve the prioritizing institutions?*** Law-makers must answer that question in light of their country's special circumstances. By setting the law-making agenda, prioritization decisions **shape the direction of government's exercise of state power**. As an important task, make sure your country's prioritization institutions give you and your colleagues an opportunity to assess and approve the government's legislative program. Here, we suggest a few factors that you might consider.

**Prioritization** requires *comparing* the claims of the many bills that clamor for legislative attention. The principal legislative opportunity to do that occurs where government presents its annual legislative program to the legislature for approval. (Not all governments do that, but they should.) In most (if not all) Commonwealth countries, for example, the Head of State reads out the annual legislative program at the opening of the first session of Parliament for the year.

Whatever committee controls the legislature's agenda should require a bill's proponents to provide sufficient information to enable the appropriate legislative committee wisely to determine its relative priority. That could take the form of a memorandum that describes the social problem the bill will address, a timetable for the drafting, and a guesstimate of the order of magnitude of resources required to formulate and implement its provisions. That memorandum should also specify the criteria, facts and logic that the proponents believe justify granting their bill priority status; and suggest the composition of the drafting committee, and the form for consulting stakeholders.

In ranking proposed bills, the prioritization body performs a planning function. Like all plans, its initial prioritization decisions should remain flexible. If, in the course of a year, a new social problem emerges that seems to require new legislation, the law-makers may decide – in light of the available facts and reasons, and clearly pre-defined, well-publicized criteria – **to alter the priority list.**



## EXERCISE: PRIORITIZATION

Describe the steps by which, in your country, the relevant authorities decide how to prioritize legislative proposals for drafting.

## B. CRITERIA FOR PRIORITIZATION

For prioritizing proposed legislation in a given country at a specific time, no one can provide a blue print. In 1994, as its first task immediately after its first democratic elections, South Africa's new government appropriately abolished state-enforced apartheid. In many countries, land reform held first place. In Afghanistan after the Taliban's ouster, laws to establish the new government, to ensure security and protect women's rights, demanded immediate attention. No one size fits all.

Reason and experience, however, do suggest guidelines for questions you should ask ministers as to which bills to rank for legislative action first; that is, what criteria to use in assigning legislative priority. In prioritizing as in all law-making processes, the discourse of power inevitably also presses for your attention. As throughout this manual we here focus only on considerations of *the public interest* as determined by *logic and facts*.

## GETTING INFORMATION FOR PRIORITIZING LEGISLATION

To prioritize proposed legislation, you need to ask:

Will a proposed bill:

1. Improve the quality of governance? How?
2. Increase employment opportunities?
3. Increase the production of goods and services to meet the basic needs of the majority of the population?
4. Increase equity? How? In the short-, medium-, or long-term, who will win, who lose?

You should also ask:

5. Do the bill's detailed provisions seem do-able? At what cost? With what possible unintended social consequences?
6. What constitute the bill's likely social costs and benefits?
7. In light of available drafting resources, how difficult and how long a drafting task does the bill seem likely to present?
8. What other proposed legislation competes for priority?

As Chapter 1 emphasized, development comprises an on-going *process* of institutional change to ensure the use of national resources to improve our people's quality of life. That process resembles a chain. How law-makers act to change one link inevitably will affect the others. In prioritizing needed legislation, you must decide which institutions require change NOW.



Which key link should you, as legislators, grasp to pull forward the whole chain of development?

The third world's post-colonial experience holds valuable lessons. Immediately after independence, in many countries, populist law-makers voted to expand social services, especially education and health facilities. Within a few years, their countries' competitive expansion of crude exports to earn the revenues needed to finance these services led to falling world prices — and many fell deeply into debt. Currency devaluations, sky-rocketing inflation, and externally imposed financial constraints forced them to curb social service expenditures. Growing numbers – **as much as 20 to 40 percent of the labor force** – found themselves without paying jobs. Deepening poverty engulfed of their populations. Economic inequality and destabilization, rampant corruption, mounting ethnic conflicts, and military coups fostered growing global demands for democratic social change and good governance. As the new millenium opens, in what order of priority should you, as law-makers, enact laws to achieve sustainable, peaceful development?

At the prioritizing stage, you likely have relatively little information. Working with whatever information you have, give high rank to those proposals with the greatest potential net economic **and social** benefits (see Ch. 5 ). Even at an early stage, ask for and weigh the facts as to a law's probable socio-economic *costs and benefits*.

In weighing those facts, remember: existing national and global institutions, perpetuating dependence on crude and labor-intensive manufactured exports, have tended to aggravate unemployment and deepening poverty. The rest of this chapter focuses on the questions you should ask to decide the relative priority of legislation designed to restructure those institutions.



## EXERCISE: CRITERIA FOR PRIORITIZING

List the criteria which, in your country, seem appropriate for prioritizing the drafting of legislative proposals.

## C. PRIORITIZING LEGISLATION FOR ECONOMIC DEVELOPMENT

Development does not concern 'merely' economic growth; social welfare and good governance, too, must remain high on the agenda. Without an adequate economic foundation, however, government cannot finance projects likely to enhance social welfare. Laws looking to strengthen the economy too often fail to win priority. To help you understand the obstacles to developing and transitional countries' economic development in today's globalization era, this section presents, first, a model of the institutions that define the relationship between the industrialized and the other countries; second, the economists' debates over development strategy as they bear on prioritization choices; and, finally, more detailed criteria for assessing the priority of legislation relating to agriculture, industry (including the informal sector), trade, finance and foreign investment.



Laws to enhance good governance and social welfare of course deserve high priority. So do laws aimed at strengthening your country's economic foundations.

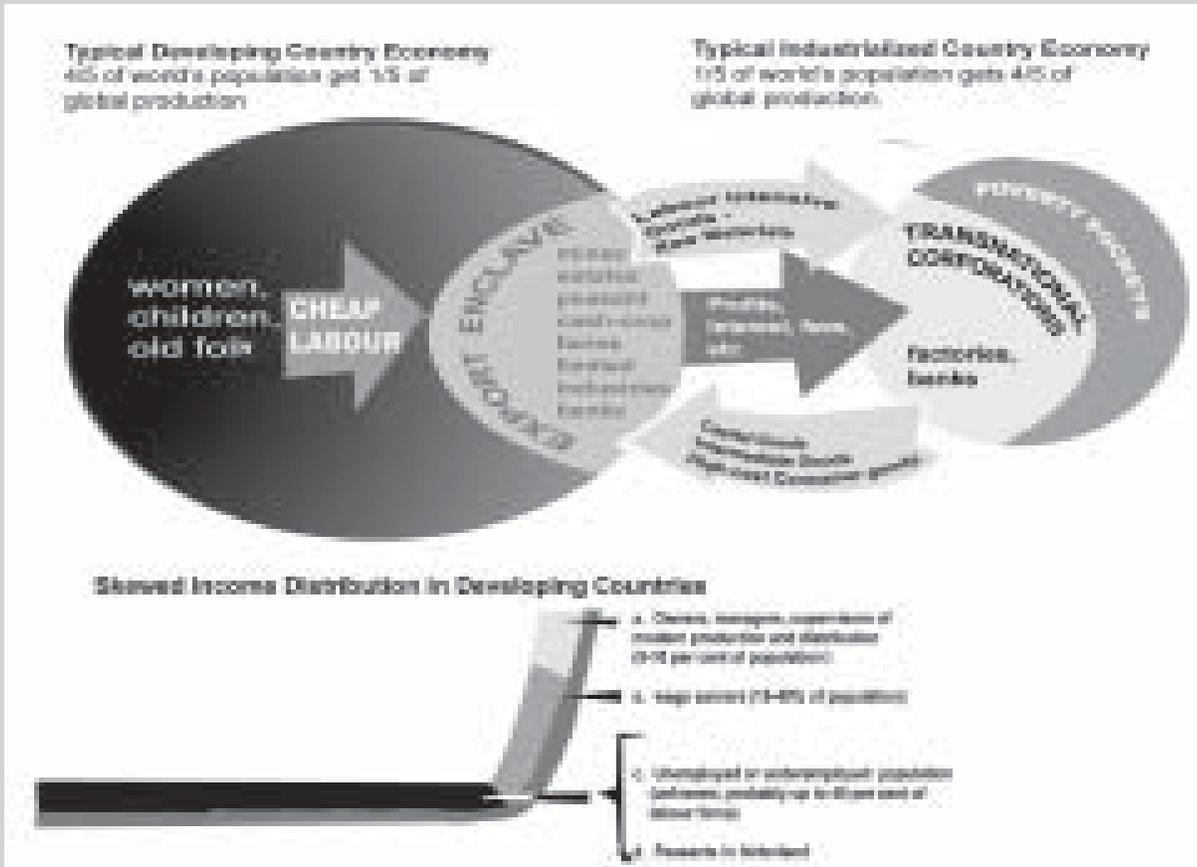
### 1. Institutions and poverty in developing countries

To improve the quality of life of a country's population requires both **increasing the total national pie** – the sum total of available goods and services (what economists call 'the Gross National Product' or 'National Income') – **and distributing it more equitably**.



A simple model shows the global resource allocations which reflect and perpetuate the underemployment of developing and transitional country human and physical resources.

**THE CHARACTERISTICS OF POVERTY IN DEVELOPING COUNTRIES: A MODEL**



Between nations, enormous disparities of wealth persist. The United Nations Development Programme (UNDP) estimated in 1998 that

***"a fifth of the world's population, living in industrialized nations, consumes more than four fifths of the world's resources. That means that four out of five of the world's peoples, mainly in the third world and transitional nations, must struggle to survive on a bare fifth of the world's goods and services."***

Within most developing countries, narrow 'modern' enclaves have emerged, dominated by local elites who, closely associated with transnational corporate enterprise, reap half to three fourths of the national income. Foreign- and domestically-owned enterprises employ low-cost labor – frequently, migrants seeking to escape from neglected rural hinterlands – to produce and export the countries' rich mineral and agricultural materials, mainly in crude form at low prices, to first world markets. In the new millennium, a few factories employ unskilled workers (at wages a fourth or less than those of first world factory workers). Mainly, they assemble and process imported parts and materials to make cheap consumer goods – shoes, TV sets, even computer parts – for sale in first world markets.

Typically, the value of most developing countries' exports exceeds the cost of imports which are mostly machinery and parts for enclave firms, and luxuries for those few who can afford them. Nevertheless, most of these countries pay out, in the form of profits, interest, and dividends to global investors and financial institutions, more than they earn. Those payments and the flight of capital to 'safer' foreign havens leave precious little internally-generated savings for investment to spur domestic production and job creation.

**The institutional basis.** No nation's raw materials produce and sell themselves to foreign countries. Historically-shaped institutions – repetitive patterns of behaviors – perpetuate these externally-dependent development patterns. Often rooted in the colonial era, inherited institutions still channel local labor to work on the plantations, the mines, and, increasingly, factories to produce crude materials and cheap consumer goods for export. Big wholesale trading firms purchase small farmers' crops at low prices. Large industrial corporations employ unskilled workers for long hours at minimal wages to manufacture cheap consumer exports. Property and contract laws make it possible for transnational corporations and wealthy nationals to reap the profits of third world production and marketing facilities.



Economists agree about precious little.

## 2. The economists' debates

Many economists teach that the quality of life of the population of a developing or transitional country depends on its productivity, the distribution of the fruits of its labor, and its ability to earn foreign exchange in order to purchase what the country cannot produce itself. The model above demonstrates that, too often instead, inherited institutions siphon out funds, thwarting the inhabitants' efforts to accumulate and invest capital to enjoy the good lives those economists promise.

Nevertheless, now-a-days most economists agree that to increase a nation's productivity requires government legislative action to:

- (1) **provide social and economic infrastructure** to enable inhabitants to obtain jobs and earn higher incomes in the context of more balanced integrated national specialization and trade;
- (2) systematically spur introduction of **appropriate new technologies** to increase productive employment and productivity; and
- (3) **create institutional frameworks** that empower the nation's citizens to work together increasingly effectively to increase their output and incomes as the essential foundation for improving their quality of life.

Debates about the kinds of laws likely to help attain these goals tend to degenerate into statements of dichotomies: Big bang *or* incremental change; Market *or* Plan; export-led *or* internal demand-led development; private *or* state ownership. For a while, in the 1990s, many economists seemed bemused by the 'Washington consensus,' a form of neo-liberalism that seemed to assume freeing 'the market's invisible hand' would, over time, ensure increased production benefits would trickle down to those in need.

Those debates often generate disagreements as to whether, on the one hand, to enact legislation to encourage investment and support business, or, on the other, laws to meet people's socio-economic needs. Too often, proponents on both sides seem to ignore the facts of country-specific characteristics which logically should undergird a government's development strategy.



*Hawking shoes, Johannesburg, South Africa, 2002; the benefits of the market may take some time to trickle down to all participants.*



ITS NOT AN "EITHER  
/ OR" DEBATE . . . .

## Market vs. Plan Debates: Some basic issues

**a. Plan or Market?** You cannot afford to think about state planning and markets as an either/or dichotomy. Today, every country's economy exhibits some planning. Even in an archetypical free market state like the United States, considerable planning takes place. How else could firms – public or private – run an electrical supply system, a telephone system, or any other 'natural monopoly'? On the other hand, given scarcities of funds and of skilled personnel, market-driven solutions sometimes trump plan solutions. In your own country's unique circumstances, you must study the facts to determine the mix of plan and market each sector of the economy demands. Especially in small countries, where one or two large firms often dominate entire sectors – like railroads, an iron and steel industry, chemicals and oil production, or finance – you should study the merits of alternative regulatory regimes for each sector. Whether a particular sector lends itself better to planning or market solutions depends on the facts, not abstract theory. For markets, as for every other aspect of life, no particular legal framework proves universally applicable.

**b. Shaping a market's legal framework.** Most economists agree that, to function well, a market must operate within an appropriate legal framework;<sup>3</sup> laws to improve that framework deserve a high priority. To determine what constitutes an appropriate legal framework in your country's historically-shaped conditions, you may wish to ask two further sets of questions:

- (1) Ought business laws invariably to receive priority?
- (2) Do those kinds of laws exhaust the category of the laws that markets require?

As to the first question, citing Max Weber, some theorists claim that in **every** market economy, to ensure the predictability for investments that capitalists seek, law-makers should prioritize business laws, which an earlier generation called 'private law.'<sup>44</sup> These theorists call for legislation to privatize state-owned property; property laws generally; and contract and corporation laws in all their elaborate variations – principally enforced by private litigation in law courts.

Each country's transition to a market economy does tend to resemble that transition in other, relatively similar countries. (That explains why one country's law-makers can learn something about that transition from other countries' experiences.) Significant differences also inevitably exist. To make a mature judgment as to whether a particular country should



AND EVERY COUNTRY HAS ITS OWN  
ISSUES, PROBLEMS AND NEEDS.

adopt a check law or a titling law before enacting other kinds of laws requires an empirical study of that country's specific circumstances.

As to the second question, some authorities insist that business laws exhaust the list of priority legislation a market economy requires. An alternative view holds that markets work not merely because of business laws, but also because of the existence of an appropriate legal and institutional (as well as physical) infrastructure. That includes laws to regulate the money supply and credit; to ensure government's fiscal responsibility for budget formation and budget discipline; to shape the educational system to provide an educated work force; to provide publicly-financed old age and disability pensions; to foster a mobile work force and social stability; to establish an agricultural extension service to stimulate a progressive agricultural sector; to establish effective environmental protection agencies to protect the environment against the ravages of private greed – a long list.

This view suggests that, to prioritize laws in developing and transitional polities, you should weigh the claims not only for business laws, but also for the full range of legislation required to bolster the market's institutional infrastructure.

Notwithstanding neo-liberal economists' advice, you should never blindly copy laws in a rush to privatize state-owned facilities. Typically, taxpayer funds originally financed those assets. To sell them to the wealthy few who happen to have capital, or to foreign investors, does not ensure their future development in the public interest. To maximize short term profits (and executive salaries), the buyers often lay off workers and strip production to the most profitable lines, aggravating unemployment and leaving unfilled essential economic functions, like building roads to remote rural areas; giving the poor access to water, housing, electricity and public transport; and establishing industrial plants to produce parts, equipment and materials to facilitate growth of small scale enterprises.

In short, nobody has a silver bullet that in one shot can vanquish the devils that plague the world's disinherited: poverty, vulnerability, poor governance. No easy short-cuts exist. You must assess your own country's realities to determine which laws require early drafting and enactment, and which to defer.

In every case, you need to consider whether a proposed law seems likely to help shape the markets' essential institutional infrastructure, and facilitate production of the goods needed to improve productive employment and *all* people's quality of life.

### 3. Prioritizing legislation for economic transformation

Legislative theory argues that an appropriate legal framework can lead to significantly increased productivity, providing the basis for meeting the entire population's basic needs. This requires transforming legislation in each of the major areas of economic activity: agriculture; industry; wholesale trade; finance; and foreign private investment.

This section asks what information you need to decide what legislation will likely help to strengthen the 'key links' to foster development in each economic sector.

**1. Agriculture.** Over the past century, many countries in the developing world have seen a shift from subsistence and small scale agriculture to cash crop production. Often this involves the formation of large-scale agri-industry. Large mechanized farms — whether owned by foreign firms, wealthy private farmers, state farms or cooperatives — use large areas, often the best land, and employ more capital equipment and machinery than small farms. As they invest in more advanced efficient technologies, they employ less labor per unit of output. At the same time, they often push off the land small farmers who cannot compete, forcing them to take low-paid jobs as hired farm labor or migrate to the cities.

Given access to appropriate technologies, small farmers, typically families with limited capital, can significantly improve on-farm productivity. To enable them to acquire new skills, inputs, credit, and markets, laws may establish agricultural extension programs, and facilitate their efforts to work together through cooperatives.



Legislation has played a key role in structuring agricultural transformation - both in creating large agri-industrial enterprises, and empowering small-scale farmers to better utilise land and labour under changing conditions. Most agricultural experts agree that, to increase agricultural productivity, legislation should facilitate farmers' efforts to gain access to six essentials:

- (1) Sufficient arable and well-watered land;
- (2) farm inputs (fertilizers, appropriate machinery, seeds, water supplies, etc);
- (3) credit to purchase those inputs;
- (4) adequate technology;
- (5) the necessary skills to maximize their use of these inputs; and
- (6) markets, including the transport, storage, and marketing facilities they need to sell their increased outputs.

Law and the legal order can and do change inherited institutions to give farmers access to these essentials. That may produce mixed results. The devil lies in the laws' details. They determine which of which particular group of people may be affected, and how they will behave in the face of the new legislation.

## EXAMPLE

Women subsistence farmers who wish to engage in cash crop production rarely have access to credit, to enable them to buy necessary fertiliser or seed; financial institutions' regulations often require a (male) head of household to provide surety for credit. UN assessments of agricultural assistance programs in Africa point out that although women comprise 80 per cent of the targeted farmers, three quarters of the credit provided goes to men. That makes it far less likely that women farmers can adjust to new economic conditions.



Over time, increased agricultural productivity tends to reduce the demand for agricultural labor per unit of crops produced. As a legislator, you should ask for facts concerning each law's likely impact, not only on productivity, but also on agricultural employment and equity.

**2. Industry.** Most economists perceive industry as a mighty engine of development. By creating new jobs and manufacturing an expanding array of low-cost goods, it holds the potential for improving the material conditions of life throughout the population, as well as expanding exports.

Widespread experience in many different developing countries suggests, however, that industrial growth may have a counterproductive social impact. Wealthy private (foreign or domestic) investors usually prefer to invest in the least risky, most profitable sectors. Typically, they shun investments in basic industries which might serve as poles of growth, and in small-scale enterprise that may provide job opportunities and produce low-cost tools and consumer goods to meet basic needs.

In recent years, transnational corporations together with locally-based affiliates have begun to invest in last-stage assembly and processing of imported parts and materials for export from developing countries. While seeming to increase industrial production, this may aggravate, not only dependence on imported parts and materials, but also a growing foreign debt to import machines, parts and materials. Typically, those industries maximize profits by hiring low-cost national labor – often women, and even children – for long hours at very low wages. Their managers seldom transfer to national entrepreneurs basic technologies and skills.



Unable to obtain wage employment, many working people struggle to earn whatever they can in the growing so-called 'informal' sector — micro-enterprises that operate on a catch-as-catch basis outside of the formal legislated framework. With little or no access to capital, credit, technology, and markets, informal sector entrepreneurs use low-cost, locally-available technologies — often only hand tools — to produce consumer goods for the nation's poor majority. Although they pay employees very little, they do provide jobs for the otherwise unemployed.

An alternative strategy might foster investment in more advanced industrial technologies to reduce the cost and increase the supply of nationally-manufactured machinery, equipment and consumer goods to raise national living standards. In countries as different as Japan, South Africa, South Korea, the former so-called socialist countries and Brazil, law-makers have enacted laws to give government a direct role in building basic industries, like iron and steel, petrochemicals, electricity, telecommunications and transportation.

Appropriately drafted laws can strengthen your country's nationally (or regionally) oriented industrial growth, creating more productive rural and urban employment opportunities, more equitable income distribution, and expanding internal markets. To assess a particular law's impact on industrial development, you should ask two sets of questions:

First, how will it contribute to the provision of five factors essential for sustainable industrial growth:

- 
- (1) a reliable source of supplies;
  - (2) an adequately educated labor force, including managerial and technical personnel;
  - (3) appropriate technology;
  - (4) credit; and
  - (5) access to markets.

Second, how will the resulting industry likely affect jobs and incomes in the rest of the economy, including the informal sector? For that, you should ask for evidence relating to that industry's potential contribution to:

- 
- (1) job-creation, especially to absorb displaced rural workers;
  - (2) the foreign-exchange earnings needed to import new machinery and equipment to spur all sectors' productivity; and
  - (3) the forward and backward linkages between manufacturing and the rest of the economy, including the informal sector; that is, will the resulting industry –
    - (a) process agricultural or mineral raw materials for domestic use as well as for export, contributing to increased domestic, including rural, incomes;
    - (b) manufacture essential machinery and equipment to spur domestic productivity in agriculture or industry; or
    - (c) produce low-cost consumer necessities to improve the majority's quality of life?

In short, to prioritize laws relating to industry, do not rely on abstract theoretical models. Instead ask for facts: will the proposed law foster sustainable industrial growth that contributes to increased productivity and employment in all sectors of the economy, leading to steady improvement in the majority's quality of life?

To become sustainable, increasingly integrated domestic industrial and agricultural growth requires new laws that facilitate the expansion of domestic and international trade.

**3. Trade.** Developing countries have often inherited trading institutions that have perpetuated dependence on the export of crude and labor-intensive manufactured goods; import of machinery, equipment and parts for export-enclave industries, and consumer luxuries for the few who can afford them. Post-colonial experience, however, has demonstrated that overcrowded global markets cannot absorb developing countries' competitively expanding exports.

Many wholesale firms enjoy long-established links with overseas buyers and sellers with whom they share lucrative external trade profits. Investing capital to build warehouses, godowns, and transportation capacity, big wholesalers dominate internal trading channels. They charge high prices that squeeze, not only retailers, but also domestic farmers' and local industries' profit margins. These smaller enterprises must pay whatever prices the wholesalers charge for consumer goods, tools and equipment.

TRADE



EXAMPLE

Some transnational firms manipulate global markets and prices with little regard for their impact on third world peoples. To illustrate: by the 20<sup>th</sup> Century's end, in many developing countries, HIV/AIDS had reached crisis proportions. Transnational pharmaceutical firms priced drugs that could protect against the disease at four to five times developing-country workers' average yearly income. When developing countries sought to import or manufacture generic drugs at more affordable prices, the pharmaceutical companies brought suit in those countries' domestic courts, and pressured their home governments to block those countries' most favored nation status.



March to end to international patent laws covering HIV drugs, Pretoria, South Africa, 2000.



Legislation to help your country's retailers and manufacturers overcome these kinds of obstacles deserves a high priority. You should ask the relevant ministries to provide the factual information you need to propose and prioritize laws likely to help restructure your country's trading institutions. These restructured institutions should foster more balanced, integrated national, and where possible, regional trade directed to boosting national productivity and incomes and fulfilling people's needs.

**4. In finance.** Everywhere in the developing and transitional world people experience great difficulty in accumulating and reinvesting capital to finance production and trade geared to their needs. Existing financial institutions — banks, insurance companies, and stock exchanges — tend to finance patterns of production and trade that perpetuate externally dependent development.

Both foreign and domestically-owned banks collect and hold whatever savings the poor, as well as the wealthy few, may accumulate. These savings could become a major source to spur economic growth. For the most part, however, large financial organisations limit their loans to large-scale farmers, formal sector manufacturers, and to wholesale trading firms, primarily those engaged in foreign trade. Banks and financial institutions seldom lend money to small farmers to grow food crops. They rarely lend funds to domestic basic industries focused on increasing developing countries' national productivity and employment; even less often do they make loans to informal sector micro-enterprises and traders from the low income majority. Taking advantage of relaxed foreign currency rules, they often ship significant amounts of locally-generated surpluses for investment in more secure markets in industrialised countries.

Over the years, insurance companies and pension funds (both foreign and domestically-owned, often associated with banks), have accumulated a significant share of many developing countries' savings. Seeking protection against risks of accidents and old age, increasing numbers of individuals pay premiums that swell these institutions' funds. Insurance company managers may reinvest these in government bonds, and sometimes through the stock market, in large-scale business enterprises. Some governments permit insurance firms to ship the accumulated funds overseas for 'safe' investment in foreign industrialized economies — a further drain of national investable surpluses.

To prioritize legislation that can improve national financial institutions' stability and safety, request evidence as to the likelihood that proposed laws will facilitate the accumulation and reinvestment of national savings to:

- increase productive employment opportunities;
- contribute to a balanced, integrated domestic (and where possible regional) economy characterized by expanding production and trade; and
- improve the population's quality of life.

**5. Foreign private investment.** Some development theorists argue that foreign capital inflows should constitute the be-all and end-all of proposed legislative programs. These theorists claim that foreign private investments will lead to expanded foreign exchange, employment, appropriate technology, marketing links, and skilled manpower — all in one package. These analysts would instantly award priority to any legislation likely to attract foreign investors; and reject legislation that might "scare" them away.

If one assumes that the existing institutional structure will remain fixed, immutable, and unchanging, that advice might make some sense. In contrast, this manual holds that through the wise use of the legislative power you can change institutions. That opens up a wide range of options, of which attracting foreign capital constitutes only one possibility.

One counter approach would be to ensure that legislation specifies criteria to make it likely that foreign investments will in fact bring their heralded benefits. Legislation can make tax relief and other benefits to foreign investors dependent upon their contribution to building basic industries, and tie them to the number of jobs and the amount of foreign exchange they generate. It can condition new foreign investments upon the introduction of new technologies and training local personnel, not merely to service or assemble an imported 'black box', but to design new versions to improve national productivity.

Say 'no' to prioritization of legislation that simply conforms to theoretically-determined Market or Plan priorities. Ask for the facts you need to assess how a proposed law to stimulate foreign investment in agricultural, industrial, trade, and financial sectors will affect your country's inhabitants.



## SUMMARY

1. A country's law-making institutions shape the prioritization process. You and your colleagues should critically review and, if necessary, restructure your country's law-making processes to ensure prioritization of legislation in the public interest.
2. In general, give precedence to legislation likely to strengthen the institutions required to ensure good governance, as well as the socio-economic institutions that shape the population's employment opportunities and quality of life. Be sure that the available



## SUMMARY (continues)

facts demonstrate that the expected benefits of proposed institutional changes will likely outweigh their probable costs.

3. When assessing the relative priority of legislation likely to affect your country's economic institutions in the fields of agriculture, industry, the informal sector, trade and finance,
  - Base your decisions, not on abstract models or theories, but on the facts of your own country's specific circumstances; and
  - Think carefully about the questions you should ask to assess their likely social impact, not only on the growth in the 'national pie', but on the people's productive employment opportunities and quality of life.



## EXERCISES

1. In practice, how does your country prioritize bills for drafting? In practice, what proposition best explains what bills get drafted first? What suggestions might you make to improve the prioritization process?
2. The text recommends prioritizing legislation that seems likely to strengthen the institutions of governance and to expand balanced, integrated domestic output to increase job opportunities and a better quality of life. What alternative criteria might a contrarian suggest? How might a contrarian justify those alternative criteria?
3. Pretend that you sit as a member of a committee of the Parliament charged with the duty to report on the government's annual plan for legislation. The Secretary to Cabinet sits before you, ready to answer questions. State at least three different categories of questions that you might ask the Secretary about how the proposed annual legislation plan relates to issues of economic development.

## CHAPTER 4: READING A BILL



To assess whether a bill will *serve the public interest* – and at what economic *and social* cost – you must *read and understand the bill on its face*.

This chapter aims to assist you in taking the first step: reading and understanding a bill. The next chapters suggest questions you should ask to determine whether a bill will likely serve the public interest.

A bill's printed pages *look different* from those of novels, magazines, or history and science texts. Most sentences begin with a number or letter. Some sentences seem to stop in the middle, followed by a new numbered subparagraph. They seem written in a strange language, with many almost unrecognizable words. Some appear so tangled that you can only try to puzzle them out.

### ASK FOR CLARIFICATION

#### ASK FOR CLARIFICATION

As you examine a bill on its face, keep in mind three essential points:

1. For historical reasons, people used to believe that judges constituted the law's only important readers. Today, especially for development, transformatory law must change behaviors. Drafters must draft so that the people whose behaviors the law aims to change can read and understand what the bill says. If you do not understand a bill, neither will its addressees; the drafter has drafted it badly.
2. Do not listen to the drafter who says that, for 'legal' reasons, a bill requires hard-to-comprehend words or sentences. If drafters cannot explain a section in simple terms, they themselves probably do not know its meaning. *Nothing* in the law defies explanation in simple terms. If a bill's addressees could not readily understand it, send it back for redrafting.
3. Remember: Your constituency elected *you* – not the drafters. Government drafters should provide the information you need to exercise your legislative power wisely.

A law prescribes how a primary role occupant and designated implementing agency officials should behave (see the Model of the Legal System, p. 27). It consists of a series of **rules**. Each **legislative sentence** specifies what someone **must, may not or may do**.

You might think of a bill as an onion. To get at its core meaning, you must peel back layer after layer. To help you peel back those layers, this chapter explains

- A. Why drafters number practically every sentence, and formally organize a bill into Sections, Chapters, and Parts:
- B. Why most lawyers (including drafters) frequently use a strange dialect ('legalese');
- C. The meaning of a bill's 'technical' sections; that the individual, numbered sections -- each composed of a single narrow command, prohibition or permission — constitute the bill's basic building blocks; and
- D. In the context of the existing legal system, the bill's prescriptions of behaviors comprise the bill's substantive thrust: its legislative content.

## A. A BILL'S FORMAL ELEMENTS



In a bill, numbers or letters denote titles, parts, divisions (or chapters), and sections.

A bill's numbering system identifies the separate commands that together make up that bill. Drafters number sections (articles) so that, in legislative debates or in court, lawmakers and judges can refer to particular ones. Drafters group sections that deal with a single issue into a Chapter, and Chapters that have some common attribute into a Part.

A bill's formal structure follows the form similar to that of any outline:

### Part I

Bills everywhere follow that outline form, but different jurisdictions' drafting conventions assign different names to the outline's various levels. (The names of a bill's levels should conform to your country's practice.)

Chapter 1  
Section 1  
Section 2  
Subsection (1)  
Subsection (2)  
Section 3  
Chapter 2  
Section 4  
Section 5  
Part II  
Chapter 3  
Section 6  
Section 7



1. **"Sections"** (some jurisdictions call them Articles) constitute a bill's basic building blocks. A section should contain no more than one 'legislative' concept, that is, a *single* rule (see Section C below).
2. **"Chapter" (or "Division")**. Some jurisdictions call a group of sections within each part, 'Chapters,' while others use 'Divisions'. Most jurisdictions number chapters (or divisions) consecutively throughout a bill. Many simple bills include no level higher than chapters, and even simpler ones, no level higher than sections.
3. **"Part"**. Conventionally, usually numbered consecutively by a Roman numeral ("I" or "II"), Parts constitute a bill's largest divisions. If a bill contains a large number of parts, each of which might stand alone, you should consider whether its sponsors tried to resolve too many diverse problems in one law (called 'stuffing a bill,' see Chapter 5).
4. **"Title"**. Only a few jurisdictions use the word "Title" to mark a division in a single bill. Historically, law-makers published statutes in the order of the dates of their promulgation. Today, some jurisdictions **codify** their laws, putting them together in a single giant compilation. (Those who can put them in a computerized form). They insert each new law into that compilation, and use the label "Title" to cover all the laws concerning a particular subject, like "Education," "Transportation," or "Prisons."

Understanding the bill's numbering system should help you to peel back the bill's first layer. The language in which drafters expresses commands in each section may appear as a second impenetrable layer.

NAMES OF DIFFERENT LEVELS

## B. THE LAW'S LANGUAGE

*If in your country's drafters write bills so the ordinary person can understand them, move onto Section C below - and rejoice!*

In most of the world, drafters write a strange, convoluted, unfathomable language. Some call it 'legalese'.

Complex legal words fall into two categories. Some reflect the requirements of law's specialized subject-matter. Others merely obscure plain meanings.

1. **Law's specialized vocabulary.** Like most professions, law sometimes requires elements of a specialized vocabulary. To illustrate: In different relationships, a person may promise to do something: To pay a debt, to complete a building pursuant to a contract, to deliver some promised goods. Another person may promise to perform if the first promisor does not. The **law of guarantees** uses specialized words for elements common to all those kinds of promises: 'Principal' means the debtor who promises to pay or to perform some other duty; 'surety' means a person who promises to pay the debt or perform the duty if the principal defaults. To understand some bills' specific subject-matter, you have to learn the relevant specialized vocabulary. ***If you do not understand the words used, ask!***
2. **'Legalese'.** Often, however, drafters use unnecessarily complicated words, and long, tortuous sentences. **Insist that they re-write them in plain language.**



## AN EXAMPLE OF LEGALESE IN THE ENGLISH DRAFTING TRADITION

Read and weep.

*From the Zambian Cooperative Societies statute:*

"The minority or nonage of any person duly admitted as a member of any registered society shall not debar a person from executing any instrument or giving any acquittance necessary to be executed or given under this Ordinance or the rules made thereunder, and shall not be ground for invalidating or avoiding any contract entered into by any such person, whether as principal or as surety, [and that contract] shall be enforceable at law against such person notwithstanding his minority or nonage."

*Translation:* "A cooperative may enforce a contract between the cooperative and a cooperative member younger than the country's age of majority."

EXAMPLE

50 England, historical circumstances encouraged drafters to use legalese. Before England

established a central drafting office in 1869, ministers hired conveyancers to draft bills. Conveyancers (long paid by the word to write deeds and wills for landed interests) used the same language to draft bills. Central drafting office drafters adopted the same form and style. They taught it to drafters in the colonies, where obscure vocabulary and convoluted legalese gave colonial officials and judges broad discretion to rule pretty much as they wished. Unfortunately, not a few post-colonial and transitional government drafters still grant broad discretion by using hard-to-understand legalese.

If you recognize a bill's underlying pattern, however, you can understand it even when written in the densest legalese. To discover a bill's pattern, try to decode the words the drafter used to write it.

### THOMAS JEFFERSON ON LEGALESE

Thomas Jefferson, one of the authors of the United States' Declaration of Independence and the United States' second President, wrote that those authors decided:

“to reform the style of the later British statutes and of our Acts of Assembly, which by their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis, and their multiplied efforts at certainty, by *said*s and *aforesaid*s, by *ors* and *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves.”

EXAMPLE

A quick review of present U.S. drafting reveals that Jefferson and his colleagues failed to persuade all future U.S. drafters.

For many legalese words, drafters could find plain-language equivalents. When I said, “Those strawberries look delicious. Please pass the said strawberries,” my friends might well look at me with alarm. ‘The said strawberries’ here only means ‘those strawberries.’ Words like ‘said’, ‘such’, ‘heretofore’, ‘hereinabove’, ‘whereas’, or ‘provided that’, serve no function useful to the law.



In many *legalese* phrases – ‘to have and to hold’, ‘null and void’, ‘give, devise, bequeath, grant and bequest’, ‘building or structure’, ‘lot, tract or parcel of land’ – two words mean the same thing. The drafter could easily delete one.

If you do not understand a word in a bill, ask what it means. If, like ‘surety’ it constitutes a technical term, insist that the bill define it in lay terms. If a word like ‘said’ or ‘hereinbefore’ seems meaningless, insist that the drafter use plain English. If a bill includes redundant words or phrases, insist that the drafter use one or the other, not both.

**3. Definitional clauses:** Frequently, a statute begins with a section entitled ‘Definitions.’ In a long statute, the definition section may go on for pages.

**DEFINITIONS: SOME EXAMPLES**

*"In this Act –*

What purpose does this section serve?



"1. 'Television dealer' means a person who by way or trade or business

- (a) sells television sets by retail;
- (b) lets such sets on hire or by hire purchase;
- (c) arranges for such sets to be sold or let as aforesaid by another television dealer; or
- (d) holds himself out as willing to engage in any of the foregoing activities;

"2. 'animal' includes whales and other mammals living in the sea.

"3. 'vehicle' does not include a wheelchair."

Many people either



(a) assume a slog

(b) throw up their hands and retire — cursing the whole tribe of drafters.

A drafter might put a bill's definitions in one of two places in a bill:

1. List the definitions of key words alphabetically in a glossary at the beginning or end of the bill (preferably the end) so readers can look up the meanings of words as needed. Unfortunately, a

reader's failure to look up important words might lead to significant misunderstandings.

2. Stipulate an important word's definition in the text where that word first appears. Then, at the end of the bill, list those words alphabetically in a glossary, specifying the page numbers where the reader can find their definitions.

Make sure that, whenever a word or concept appears more than once in a bill the drafter always uses the same definition for it. Throughout the (fictional) bill in the previous example, for example, the word 'television dealer' should always have the meaning given it in the bill's definition section.

## USING A DEFINITIONAL SECTION

Suppose Section 2 of a bill defines 'television dealer' as defined in the above example. Section 5(1) of the same bill reads as follows:

"5. Forwarding document of sale to National Tax Office.

"1. Upon request by the *television dealer*, the Department of Taxation shall supply to the *television dealer* a form that indicates the date of a sale or contract to sell a television set that the *television dealer* has entered upon, and the name and address of the purchaser."

The reader should substitute the definition set forth in example No. 1 on p. 52 wherever "television dealer" appears. *In Section 5, above, that would require repeating that lengthy definition in three places. By using the word as defined in the bill's definition section, the drafter avoids lengthy repetitions throughout the bill.*

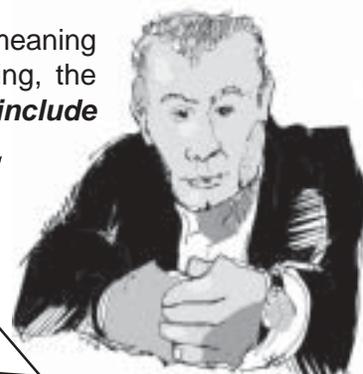
EXAMPLE

Bills include definitions for either of two reasons. First (as shown in the previous box) in some statutes, drafters must use many, sometimes even a long list, of words to describe a complex concept. Using the word(s) as defined in the bill's definitions section throughout the statute avoids tedious repetition and increases the bill's readability .

Second, a definition helps to avoid the vagueness inherent in every word (proper names excepted). Consider the word 'vehicle' in a municipal ordinance that states "A person may not drive a motor vehicle in a city park." Plainly, the ordinance prohibits a person from driving an automobile in a city park. Yet reasonable speakers of English could disagree as to whether the bill prohibited motor-driven wheelchairs. To avoid disagreement, a drafter could expressly define the word 'vehicles' to **exclude** 'wheelchairs.'

Occasionally, a drafter may intend a bill's reader to construe a word to include in its meaning items that, in ordinary language, that word might exclude. To avoid misunderstanding, the drafter should define the word in the bill, for example, by defining 'animals' **to include** whales and other sea mammals.

This section peeled back a second layer of confusion about a bill - that of language. The next peels back a third layer -- **that a bill prescribes specified social actors' behaviors.**



## C. THE STRUCTURE OF A SECTION

As a bill's basic building block, a section constitutes a single rule, a **prescription**. Sometimes that prescription seems hidden behind a thicket of dense language. As you analyze a section's words, keep in mind that you need to identify the behaviors they prescribe. **With very few exceptions (usually less than 5 per cent) each section of a well-drawn bill commands, prohibits or permits a social actor to behave as it prescribes.** (Even the remaining 5 per cent constitutes commands, although of a peculiar sort; see Section D, below.) Always ask, does a section properly tell the reader, **Who? What? When? and Where?**



Who?

To answer the question, **'Who?'** look for the person whose behavior the section prescribes. A language expert would tell you to identify the sentence's **subject**. (Mistakenly using a passive voice, a drafter may fail to specify the rule's **subject**. Take a legislative sentence that states, "The accounts of the Small Claims Court shall be audited at least twice a year." Does it state **Who** will audit the accounts?) **If you cannot discover the subject of a sentence, insist that the drafter redraft it.**



What?

The question, **'What?'** tells you to look at how the sentence commands the person (the 'subject') to behave. A language expert would tell you to look at the sentence's **verb**. Does the section's prescription command, prohibit, or permit a subject to 'behave' as the verb indicates? For that, language experts would tell you to look at the section's **auxiliary verb**: by convention in English, drafters use **'shall'** (in some jurisdictions, 'must') for a command; **'may not'** (or 'shall not'), for a prohibition; and **'may'** for a permission. If a bill's section does not limit the prescription, it applies at all times and under all conditions.



Where and when?

Most sections do specify **where** and **when** the command, prohibition or permission goes into effect. A section may limit the behavior prescribed – the **When?** and **Where?** — by stating a **case**, a **condition**, or an **exception**.

1. A **case** modifies either
  - a **subject**: “An individual who has passed that individual’s eighteenth birthday may vote in a national election.” This sentence **limits** the **subject** to an individual **who has reached 18 years of age**.
  - a **verb**: “[Under specified circumstances, a person] may vote **by absentee ballot**.” This sentence limits the **verb, ‘to vote,’** to voting by an absentee ballot.
  - the **object** of the verb: “[Under specified circumstances] a person may cast **a paper ballot**.” This limits the **object** (the kind of ballot the voter may cast).
2. A **condition** states **what** must happen **before the rule comes into force**: “If an individual has passed that individual’s eighteenth birthday, that individual may vote in a national election.” (Usually the words **‘if’** or **‘where’** precede a condition.)
3. In the **exception**, the prescription states a general rule applying to the whole domain, and then carves a portion out of it – the **exception** – limiting the prescription to only that part of the whole domain not excepted. “Except when an individual’s eighteenth birthday has not passed, an individual may vote in a national election.” (Usually, the word **‘except’** precedes the ‘exception’.)

All three forms tell the reader the circumstances in which the permission granted (that is, to vote in a national election) comes into effect.

## EXERCISE: DISENTANGLING A BADLY-DRAFTED SECTION

*Use the four key questions — Who? What? When? and Where? – to unpack the following statute:*

“**ACT OF JULY 3, 1939** 40 STAT. 850 (1031) [U.S.A.]

”Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Narcotics is authorized and empowered to pay to any person, from funds now or hereafter appropriated for the enforcement of the narcotic laws of the United States, for information concerning a violation of any narcotic law of the United States, resulting in a seizure of contraband narcotics, such sum or sum of money as he may deem appropriate, without reference to any moieties or rewards to which such person may otherwise be entitled by law: Provided, That all payments under authority of this Act to any informer in any foreign country shall be made only through an accredited consul or vice consul of the United States stationed in such country; and every such payment must be supported by a voucher with an accompanying certificate of the said consul and vice consul that the payment of the amount stated on the voucher has been made to the informer named, and at the place and time specified on said voucher.”

... is this  
English?



By identifying the who, what, where and when, you can explain what this horribly written statute means. Redrafted, it might read like this:

“(1) **Payment of reward.**

- (a) The Commissioner of Narcotics (**the who**) may pay a reward to a person who provides information concerning a violation of a United States narcotics law (**the what**).
- (b) The Commissioner may make that payment only if the information leads to a seizure of contraband narcotics.

[The remainder of the bill might specify the **Where** and the **When**, that is, the **limits** on the powers granted to the Commissioner]

(2). **Amount of reward.** Without taking into consideration an award which some other law may allow to the person providing the information, the Commissioner may pay the reward mentioned in (1) in an amount that the Commissioner determines.

(3). **Payment made in a foreign country.**

- (a) If paid to a person in a foreign country, the Commissioner shall pay the reward mentioned in (1) through a United States consul or vice consul stationed in that country.
- (b) The Commissioner shall accompany the Commissioner’s report of a payment made pursuant to 3(a) with a certificate by the consul or vice consul that the consul or vice consul made that payment in the amount, to the person, and at the place and time stated in the report.

(4) **Source of funds.** The Commissioner shall pay an award pursuant to section 1 out of funds appropriated for the enforcement of the narcotic laws of the United States.”

*Note: the bill makes no provision for accounting for rewards paid to informers in the United States — an omission that only becomes clear when one breaks the bill down into more manageable sections.*



These four questions – the **Who?** the **What ?** and (where relevant) the **Where?** and the **When?** – focus attention on a section as a single prescription. Once you understand a bill's formal structure of sections, chapters and parts, and what the individual words and sentences mean on their face, the answers to these four questions will give you a grasp on the meanings of about 95 per cent of that bill's substantive commands.



AHA!

## D. DISCOVERING THE BILL'S SUBSTANCE

After you have peeled back the layers of legalisms in which drafters couch their bill's commands, after you understand its various prescriptions and its 'technical' provisions, you should find it easier to **assess** the bill as an integrated whole. Its prescriptions may aim either to change an existing institutional structure, or, more rarely, to create a whole new institutional structure.

The bill's text gives you no direct information to enable you to determine whether or how the new law, once enacted, will function. To make an estimate of the bill's probable social consequences, you must understand the bill's substantive core, the central purpose and thrust of all its commands.

If, in the context of existing law, the relevant actors behave as the new law's rules prescribe, they will **create or change eight different kinds of interrelated institutional sub-systems** – an entire legislative system – embodied in the existing legal order.

A complete legislative scheme prescribes behaviors that institute eight subsystems. It consists of rules addressed to:

1. Primary role occupants.
2. Principal implementing agencies.
3. Sanctioning agencies.
4. Dispute-settlement agencies
5. Funding agencies.
6. Monitoring and evaluation agencies.
7. The agency that makes regulations under the law.
8. The personnel who keep the corpus of the law in order.



Whether the new law will prove effectively implemented and achieve its stated purposes depends on whether and how each of those sub-systems affects and becomes affected by the relevant actors' prescribed new behaviors.

A simple bill, like one prohibiting spitting on the sidewalk, may expressly address only one aspect of one sub-system (see example on page 58). When enacted, however, the new law will exist in the context of other laws that provide for the on-going operation of the other seven sub-systems. Assuming the other seven sub-systems function reasonably well, you can assess a simple bill on its face.

A large and complex bill (for example, a bill creating a new University or a new Agricultural Bank) may incorporate rules affecting all sub-systems.

## HOW A BILL FITS INTO THE EXISTING LEGAL ORDER'S SUBSYSTEMS OF A LEGISLATIVE SCHEME

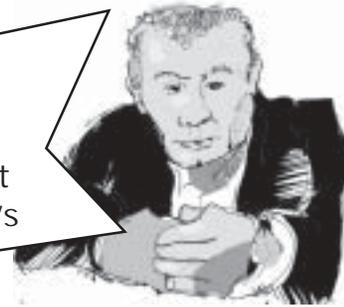
Consider a simple bill forbidding spitting on the sidewalk in urban areas. It contains only a few short sections.

- “1. [Short title]
2. Within the boundaries of an incorporated city, a person may not spit on the sidewalk.
3. A court shall convict a person of an offence whom after a hearing it finds violated section 2 and fine that person not more than \$50.”

This bill, on its face, only prescribes part of the behaviors of two subsystems – the primary role occupants and the sanctioning agency (see diagram, p. 27). It assumes that elsewhere in the body of law exist other rules addressed to the relevant actors in other subsystems. These implicit prescriptions include rules addressed to:

1. *The implementing agency.* The police, whom an existing Police Act usually commands to arrest a person they have reasonable ground to believe committed an offence (here, spitting on the sidewalk).
2. *The sanctioning agency.* The prosecutors and the judges for whom the existing Court Act and Criminal Procedures Act prescribe procedures for bringing an accused person to trial and deciding its outcome.
3. *The dispute-settlement agency.* Frequently (as here), the courts serve simultaneously as both the sanctioning agency and the dispute-settlement agency. Existing procedural laws prescribe how courts should hold criminal trials and settle disputes over guilt or innocence.
4. *Funding agencies* which, under existing budget and finance laws, provide funds for the police and the courts.
5. *Monitoring and evaluating agencies.* Existing law usually requires the elected legislature to oversee government's implementation of laws. The Chief of Police's annual report on the incidence of crime may list the number of people arrested for spitting on the sidewalk, an indication of whether the police enforce the new law.
6. *The rule-making agencies.* In many laws (particularly those that aim to transform an institution), some agency must make and promulgate detailed regulations. In complex legislative schemes, without detailed rules, the scheme will not work. Either in the bill proposing complex legislation, or elsewhere in the body of the law, authorization to make detailed rules must exist together with criteria and procedures for doing so (see Chapter 6).
7. *The people who keep the corpus of the law in order.* The bill's section 1 constitutes a command to those concerned with the law.

This manual's next chapters show how legislative theory provides a guide for asking the questions to assess whether a proposed bill will likely ensure that each of these subsystems contribute to the new law's effective implementation.



## SUMMARY:

### FIVE STEPS TO UNDERSTANDING A BILL

In short, to understand a bill, you should take five steps:

1. Outline the bill, following its numbering system for Sections, Chapters, and Parts. Fill in the Chapter and Part headings from the bill.
2. Read each section carefully. Make sure that you understand the words it uses. Don't let legalese upset you. Insist that the bill's sponsors and drafters explain each word with which you have difficulty.
3. Analyze each section by asking, **Who** does **What?** Under **what limits** or circumstances? **When?**
4. Disentangle the 'technical' sections by interpreting them as commands, especially to government officials about how to fit the bill into the existing body of law.
5. Complete the outline you started in step 1 by putting each of the commands related to one of the subsystems into a separate group. Where, as frequently happens, the bill says nothing about a whole subsystem, ask whether another law will work to provide for that function. (For example, in the absence of a specific dispute settlement system, ask, will your country's court system adequately settle disputes arising under this bill?)

Having completed those five steps, you should understand the bill well enough to decide whether it merits your support – that is, you are at last in position to assess the bill.

This manual's first chapters built a theoretical basis to enable you to understand a bill and the criteria for assessing it. This chapter has emphasized that you should ask more detailed questions about **who** the bill commands, prohibits or permits to **do what**; and the nature and consequences of the **limits** it imposes on those prescriptions. The remaining chapters provide a **methodology for assessing whether, in the public interest, the bill's substantive prescriptions will likely facilitate democratic social change.**

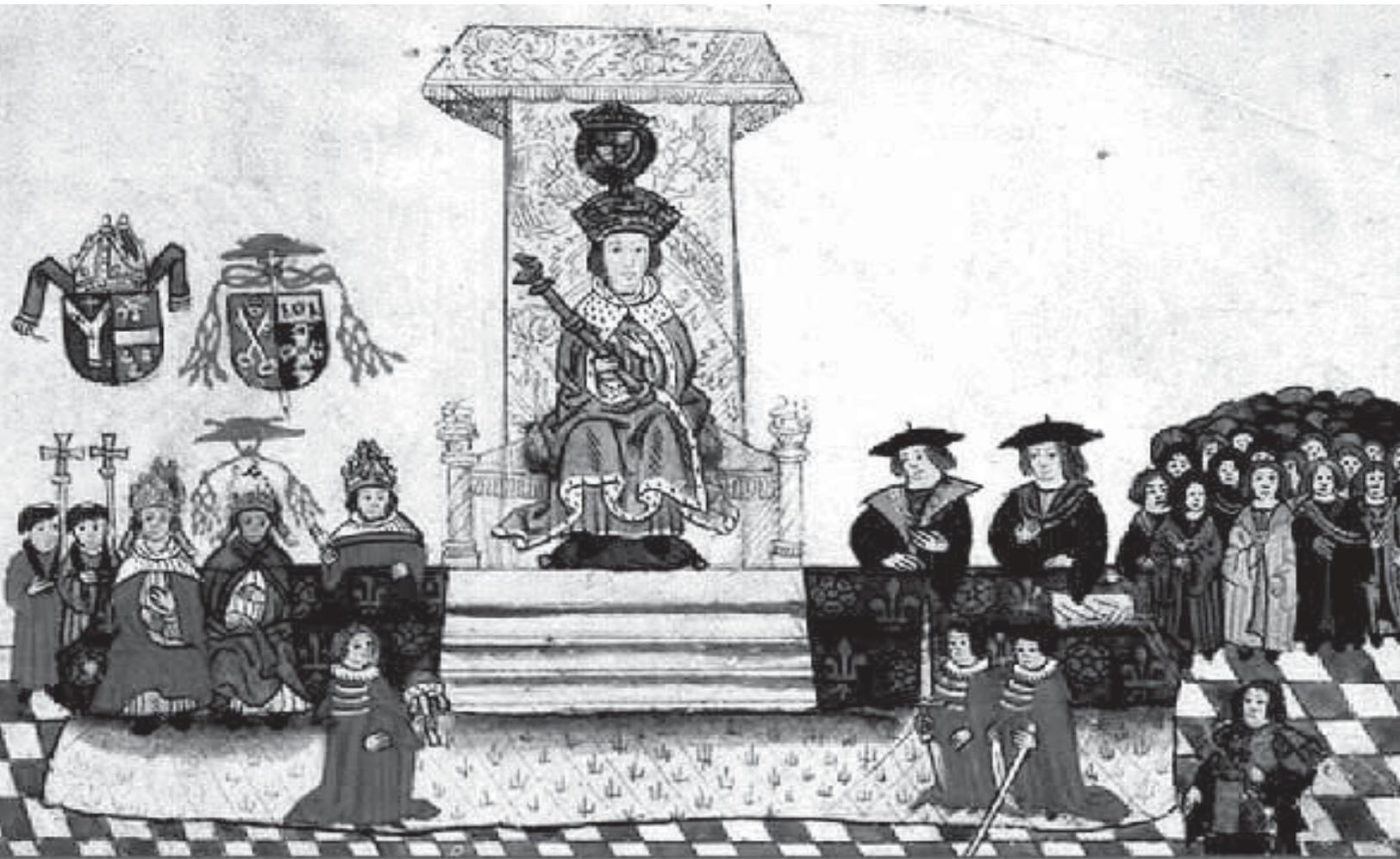


## EXERCISES

1. Explain why **outlining** a bill constitutes the first step in assessing it.
2. You ask a drafter what a phrase in the bill means. He replies, “Don’t worry about it. That’s only technical language necessary to ensure the bill’s legality. You have to be a lawyer to understand that phrase.” How would you reply to the drafter?
3. “In a well-drawn bill, almost every sentence **commands, permits, or forbids.**” What does that proposition reveal about the nature of the law? Is it consistent with the proposition that almost every sentence in a bill must state **Who does What?** How might you use that proposition in asking questions about the meaning of a section of a bill?
4. Whether in the bill itself, or in other, existing applicable legislation, a complete legislative scheme’ contains some ‘technical’ provisions. Give some examples of these ‘technical’ provisions. Why does every legislative scheme include some of these?
5. “Whether contained in the bill before you or in other, existing legislation, a complete legislative scheme contains prescriptions addressed to eight sets of addressees.” Who constitute those eight sets of addressees? How might you use that information to help you to assess a bill?

# PART II:

## LEGISLATIVE THEORY AND METHODOLOGY: THE KEY TO A LEGISLATOR'S TASKS



*Henry VIII in Parliament, England, 16th century*

# CHAPTER FIVE: AN INTRODUCTION TO LEGISLATIVE THEORY AND METHODOLOGY



ASKING THE RIGHT  
QUESTIONS

## PREVIEW

Part I described the difficulties that, the world around, legislators like yourself encounter in trying to carry out their constitutionally-designated law-jobs to facilitate development in ways consonant with good governance. In developing and transitional countries, poor governance tends to thwart development efforts. Few legislators know how to assess a bill (rarely do they introduce legislation). Without knowing that, they cannot inform their constituents about a law's likely social impact; they cannot monitor and evaluate the causes of its negative impact; they cannot even know what questions to ask the proponents of a bill to determine whether its detailed provisions rest logically on the country's unique circumstances.

This chapter shows how to use institutionalist legislative theory and methodology as a guide to discovering the facts and logic relevant to assessing, not only a bill's general desirability, but also the likelihood that its detailed provisions will ensure its effective implementation. It explains:

- A. The general uses of legislative theory and the four steps of its problem-solving methodology;
- B. The range of possible causes of the problematic behaviors that comprise a dysfunctional institution;
- C. The importance of weighing the social and economic costs and benefits of the logically alternative legislative measures;
- D. Why you and your colleagues should require the bill's sponsors to accompany an important bill with a research report that in terms of legislative theory justifies the bill and demonstrates its likely social impact;
- E. Why a bill's sponsors should narrow its scope;
- F. What you may learn from history and other countries' experiences in using law to help resolve similar problems; and
- G. A checklist of questions to ask to obtain the information you need to assess a bill.



## A. A PROBLEM-SOLVING METHODOLOGY: A GUIDE FOR ASKING QUESTIONS AND ASSESSING BILLS

To realize democracy's promise, you and your colleagues must exercise the legislative power in the public interest. What theory and methodology can best guide you in assessing whether proposed legislation will solve a social problem effectively and at least social cost? This section explores the use of theory in the search for facts, and the logic of the four steps required by institutionalist legislative theory's problem-solving methodology.

### 1. In general: Using theory as a guide

As discussed in Chapter 2, your role as a *trustee* for the public interest requires that, in making arguments for or against a bill, you appeal not only to your own party's adherents, but to the public at large. For that, you cannot rely on subjective values (whether you like its 'taste'), opinion polls, party commands, interest group demands, or some authority's ***Diktat***. As trustee ***for the public interest***, you need to know how to answer two questions:

- (a) whether the bill will effectively solve the social problem at which it aims, and
- (b) at what economic and social cost.

Your assessment must rest on facts specific to your own country's realities. Social problems come embedded in the complicated, intertwined facts of the real world. To predict a proposed law's probable social impact, you need a guide to distinguish the relevant facts from the irrelevant. Legislative theory can guide you in asking relevant questions, and in logically structuring the facts you capture.

Take, for example, a bill to transform an agricultural extension agency from one that services large commercial farmers to one with the primary mission of improving small peasants' agricultural methods and productivity. To assess that bill, what facts do you need? Faced by problematic behaviors and limited research resources, you must decide *in advance* which areas merit detailed examination – that is, what categories of facts will likely prove relevant.

For that, you need an explicit, carefully reasoned theory — an intellectual map. That kind of map guides your search for relevant facts by suggesting *hypotheses* – educated guesses. To determine whether those hypotheses prove consistent with the available facts, you must test them by examining the relevant facts.

Implicitly or explicitly, a law rests on educated guesses about what behaviors constitute the social problem it aims to help resolve (**descriptive** hypotheses), and about the causes of those behaviors (**explanatory** hypotheses). To induce behaviors more likely to solve that problem, the law's detailed prescriptions logically must alter or eliminate those causes. To test these hypotheses, you must ask questions – mainly, questions about the facts that might *falsify* them. If the hypotheses prove consistent with the facts, and the solution logically addresses the causes those hypotheses reveals, the proposed law has some probability of ameliorating the social problem at which it aims. Thus legislative theory guides the search for relevant facts.

An hypothesis helps to limit the area of facts which researchers must try to discover. Someone whose hypothesis reflects a personal 'vision' will likely limit their search to facts that conform the hypothesis, and thus coincide with that person's subjective values. To overcome the universal tendency to find only confirming facts, conscientiously search for facts to **contradict** your hypothesis. A law has a better chance of helping to resolve a social problem — that is, to **work** — if it rests on hypotheses grounded, not on how you would like the world to be, but on how it actually *is*.

#### a. **The function of legislative theory**

This manual does not offer a treasure chest, but a tool box. Its legislative theory (including the model explaining why people behave as they do in the face of a rule of law, and the problem-solving methodology described in subsection 2, below) offers you a guide for analyzing how a law will likely affect relevant social actors' *behaviors*.



That theory rests on the fact that all **social** problems reflect repetitive patterns of behavior; that is, by definition, **institutions**. Only by re-channeling dysfunctional behaviors can law help resolve those problems. The model on p. 27 purports to explain why, given existing laws and conditions, people behave as they do. That constitutes an essential tool for finding and evaluating the evidence necessary to assess whether a bill will likely induce new behaviors to resolve a specified social problem.

#### b. **The function of Grand Theory**

Social scientists offer various large-scale theories – what some call 'Grand Theory' – to explain, usually in very general terms, large bodies of data covering relatively broad sectors of human existence. Does the bill aim to help resolve a problem related to economic development? political power? family relationships? criminal behavior? agricultural productivity?<sup>1</sup> For each of these subjects, Grand Theories exist. Frequently, on significant issues, their authors disagree with each other.

The neo-liberal Grand Theory, for example, posits that, as long as markets operate ‘freely’ and ‘without constraints,’ they allocate resources optimally. That theory argues that no obstacles, such as government regulations, should block realization of the several market conditions essential to enable market actors to compete effectively.

In contrast, historical materialist theorists view social class formation, exploitation, and state structures as the main causes of poverty and oppression. They explain that these cause the unequal patterns of national and international accumulation and re-investment of capital, rapid technology expansion along with growing unemployment, and widening wealth-poverty gaps.

Some theorists view Grand Theory, not as a **guide** for discovering relevant evidence, but as a **metaphor** for the real world: After identifying a real-world problem, they move to their Grand Theory’s ideal world. They analyze how their Grand Theory would solve that problem in that ideal world. Then they simply apply that solution to the real world — without even trying to discover whether the real world’s conditions match those their Grand Theory assumes.

## GRAND THEORY AS METAPHOR

### GRAND THEORY USED AS METAPHOR

An American jurist proposed that, to assess existing law on the adoption of babies, one should use the neoclassical economists’ market model. Given the right market conditions, unrestricted competition produces the best allocation of resources. That model, the jurist asserted, justifies removing all constraints imposed by law on private bargains between birth-mothers and adopting parents. Would-be adoptive parents, competing for the small number of adoptable babies, would accomplish the ‘best possible’ allocation of babies. The jurist felt no need to investigate how that proposal would likely work in the real world, or what consequences it might have for birth mothers, adopted children and adopting parents.

With tongue in cheek, Dr. Makgetla wrote that using Grand Theory to solve real-world problems in that way resembled the case of the lover who compared his love to a red, red rose – the model (or ‘metaphor’). Forgetting about the reality of his true love, the foolish lover consulted his metaphor, and, in a romantic spot, with a background of violins, a lake, snow-capped mountains, fed her what red, red roses like best – dew and well-rotted fertilizer.



No matter how well a metaphor conforms to someone’s Grand Theory, without detailed research into the facts of the specific case, grounding a law on its perceived prescriptions will likely prove disastrous.

In contrast to making policy on the basis of Grand Theory as a metaphor, this manual emphasizes that a Grand Theory, at best, may **guide** the formulation and testing of alternative possible hypotheses for explaining existing problematic behaviors. Whatever their Grand Theory, law-makers cannot use it as a metaphor for the real world. If they enact laws based on metaphors, however derived, they too often enact laws which they claim will improve people's lives – but which, in the event, do not.

Human behaviors differ in different times and places. Without empirical investigation, no one can assume that any model will safely predict a law's impact. To assess a proposed law requires empirical investigation about the country-specific social circumstances that influence relevant social actors' behaviors. At most, Grand Theory can suggest more detailed explanatory hypotheses which, in turn, guide the search for facts to determine whether those hypotheses prove consistent with the available evidence. ***Unless an explanatory hypothesis derived from a Grand Theory proves consistent with available country-specific realities, you cannot safely assume that it provides a sound basis for designing the essential details required for effective legislation.***

Effective law must build, not on dreams and visions, but on concrete, real circumstances. To assess whether a bill's detailed provisions rest on real-world foundations, institutionalist legislative theory offers a methodology that, at every step, guides the search for the necessary time and place specific facts.



## 2. Using legislative theory's problem-solving methodology

The problem-solving methodology aims to use ***reason informed by experience*** — facts and logic — to assess whether a bill's prescriptions will likely lead to effective implementation and achieve that bill's stated objectives.

## OTHER METHODOLOGIES: ENDS– MEANS AND INCREMENTALISM

Other widely-used policy-making methodologies, what we denote as **ends-means** and **incrementalism**, implicitly reject the possibility of using theory as a guide in policy-making grounded on reason informed by experience.

The *ends-means methodology* takes as given the policy-maker's stated goals or objectives.<sup>2</sup> Its users then invent alternative legislative solutions for reaching those objectives, and choose the one that, to them, seems to promise the most socially cost-effective outcome. Implicitly, ends-means adopts the positivist separation of facts and values. It denies the relevance of research about facts for determining a law's substantive goals, leaving that critical decision to the policy-maker's 'values'. (In ends-means, policy-makers use facts primarily to weigh the costs and benefits of alternative means of attaining pre-determined goals.) In effect, by assuming that no one can use facts and logic to query a decision about goals, ends-means inevitably leaves the law's objectives to those who hold power. Ends-means inevitably assumes an authoritarian cast.

*Incrementalism* teaches that, given real life's complexity, no one can confidently predict a new policy's or law's consequences. Given the unknown dangers of wide-sweeping change, incrementalists recommend as the wisest course that law-makers nibble at social problems by making the *smallest changes possible*. At best, progress takes place only in small incremental changes. 'Muddling through' becomes not the result of deliberate policy, but bumbling. Incrementalism has its uses, especially when insufficient research makes major changes risky. As a general strategy, however, it proves ineffective for making the significant institutional changes development requires.

### a. The problem-solving methodology

To determine whether in your country's unique circumstances a bill's provisions will likely overcome the causes of a particular social problem, legislative theory's problem-solving methodology recommends that, at each of four logically-connected steps, you ask specific questions :

Step I: **Identifying the social problem.** To understand the nature and scope of the social problem the bill proposes to address, you must ask two questions. **First**, you need country-specific information about its surface appearance: What facts can the bill's supporters provide to support their descriptions of its nature and scope? **Second**, because laws can only address behaviors (see p. 27), ask questions to discover who constitute the relevant social actors, including the implementing agents, and what they do that creates or exacerbates that social problem. Unless you know exactly **whose and what behaviors** constitute that social problem, you cannot meaningfully assess the bill's likely effect.



Step II: **Proposing and warranting explanations.** To help resolve the problem, the proposed law must alter or eliminate the **causes** (that is, the explanations) of the relevant social actors' problematic behaviors. Ask the bill's proponents to explain those behaviors, and demonstrate that their explanations prove consistent with the facts.



Step III: **Proposing a solution.** Once convinced that the facts justify the explanations of the existing problematic behaviors, you can assess whether logically the bill's prescriptions — especially the implementation provisions — seem likely to alter or eliminate those causes, and induce more desirable behaviors.<sup>4</sup>

Always ask the bill's proponents to describe the alternative solutions they have considered, and the costs and benefits of those alternatives as well as of the bill before you. Especially, ask them to describe the bill's probable impact on groups and interests typically poorly represented in the halls of power: women, children, the poor, minorities, human rights concerns, environmental protection matters (see section C below).



Step IV: **Monitoring and evaluating the new law's implementation.** Finally, ask questions about the monitoring and evaluation mechanism that the bill prescribes. No law ever works exactly as anticipated. Prior to enactment, pressures to pass legislation quickly often preclude adequate research. Constantly changing circumstances inevitably accompany transformation. After a law's passage and implementation, you and your colleagues can only carry out your oversight tasks if you have adequate information to determine whether people and organizations (including implementing agencies) do in fact behave as the bill prescribes, with the expected consequences.



Once you get the facts about a law's actual impact, you may want to revise and improve it. Your job as lawmaker does not end with the enactment of a bill. Like life itself, lawmaking involves solving one problem after another.



### b. *Capturing the facts*

Asking ministry officials or other proponents to give you the evidence that justifies their bills' detailed measures does not prove as formidable a task as it may appear at first blush. Social problems usually lead to drafting legislation only after they have persisted for a long time. Ministry officials, academics, and activists can usually provide the relevant facts (see Chapter 7 below.)

Problem-solving's second step, explaining the causes of the behaviors that comprise the problem, proves crucial. If a bill's design does not logically alter or eliminate the causes of problematic behaviors, it will not likely induce the new behaviors needed to help resolve the problem. Legislative theory suggests a set of categories to help identify all the plausible explanations for the problematic behaviors the bill addresses.

## B. LEGISLATIVE THEORY'S GUIDE TO FINDING PROBLEMATIC BEHAVIORS' CAUSES AND SOLUTIONS

ROCCIPI

Institutionalist legislative theory builds on the premise that no single factor causes behavior. It suggests seven broad categories to help generate all the likely hypotheses as to the causes of a relevant set of social actors' behaviors: *Rule, Opportunity, Capacity, Communication, Interest, Process and Ideology*. (The first initials of these categories make the acronym, **ROCCIPI**. The order of the categories has no significance. The acronym aims to help you remember the categories.)

Together, these categories serve to focus your questions on the facts you need to validate the likely **causes** of each set of problematic behaviors the proposed bill's details aim to alter. Unless the bill's detailed measures logically seem likely to overcome the existing problematic behaviors' causes revealed by those facts, you probably should call for alternative legislative solutions more likely to succeed.



Ask about the facts concerning possible causes suggested by each category in turn.

**The Rules.** The model on page 27 focuses on the question, why do people behave as they do in the face of a rule of law? In reality, people behave as they do, not in the face of a rule, but of a whole *cage* of laws.

### HOW EXISTING LAW MAY HELP EXPLAIN BEHAVIOR: AN EXAMPLE

Suppose that, despite a law forbidding it, people pollute the rivers. On its face, the law's provisions may suggest several explanations for that behavior. **First**, the existing law's provisions may not forbid the dumping, or may not require an agency to act to prevent it. **Second**, the rule's wording may grant the polluters or the implementing officials broad discretion to decide how to behave, leaving them scope to respond to inappropriate motivations. **Third**, the law's provisions may permit or even authorize the implementing officials to use non-transparent, unaccountable decision-making processes that make it easier for them to permit polluting behaviors (think corruption). **Fourth**, ambiguous or confusing language may leave polluters unclear as to the law's requirements. **Fifth**, other rules may exist that in effect make compliance impossible. For instance, a rule may require companies to get rid of waste without providing an alternative place for waste disposal.

Ask four kinds of questions about the precise wording used in existing laws to discover how they may help to explain problematic behaviors. Do the existing laws' detailed provisions -

- 1) prescribe or expressly **permit** the problematic behaviors?
- 2) expressly or by vague or ambiguous wording grant **discretion** to its addressees to decide how they should behave?
- 3) specify **criteria and procedures** likely to ensure that implementing agency officials make decisions using non-arbitrary — i.e., transparent, open, accountable, and participatory — processes?
- 4) prescribe the required behaviors of the relevant role occupants (including implementing agency officials) in words that leave them **unsure** about what they must or may do?

The answers to these four questions may help you to decide whether the existing law itself, on its face, helps to explain the problematic behaviors at issue.

In addition to examining the existing cage of rules, the remaining ROCCIPI categories suggest that you should ask questions about non-legal causes embedded in your country's unique realities. Since the bill should alter or eliminate the causes of the behaviors that constitute the social problem the bill addresses, the answers may suggest possible additional detailed provisions in the bill.

**Opportunity: Do circumstances facilitate the problematic behaviors?** First, do the circumstances create an **opportunity** for the relevant actor to misbehave? If so, the new law should try to change the environment to make that behavior more difficult. For example, if customs officials, in an out-of-sight field post, take bribes, the law might require monitoring by hidden cameras, or inspectors making unannounced visits. If mining inspectors come to a mine, see only the manager in private, and then, despite dangerous conditions, give the mine a clean bill of health, an effective legislative provision might forbid the inspector from conversing with the mine manager without a representative of the labor union representing the mine workers within easy earshot. Second, do the relevant actors have an opportunity to behave as the law prescribes? For example, if a small farmer has no access to a market for a crop, that farmer may not grow it even if the law aims to encourage all farmers produce it.

**Capacity: Do the relevant actors possess the necessary knowledge, skills, and resources they need to behave differently than they do now?** For example, to explain low farm productivity, ask: Do farmers have access to necessary new technology and the skills to operate it? To explain non-accountable decision-making: do officials have the skill and resources to publish written explanations for their decisions?



CAPACITY? IF I CAN'T DO IT MYSELF, IT WON'T GET DONE.

**Communication: Do the actors know and understand the existing rules?** A person cannot consciously obey a law without knowing that it exists, and understanding the behaviors it prescribes. A country's channels for communicating information about laws often reflect, and in some cases foster a skewed social structure. In most jurisdictions, laws only appear in a government Gazette (or its equivalent) that appears in very few copies to which few people have access. This may seriously erode the rule of law.

Local media may publish reports on the most important laws, and ministries usually inform their officials about new laws, especially those responsible for enforcing them. Urban elites, especially formal-sector businessmen, usually learn from their lawyers or business associations about laws likely to affect their affairs. In contrast, unless the responsible ministries make special efforts to inform them, the poor – especially the rural poor – seldom learn about new laws, even those supposedly designed to help them better their own lives.

Ask: Do a bill's provisions ensure that the poor and vulnerable will learn about the law, especially if it will likely to affect their lives? Do poor peasants, for example, know about

new laws that give them access to credit, or aim to facilitate their participation in decentralized government affairs? Does a law designed to protect women and children against domestic violence include a provision to inform them about it?

More generally, you might consider legislative provisions for wider communication of all laws enacted, in newspapers, radio and television programs, as well as for direct announcements to affected communities.

**Interest: What incentives exist to induce relevant actors to behave as they do?**

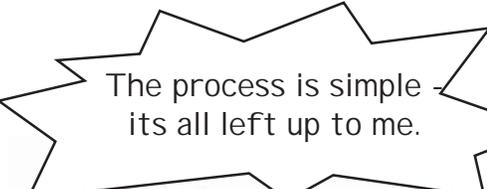
The category, 'Interest' (or incentives) refers to the actors' own perceptions as to how the existing law's costs and benefits affect them and people close to them. These may include material benefits, like increased cash or fringe benefits. They may also include non-material incentives, like power or their family members', friends' and associates' esteem.

In considering how particular interests influence an actor's behaviors, exercise caution. Too often law-makers propose laws that, implying that 'Interest' constitutes the main cause of problematic behaviors, merely impose heavy punishments to deter violations, or, sometimes, grant rewards as incentives for compliance.

In reality, few actors take into account a law's paper penalty. Drivers on major highways, for example, may worry less about the speed limit than whether a radar-equipped police car hides around the next bend in the road. That suggests the need, not for greater penalties, for more police patrols.

Some theorists expand the 'Interest' category to subsume all the other categories of explanation. In that view, for example, farmers fail to increase production only because they do not receive sufficient profits from the venture — never mind that no road leads from their farms to market; or officials do not obey a law to write an explanation for their decisions because they receive no punishment for their failure — never mind that they remain illiterate.

To expand any of the ROCCIPI categories so broadly destroys their usefulness for specifying detailed explanatory hypotheses. Without detailed explanations, warranted by facts, as to all the probable causes of problematic behavior, you have no basis in logic or facts for assessing a bill's detailed prescriptions.



The process is simple -  
its all left up to me.

**Process: How do the actors decide to behave as they do?** Especially with respect of complex organizations (and that includes *all* implementing agencies), focus your attention on the **process**, the criteria and procedures by which the relevant actors decide whether or not to obey the law. Usually, if the relevant actors comprise individuals, the 'Process' category yields few useful explanatory hypotheses; individuals usually decide on



their own whether or not to obey the rules. In contrast, 'Process' may constitute ROCCIP's most fruitful category for inspiring hypotheses to explain the problematic behaviors of actors who work in complex organizations: corporations, non-government organizations (NGOs), schools, trade unions, cooperatives, and especially implementing agencies — police, courts, ministries, agencies, departments, local government, bureaus (for more details, see Chapter 6).

**'Ideology' (values and attitudes): What goes on in an actor's head that helps explain behavior?** Many social scientists turn to 'Ideology' to explain problematic behaviors. 'Ideology' here refers to matters of belief, encompassing values, attitudes, tastes, myths about the world, religious beliefs, more or less well-defined political, social and economic ideologies.

Some people try to subsume most other explanations under 'Ideology,' leading, as does a similar expansion of 'Interest,' to the neglect of solutions aimed at other causes. For example, in a particular country, to blame coal mine accidents solely on the managers' culture of profits over workers' safety may ignore the managers' lack of technology to prevent accidents, or even the absence of a law seeking to ensure mine safety.

## CATEGORIES AND EXPLANATORY HYPOTHESES

We reiterate: Given the pressure of legislative work, you do not have much time in which to ask questions of Ministers or other officials. To make the best use of your limited time, you need a guide to formulate hypotheses as a basis of questions about relevant facts likely to help identify the causes of problematic behaviors. Broadly construed, legislative theory's seven categories, captured as "ROCCIP", may help you to make useful 'educated guesses' about each set of problematic behaviors' causes

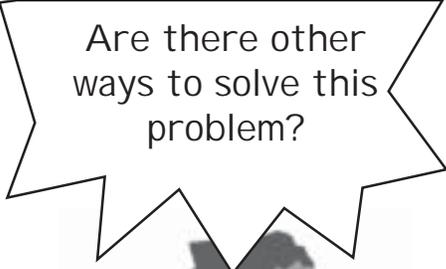
For example, to explain an official's arbitrary decision-making, the category 'Rule' might 'spark off' an hypothesis that the law grants that official unlimited discretion; the category, 'Capacity'; might suggest another hypothesis; the category, 'Process', a third. No matter which category inspires useful hypotheses, the ROCCIP agenda served its function if it inspired you to consider all the likely possible causes.'

The ROCCIP categories help you to ensure that — given the facts available as to your country's circumstances — a bill's drafters have identified all the probable causes of the relevant actors' problematic behaviors. (That includes the behaviors of implementing agency officials). That lays the essential foundation for assessing whether the bill's detailed provisions logically seem likely to overcome the causes of the specified problematic behaviors, and thus to induce those actors to behave more appropriately.

## C. DESIGNING A DETAILED LEGISLATIVE SOLUTION

Having incorporated the causes of problematic behavior, you must enquire about the adequacy of the solution – the proposed bill. That calls for four sets of questions:

- (1) Have the bill's proponents canvassed the possible alternatives?
- (2) Have they tested the preferred solution – the bill – against the ROCCIPI categories?
- (3) Have they identified in the bill the most **socially** cost-efficient solution?
- (4) Does the bill provide a method for monitoring and evaluating its implementation?



Are there other ways to solve this problem?



### 1. *Canvassing alternative possible solutions*

The first step in assessing a bill requires that you enquire of the bill's proponents what alternative solutions they considered. One can gather ideas for alternative solutions from a variety of sources: from the professional literature on the subject; from comparative law and experience; and from one's own ideas. As we have emphasized, from foreign law there is nothing to copy, but much to learn. Mainly, you can learn what others have tried to solve analogous social problems, and how well those solutions worked. Unless the proponents of the bill have considered alternatives, you cannot assure yourself that their solution constitutes the most appropriate one.

### 2. *'Reverse ROCCIPI.'*

Ask the proponents to demonstrate that their preferred solution addresses the earlier-identified causes of the problematic behaviors that constitute the social problem addressed. Unless it does, the new solution may not succeed in changing those behaviors and thus fail to ameliorate the social problem. When considering explanations, you used the ROCCIPI categories to generate hypotheses to explain existing behaviors. Now use it to **predict** what behaviors a bill will induce. If the bill before you proposes to create a new agricultural finance bank to supply credit to small farmers, ask, for example: Will the new bank have the Capacity to make the many small loans required of such a bank? will it have Opportunity to do so? will the responsible bank officers have sufficient incentives ('Interest') to make the loans? do the bank's Processes tend to ensure accountability, transparency, and participation by stakeholders in bank decision-making?

In particular, you should ask for facts you need to weigh the relative social and economic benefits and costs of implementing the alternatives as compared to the drafters' bill.

### 3. Weighing a proposed bill's probable costs and benefits

No matter how effective a bill, unless its anticipated social and economic benefits exceed the anticipated costs, you should vote it down. To make that decision, ask for the facts about its probable impact, as well as its estimated benefits and costs compared to those of the leading potential alternatives — including the current law.

#### a. A bill's likely differential impact .

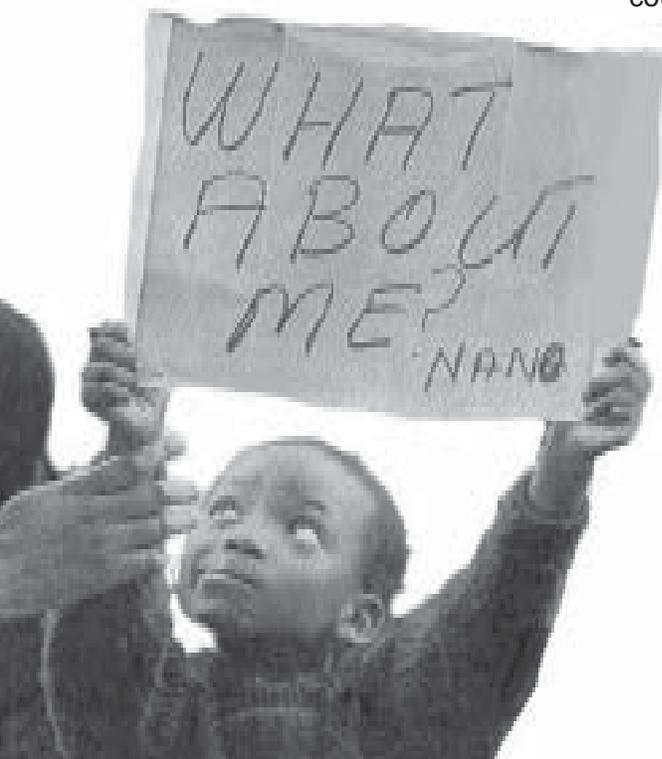
- (1) **On various social strata.** No law impacts all society's diverse social groups equally. Even a seemingly simple new law that requires drivers to change from driving on the right instead of the left side of the road imposes massive costs on the owners of existing automobiles, whose right-hand-drive cars suddenly lose much of their value. In the United States, where an income tax law requires that the rich pay a somewhat higher percentage of their income as tax than the poor, a recent seemingly equitable 10 per cent across-the-board tax cut in reality gave 62 per cent of the proposed tax saving to the wealthiest 10 per cent of taxpayers. A regulation requiring that the police commissioner appoint as policemen only people six feet tall or taller discriminates against women.

Those with power and privilege always have channels to communicate their objections to political movers and shakers. As an elected representative, ask for the necessary facts to assess how a bill's detailed provisions will likely impact on the poor, women, children, the elderly and disabled, and, in many countries, minority ethnic groups – all typically under-represented in the halls of power.

- (2). **“For the public interest”.** You should also ask how proposed laws may differentially affect at least three sets of areas of common concern too often neglected by those in power: The environment, human rights, and good governance. (Note: In a particular country, people may also value other special concerns).

- (a). *The environment.* Although almost every bill affects the environment, it too seldom has strong protectors in government. As a minimum, ask for the facts about a bill's likely environmental impact.

- (b). *Human rights.* In some cases — as when a



proposed bill gives officials the power to detain persons without trial, or imposes political controls over the press — the negative consequences for human rights may seem obvious. You should also ask questions about how other bills may affect human rights in less obvious ways. Does a legislative proposal for new roads raise issues of human rights if it takes private lands inhabited by poor people who cannot afford to move elsewhere? Does a proposal to build a hospital to serve an ethnically powerful, wealthy group — which already enjoys access to a developed health delivery system — raise issues of discrimination against neglected poorer communities? Does a bill to provide high-tech skills neglect to ensure equal opportunity for well-qualified women applicants?

- (c). **Good governance.** Increasingly, people have come to value good governance. This requires you to ask: Does the bill provide for transparent, accountable, participatory decision-making? Does the bill contain built-in defenses against corrupt behavior? (See Chapter 9)

**b. Estimating costs and benefits.**

It frequently proves difficult (sometimes, impossible) to obtain accurate quantitative measures of a bill's economic and social costs and benefits. Request a separate analysis of the factors included in efforts to make such estimates.



(1). **Economic costs and benefits.**

**i. economic costs.** By 'economic costs and benefits' we mean the costs a hard-nosed accountant would include. The costs include government's out-of-pocket direct expenditures for personnel, buildings, equipment and services required to implement a law. Government usually pays these out of current revenues, or, over time, in the form of the principal and interest on loans. Unanticipated factors like inflation or shortages may make estimates of these direct economic costs problematic.

Governments also pay harder-to-estimate indirect costs. If, for example, a proposed product liability law relies on individual litigation as its principal implementation measure, government revenues must cover additional expenditures to enable courts to deal with the resulting law suits.

The private sector may also bear economic costs due to a law's effect on existing enterprises' employment, wages, or present or future profits. Those

costs may appear in the form of tax increases (the impact of which depends on whether the taxes fall more heavily on the high or low income groups). Some of these economic costs may only appear over time.

**ii. Economic benefits.** The economic benefits generated by a bill's authorization of government spending usually only appear over time. This makes them even harder to estimate than economic costs. For example, current government expenditures on infrastructure to stimulate new business may generate increased future government revenues as a result of expanded private sector employment and profits — but who can say by how much? Government investments may also produce more government income in the form of profits, increased fees for services or interest on government loans — but these future returns remain difficult to predict.

New legislation may also bestow differential economic gains on various private sector groups. Laws initiating new government development projects may stimulate increased profits, employment and wages, but with different impacts on different social groups. Uncertainty concerning many interrelated factors render these potential gains difficult to estimate.

Sometimes, politicians claim reduced taxes constitute a private sector gain. Which social group will benefit depends on the particular taxes reduced, as well as who will lose when reduced revenues force the elimination of services. Reducing the education or health budget will likely most seriously impact the poor, who have no alternatives on which to fall back. A shift from income or profits taxes to higher taxes on value added or consumer goods sales usually reduce the poor's real incomes, since they pay a greater share of their income than do the rich to buy consumer necessities.



What do you mean,  
there are OTHER  
costs and benefits?

## (2). 'Guesstimating' social costs and benefits

Social costs and benefits generally prove even more difficult to compare and assess than economic costs and benefits. They affect intangible items like the quality of life (jobs and incomes, housing, recreational facilities), human rights, and environmental conditions.

Typically, these, too, differentially affect the quality of life of society's historically-disadvantaged groups. How to measure the impact on a poor family's life of a government decision to demolish their house in order to build a road through their property? Of building a school or a hospital in a high-income area rather than a low-income area? Of permitting timber companies to chop down swaths of natural forest, which, over time, will likely contribute to increased water run off and flooding? Of increased spending on education so that many years later the community's poorest citizens may enjoy new employment and income opportunities?

Good governance calls for greater participation in the development process by the poorest, most historically disadvantaged segments of the population. How to measure the social costs and benefits of their participation? This makes it especially important for government to hear from the poor about the law's impact upon them.

Frequently, the intangibles comprise a law's most important development impacts. You should ask the relevant ministries to provide the best estimates they can — including an explanation of how they reached those estimates. Then do your best to evaluate the bill.



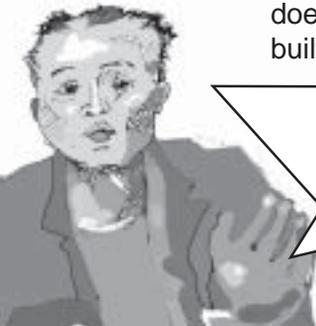
## EXERCISE: ASSESSING COSTS AND BENEFITS

1. Draw up two columns side by side, one for all the economic costs you can think of which the proposed bill seems likely to entail; and one for all the economic benefits. Note those items in both columns for which you can easily obtain relevant information as the basis of estimates, and those for which it will be harder, or about which so much uncertainty remains that you can only make an informed 'guesstimate.' Design a strategy for estimating those economic costs and benefits.
2. Draw up two more columns, this time for the proposed bill's probable social costs and benefits. Again, note those items for which you can obtain information, and which will undoubtedly prove more difficulty. Design a strategy for arriving at some kind of defensible estimates.

### 3. Mechanisms for learning about a new law's effects

The difficulties involved in estimating a proposed law's probable social costs and benefits — only one of the many places where, no matter how hard the law-makers try, legislation necessarily proceeds with less than exact information — underscores the importance of incorporating in important bills an adequate monitoring and evaluation mechanism. This, problem-solving's fourth step, should provide information to determine whether the law actually does induce the behaviors it prescribes, and their anticipated impact. (If it does not, you may decide to amend or even repeal the law.) You should ascertain whether the bill contains provisions making it easy for the legislature to learn how well the new law has succeeded in reducing the original perceived social problem, and at what actual economic and social cost.

In the largest sense, democracy itself constitutes a gigantic, if somewhat unsystematic, monitoring and evaluation system. Constituents whose toes a law's implementation may pinch can and frequently do complain to you and your colleagues as their elected representatives. You have a constitutional responsibility to listen and respond. Many legislative committees oversee the work of particular ministries. This system, however, does not always ensure reliable monitoring. Important transformatory laws should include built-in devices to ensure more direct feedback.



It may be that legislators who are corrupt will be voted out. But... the next elections are in three years' time.

Over the years, various countries' law-makers have devised potentially useful specific monitoring devices:

#### SOME MONITORING DEVICES

- \* **A reporting requirement**, that a responsible officer (frequently the Minister) report periodically to a legislative committee on the new law's operation. In most countries, Ministers already, almost ritually, comply with laws' requirements that they report to Parliament'— but experience shows that, too often, little comes out of this process. This underscores that, for important bills, additional monitoring devices appear essential.
- \* **A sunset clause** (i.e., the new law stipulates its own limited life, so that it will only continue if people become convinced that it should continue. That may stimulate those for or against the bill to investigate its performance in some detail).
- \* A requirement that, after a stated period, an official appoint an evaluation commission; and/or
- \* **A provision for a referendum** at some fixed future time on whether to continue the new law.

(On monitoring devices to reduce the dangers of corruption, see Chapter 9).



## SUMMARY

Merely by reading the face of any but the simplest of bills, nobody can judge whether it will resolve the social problem it purports to address. Nor can anyone assess a bill merely by consulting personal values. To assess a bill in the public interest requires facts and logic. Legislative theory's problem-solving methodology and ROCCIPI agenda help to formulate hypotheses to guide you in asking for the kinds of facts you need. It provides the logic necessary to structure those facts to design a law's detailed provisions and to estimate their likely social impact. The entire law-making process would benefit if proponents of an important bill accompanied it with research report that justified its detailed provisions on the grounds of facts and logic.

## D. OBTAINING THE FACTS: THE ADVANTAGES OF A RESEARCH REPORT

Just as a court must *justify* its judicial decisions by stating the reasons that underpin them, so you might consider a rule to require sponsors of an important bill to provide a written *justification* for its detailed provisions. To ensure the adequacy of that justification, you could require a bill's sponsors to structure their justification by organizing the available facts logically:

- (1) Describe the social problem, and whose and what behaviors comprise it (including those of the responsible implementing agency);
- (2) explain the legal and non-legal causes of those behaviors;
- (3) show –
  - (a) the alternative solutions considered;
  - (b) that the bill's detailed provisions seem likely to overcome the identified causes; and
  - (c) that the bill's economic and social benefits will likely outweigh its costs; and
- (4) ensure that a responsible agency will monitor and evaluate the bill's implementation and social consequences.



## E. AVOID 'STUFFED' BILLS

Society constitutes a closely-woven web of relationships in which social problems appear closely interlocked. Law-makers too often enact great grab-bags of bills, stuffed with subject-matters, only tenuously held together by a common thread.

### STUFFING A BILL: A CHINESE EXAMPLE

#### STUFFING A BILL: A CHINESE EXAMPLE

A Chinese bill for reforming the banking structure, as originally proposed, not only provided for the creation of central, commercial, development and agricultural banks, but also for the establishment and operation of stock exchanges and insurance companies. The bill's broad scope multiplied the number of issues on which law-makers had to agree. Supporters of one provision often objected to other provisions. Attempts to win consensus for the entire bill proved an unending task. Debates dragged on for years, delaying action, not only on that bill, but other priority legislation, too.

Eventually, the Chinese found it useful to conceptualize an overall legislative program relating to banking. Within that larger program, they first enacted a separate bill for the central bank, and then, separately, additional bills for other banks, stock exchanges and insurance companies.

Instead of stuffing many subjects into one bill, wise law-makers design an overall legislative program, and narrow the scope of each bill within that program. When you receive a bill prescribing significant institutional change, first consider: does the bill focus its measures on a defined set of behaviors? It also helps to ask how many different implementing agencies the bill requires. As originally proposed, the Chinese banking bill required four distinct implementing agencies, with quite different missions: a central agency (to implement the Central Bank Law concerning money supply), a Banking Commission, a Securities and Exchange Commission and an Insurance Commission. That alone signalled that the bill seemed 'stuffed.'

Conversely, to assess a bill with a seemingly narrow scope, ask about the general context within which the bill will fit. For example, if you receive a bill addressing only the problems of the central bank, ask how it fits into the legal regime for commercial and other banks, stock exchanges and insurance companies – that is, the larger financial sector. The bill of course would merit the characterization 'stuffed' if it tried to address all those problems. You should, however, make sure that it dovetails neatly with the laws that govern those other sectors.



## EXERCISE: ASSESSING A BILL'S SCOPE

- (1) Consider the social problem a proposed bill aims to overcome. Does it comprise one or several more or less discrete problems? Should you enact one bill to resolve the entire social problem, or separate bills for each problem?
- (2) In determining the appropriate scope of the proposed bill, what factors ought you take into account?
- (3) What constitutes the larger social problem within which the bill before you fits? Will the new law fit appropriately into that larger context?

## F. LEARNING FROM EXPERIENCE: HISTORY AND COMPARATIVE LAW



To deepen your understanding of the difficulty a bill addresses, research reports may describe how that problem arose historically in your own country, and the consequences of other countries' attempts to use law to resolve similar difficulties.

### 1. History

By the time someone proposes a bill, the social problem it addresses usually has a long history. Some law attempting to deal with the subject probably exists. Some agency probably already has responsibility for implementing that law. Ask questions about that history; it might prove useful at any one of problem-solving's four steps: to fit the specific problem in its larger context; to understand how its causes changed over time; or to learn about previous efforts to use law to resolve it.

## 2. Comparative law and experience

No government can safely copy another country's law. That does not mean that you cannot learn from other countries' experiences in using law to resolve similar problems. Other countries' experiences may urge a general caution against tackling too many difficulties at once. They may reveal an aspect of the difficulty that appeared elsewhere against which (even if it has not yet appeared in your country) your law might guard. It may offer new insights into the nature and causes of the behaviors that comprise the difficulty. Most frequently, other countries' experiences offer ideas about alternative legislative solutions and their likely consequences. A research report could provide evidence of other countries' laws *and experiences*.

### G. A 'CHECKLIST' FOR ASKING QUESTIONS



This section offers you a checklist of questions to determine whether available facts and logic justify a bill's prescriptions. But first, why a checklist, and how might you use it?

#### 1. The functions and uses of checklists

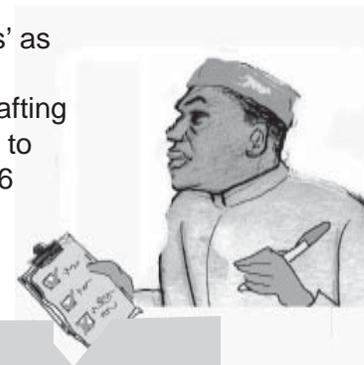
This checklist aims to remind a wise legislator of the factors to consider when assessing a bill. No matter the bill's subject-matter — the adoption of children, labor safety in coal mines, court procedures, or anti-competitive behaviors — it suggests the questions to ask to assess it.

To achieve that broad purpose, this checklist remains very general. Essentially, it tracks the four steps of legislative theory's problem-solving methodology. Absent a research report, it should help you decide what questions to ask to determine whether the available facts logically demonstrate that the bill's detailed provisions will likely to lead to the changed behaviors necessary to resolve the specific problem.

## 2. When not to use this checklist.

This checklist will not prove very helpful for two kinds of bills.

- (a). A few bills aim to solve problems that **do not arise from problematic behaviors**. Suppose an existing law empowers the Minister of Transportation to collect a toll of five *kwacha*, and details how ministry officials should collect it. Now, the Ministry of Transportation wants to amend the law to increase the toll to seven *kwacha* per vehicle. That amendment does not require any changes in the behaviors required to collect the toll. (For help in assessing the amendment's costs and benefits, you might ask economists or transportation engineers for facts.)
- (b). Some bills **focus mainly on changing implementing agency officials' behaviors**. That raises significant issues relating to the importance of 'Process' as an key category for explaining officials' behaviors; the necessity of considering alternative conformity-inducing measures; and the special issues involved in drafting laws that, as their principal function, delegate to an agency's officials the power to make detailed rules to bring about the required behavioral changes. Chapter 6 proposes an amended checklist for dealing with the use of law to change the behaviors of implementing agencies and their officials.



### A CHECKLIST OF QUESTIONS TO ASK ABOUT A BILL

*NOTE: For each question, ask a further one: On what evidence do you base your answer?*

#### I. The bill's content, in general

1. What social problem does the bill attempt to solve?
2. How would you summarize the bill's proposals to overcome the social problem addressed?
3. Where and how does the bill fit into the government's larger legislative program?
4. What might you learn from the history of efforts to deal with the problem in your own or other countries that helps to understand the reasons for introducing this bill at this time and in this form?

CHECKLIST FOR ASSESSING  
A PROPOSED BILL



## II. The social problem the bill addresses, and how it fits into the larger picture

1. Describe the surface appearance of the social problem at which the bill aims.
2. Whose and what behaviors contribute to the difficulty the bill aims to help resolve (in as much detail as possible)?

**NOTE:** In many ways this constitutes a preliminary, key question. Unless you know what *behaviors* constitute the social problem, you do not know where to begin to decide whether a bill's details will likely help to resolve that problem by inducing new behaviors

3. Does either the history of the difficulty or foreign law and experience provide insights into the nature and scope of the difficulty, or whose and what behaviors comprise it?
4. Who benefits and who suffers from the present situation?

## III. Explanations of problematic behaviors

### NOTES:

1. This also constitutes a key section. Unless you can understand the causes of the problematic behaviors that comprise a social problem, you cannot determine whether the bill addresses the problem's underlying causes, not merely its symptoms..
2. In the case of almost every set of role occupants, you may not find an explanatory hypothesis for every ROCCIPI category. For example, for government officials, the category, 'Communications,' often appears as an empty box; usually, the relevant authorities do inform officials about the rules they should follow. If you decide nothing subsumed by that category helps explain that particular behavior, you need ask no further questions about it.
3. Ask for explanations for each behavior of each set of role occupants (including the implementing agency) separately. Although they together constitute the social problem addressed, they may and probably do have different explanations.

For **each set of actors** whose problematic behaviors contributed to the social problem, ask:

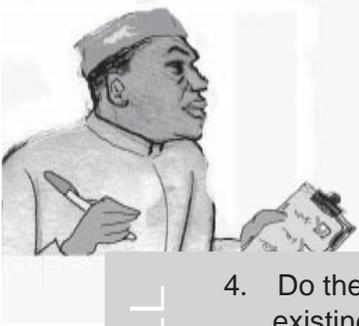
1. **Rules:** Do the existing rules forbid the problematic behaviors?
  - a. Do the present rules expressly require or permit the problematic behaviors?

- b. In what respect do those laws' provisions seem insufficient to limit the role occupants' discretion in deciding how to behave?
  - c. Does the decision-making process defined by the rules seem likely to induce accountable, transparent, participatory behaviors?
  - d. Do those provisions leave its addressee unsure of the behaviors required of them?
2. **Opportunity:** Does the situation in which these role occupants find themselves furnish opportunities for problematic behaviors?
  3. **Capacity:** Do these actors have the capacity — the skills, knowledge, and resources — to obey the law? Contrariwise, do they have special capacity to disobey the law?
  4. **Interest:** How and to what extent do these role-occupants' incentives (including the effect of potential sanctions) seem to influence their behaviors?
  5. **Communication:** Do these actors know and understand the provisions of the law?
  6. **Process:** What criteria and procedures determine the **process** by which this set of actors (especially those who comprise implementing agency officials) make decisions as to how to behave? Do they appear transparent? Accountable? Participatory?
  7. **Ideology:** How and to what extent do these role occupants' values and attitudes ('domain assumptions') seem to affect their behaviors?

[Ask the same kinds of question in turn for each behavior of each set of role occupants and for the relevant implementing agency.]

#### IV. Proposals for solution— Do the bill's detailed provisions logically seem likely to overcome the causes of each set of role occupants' problematic behaviors?

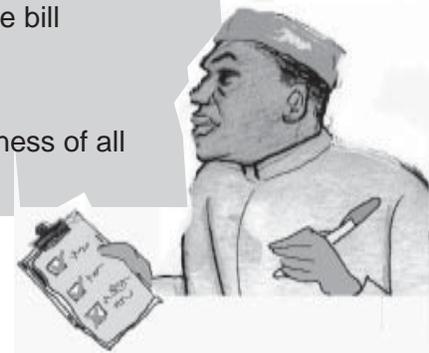
1. Request a detailed description and explanation of the bill's major provisions — in plain language.
2. Does a review of your country's **history** of efforts to use law, or **other countries' laws and experience**, provide insights into possible solutions, other than the one proposed in the bill?
3. What **alternative solutions** did the proponents of the bill consider? Can you think of any others?



## CHECKLIST FOR ASSESSING A PROPOSED BILL

4. Do the bill's **conformity-inducing measures** relating to the primary role occupants existing problematic behaviors seem likely to:
  - a. Alter or eliminate the objective and subjective causes of those behaviors?
  - b. Induce them to behave in more appropriate ways?
5. Do the bill's provisions with respect to the **implementing agency officials' existing problematic behaviors** seem likely to –
  - a. change the causes of their problematic behaviors identified by reviewing the ROCCIP categories (identified by reviewing the ROCCIP categories)?
  - b. induce those officials to behave in ways necessary to assist the primary role occupants to change their behaviors?
  - c. ensure they employ transparent, accountable, and participatory decision-making processes?
6. Do the bill's estimated long term social and economic benefits seem likely to outweigh its estimated long-term social and economic costs?
  - a. What facts do the bill's proponents provide about–
    - (1) short and long term economic costs and benefits?
    - (2) non-quantifiable social costs and benefits?
  - b. What social impact will the bill likely have for –
    - (1) different social groups, especially the poor, women, children and minorities?
    - (2) valued but typically poorly-represented community concerns, especially the environment, human rights, and the Rule of Law (including the prevention of corruption)?
7. Do the bill's **dispute-settlement** provisions (see Chapter 6) seem appropriate and sufficient to take care of anticipated disputes?
8. Does the bill or other relevant law provide adequate **funding** to ensure implementation of its entire program (see Chapter 8)?
9. Does the bill contain appropriate **instructions to judges and others who must ensure it fits into the existing corpus of the law** (see Chapter 8)?
  - a. Does the bill contain a General principles (or 'Objectives') clause sufficiently narrowly drawn to guide the relevant official in drafting regulations under the new law?
  - b. Does it contain sufficient definitional clauses?

- c. Does it contain the necessary consequential amendments to existing laws to avoid conflicts?
  - d. Does it provide for coming-into-force at an appropriate time?
10. Does the bill provide an adequate mechanism for monitoring and evaluating whether, after its enactment, the law proves effectively implemented and produces the desired social impact (*problem-solving's indispensable fourth step*)?
- a. Why did the bill's proponents select the monitoring and evaluation system it proposes? Do their reasons seem sufficient?
  - b. What alternative possible monitoring and evaluations devices might the bill contain, either in addition to or in place of those it proposes?
  - c. What does foreign experience demonstrate as to the relative effectiveness of all these 'feedback' devices?



## SUMMARY

To strengthen your country's law-making processes, you and your colleagues need to assess whether the available facts and logic justify the detailed provisions of important transformatory bills. Using institutionalist legislative theory, including its problem-solving methodology, this chapter suggests the kinds of questions you should ask to make that assessment. It recommends that your legislature should consider promulgating a rule to require that the proponents of an important bill accompany it by a research report. Adopting a problem-solving methodology, that report should present the kinds of evidence you need to determine whether that bill rests on reason informed by experience. To assess the likelihood that, given the country's unique circumstances, the bill's prescriptions will likely induce the desired changed behaviors, you should insist that the proponents of an important bill give you the evidence and rationale on which it rests.

The checklist at the end of this chapter, structured in accord with problem-solving's four steps, summarizes the main questions for which you should insist on receiving adequate answers. In particular, you must satisfy yourself that the bill designates an appropriate implementing agency which, operating according to carefully designed criteria and procedures, will likely effectively induce the kinds of behaviors required to achieve the bills' objectives. The next chapter discusses in greater depth the critical issue of implementation.



## EXERCISES

1. In the country of X, a bill provides that for each farmer within an agricultural agent's district whom the agent fails to visit at least twice a year, the agent shall lose one week's pay. When questioned about the bill, the drafter states that economic theory holds that people behave as rational profit-maximizers; that implies that the only factors likely to influence behavior consists of rewards and punishments, incentives and disincentives. The bill, the drafter says, embodies that economic theory. It aims at the failure of agents to visit farmers, and provided an incentive which, the theory held, would change the behavior. What further questions should a legislator ask the drafter?
2. Play devil's advocate. Summarize the arguments against the problem-solving methodology, and in favor of either incrementalism or the ends-means methodology. How would an advocate of the problem-solving methodology answer those claims of the devil's advocate?
3. Some experts say:

“A problem well stated is a problem half-solved.” Perhaps more than for any other cause, drafting projects go a-stray because of a failure of the law-makers to understand correctly the social problem addressed. Consider the first two sets of questions in the ‘Checklist of Questions to Ask about a Bill,’ p. 86. Do these seem sufficient to guide you to ask the specific questions you should ask accurately to define the social problem the bill addresses?
4. Does the ROCCIP agenda provide a useful framework for asking questions about the possible **causes** of the problematic behaviors at which a bill aims? What additional categories might you consider adding to ROCCIP's seven categories?
5. What questions should you ask to assess whether a bill's detailed provisions seem likely to alter or eliminate the causes of a role occupant's existing problematic behaviors?
6. What categories of questions should you ask to determine whether a bill's social and economic benefits seem likely to outweigh the social and economic costs of implementing its detailed provisions?
7. The problem-solving methodology places central emphasis on monitoring and evaluation. Feedback, it argues, becomes central to decision-making on the basis of facts and logic. Do you agree? What sorts of questions should you ask to assess a bill's provisions for monitoring and evaluation?

# CHAPTER 6: ENSURING A LAW'S EFFECTIVE IMPLEMENTATION

Everywhere, people complain, "we have good laws but they don't get implemented". That complaint contradicts itself. How can we call a law 'good' when it does not work? The 'legislative power' that the Constitution assigns to you and your colleagues requires you to oversee the executive branch's implementation of the laws. To assess whether a bill will *work*, you must determine whether it, or other existing law, adequately provides for its own implementation.

Legislative theory suggests that you should not focus only on the bill's broad 'policy,' or on its prescriptions to primary role occupants. You should also give special attention to whether either the bill or existing law provides processes likely to ensure effective implementation.



A law 'works' only when it induces the behavior it prescribes. Whatever its proponents' good intentions, if a law fails to improve existing problematic behaviors, how can one call it 'good'?

**This chapter aims to guide you in asking questions to obtain the information you need —**

- A. To describe the existing implementation agency officials and their behaviors, and to explain their failure to perform their jobs effectively;
- B. To assess whether the bill's detailed provisions for implementation (including the agency and its design, and conformity-inducing measures) will likely overcome those causes; and
- C. To decide whether or not a transitive or an intransitive bill will more likely resolve a particular social problem.

## A. WHY DO SOME AGENCIES FAIL TO IMPLEMENT?

Nowadays, in most countries, usually some law already addresses the same social problem as does the bill before you. Usually, some agency already has the duty to enforce that law. Too often, it fails to implement that law effectively.

As directed by the problem-solving methodology, we begin, not with the ‘end’ – here, effective implementation of the laws – but with the social problem. In the case of an existing problematic implementation agency, **whose** and **what** behaviors contribute to the weak or non-existent implementation of existing law? To help you in asking questions about a particular bill’s proposed implementation mechanisms, we then propose some general explanations for laws’ too-common ineffective implementation.



Most new laws address old problems.

Most new laws address old problems unresolved by previous laws. More often than not, at least in part a social problem reflects the failure of officials in an existing agency effectively to implement the law. In those cases, the solution — the new bill — must include detailed prescriptions that change those behaviors.

### 1. Whose and what behaviors contribute to ineffective implementation?

Usually, a ministry, or some other agency designated by government authorities, implements a law. Many people speak as though they consider the ‘ministry’ as a single rational actor. Frequently, a law directs a named official to implement it – the ‘Minister’ or ‘the President.’ Invariably, that constitutes only shorthand for a complex decision-making organization.

A complex organization, however, never functions as a ‘single rational actor.’ Commonly heard phrases — “The XYZ Corporation intentionally violated the anti-monopolies law” or “The Ministry of Agriculture seems biased in favor of large-scale commercial farmers” — imply that the organization **acts**. An act requires choice. Choice requires consciousness. Complex organizations have many characteristics, but not consciousness. An agency consists of many sets of actors and their interacting behavior patterns. Those actors **do** have consciousness. They **can** choose how to behave. They can **act**.

## IS THE ORGANIZATION LARGER THAN THE SUM OF ITS PARTS? THE 'SINGLE RATIONAL ACTOR' FALLACY

People often say that "an organization is larger than the sum of its parts." An organization can do more than its members can do as individuals. Some authors, however, imply that an organization has a *mind* that somehow exceeds the sum of its parts. They err. No such thing as a 'group mind' exists. A group never 'behaves' as a 'single rational actor.' In contrast, the organization's individual members can and do think. Those individual members do have consciousness. At most, an organization's leaders expect its members to follow rules that prescribe agreed-upon behaviors, and seek to induce behavioral conformity.

To answer the question – Why does the implementing agency fail to effectively implement the law? — you must 'unpack' the particular agency into the sets of officials who comprise it. Ask:

- (1) What officials in the agency behave in ways that hinder or prevent effective implementation?
- (2) Why do those officials behave in those problematic ways?

An implementing agency always has rules that prescribe its officials' behavior. To explain those officials' problematic behaviors, ask the same questions you would about other role occupants:

*Why do these officials behave as they do in the face of those rules?*



### 2. Two structural explanations for officials' problematic behaviors

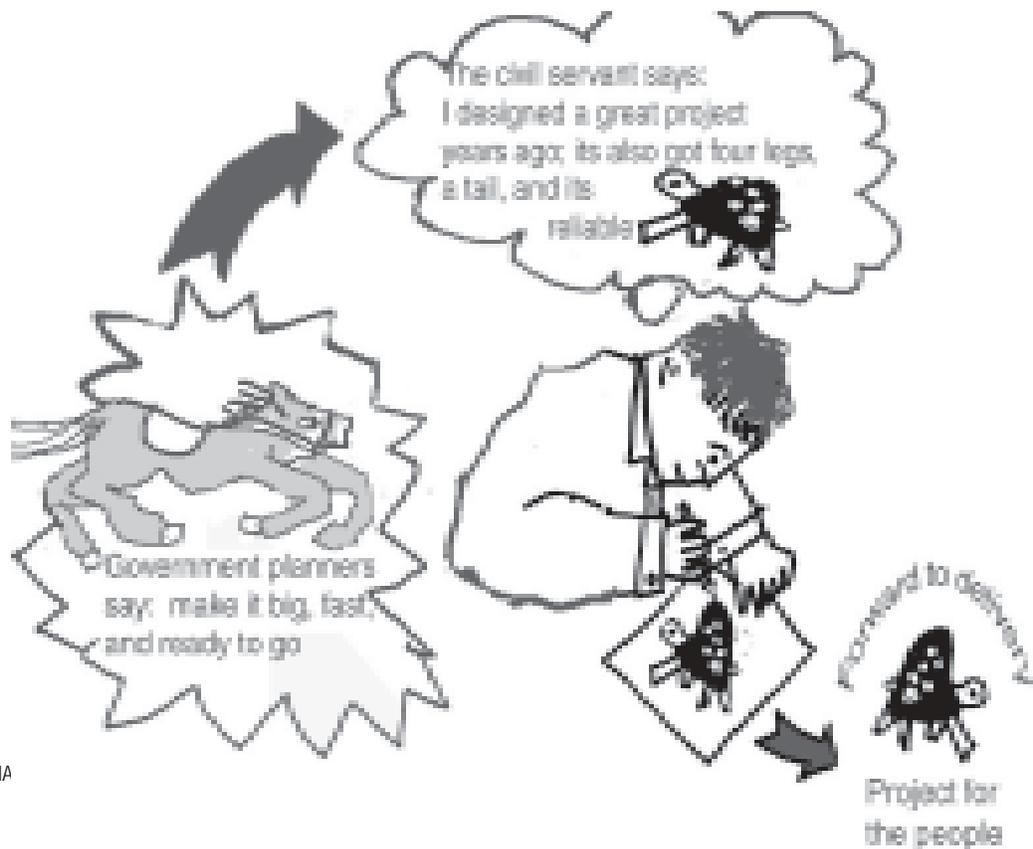
Based on weaknesses in most implementing agencies' **structure**, two hypotheses frequently prove useful in explaining officials' behaviors: mechanisms do not exist adequately to implement rules addressed to officials; and some officials' prescribed duties conflict with their personal interests, ideologies, and perceived role.

First, few laws specify either direct or roundabout measures to make it likely that officials conform to the law's prescriptions. The higher the officials' rank, the more vague and ambiguous become the monitoring and enforcement provisions that address their behaviors. Very few systems regularly monitor senior officials. To sanction perceived unacceptable performance, most have in place only default mechanisms.

Those default systems rarely prove very effective. In many countries, the Civil Service Commission has limited power to punish official misbehavior. General administrative law usually provides a method of appeal – frequently to the courts – for a citizen who feels an administrator has behaved unfairly. In a democratic society, a system of checks and balances may serve as a defense against arbitrary behaviors by top officials. Slow, cumbersome and very costly, these default procedures seldom provide relief. Thus, senior officials mostly behave without an effective agency to implement the rules that prescribe their behaviors

Second, role conflict often helps explain problematic official behaviors. In their formal role, officials should only behave as the law prescribes. Like everyone else, however, officials play many roles beyond their official capacities: as wives, mothers, husbands, fathers, children, students, teachers, consumers, home owners, renters – a long list. Occasionally, an official will use public power to play out another, private role — one that conflicts with the public interest. Called by sociologists ‘role conflicts,’ these may help to explain official misbehavior.

The lack of effective supervision of the implementing officials, and those officials’ own role conflicts, constitute two pervasive structural explanations for officials’ problematic implementing behaviors. Where existing implementing agency misbehavior constitutes part of that social problem a bill aims to help resolve (as usually happens), ask questions to determine whether structural causes influence the officials’ behaviors. Then ask about the other possible causes for officials’ problematic behaviors that the ROCCIPI categories suggest — especially, the **Process** category.



### 3. The centrality of *Process* in implementation

Whatever else it does, a complex organization – and every implementing organization constitutes a complex organization – produces decisions. Decision-making processes invariably involve many actors and their interacting behaviors. How to unpack these interrelated sets of actors and behaviors? A simple input-output Process Model helps to understand how officials arrive at their decisions; at the same time, it suggests what questions you should ask to assess the sufficiency of a bill's implementation provisions.



The Process Model teaches that, in a complex organization, the *range* of decisions — the outputs — depends on three subsystems. The *input* and *feedback processes* determine which personnel, and *whose* and *what* issues, facts, theories, opinions, claims, and information about the consequences of the organization's earlier decisions, enter the conversion processes. The *conversion processes* combine those inputs and feedbacks to produce outputs — the organization's decisions.

This model explains an organization's 'decisions.' It calls attention to the rules controlling the admission of issues into the system, and the behaviors that take place in the face of those rules. Those rules and behaviors may also help explain non-decisions, that is, those issues and claims which the officials exclude from the process.

Each of these processes consists of a set of officials acting in repetitive patterns in the face of laws or regulations that prescribe their functions. To assess a bill concerning problematic implementing agency behaviors, you must ask about each set of these officials the (by now familiar) underlying question: ***Why do these role occupants behave as they do in the face of a rule of law?*** In relation to each set of role occupants' problematic behaviors, consider the hypotheses inspired by a review of the ROCCIPI agenda (see Chapter 5).



The following checklist offers questions you may want to ask to understand why an implementing agency produces the decisions that it does — that is, why its officials behave as they do in the face of existing law.

CHECKLIST: OFFICIAL'S BEHAVIOUR

**CHECKLIST: EXPLAINING OFFICIALS' PROBLEMATIC BEHAVIORS**

**I. What social problem concerning an implementing agency does the bill address?**

- A.** What *surface indications* suggest that the performance of an existing implementing agency constitutes a social problem?
- B.** *Whose* and *what* official behaviors constitute that social problem?

1. Describe in detail *whose* and *what* behaviors constitute the input and feedback processes of the agency involved.
  - a. From whom do the agency officials regularly receive inputs (i.e. issues, facts, opinions, claims) and feedbacks (i.e., information about the consequences of previous decisions)?
  - b. What sorts of inputs and feedbacks do they consider?
  - c. What criteria and procedures do they use to decide what inputs and feedbacks to transmit to officials in the conversion process?
  - d. Do inputs or feedbacks from a group of people seem systematically excluded from, or included in, these processes?
  - e. How much does red tape confine official behaviors?
2. Describe in detail *whose* and *what* behaviors constitute the conversion processes of the agency.
  - a. Which officials decide what to do with the inputs and feedbacks they receive?
  - b. By what criteria and procedures do officials combine inputs and feedbacks into the problematic decisions that constitute the defined social problem?
  - c. Who carries out decisions made by the officials in the conversion processes? Do they do so regularly? Do agency officials regularly ensure the enforcement of their decisions? How?

The decision of officials in the conversion process becomes the input to a new set of decisions about carrying out the decision. If these behaviors seem problematic, you should describe these behaviors also, and explain them in the explanations section.



As to each set of officials and each type of problematic behavior, ask the questions that you would ask about any role occupant (see checklist, p. XXX). In addition, as to each official identified as contributing to the agency's problematic decision-making, ask the following questions (the ROCCIPI factors appear here underlined)—

**II. Explanations for problematic official behaviors**

**A. Ask about relevant officials in the input and feedback processes, and each of their problematic behaviors:**

**1. Rule:** On the *face* of the rule —

- a. What inputs, from whom, do the rules require or permit relevant agency officials to admit into the input and feedback processes? Especially, do they permit or require inputs or feedbacks from the poor, women, ethnic minorities, children, or from advocates for the environment, human rights, and the Rule of Law?

Since decisions reflect inputs and feedbacks, an agency's decisions tend to favor the interests of those who contributed the inputs and feedbacks upon which the agency bases its decisions. The elite always have formal or informal channels of communication to officials. Do the rules set up channels by which the disinherited or those concerned with often-ignored issues may also participate in input and feedback processes?

- b. What do the rules prescribe that these officials **do** to induce conforming role-occupant behavior?

Where a rule prescribes that an agency perform a particular task (for example, to create and operate an agricultural extension agency, or to decide appeals from a mining inspector's decisions about coal mine safety) it sets an agenda for the decisions that the agency must make. (In the cases of the two examples given, that agenda involves making decisions about creating and operating an agricultural extension agency, and decisions about the correctness of mining inspectors' decisions about coal mine safety). That rule necessarily implies an agenda not only for officials in the conversion processes, but also for officials in the input and feedback processes.

- c. What scope for **discretion** do the rules (explicitly or implicitly) permit the officials in deciding whose and what inputs and feedbacks to pass on to the officials in the conversion processes? What criteria and procedures do the rules provide that limit the exercise of that discretion?
- d. What (if anything) do the rules prescribe for measures to induce conforming behaviors **on the part of these officials**? Which agency (if any) do they directly or by implication command to implement the measures directed at the implementing agency officials?
- e. What do the rules prescribe for **monitoring and evaluating** these officials' behaviors? Whom do the rules require to undertake that task? How?



## CHECKLIST: OFFICIAL'S BEHAVIOUR

- f. What do the rules prescribe concerning the **transparency** of behaviors under the law (that is, how do stakeholders learn about what goes on within the agency)?
2. **Opportunity and Capacity:** What **Opportunity** and **Capacity** do agency officials have to provide inputs and feedbacks?
  - a. Do the officials have sufficient human and material resources (including skills) to capture the relevant inputs and feedbacks?

Officials have different capacities and opportunities to make contact with, and to develop inputs and feedbacks from, different segments of the population. That may help to explain a seeming bias in the inputs and feedbacks the officials capture and transmit to conversion process officials.
  - b. Who appoints these officials? How? According to what qualifications?
  - c. How do infractions of the laws come to the notice of the relevant input process officials? Do those procedures make it likely that those infractions will come to the attention of relevant officials?

A **reactive** agency frequently has small opportunity or capacity to ensure that it learns about all violations of the law. Its officials usually must depend upon the initiative of aggrieved persons – who may or may not come forward, in part because they may have neither the capacity nor opportunity to do so.
3. **Communication:** Have the authorities informed the agency officials of the rules that prescribe their behavior?

Usually, officials do know what law applies to their positions. Especially in rural areas, however, officials may not know the details of laws and regulations.
4. **Interest:** What incentives do officials have to implement the law?
  - a. How does merit relate to compensation?
  - b. What constitute those officials' private or personal incentives? Does corruption influence official behavior?
  - c. Does official misbehavior in practice incur consequences? By whom administered?
  - d. Any evidence of conflict of interest?

5. **Ideology:** What private 'domain assumptions' influence the official in question?

a. What form do these domain assumptions take?

Domain assumptions come in many sizes and shapes. Does the official adhere to a full-fledged, Grand Theory that leads to the problematic behaviors? Does she subscribe, consciously or unconsciously, to a set of embedded norms that induce those behaviors at issue? Does she have a set of unarticulated factual assumptions about how the world goes around that leads to those embedded norms? Does she hold a 'bureaucratic' set of norms, content to abide by the details of regulations, or is the official inspired by zeal to achieve the agency's overall objectives?

b. Does an official's domain assumptions conflict with agency doctrine?

c. Do they conflict with the domain assumptions held by long-serving senior agency officials (i.e., agency 'culture')?

Ask the same kinds of questions as those above about officials in the conversion processes.



**B. Conversion processes:**

In particular, ask about conversion process officials:

1. **Rule:**

- a. If more than one decision-maker, how many? Do the rules prescribe individual or joint decision by the decision-makers?
- b. Do the rules ensure that stakeholders will learn in good time that an official plans to decide an issue, and when the official will make the decision? Do they have opportunity to submit inputs, either about a proposed decision, or about agency behaviors?
- c. Do the rules require the official to respond to stakeholder inputs or stakeholder complaints? to state reasons for a decision? in writing? to publish their reasons?
- d. Do the rules permit or require other forms of stakeholder participation in the conversion process?

## 2. Opportunity and capacity

- a. How much expertise do these decisions require?
- b. Do these officials have that expertise? If they do not, can they get necessary assistance?
- c. If officials in the conversion process believe they need more information, can they obtain further inputs? If so, under what conditions? From whom?

## 3. Process:

- a. In practice, do the officials in the conversion processes give notice that they contemplate making a decision? Before decision, do stakeholders have opportunity to make inputs to the decision?
- b. Do they make their decision in writing? Do they state the reasons for decision? Do they make their decision public?
- c. What body, if any, monitors and evaluates the officials' decisions? By what criteria and procedures does the appeals body in practice assess agency decisions?
- d. Must an official report to anyone that she or he has made a decision?

To say 'we have good laws but they remain poorly implemented' constitutes a contradiction in terms. A law that does not provide for its own effective implementation reflects poor drafting. Drafting effective implementation provisions constitutes a critical aspect of drafting bills for social change. Legislative theory suggests that analysis of officials' behavior, and the repetitive processes ingrained within the responsible agencies, highlights major obstacles that block effective implementation.



These questions concern the existing implementing agency and its behaviors. You should ask a bill's proponents analogous questions to get the additional information that you need to assess their bill's provisions for its own implementation.

## B. ASSESSING A BILL'S PROVISIONS FOR ITS OWN IMPLEMENTATION

As an important aspect of your task, you must assess a bill's detailed prescriptions for an implementing agency. To do that, in general you should follow the steps suggested in the last chapter for assessing the bill as a whole, now thinking specifically about the implementing agency. For the bill as a whole you must ascertain whether it will likely induce the behaviors it prescribes for agency officials to implement measures likely to ensure that the primary role occupants conform to the new law. (What role does the implementing agency play in the social problem at which the bill's provisions aim? What agency officials and their behaviors contribute to that social problem? What causes those problematic behaviors? Do the new bill's provisions logically appear likely to overcome those causes? What constitute the social as well as the economic costs and benefits of the bill's provisions for changing the implementing agency?)



In this chapter, we do not repeat these sorts of questions (especially those concerning costs and benefits).

We focus here on questions to ask to determine whether, in your country's circumstances, a bill's detailed prescriptions will likely to induce agency officials to behave so that primary role occupants will probably conform to the bill's prescriptions?

This section discusses questions directed at assessing:

- (1) the bill's conformity-inducing measures;
- (2) the drafters' choice of agency; and
- (3) the details of the proposed agency's structure and procedures.

### 1. From 'sanctions' to 'conformity-inducing measures'

In assessing an implementing agency's design, you should consider first whether it directs agency officials to use appropriate conformity-inducing measures.

In the older legal literature, and still in popular conception, 'law' implies a sanction, and 'sanction' means punishment. As the famous 18<sup>th</sup> Century author (and first Professor of Law in an English university) William Blackstone, declared, 'No sanction, no law.' The preferred means of inducing conforming behaviors used punishment to stop non-conforming behavior. Punishment needed no other justification. Today, in most countries, for most people, 'law' implies "punishment.

At least for the purposes of institutional transformation, this manual rejects that popular misconception. Of the seven ROCCIPI categories of possible causes for problematic behaviors, punishment directly addresses only one: **Interest**. Its proponents claim punishment offsets the advantages the miscreant perceives in engaging in the forbidden behavior. In principle, a reward for conforming behavior would serve equally well.

Logically, however, neither punishments nor rewards directly address the six other possible causes of behavior. Legislative theory suggests that, as legislators, you and your colleagues should ask for evidence that a *bill's proposed conformity-inducing measures actually do address the multiple causes of problematic behaviors*. To eliminate the causes other than Interest may require *roundabout* measures.

### ROUNDAABOUT MEASURES

'Roundabout' measures comprise all the activities an implementing agency may use to: (1) alter or eliminate the country-specific non-legal circumstances (Interest causes excepted) that cause social actors — either primary role occupants, or implementing agency officials — to behave in counterproductive ways; and (2) to then induce more appropriate behavior.

Implicitly, depending upon the causes of the problematic behaviors, the ROCCIPI agenda suggests some alternative measures likely to change an addressee's behavior in a way likely to help resolve the social problem. Ask questions about measures to –

- Alter or eliminate curbs that circumstances impose on **Opportunity**.
- Provide required resources and skills training to ensure sufficient **Capacity**.
- **Communicate** the law's provisions to its addresses.
- Require transparent, accountable, and participatory input, feedback and conversion **Processes**. Include in those measures specific criteria and procedures to prevent arbitrary and even corrupt decision-making, especially in complex organizations (including implementing agencies).
- Introduce educational programs to alter dysfunctional **Ideologies**.



If circumstances other than those subsumed under the Interest category dictate non-conforming behaviors, a bill that only threatens imprisonment for those behaviors in fact provides an incentive, not to conform to the law, but to evade detection.

## A TALE WITH A MORAL

Once upon a time a huge lorry with two trailers behind it came to a steep hill covered with ice. It came to a halt halfway up the hill; it did not have the power nor the traction to go further. The two large truck drivers went to the house that stood by the road and asked a little old lady who lived there if they could borrow her little poodle dog.

“Why do you want to borrow my poodle dog?” she asked.

“We want to hitch the poodle in front of the truck so the poodle can pull the truck up the hill,” they answered.

“Don’t be silly,” she said. “A little poodle like that cannot pull that great big truck up that hill.”

“That’s what you think, lady,” the men said. “*We have whips!*”



Moral: Punishment does not solve every behavioral problem.



Avoid over-criminalization of the law.

If a bill prescribes only criminal sanctions for behaviors caused by factors other than **Interest**, call for provisions in the bill to address those factors.

In the same way, bills that offer rewards for desired behaviors aim to meet the actor’s (assumed) **Interest**. Usually, it proves more effective to design conformity-inducing measures to facilitate behaviors that benefit that actor. To increase farm production, do not threaten a farmer with six months in jail if the farmer does not increase production. Better by far to provide farm-to-market roads, inexpensive credit, instruction in improved farming techniques, better seeds and tools.

## 2. Punishments vs. rewards

While conceptually both punishments and rewards address causes related to **Interest**, in a particular case pragmatic reasons may suggest one rather than another. Punishments seem useful when most of the population already has internalized the undesirability of the behaviors prohibited. For example, in the case of murder, the costs of rewarding everyone who does *not* commit murder seems prohibitive. Conversely, rewards seem more appropriate when the law prescribes behavior that existing, internalized norms forbid. In that case, the cost of policing to catch everyone who violates the law seems prohibitive. Rewards also seem more appropriate when the authorities see a need to provide incentives to achieve maximum effort. The law can tailor rewards to match effort and achievement.

The common results of tax subsidies – tax concessions for behaving in desired ways – illustrate the dangers of rewarding anticipated behaviors.

### EXAMPLE: TAX SUBSIDIES

#### TAX SUBSIDIES

Frequently, proponents seek to grant tax concessions as a device to reward an actor for conforming to a new law. For example, to induce manufacturers to introduce labor-intensive machinery as a method of increasing employment, a government might offer a flat subsidy of \$5000 per job created. Alternatively, it might offer a \$5000 credit against tax. The economic consequences of either course seem all but identical.

Because the money does not pass through government coffers, however, a \$5000 credit against tax does not appear in the annual estimates. Politicians can — and do — claim that the tax subsidy comes costless. It does not. Income foregone is income paid out. A \$5000 credit against tax has the same consequences as collecting the \$5000, and then paying it out as a cash subsidy. Under these circumstances, it clarifies thinking to speak not of tax *deductions*, but of tax *subsidies*.

It usually proves difficult to ensure that the taxpayer has earned the tax subsidy. No government pays a *cash* subsidy without evidence of performance. With a tax subsidy, however, the taxpayer takes the deduction, and maybe sometime later a tax audit will reveal whether or not the taxpayer actually earned the tax subsidy. It proves difficult to account for tax subsidies.

All in all, avoid tax subsidies. A cash subsidy costs no more, it proves easier to keep account of, and you have better assurance that government will receive value in exchange for the subsidy.

### 3. Assessing a bill's prescriptions for an implementing agency

When considering a bill's provisions relating to implementation, ask three preliminary questions:

- What kinds of decisions will the agency officials have to make?
- Which can better do the job, an old or a new agency?
- Which of the four alternative agency forms – dispute settlement, ministry or other bureaucratic agency, state corporation, or private sector organization – can best do the job?



#### **a. Different outputs require different structures**

The Process Model underscores the proposition that **a decision-making structure has a defined range of potential outputs**. To ensure that its implementing agency produces sound decisions, the bill must prescribe input, feedback, and conversion processes appropriate to the kinds of issues it will confront. No one-size-fits-all implementing agency structure does or can exist.

Agencies generally confront five sets of issues. To assess a bill's prescribed implementing agency's structure and process, you must first determine the specific shape of the agency's tasks. These usually include some or all of the following:

- implementing the bill's conformity-inducing measures;
- maintaining itself as an organization;
- making regulations to fill in the law's details;;
- settling disputes; and
- monitoring agency officials' law-implementing behaviors.

Having determined the range of issues with which the agency must deal, ask whether that agency's input, feedback and conversion processes will likely address those issues. Do those procedures seem likely designed to produce decisions based on reason informed by experience – questions which we amplify in the checklist below.



**b. New or old agency?**

Before doing that, however, ask: Does the bill prescribe using the existing agency, with or without change, or restructuring an existing agency or creating a new one?

You may have to ask whether an existing agency with less-than-optimal capacity could cope adequately with the new law's demands, or the bill itself should establish a new agency. Ask about the costs of relying on an existing organization to implement the law effectively, compared to the start-up costs of a new institution. These may include constructing a new building, setting up new systems, hiring and training new people. Would changing the criteria and procedures of an existing agency enable it to use existing human and material resources to implement the new law effectively at less cost? After weighing the relevant social and economic costs and benefits, do you agree that the implementing agency designated in the bill will likely best serve the public interest?

**c. What kind of agency?**

In general, a law may prescribe one, or a combination, of four forms of implementation agency:

- a court or other dispute-settlement tribunal;
- a ministry or an autonomous government agency;
- a public corporation (for example, a publicly-owned electricity corporation);
- contracting a specified administration task to a private enterprise (for example, contracting with a private corporation to manage a prison).

Some bills contain a mix of these four forms. A law establishing a public corporation, for example, may assign a Ministry to set it up and monitor its performance, and, for disputes, an intra-Ministry proceeding with an appeal to the courts.

FOUR KINDS OF IMPLEMENTATION AGENCY

In any particular case, which of these forms seems most useful? That depends on the specific circumstances in which the proposed law will operate. Here, we discuss the advantages and disadvantages of the four forms. In considering the implementation agency specified for a particular bill, ask questions to discover where — in the particular circumstances of the problem addressed by that bill — the balance of advantage seems to lie.

## I. DISPUTE-SETTLEMENT INSTITUTIONS AS IMPLEMENTATION AGENCIES

To most people, dispute settlement and the implementation of the laws appear indissolubly linked. Courts — the paradigmatic dispute-settlement agency — also seem the paradigmatic implementing agency. For many laws, in the course of settling disputes, courts (or other dispute settlement agencies, for example, a Workmen’s Compensation Commissioner, or an arbitrator under a contract of sale of goods) do serve as a principal implementing agency. That reflects both a long history, and society’s requirements for a dispute-resolution system.

First, history: Centuries before the welfare state and its gaggle of programs to round off the sharp corners of the market economy, long before development appeared on any country’s program, dispute-settlement agencies (usually courts) enforced the law as an incident to settling a dispute. In England, at first they enforced the criminal law, bringing ‘the King’s peace’ to a violent and lawless countryside.

Operating mainly through the criminal law, in 17<sup>th</sup> and 18<sup>th</sup> Century England, the Justices of the Peace – almost invariably, the local landowner — became the administrative arm of the Crown. They depended almost entirely upon criminal sanctions. As well as minor, traditional criminal laws (petty theft, minor assaults, etc.), they enforced laws that had functions not different from what today we call ‘administrative regulations’: laws against ‘sturdy beggars’ or witchcraft, and the laws of markets and toll bridges. In the later 18<sup>th</sup> and 19<sup>th</sup> Centuries, other courts enforced the property, tort and contract laws on which the economy depended.

Secondly, to avoid blood feud and private warfare, every society does need a peaceable dispute-resolution system. With respect to a particular law, in default of another system, courts serve that indispensable function. In popular perception, courts came to constitute the very capital of Law’s empire.

As the default mode of dispute resolution, a court has an open door. In all government, only a court *must* open its doors when a citizen has a complaint about the enforcement of a law — even if an official becomes the defendant. (That open-door characteristic makes courts the **default** dispute-settlement system).

No matter how useful as a *dispute-resolution* agency, however, for many, probably most, development programs, the choice of courts as *implementing* agency appears problematic. Consider, especially, **Process:** Court procedures focus on dispute resolution. For many laws the sorts of outputs – that is, decisions – required for dispute settlement differ markedly from the kinds of decisions required for implementing a law’s detailed provisions. That implies that the input, feedback and conversion processes for dispute settlement may not serve the requirements of the implementation process.

To assess a bill’s proposal (often implicit) that courts serve as its main implementation mechanism, ask questions about the following issues:

**1. Will a reactive implementation system suffice?**

The breach of many laws – especially ‘private’ law like property, contract or tort law – only come to attention of authorities on complaint of a person injured. (In technical terms, it is a *reactive*, not a *proactive* process). That works well enough where the failure of a party to behave as the law prescribes injures primarily a single individual (for example, contract, tort and property law). It does not work very well where a failure to obey the law injures the public generally (for example, environmental law or public education law), or where the breach of the law injures many people, but each individual only slightly. In those cases, often nobody brings a lawsuit. If a court never learns about the breach of the law, it has no opportunity to implement it.

Some argue that this constitutes an advantage. Individuals, not a nosy, intrusive government, decide what breaches of the law warrant formal implementation. On the other hand, in most countries, to bring and win a lawsuit requires resources, sophistication, and connections. Despite its seeming neutrality, in practice reactive law enforcement favors power and privilege.

**2. How will the court learn the facts related to the implementation problem?**

Dispute settlement requires decisions based on evidence. Unless both sides to a dispute have had a chance to bring forward evidence and argument, the arbiter – in a court, the judge – may decide on the basis of incomplete facts. A fair hearing lies at the heart of rational dispute-settlement.

A decision on whether to implement a law to resolve a complex social problem, however, often requires evidence from a broader range of stakeholders, as well as from neutral experts.

If you complain of a violation of a law but cannot frame the complaint as a lawsuit between two parties, however, you will have difficulty in persuading a court to hear your case. In particular, courts have no funds to finance a remedy for a social problem. Without the ‘power of the purse,’ a court frequently lacks the means to induce changed behavior. (If a community needs a new school, a court faces almost insurmountable difficulty in getting it built.)

### 3. Are the court's processes of a level of complexity appropriate to the implementation issue?

Courts usually have slow, formal, expensive and complex procedures. These prove useful in processing difficult claims on which a great deal depends. In other instances, they may engender delays and unwarranted inefficiencies.

### 4. Do the judges have sufficient expertise to implement the law?

Necessarily generalists, a judge may not have the special expertise required to deal with particularly complex substantive issues. Implementation frequently requires expertise in the subject-matter.

### 5. Will the judges prove sufficiently zealous in implementing the law?

In courts committed to the adversarial system, judges, in principle, ought to remain uncommitted and detached, 'above the fray.' Development, in contrast, often requires dedication that only commitment can ensure.

### 6. Does implementation require gathering 'legislative facts'?

Court procedures work reasonably well in finding facts about what has happened in a particular event at a particular time and place. They do not work very well in finding 'legislative facts' – that is, data indicating broad trends or forecasting probabilities of future behaviors.

In sum, for a limited range of laws, a dispute-settlement agency can also serve as the implementing agency. For many laws, however, dispute settlement calls for different input, feedback and conversion processes, and different capacities, than does implementation. If a bill before you expressly or implicitly specifies implementation through dispute settlement, enquire about the sufficiency of its procedures and structures for the implementation task required.

## II. IMPLEMENTATION THROUGH GOVERNMENT ADMINISTRATION (MINISTRIES, DEPARTMENTS, ETC.)

### *Government administration through implementing agencies— advantages*

1. A bill can structure a government agency as relatively independent of partisan political influence –for example, in many countries, the civil service.
2. An administrative implementing institution, properly structured by law, seems an efficient and effective form of doing government business. (Max Weber thought that, as a great technical advance, the discovery of bureaucracy ranked with the discovery of the wheel.) Because it has enormous flexibility, drafters can shape bureaucracy to the purposes of their particular bills.
3. In contrast to courts, administrative agencies serve as specialized institutions. They generally employ experts to make decisions.

4. A bill can structure a ministry to take either a **reactive** or a **proactive** stance, whichever best suits the problem at hand.
5. Ministerial officials may bring zeal to their task — a strong plus in implementing transformatory law. By contrast, the judges' role demands the opposite of zeal: impartiality, coolness, deliberateness.
6. The ministerial form provides sufficient flexibility to enable a ministry to introduce procedures appropriate either for deciding a specific case, or for drafting subordinate legislation.

**Government administration through implementing agencies — disadvantages**

1. Administrative agencies sometimes do prove 'bureaucratic': Bound by antique rules ('red tape'), slow, ponderous. Bureaucrats sometimes become equally hidebound, incapable of behaving as entrepreneurs, or trying out new ideas. Unless the rules expressly permit it, sometimes they seem incapable of chewing gum and walking at the same time.
2. Ministries necessarily work intimately with the principal stakeholders in the area of their competence. Too often, in time, the regulated take over the regulators.
3. Unless carefully-structured, the hierarchical organization of an administrative agency may encourage officials to behave in a remote, authoritarian manner that defies transparency, accountability, and stakeholder participation.

**III. IMPLEMENTATION THROUGH A STATE CORPORATION**

**State corporations as implementing agencies — advantages**

1. A government corporation usually has considerable freedom from ministerial control. Some people claim this enables it to respond more readily to business or quasi-business opportunities, and to foster greater managerial creativity and entrepreneurship.
2. In dealing with personnel, a government department invariably must follow the general rules for the public service; a public corporation usually does not.
3. The same applies to rules for financial accountability. That may free the corporation from a lot of red tape that binds ministries.

**Disadvantages**

1. Precisely because of their freedom from oversight and its accompanying rules, public

corporations have frequently become the site of serious corruption (see Chapter 9). As do ministries unless carefully structured, that very freedom from civil service and financial constraints (that in some circumstances counts as an advantage) may facilitate behaviors in violation of good governance.

## IMPLEMENTATION THROUGH A PRIVATE AGENCY

In a variety of circumstances, governments implement programs through the private sector. For example, a hospitals bill may empower a health ministry to contract with private companies or individuals to manage public hospitals for a fee; a prisons bill may permit a ministry of justice to contract with private companies to manage prison for a specified price; in many countries, legislation permits welfare ministries to negotiate contracts with non-government organizations to administer welfare programs.

### *Implementation through a private agency – advantages*

1. Private enterprises may bring their own resources — personnel, financial or physical — to the implementation task.
2. Some people claim that private enterprises, presumably as a result of some form of competition, operate more efficiently than government enterprise.
3. Like public corporations, private enterprises may permit greater creativity and entrepreneurship than does bureaucracy.

### *Implementation through a private agency – disadvantages*

1. Private enterprise seeks to maximize profits. For government activities that require redistribution of resources, or improved services for the poor, the profit motive may conflict with the agency's mission (for example, welfare agencies; old-age homes; prisons; hospitals.)
2. Practices purporting to enhance efficiency may conceal behaviors that government agency rules characterize as corrupt.
3. Unlike most government agencies, no generally applicable rules subject private enterprises to requirements of transparency, accountability, and participation.

**IMPLEMENTATION BY GOVERNMENT OR BY PRIVATE CONTRACTOR? SOME EXAMPLES**

1. In **South Africa**, since 1990, the government has sold to the private sector previously state-owned enterprises. These included a number of infrastructural systems that provided for the population's basic needs like public water supply, electricity and telephones.

As a result, the charges for these services rose; and, when the poor failed to pay, the now-privately owned companies cut off connections in rural areas and (previously black) townships. In some cases, private managers broke existing union contracts with municipal workers and laid off employees, contributing to mounting unemployment.



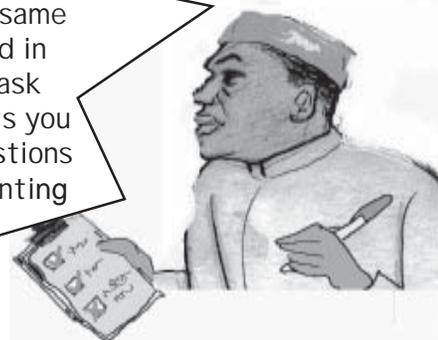
2. A few times a winter, **Maine**, one of 50 states in the US, experiences heavy snowstorms. To clear snow off the roads quickly after a blizzard requires many trucks or tractors equipped with snowplow blades. Maine communities could either (a) purchase many trucks and tractors, most of which would stand useless save for the few times a year when snow falls heavily; or (b) hire privately owned trucks fitted with a snowplow to remove most of the snow, especially in the many roads away from major highways. Maine communities have found option (b) more efficient.



**Moral:** No general rule about the relative advantages of government or private sector implementation seems warranted. Do not let ideologues for either pro-government or a pro-private sector implementation persuade you that one size - **their** size - fits all. Whether to use government employees or private contractors to implement a program depends upon the time- and place-specific circumstances.

Whatever its form, you must assess the bill's designation and design of an implementing agency, and whether its prescriptions for the behavior of its officials have a high likelihood of inducing the prescribed behaviors. In that sense, you are responsible for the bill's successful implementation.

To assess a bill's implementation provisions, you generally must ask the same kinds of questions about officials as role occupants as those suggested in Chapter 5. This Chapter 6 does not suggest *alternative* questions to ask about implementing agency officials in place of those Chapter 5 suggests you ask about primary role occupants. Instead, it suggests *additional* questions that prove useful for assessing a bill's provisions related to its implementing agency.



#### 4. A Checklist for assessing implementing agencies

##### A CHECKLIST : QUESTIONS TO ASK ABOUT AN IMPLEMENTING AGENCY'S STRUCTURE AND PROCESS

CHECKLIST: AN IMPLEMENTING AGENCY'S STRUCTURE AND PROCESS

##### *I. Designation of an agency to implement the law:*

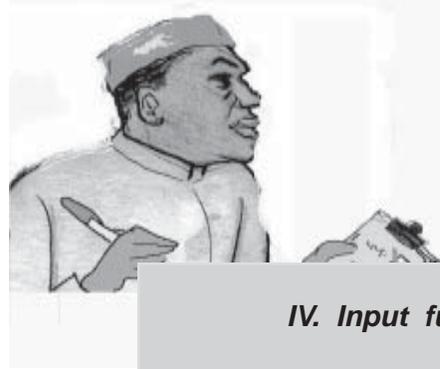
1. If an old agency (for example, an existing ministry), which agency?
2. If a new agency, what does the bill prescribe about its title and location in the existing bureaucracy? Do these seem appropriate?

##### *II. Agency actors (officials at all levels):*

1. Number of officials at each level? Why?
2. Who will appoint them? How?
3. What qualifications must candidates have for appointment? Why those qualifications?
4. How long a term will they serve? Why?
5. By what process can which official or institution remove an official from office (end of term; resignation; removal for cause; retirement age)?

##### *III. Duties and powers of the agency:*

1. What responsibilities will the agency have? If the agency performs those duties, will it contribute to altering or eliminating the causes of the primary role occupants' present dysfunctional behaviors?
2. What conformity-inducing measures will the agency officials use to carry out their responsibilities? Do these measures address the causes of the problematic behaviors that the bill aims to help resolve?
3. Will the agency have the authority to impose punishments? What kinds of punishments? How useful do these seem to help resolve the identified problematic behaviors?



CHECKLIST: ON AN IMPLEMENTING AGENCY'S  
STRUCTURE AND PROCESS

**IV. Input functions:**

1. Whom will agency officials consult about how to implement the law's details? Do these include all the stakeholders? Especially, does the bill require them to consult advocates for the poor, women, children, minorities, the environment, human rights and the Rule of Law?
2. How and from whom will agency officials gather facts to help them decide how to implement the law's detailed provisions?
3. How will the agency recruit and train personnel?

**V. Feedback functions:**

1. How will the agency learn about whether the law's addressees obey its prescriptions?
2. Will the agency wait until people come forward with complaints?
3. Almost every implementation agency **permits** complaints; will the agency also have an obligation to search out violations? (That is, does the bill prescribe a reactive or proactive agency?)
4. Who has standing to make complaints?
5. By what procedures may those with standing make their complaints?
6. Will the agency obtain facts about whether the law's addressees obey the law by investigations by agency employees? public hearings? by soliciting responses from those affected — especially from the vulnerable, historically disadvantaged? Helping the people subject to the law to meet and develop their own assessment of implementation, and to take steps to improve it? Commissioning a research agency to investigate and report back? Hearings on charges made in writing? (especially appropriate where an individual is charged with wrongdoing that may lead to punishment, demotion, loss of job, etc.) Other?

**VI. Conversion processes:** If the agency has a decision-making body empowered to make implementation decisions:

1. If that body has more than one member, what proportion of its members must vote in favor of a proposition? Must they meet and discuss the issue, or do they each write their own opinion?
2. Must decision-makers accompany their decisions with statements of reasons?

Must they provide **written** reasons? Should they include findings of fact as well as reasons?

3. Must they notify stakeholders when they have an issue under consideration, and invite their inputs? How must the agency respond to those inputs?

#### VII. Appeals:

1. Will a person aggrieved by an agency decision have a forum to which to appeal?

You must ask these kinds of detailed questions to assess whether the bill's provisions will likely ensure its effective implementation. Sometimes, however, under the changing circumstances of development and transition, a bill may empower an administrative agency – a Minister, or some other official – to formulate and promulgate rules to fill in the essential details left out by the bill's more general provisions. The literature calls that **'intransitive law.'**

In that case, you must ask further questions to ensure that the agency officials use their delegated rule-making power in conformance with the requirements of good governance.



## C. TRANSITIVE VS. INTRANSITIVE BILLS

At the end of the day, to induce changed behavior and thus bring about desired social change — and this we cannot repeat often enough — a law must prescribe the desired behaviors in **detail**.

Who should draft and promulgate those detailed rules? You and your colleagues, the elected representatives of the people, in whom the Constitution vests the legislative power – or some administrator or executive usually appointed, not elected? Remember, policy resides in the details. To empower an administrative official or an agency to decide on a bill's details delegates much of the legislative power.

Ideally, you should never delegate that supreme constitutional power. Sometimes – in conditions of development, often — you have small choice but to delegate a portion of that power to executive officials. That poses the central question concerning intransitive laws: ***How can you surrender to the executive the power to make detailed rules without surrendering the legislative power itself?***

**DEFINITIONS: TRANSITIVE AND INTRANSITIVE LAWS**

Almost all laws (at least, laws concerned with institutional transformation and development) require some administrative rule-making. With respect to their generality, bills stretch in a continuum between a wholly *transitive* and a wholly *intransitive* bill. A *transitive* law contains in its text the detailed prescriptions for the role occupants and implementing agency behavior. An *intransitive* law delegates to some authority — government agency, state corporation, or private entity — the power to make and implement detailed rules (regulations, subsidiary legislation) that prescribe the desired behaviors.

How can you assess a bill for an intransitive law?



**That assessment requires two steps:**

- (1) Do the circumstances here make an intransitive law **necessary**; or might its drafters successfully write a transitive bill?
- (2) Does the bill sufficiently limit the discretionary power to make subordinate legislation?

This part first discusses these two issues, and then provides a checklist of questions to ask to assess an intransitive bill. Preliminarily, it considers the larger problem: the seeming conflict between democratic ideology (which points towards **transitive** laws) and the need for delegated discretionary power (which points towards **intransitive** laws).

### 1. The ‘deadlock’ of development administration — and how to dissolve it

In the industrialized world, increasingly bills have tended towards the intransitive end of the continuum. Going back to Napoleonic times, European legislative traditions have given the legislature power to enact laws in general terms. These laws only go into effect after a minister or other executive officer promulgates an Implementing Decree that fills in the details. That tradition, however, seems to contradict the notion of representative government.

Everywhere, history and democratic theory alike argue that the legislature ought to enact the detailed rules that law-induced social change requires. From capitalism’s early years, private investors demanded laws free of official and administrative discretion. They experienced enough trouble trying to out-guess fickle and changing markets. If their capital risked not only market fluctuations, but also changing official whims, they feared to invest. They demanded detailed, certain and ascertainable laws which they could take into account in their business planning.

In the latter part of the 19th century, the English writer Dicey claimed that the true mark of the English Rule of Law lay in its assurance that no person's property or liberty depended upon administrative discretion. That required minimizing official decision-makers' discretion by writing transitive laws that precisely prescribed role occupant behaviors and limited the discretion of implementing agencies (in Dicey's day, mainly the courts).

In democratic principle, law-makers operationalize Dicey's dictum by the rule of *ultra vires* (see Chapter 2). That rule goes to the heart of the Rule of Law (see Chapter 9). It says that government officials, no matter how high and important, remain subject to the law. If the law contains no details, in what sense does the law control their behavior? A statute that proclaims that 'a person must obey the whim of the Prince' does not merit the title of 'law.'

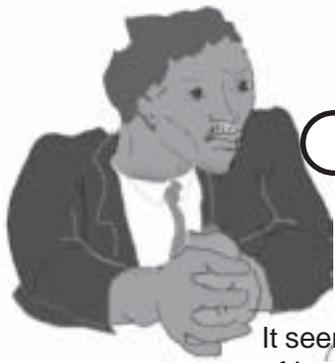
Nevertheless, the complexity of industrialized economies made it difficult always to enact, in advance, the detailed rules required to resolve societies' increasingly complicated, ever-changing social problems. Increasingly, industrialized country legislators delegated to administrative officials the discretionary power to write detailed rules. In Europe, they call the rules enacted by the executive, 'Implementing Decrees;' in England, 'subordinate legislation;' in the United States, 'administrative rules.' All rest on relatively intransitive statutes.

Developing countries face a similar paradox. At least nominally, today most adhere to a democratic ideology. At the same time, most hold development as a principal policy objective. For development, good governance constitutes a necessary if not sufficient foundation. The history of government everywhere — and no more so than in the developing world — teaches the evils of granting officials unlimited discretion. It breeds arbitrary decision-making in the interest, not of the public, but of private greed. Both democratic theory and the demands of development hold that, not an unelected official, but the people's representatives must enact the **details** of a law — especially of transformatory law.

In the developing countries, a variety of forces tended to make that difficult. History furnished a powerful influence. During the years of colonial domination, the pattern of governance remained highly authoritarian. Laws endowed executive officers with practically unlimited power. Today in most former colonial countries traditions of unlimited executive discretion remain deeply embedded in the drafters' and the general political culture. Sometimes embedded in constitutional provisions, former French, Dutch and Portuguese colonies still labor under traditions that mandate that all legislation consist of general, highly intransitive laws implemented by presidential or ministerial decrees that specify their details.

Developing countries look to induce rapid social change. I inevitably, that comes clothed in uncertainty. Officials need flexibility in governing – and for – 'flexibility,' read discretion. Development and transition require not fixed, immutable plans, but flexibility, experimentation, innovation, entrepreneurship.





How can *anyone* show their love of enterprise, ingenuity, and get-up-and-go in this bureaucratic maze?

It seemed that developing countries might permit officials no discretion, and have the Rule of Law – and little or no development. Or, these countries might opt for development and transition – but that requires a high degree of official discretion, and thus defies the Rule of Law. Some called that the ‘deadlock’ of development administration.

Three general strategies emerged. Two of them merely asserted one or the other side of the paradox embodied in the deadlock of development administration. In the name of ‘development’ and ‘transition,’ some called for an ‘entrepreneurial’ administration. Others, rejecting the notion that government should facilitate transformation, called for a return to a ‘night watchman’ state that merely collected taxes and kept law and order.

As a third strategy, some law-makers rejected the entire concept of the deadlock in development administration. Under the whip of necessity, they argued, a grant of a specified portion of legislative power need not diminish the constitutional grant of legislative power. In some circumstances, it made the exercise of legislative power possible.

Advocates of that third strategy transformed the ‘deadlock of development administration’ into another, more malleable question: How to grant a limited part of the legislative power without weakening it beyond repair? How to devolve discretionary power to administrators – but only a measured amount, as necessary to the developing world’s excruciating circumstances? How to ensure that agencies used the delegated power for public, not for private purposes? How can you and your colleagues claim to represent the people, who hold you accountable, and at the same time conscientiously give away a part of the legislative power to the executive?



Wait a minute! We were elected to represent the people – how can we still do that?

The answer lies in general principles of agency law. In reality, neither ‘government’ nor ‘the state,’ alone, powers the development effort. Neither constitutes a ‘single rational actor.’ As earlier discussed, frequently people talk about ‘the government’ or ‘the state’ acting: “The state has taken over the oil wells”, or “The state operates the schools.” That again constitutes ‘single rational actor’ talk. In fact, some identifiable government officials do what you as legislators enact law to command them to do. (If a state official takes over an oil mine without the authority of the law, the act constitutes merely theft of property, not state action.) The officials act as agents of ‘the state’, as directed by rules made by the people’s representatives.

Sometimes, to achieve desired policy ends, you must direct specified officials to use their discretion to solve a problem too complex, too dynamic, too multifaceted to resolve at this time by specifying the details in a law. Perhaps, with more study and closer relationships to the actors on the ground, officials can devise regulations (or 'subordinate legislation' or 'implementing decrees') to provide those essential details. To delegate the rule-making power to those officials does no violence either to democratic ideals or to constitutional allocations of power.

That strategy does not pose a whole new set of legal concepts. Agency law has always held that, with exceptions, what one can do oneself, one can do through an agent. Where the choice lies between development or stagnation, development must win. The problem lies, not in a supposed 'deadlock' of development administration, but in drafting the law: ***How to draft a law that delegates enough discretion for the administrator to write the necessary detailed rules, while imposing sufficient limits to prevent the administrator from using the delegated power against the public interest, or for some purpose outside the scope delegated?***

That poses a challenge. The next section sets out four circumstances that may justify a relatively intransitive law. The following two sections focus on limiting the grant of discretionary rule-making power



## 2. When to write intransitive bills?

Unbounded discretion wars with good governance. How to grant officials scope for initiative, experiment, entrepreneurship, and still guard against the misuse of public power for private reasons? How to ensure that rules made by a non-representative officials still represent the *public* interest?

**Only necessity justifies an intransitive bill.** Before granting legislative power to unelected officials, ask whether any one of four conditions exist. If none of these exists, insist that the bill's proponents include in the bill itself the essential details.

### a. *Difficult subject matter*

First, ask: Does the bill aim to resolve a complex and difficult problem about which nobody could *now* specify the required detailed rules? If so, it makes sense to enact an intransitive law. Subject to specified criteria and procedures, you may vote to grant the agency officials **limited** discretion to decide what initial measures to take, and, as they gain experience to introduce new measures. That law should grant the agency officials only enough power to gain the experience essential to development progress.

When is this kind of law really necessary?



**b. Many role occupants and many behaviors**

Second, ask: Does the bill address a problem in which many role occupants engage in a wide variety of problematic behaviors? Identifying and adequately explaining each of these behaviors sometimes exceeds existing knowledge or capacity. Without information about each of these behaviors, drafters cannot draft, and you cannot assess, the bill's **detailed** rules. Instead, it makes sense for you to vote for an appropriate intransitive bill. In granting agency officials power to conduct the research and write the detailed rules governing the many actors' behaviors, make sure that the bill specifies **appropriate criteria and procedures to curb their discretion**.

**c. Widely differing circumstances**

Third, especially in a geographically large country, ask: Does the bill address problematic behaviors by people in widely differing circumstances? Confronting conditions as different as the bustling urban commercial centers of Guangzhou, Shanghai, and Beijing, the desert wastes of the old silk route across Xinjiang and the remote mountain fastnesses of Tibet, frequently Chinese law-makers justifiably hesitated to enact detailed transitive laws. Instead, they enacted intransitive laws, requiring specified agencies to make detailed rules appropriate for each of these different circumstances.

**d. Rapid change**

Finally, ask, does the bill address a problem embedded in rapidly-changing socio economic circumstances for which no one, in advance, could specify all the detailed behaviors?

*Necessity* constitutes an intransitive bill's primary justification. Beyond that, you must ensure that a proposed intransitive bill provides adequate criteria and procedures to limit the agency officials' discretion to draft only those rules essential for achieving the bill's stated objectives.

**e. Limits on the delegation of legislative powers: Procedures**

What questions should you ask to assess a relatively intransitive bill's rule-making procedures? You must assess whether an intransitive bill adequately prescribes procedures for two agency sets of tasks: First, an implementing agency requires procedures that limit officials' capacity to make arbitrary or ideosyncratic rules. Suppose a bill authorizes the Ministry of Culture to make rules concerning grants to artists. To protect against a Minister making a rule that reflects the Minister's mere personal taste in art (for example, directing all Ministry of Culture grants to a particular school of art)? Second, an intransitive bill must specify procedures to protect against the danger that administrators may use their rule-making power to aggrandize their power or personal wealth. How to ensure that, under the bill concerning Ministry of Culture grants, the Minister does not promulgate a rule that facilitates grants to the Minister's friends and relatives?

i. **Getting the facts.** In undertaking their assigned implementation tasks, many

agencies must continually make decisions about whether a particular state of affairs took place in the past — for example, whether an importer owes duty on a shipment, whether a veteran of a war should receive a pension payment, whether a steel company polluted the atmosphere by discharging smoke. Frequently, they must make highly technical, specific decisions — for example, whether an electricity company’s design for a high tension transmission cable contains adequate safety provisions, or whether a proposed school textbook meets the demands of the eighth grade curriculum.

By contrast, to make sound decisions about new, detailed rules, an agency needs information about **legislative** facts, that is, facts required to warrant hypotheses that purport to describe and explain a social problem, and weigh the comparative costs and benefits of alternative possible rules.

Capturing evidence about a specific past event requires different procedures than capturing legislative facts. In particular, getting legislative facts may require provisions to build the agency’s research capacity. Ask: Does the bill make it likely that the agency will have the capacity to carry out its rule-making function?

- ii. **Ensuring transparency, accountability, participation.** To protect against agency officials’ exercise of unjustified power, ask: Does the bill contain provisions guaranteeing that the agency’s rule-making procedures will prove transparent, accountable, and participatory? For example, does it provide for public hearings? Notice-and-comment? Must the agency submit proposed regulations to the legislature for review? Must agency decision-makers state reasons for the substance of their rules?

#### f. **Criteria.**

Unless the law empowering an agency to make rules imposes criteria to limit officials’ rule-making discretion, its rule-making procedures may prove

unaccountable and non-transparent. One or more of five devices can limit officials’ rule-making discretion. Ask: Does the bill:

- **State the law’s objectives sufficiently precisely to constrain discretion?** For example, does a bill giving the Motor Vehicle Commissioner the power to set maximum permissible speeds on sections of the highway, include a statement that the bill aims to balance the safety of motorists, passengers and others against the need for economical, swift transport?
- **Limit the agency officials’ power to prescribe remedies?** For example, does the speeding bill mentioned above limit the Commissioner’s power to make rules specifying penalties?
- **Specify the kinds of factual propositions which most experts in the field consider relevant to explaining the behavior at issue?** For example, in setting speed limits, does the bill require the Commissioner to

We do have ways to limit decision-makers' discretion.



take into account only the state of the highway, the weather, the amount of traffic, and perhaps the driver's reasons for speeding -someone bringing a wife in labor to a hospital may have a more socially-acceptable reason to speed than a young man showing his girlfriend how fast his car can go?

- **Require that the agency establish rules that embody current practice?** For example, does it require that the Commissioner set speeds at 10 kilometers per hour less than the average speed that vehicles actually drive over that section of the highway?
- **Require the rule-making authority to state exactly what criteria it used in making a particular rule, and authorize a reviewing authority to review those criteria before the rule goes into effect?** For example, does the bill permit the Commissioner to set a 'reasonable' speed for a section of the highway, but require that, in such a case, the Commissioner state the reasons for that decision in writing, and suspend the operation of the rule until a court reviews the new speed limit and approves the criteria used.

In some countries, an Administrative Procedures Act specifies default rules for the criteria and procedures which administrative rule-makers must employ in formulating and promulgating rules. Unless such a Act exists, make sure that an intransitive bill incorporates provisions which ensure **openness, accountability and appropriate stakeholder participation, and limits officials' opportunities to make arbitrary (potentially corrupt) rule-making decisions.**



## EXERCISE: TRANSITIVE OR INTRANSITIVE?

- (1). How do 'transitive' differ from 'intransitive' bills?
- (2) Can drafters ever write a purely 'transitive' bill about a matter more complicated than prohibiting spitting on the sidewalk?
- (3) What factors should you consider in assessing an intransitive as opposed to a transitive bill?
- (4) From your country's laws, identify an example of an intransitive law. Do you think the law specifies sufficiently precise criteria and procedures to limit the agency's discretion in the formulation and implementation of rules?
- (5) Does your country have an administrative procedures act? Does the act (or, if you do not have an act, the existing procedures for drafting regulations or subsidiary legislation) adequately control implementing agencies' discretion?

### 3. Assessing an intransitive bill.

Chapter 5 offered a checklist of questions that you might ask to assess a transitive bill. An intransitive bill differs from a transitive one in three significantly different ways. A properly drafted intransitive bill's provisions have these characteristics:

- (1) On their face, they do not prescribe behaviors designed to solve the social problem addressed. Instead, they empower an institution to make rules prescribing behaviors likely to help solve that problem.
- (2) They require the appointed authority, in making detailed rules to solve the social problem, to use **transparent, accountable, and, insofar as possible, participatory procedures.**
- (3) must specify appropriate substantive **criteria to constrain the agency's discretion in making rules.**

Always ask:

First, what essential evidence and logic do the bill's sponsors claim justifies an intransitive rather than an intransitive bill? If some agency already exists that should have but has not made adequate detailed rules, ask for explanations for its problematic rule-making behaviors.

Second, what facts and logic justify the bill's intransitive solutions? Why did its sponsors choose *this* agency to make and promulgate the new rules? Why did it prescribe *these* procedures? Why did it specify *these* criteria?

Using legislative theory's problem-solving agenda, the checklist below suggests questions to ask in assessing an intransitive bill.

#### A CHECKLIST FOR FOR ASSESSING AN INTRANSITIVE BILL

Note: Here we mention only questions specially relevant to an intransitive bill. You should consider this list together with the questions earlier suggested concerning an agency to implement a *transitive* bill – i.e., a bill that does include the necessary details.

**I. Why does this problem require a relatively intransitive bill?** Does it:

1. involve little understood issues which require on-going study together with some power to experiment with different solutions?





## CHECKLIST TO ASSESS AN INTRANSITIVE BILL

2. involve many different role occupants' behaviors and differing explanations for those behaviors?
3. reflect different behaviors (and the causes of behaviors) of role occupants in different parts of the country, which may require different solutions?
4. occur in circumstances of rapid change?

### **II. If some agency presently has power to make detailed rules concerning this problem:**

1. Which agency? Which of its officers, and what behaviors constitute its decision-making processes with respect to rule-making?
2. Using the ROCCIPI agenda, what explanations do the sponsors offer for existing problematic rule-making behaviors?

### **III. Solutions: Why the present bill?**

1. What alternative modes of generating a detailed set of rules for the substantive problem addressed did the sponsors consider?
2. What constitute the bill's prescribed criteria and procedures for each of the agency's decision-making processes relating to substantive issues – in detail?
3. If some agency already has the power to make rules of the sort required by the bill, does the bill's solution adequately address the causes of that agency officials' problematic rule-making behaviors?
4. What criteria and procedures help to limit the agency officials' discretion in making the relevant rules? Will those procedures and criteria lead to transparency, accountability, participation by relevant stakeholders? Will those procedures and criteria likely lead to reasoned, non-arbitrary rule-making?
5. At this time, does a social cost-benefit analysis demonstrate that enacting the bill into law will produce greater social benefits than any possible alternative solution (including doing nothing)?



## SUMMARY

The world around, effective implementation of the law proves the key to the attainment of good governance, transition and development. To serve the public interest as an elected representative, be sure to vote only for those laws promising democratic social change which provide for their own effective implementation.

A bill that comes before you raises three major sets of questions. To determine whether that bill will prove effectively implemented you need answers to these questions:

First, Does an implementing agency already have responsibility for helping to resolve the problem the bill addresses? If so —

1. What conformity-inducing measures does that agency now use to induce the new behaviors necessary to resolve the problem, and in what ways do they seem insufficient? Evidence?
2. Do the agency's decision-making processes seem non-transparent, non-accountable, or non-participatory? Evidence?
3. Why do the responsible officials behave in these problematic ways? Evidence?

Second, given the kinds of decisions the agency officials must make, you must ask questions about the wisdom of the bill's assignment of the implementation task either to an existing agency, or to a new agency:

1. Given the country-specific circumstances, did the bill's proponents make a wise choice between implementation by dispute settlement, bureaucratic agency, government corporation, or private sector implementation?
2. Do the bill's implementation provisions logically seem likely to alter or eliminate the causes of existing problematic behaviors by officials?
3. Will the new law prove socially, as well as economically, cost-effective?

Finally, you should pay careful attention to any grant of rule-making (that is, **legislative**) power to an administrative agency official:

1. If an intransitive bill, do conditions require transferring to the agency this degree of legislative power?
2. Do the bill's procedures make arbitrary or idiosyncratic rule-making difficult? Or do they ensure participation, accountability and transparency?
3. What criteria does this bill impose on agency rule-making discretion? Do they seem sufficient?

Effective implementation lies at the heart of good governance and the Rule of Law. No matter how good a law's wording seems, how laudatory its stated principles appear, it cannot facilitate the institutional transformation required for either development or transition unless it ensures that some well-chosen agency effectively implements its detailed provisions.



## EXERCISES:

1. Recall the four principal kinds of implementing agencies. In general, what sorts of questions should you ask to determine whether a bill's drafters have assigned its implementation to the appropriate kind of agency?
2. Explain why 'Process' constitutes the category that most frequently yields useful explanations for the behavior of an implementing agency. What categories of facts would you ask about to discover how an agency's Process influences its decisions?
3. What kinds of questions would you ask to determine whether a bill's detailed provisions sufficiently limit the implementing agency officials' discretion?
4. What questions would you ask to assess whether the circumstances in which the social problem arises justify enactment of an intransitive law?
5. In assessing a bill for an intransitive law, why should you ask questions about the bill's provisions stating criteria and prescribing procedures for the agency to make regulations (subordinate legislation, decrees, administrative rules)?

# CHAPTER SEVEN: CAPTURING AND ASSESSING THE FACTS



This chapter focuses on how to assess whether, in the public interest, a bill's details appear grounded on available facts. Viewing the legal order mainly as a set of rules to guide judges in deciding lawsuits, most lawyers study only the laws-in-the-books. That makes sense when a lawyer seeks to solve a problem arising within an existing legal system ***Legislative theory, in contrast, requires studying the law-in-action; that is, analyzing why people behave as they do in the face of existing laws.*** Studying ***behavior*** in the face of a rule makes sense when you must decide what the law ought to be. In courts, the discourse concerns the interpretation of the law, the application of existing rules to a set of facts; for law-making, in contrast, the discourse centers on changing the behaviors that comprise social problems.

This chapter

- A. Reviews problem-solving as a guide to formulating hypotheses that provide criteria for finding relevant facts;
- B. Suggests shortcuts and the importance of stakeholder participation in finding those facts; and
- C. Considers the significance of different ways of gathering the facts: quantitative vs qualitative methods; representative samples; and foreign law and experience.

## A. FINDING THE RELEVANT FACTS

At each of problem-solving's four steps, legislative theory suggests examining the facts as to existing problematic behaviors, their causes, and the the costs and benefits of the bill's detailed measures to change the. The drafters must show you that their hypotheses prove consistent with your country's realities. Otherwise, the bill may merely reflect their own assumptions. At best, they may address the symptoms of the problem, not its underlying causes.

## A BILL MUST REST ON MORE THAN LOGIC OR THEORY– ASK FOR THE *FACTS*

Formally, the following syllogism's logic has no flaws:

1. All cats have nine lives.
2. My cat, Tandy, is a cat.
3. Therefore Tandy has nine lives.

Despite its formal logic, the argument states nonsense. Its major premiss (“All cats have nine lives”) does not fit the facts. In the same way, a drafter's justification for a bill, no matter how logical, may make no sense because its underlying hypotheses remain inconsistent with the facts.

Ask the bill's sponsors for the facts you need to determine whether the law will serve the public interest!



If drafters base a bill's substantive provisions on assumptions that **do NOT prove consistent with the available evidence**, either:

- (1) reject the bill;
- (2) require the bill's sponsors to revise their hypotheses to fit the facts, and revise the bill's details accordingly; or
- (3) suggest that the bill's sponsors redraft the bill to direct an appropriate agency, pursuant to specified criteria and procedures, to undertake needed further research (see 'intransitive laws,' Chapter 6).

That a bill's detailed provisions should rest on logic and facts argues that drafters should accompany an important bill with a research report that states its *underlying hypotheses and the essential facts, all tied together in a clearly articulated logical structure*.

Without hypotheses, which facts count as relevant? You have limited research resources. The facts stretch endlessly. Which ones should you try to capture? Your hypotheses guide you to the information which describes relevant behavior and their causes. Without hypotheses, you have no way of knowing where to start looking. Then ask: Do the available facts *falsify* the drafters' hypotheses?



Why falsify?

WHY FALSIFY?

Try this: To test the hypothesis, that “Water boils at 100 degrees Centigrade,” boil water in an open pot **at sea level** 1000 times. Every time, the water will boil at 100 degrees Centigrade. If you boil the water just once in an open pot **at 5000 feet**, however, it boils at a lower temperature. By that one item of evidence that **falsifies** the hypothesis, you learn more than you learned by 1000 experiments that seem to warrant it. This story underscores two points:

1. You **learn much more by trying to falsify an hypothesis** than from evidence that **seems** to warrant it. **Make sure the drafters have considered all the facts that might prove their hypotheses false.**
2. Problem-solving’s fourth step, monitoring and evaluating the law’s social input reflects the importance of always treating **knowledge tentatively, experimentally, always open to the possibility of new evidence that may prove its underlying hypotheses false.**

## B. GETTING THE FACTS

Usually – as does a drafter – you must rely on facts other researchers gather. You should know enough about social scientists’ fact-gathering techniques to intelligently **assess the facts** other researchers provide.

In the past, ruling through secretive, authoritarian law-making and implementing processes, political elites too often enacted laws that reflected, not the facts, but their own views. In the two leading legal systems – that of the English Commonwealth and the Napoleonic codes – they justified their laws by claiming that their provisions only stated as law ‘the custom of the realm.’ Since everyone knew those customs, they argued, who needed research?

Today’s law-makers consciously enact laws looking towards development and transition. But for a country seeking to leap from a recently post-colonial society – perhaps retaining elements of hoe-agriculture, kin-organized society, depending on exporting raw materials and low - technology manufacturing – into a society with high standards of productivity, education, health, housing, recreation and good governance, laws that do not rest on facts

and logic too often end up in the 'good law but badly implemented' category.

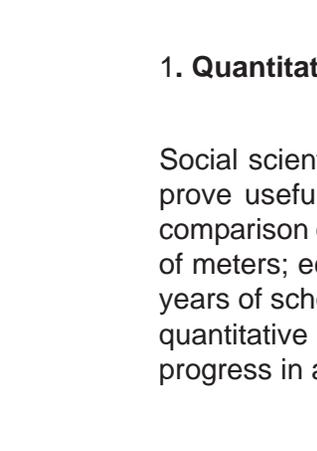
In the law-making or law-implementing process, someone – usually a ministry official, occasionally a fellow-legislator or a non-government organization's staff member – has evidence about an existing problem. To fulfil your duty as a law-maker, you must ask a bill's sponsors to demonstrate that they grounded the bill's details, not only on logic, but also **facts**. The trick lies in knowing what questions to ask these knowledgeable people.

By the late 20<sup>th</sup> Century, community activists and growing numbers of professional evaluators recommended engaging the stakeholders – those affected by the law, especially the poor and vulnerable – in drawing on their own experiences to make suggestions for improving legislative programs. As an elected legislator, you can help the stakeholders among your constituents to use the problem-solving methodology to gather and analyze the relevant facts as the basis of new rules. In the process, they may also figure out ways to improve resources to better their lives.



## EXERCISE: STAKEHOLDER PARTICIPATION IN THE RESEARCH

1. Compare the advantages and disadvantages of asking stakeholders
  - (a) only to state their claims and demands compared to
  - (b) engaging them in an analysis structured by problem-solving's four steps.
2. Which stakeholders should participate in analyzing the causes and finding legislative solutions to particular social problems in your country?



Ask your constituents and leaders of civil society — church groups, trade unions, small enterprise associations, farmers' cooperatives — for help in gathering the facts.

- Encourage your constituents to provide facts about the nature and scope of problems that affect their lives; their own ideas as to the causes of the behaviors that contribute to them; and their suggestions as to how specific new legislative measures might induce new, more appropriate behaviors.
- Arrange hearings in your district to enable your constituents to talk directly with you and your colleagues about specific problems, their causes, and possible legislative measures.
- Encourage your constituents to survey community members' opinions to fill gaps in the available evidence relevant to solving social problems. To do that, urge them to use legislative theory's problem-solving methodology and the ROCCIPI checklist.

Can you think of other ways to involve your constituents in providing facts to help ensure that proposed transformatory laws will meet their needs?

## C. SIGNIFICANT FACT-FINDING METHODS

Social scientists have developed a variety of techniques for gathering facts. You need to know enough about their methods to assess the implications of the facts they provide.

### 1. Quantitative and qualitative methods compared

Social scientists have developed quantitative and qualitative research techniques which prove useful for different purposes. **Quantitative methods** facilitate measurement and comparison of phenomena in terms of discreet units: Age in terms of years; height in terms of meters; economic inputs and outputs in terms of monetary units; education in terms of years of schooling. As societies became increasingly complex and monetized, gathering quantitative statistics served both to plan and administer resource use and to measure progress in achieving stated targets.

Social scientists also use quantitative techniques to learn about people's ideas or opinions. The people questioned, however, contribute only those small bits about their behaviors about which the researcher asks – not necessarily the facts that the informants consider important.

## THE USES OF QUANTITATIVE EVIDENCE TO JUSTIFY A BILL

### The case of an (hypothetical) proposed Land Reform Bill

To help assess whether to vote for a proposed land reform bill, you should ask for *detailed quantitative evidence* to answer two kinds of questions:

**(1) Do the existing land-holding patterns block the poor majority of farmers from increasing their productivity and improving their quality of life?**

Quantitative data might include facts as to:

- how many farmers comprise 'the poor majority';
- the average size of their land holding and per capita incomes compared to the large farmers;
- the existence of unused land on the larger farmers' holdings;
- the limits imposed by the majority's low incomes on the domestic market.

**(2) Will the new bill's provisions likely increase socio-economic benefits that outweigh the probable economic costs?**

Quantitative data might also include fact-based estimates of:

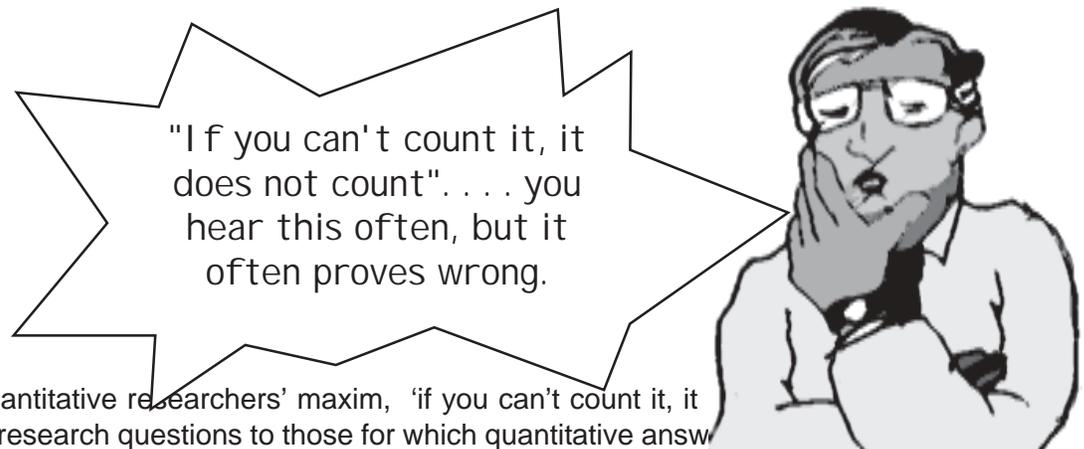
- the expected increased agricultural productivity per farmer;
- the resulting rise of poor farmers' per capita incomes;
- increased domestic sales of foodstuffs and agricultural exports (increasing foreign exchange reserves);
- increased domestic manufacture sales resulting from a more equitable distribution of rising incomes.

To warrant hypotheses concerning behaviors, surveys of large numbers of cases encounter obstacles. First, problematic behaviors reflect not one cause, but many interrelated causes. That makes it difficult to isolate one causal factor and gather data about

but what does this mean to my life?



it. Second, even if available techniques permitted gathering data about many causes, gathering the data often requires more resources than available. For those reasons, law-makers often rely primarily on research findings provided by **qualitative methods**.



The hard-nosed quantitative researchers' maxim, 'if you can't count it, it limits the choice of research questions to those for which quantitative answers are possible, so many tons of output, so many dollars (rands, yen) of goods sold, so many individuals trained. Only sometimes, and with great difficulty, can a researcher get quantitative answers, for instance about the quality of goods produced or sold, or the kinds and effects of 'training' on the individuals' behaviors.

To assess a bill, you need *all the facts* relevant to describing and explaining problematic behaviors, and to devising socially-desirable programs to change them. You must often ask questions about social actors' behaviors that researchers can only answer in terms of *unmeasurable qualities*.

## THE USES OF QUALITATIVE DATA

**Qualitative techniques** focus on **interconnectedness**, requiring researchers to view people as **subjects**, with all the individualized complexities of whole human beings. Open-ended, rather than structured interviews; stories, rather than snippets of information; observations made by participants in group activities; focus groups: these kinds of qualitative methods tend to provide insights, not merely into narrow slices of reality predetermined by the researchers' questions, but into all the **interrelated circumstances of the subjects' lives**. Using problem-solving's four steps to structure their analyses, a group enquiry or participant- observers may generate deeper insights into causes of relevant actors' dysfunctional behaviors. These may lay a basis in facts for more effective legislative measures.

QUALITATIVE  
DATA

**To describe a social problem**, qualitative evidence often seems sufficient. Whether the murder rate in a particular country totals 14 or 100 per 100,000 population per year, you would undoubtedly vote for a statute prohibiting murder. A surprising number of bills originate in a single anecdote: a person on parole for a sex crime conviction, by committing another sex crime, sparks new and repressive sex offender registration laws. A single coal mine collapse spurs enactment of new safety measures.

If a bill's sponsors provided more detailed information, however, you could more easily decide whether the relevant facts and logic **demonstrate that the bill's social benefits exceed its social costs**. For that, you need as much quantitative evidence as possible: the number and composition of the people the problem affects; their percentage of the total population; and the problem's present and probable future impact on their lives' quality.

You need facts to assess a bill's drafters' (often implicit) hypotheses as to **whose and what behaviors** constitute the social problem. Qualitative evidence may prove sufficient. That *some* industrial managers countenance the disposal of chemical wastes that pollute the underground water system focuses attention on their behaviors' causes and the likelihood that the proposed legislative solutions would change them. A survey showing the numbers of industries that discharge chemicals into the water, and the percentage of the water supply affected (i.e. quantitative evidence), however, might more effectively persuade you and your colleagues to vote for a proposed anti-pollution bill.

For generating information concerning the **causes of problematic behaviors**, 'focus groups' – small groups of stakeholders conversing together – quickly arranged and relatively inexpensive, may provide useful insights backed by anecdotal evidence. For example, a farmers' group may point out that many farmers cannot increase their crops' low yields because they do not have sufficient inputs to grow high-yielding varieties. Even without data on the precise number of farmers whose low productivity results from that cause, you might justifiably vote for a bill to help farmers obtain the essential inputs. To demand quantitative evidence to prove that hypothesis at a higher level of probability might unnecessarily delay legislative action.



Sometimes, you just have to ask.



## USING A FOCUS GROUP TO GET FACTS ABOUT POLLUTING BEHAVIORS

Consider a focus group in your constituency of representatives of the community, plant workers, company managers and relevant implementing agency personnel. They could provide facts from their own experience as to the causes of industrial polluting behaviors. They might have useful insights on a proposed law's likely social costs and benefits.

The group's conclusions' validity, of course, would remain restricted to their own experience. Their analysis might however reveal that some plants lack the technology to dispose of particular toxic wastes in less polluting ways. That might suggest that, in addition to prohibiting the dumping of wastes into the underground water, the bill's provisions should assign a government agency to assist plant managers to acquire available non-polluting disposal technologies. Alternatively, the group might provide information about the possibility of prohibiting the manufacture of products using the toxic components, and requiring substitution of another, already-available non-toxic component. If these legislative provisions seemed likely to have no more than affordable costs, you might reasonably adopt them, even without further research.

On the other hand, if the participants provided facts to show that prohibiting the use of the toxic chemicals threatens large social or out-of-pocket costs (like lost jobs, lost essential products, or high enforcement costs), you might consider a law to commission an agency or research institute to explore the possibility of using alternative manufacturing techniques.

To obtain evidence as to the generalizability of the focus group's analysis, the agency might undertake a quantitative survey of industries using the toxic chemical. The group might provide facts to help weigh the costs of making that survey — in terms of time, human and financial resources — against the likelihood that the proposed measure would reduce the pollution hazard. The group might suggest ways in which stakeholders might help to monitor and evaluate the proposed law's implementation and its social impact.

Quantifiable data proves valuable for ***weighing social and economic cost and benefits*** (see Chapter 4). If half of all farmers, rather than only 3 per cent of them, reaped low crop yields because of poor seed quality, you and your colleagues would more likely vote for a law to require the agricultural extension agency to give them access to modern seed strains.

Still, many ***social factors*** which you must assess in making a cost-benefit analysis defy quantitative measurement. Given time and resource constraints, you may have to rely on qualitative information. Remember to reduce the dangers of bias by ensuring that researchers who provide qualitative information use high level multi-disciplinary skills and employ carefully designed procedures and criteria. If a proposed law appears likely to

prove expensive in terms of implementation costs or possible negative consequences, you may wish to grant an agency power to undertake further necessary research, and, on that basis, to promulgate new administrative regulations. (See intransitive law, Chapter 6; and remember to limit agency rule-making power by specifying criteria and procedures.)



### 3. The importance of sampling techniques

No researcher can gather all the information that individual stakeholders may have about the causes of problematic behaviors. **Researchers must choose samples that adequately represent the larger population's relevant stakeholders:** for an agricultural extension law, the farmers and the extension agents; for a workers' compensation law, workers, factory managers and the existing compensation system personnel; for a law directed at some kinds of environmental pollution, members of the neighboring community.

The larger population of stakeholders almost never comprises an homogeneous group. Age, gender, ethnic, religious and class differences may significantly impact the way the causes suggested by the ROCCIPI agenda may influence the relevant actors' behaviors. Whether researchers select stakeholders to participate directly in designing and implementing the research process, in focus groups, or as informants in a broader survey, they should choose a sample that, as far as possible, represents all of the larger population's relevant segments.

Social scientists have designed techniques to minimize the danger of bias in selecting samples. Researchers decide which technique to use by comparing costs in terms of time, finances, and human effort. Always check: Did the researchers select a sample that adequately represented the groups and strata in the relevant population?

### 4. Learning from foreign law and experience

Since social actors' behaviors reflect unique country-specific realities, simply reading another country's legal text proves of little value. Factual studies about a foreign law's **social impact** (although not easy to find), on the other hand, may provide real insights into the possibilities and difficulties of introducing similar legislative measures in your own country.

Keep a lookout for the four practices that might limit the usefulness of evidence about other peoples' experiences with laws that, on their face, seem similar to the bill at hand:

Actually, in my country we tried to do exactly that. Of course I can tell you what happened to us. It's a long story and we learned a lot of things along the way .... None of it was easy. First, back in 1984 we tried to pass a law to lessen the amount of corruption on welfare grants, but the same officials continued to help themselves,,,,



**1. Different concepts.** To make inter-country comparisons, researchers must use concepts with the same meanings. In particular, economic concepts used for statistical purposes in different countries may have quite different meanings — with significant social implications. For example: A government report that defines as 'employed' only those who work in the so-called 'modern' sector may lead to ignoring the way a new law, permitting imported goods to flood domestic markets, has caused growing numbers of informal sector workers to lose their jobs.

**2. Different country circumstances** may cause informants in different countries to give misleadingly different answers to the same questions. Some may untruthfully answer survey questions about their family incomes because they fear increased taxes. To assess ability to handle tools, United States researchers might ask the difference between a screwdriver and a wrench; in developing countries, where many people have never used either, their answers would indicate nothing about their ability to use tools.

**3. Interpretations of words.** Differences in language translations — ranging from different meanings for the same words to different culturally-determined answers to the same questions — may lead to misinterpretation of cross-cultural research findings. Ask, in different countries: Did the questionnaire's words mean the same things to those who answered them?

**4. Sampling techniques** used in different countries may produce non-comparable conclusions. Try to discover the extent to which, in each country, the researchers used comparable population samples.

LIMITS ON USING OTHER  
PEOPLE'S EXPERIENCES

You may learn a great deal by examining studies of specific laws' social impact in other countries. But to do so, you not only need an adequate legislative theory, but also sufficient knowledge about social science research methods to determine whether other countries' researchers' evidence really proves comparable to facts about your own country's realities. Only if it does can you justifiably rely on their findings to assess a similar law's likely impact in your own country.





## SUMMARY

That transformatory legislation aims to facilitate important social change holds significant implications not only for the **kinds of facts** you need to assess proposed bills, but also for the **process** used to obtain those facts.

First, did the drafting process follow criteria and procedures that facilitated inputs and feedback from the relevant stakeholders, especially those usually excluded from the halls of power: women, old folk, the poor, disabled, and ethnic minorities?

Second, participatory research may produce enough qualitative information about problematic behaviors' causes to contribute to the design of effectively implementable bills. To weigh alternative possible legislative measures' socio-economic costs and benefits, however, may require more quantitative evidence.

As legislators, you need to know enough about both qualitative and quantitative techniques to assess the implications of the facts – however gathered – which the bill's drafters claim as justifying their bills' details. Ask: Did the researchers use sufficiently representative samples to avoid one-sided conclusions? Did they avoid culturally biased responses? How did they define the particular indicators they used? Did language differences affect the answers' implications? To assess the implications of another country's experience, ask all these questions and more.

In short, you need to understand enough about research techniques to assess the available evidence. Sound legislation must rest on sound facts. To assess what someone reports about the facts, assess the methodology used to capture those facts



## EXERCISES:

1. Why should you ask questions designed to discover the quality of the facts (that is, the evidence) on which a bill's sponsors relied in justifying the bill's detailed provisions? By what criteria should you assess that evidence?
3. Why should you enquire about the extent to which the bill's sponsors and drafters have engaged the stakeholders – those affected by the bill, especially the poor and the vulnerable – in providing evidence: about the nature of the social problem and whose and what behaviors it involved? the explanations for those behaviors? the range of possible solutions? and the socio-economic costs and benefits of the bill's solution (including its possible adverse consequences) compared with the leading alternative solution?
3. What do you understand as the differences between quantitative as compared to qualitative evidence? For purposes of a research report justifying a bill, what constitute the advantages and disadvantages of each?

# CHAPTER 8: ASSESSING A BILL'S FORM

Keep in mind: A bill's form affects its substance, just as its substance affects its form.



Chapter 4 pointed out that, when you vote for a bill, you vote only for the words that, as lawyers put it, appear within the bill's 'four corners.' This chapter emphasizes that, once you understand a bill's substantive design, you can assess whether its **form** seems likely to ensure effective implementation. Conversely, content and form make up two sides of the same coin: fully to assess a bill's substance, you must also assess its form.

This chapter will examine –

- A. The three criteria legislative theory suggests for assessing a bill's form: its completeness, accessibility, and usability;
- B. A bill's structure (its outline);
- C. The way the bill chains words together; and
- D. A bill as an amendment to existing law

## A. CRITERIA FOR ASSESSING A BILL'S FORM

As legislator, you must determine whether a bill's form will contribute to changing the institutions – the problematic behaviors – that block transition and development in the public interest. Three criteria – completeness, accessibility, and usability – suggest detailed questions as to whether a bill's form will likely lead to effective implementation. **Completeness** asks, does the bill and associated laws include all the prescriptions necessary to accomplish the desired institutional transformation? **Accessibility** asks, can a reader readily understand how the law requires primary role occupants and implementing agency officials to behave? **Usability** asks, can a reader easily use the law's text? The next sections help to test the bill's form against these three criteria. We begin with a bill's structure, its outline.

## B. ASSESSING A BILL'S STRUCTURE (OUTLINE)

Just as assessing a bill's substance requires wrestling with issues of form, so assessing a bill's form, especially its structure, requires wrestling with issues of substance. This section discusses:

- how a transformatory bill's **outline** — its structure — should help readers to understand the bill's function in overcoming obstacles to good governance, transition and development;
- how a bill's **outline** should help to assess the bill's substantive accessibility and utility, as well as its formal and therefore its substantive **completeness**;
- how a **default system for grouping and ordering** the bill's provisions may serve as a first step in understanding the bill's **outline**.



### 1. Structuring a bill

To ensure effective implementation, a transformatory bill's outline should clarify the logic that underpins its prescriptions. A badly structured bill may hinder effective implementation in three ways. First, it may prevent readers from understanding how the bill's substantive provisions relate to each other, violating the criterion of **accessibility**. A bill's outline should communicate its underlying logic so that its users will likely behave and, as necessary, interact with each other as the bill prescribes.

To engage creatively in implementing a new law's detailed provisions, both the primary role occupants and the implementing agency officials need a deep understanding of how, by behaving as the new law stipulates, they can help to overcome the social problem, and improve citizens' lives. Only then will they likely play their prescribed new roles creatively, with ingenuity, with entrepreneurship, and with spirit.

Second, a bill's structure should ensure its **usability** by positioning the prescriptions as to the users' behaviors so they can find them with as little page-turning as possible. It should not contain cross-references.

## AVOID CROSS REFERENCES

To avoid repeating a definition of a word already defined in another law, a drafter might write, "In this statute, a 'steam engine' has the meaning it has in Statutes 1998, Chapter 17, section 3(1)." To understand the new law, a reader must scramble to find the old one. Instead, to make the new law more usable, you should make sure that, instead, the drafter copies the old definition in the new text.

Finally, an appropriately-structured bill should prove substantively *complete*.



## 2. Examining structure to assess completeness.

You can determine whether a bill seems *complete* by examining its outline.

Recall that legislative theory emphasizes that a bill's provisions, together with the existing legal order, comprises a legislative system comprised of eight subsystems (see Chapter 4, pp. 58): ***The primary system composed of prescriptions directed to changing the primary role occupants' behaviors, plus seven other subsystems to ensure the primary role occupants behave as prescribed.***

That implies that either the bill itself or existing laws, decrees, and regulations prescribe the essential behaviors of the eight sets of actors.

Seldom do all the relevant prescriptions appear in a single bill. Usually several, sometimes most of the essential rules appear elsewhere in the country's body of existing law. Since a bill's outline often lists only some of the prescribed subsystems, be sure to ask the bill's sponsors ***where the existing body of law provides for the other necessary subsystems.*** Ask them, too, to provide the facts and logic necessary to demonstrate that, as established by existing laws, ***those subsystems will ensure this particular bill's effective implementation.***



If you require an important bill's sponsors to accompany the draft with a research report, be sure to insist that the solutions part briefly provides this information.

For example: If a primary role occupant disobeys the law, will an injured person have a cause of action – the right to sue in court – for damages (a question of sanctions)? Who will determine disputes under the new law? By what procedures and criteria? Who will monitor and evaluate the implementation of the law’s provisions, and their social impact? Unless the bill’s proponents can satisfactorily explain where to find the missing subsystems, either in the bill or other existing law, insist that they redraft the law **to complete the entire legislative scheme**.

### 3. Assessing a bill’s structure for accessibility and usability

The **grouping and ordering of a bill’s provisions** help determine its **accessibility** and **usability**. **Grouping** reflects the drafters’ decisions as to **what prescriptions belong together** in each section, Chapter, or Part. **Ordering** comprises the order of prescriptions within each group. The principles used for grouping and ordering determine the bill’s outline.

Think about the principles according to which different people might sort out piles of used clothing. A used-clothes salesman might sort them for the different markets in which he hopes to sell them (warm clothes to markets in cold climates, for example); the director of a home for the homeless, according to the sizes of the garments and whether for men, women, or children; a paper manufacturer, according to the clothing’s utility for grinding into pulp to make rag-type papers; a laundry operator, according to their colors and the likelihood of their discoloring other clothing in the washing machine load. In the same way, drafters should group and order their bills’ provisions to facilitate their users’ convenience.

To assess an outline’s accessibility and usability, see if you can discover by what principle the drafter grouped and ordered the bill’s provisions. If you cannot, ask the bill’s supporters. If they cannot articulate a meaningful principle, return the bill for redrafting.



Be sure the bill’s outline makes it easy for you and other readers to find and understand what the bill expects the role occupants and implementing agency officials to do.

### THREE DIFFERENT WAYS OF STRUCTURING A BILL'S PRESCRIPTIONS

Drafters usually group and order a bill's Sections, Chapters and Parts in one of the three ways. Which seems most likely ensure the bill's effective implementation?

- (a) **A 'golden thread.'** Some drafters look for a 'golden thread' that runs through a bill's various sections. For example, in hospitals, many people have contact with patients — not only doctors and nurses, but secretaries, telephone operators, emergency room orderlies, clerks, bill collectors, pharmacists, cleaning staff. As the 'golden thread' that ties them together, one drafter might group the bill's provisions around 'contact with patients.' Another might group provisions concerning the duties of various hospital personnel working on the same hospital floor: Sections concerning people working on the first floor would appear in Chapter 1, on the second floor, in Chapter 2, and so forth. Why one 'golden thread' rather than another? In reality, the drafters' unexplicated biases seem to shape their particular 'golden thread' — hardly a decision-making process grounded on reason informed by experience.
- (b) **Abstract 'logic.'** Other drafters group and order a bill's provisions in terms of a preconceived principle or abstract logic. In one country where we worked, a bill empowering an Arts and Culture Council to grant funds to support the arts 'logically' included the definitional sections first, then the provisions for appointing people to the Council, then provisions for the duties of persons on the Council, then provisions for removing persons from the board, then provisions for the Council's procedures. Only after all that did the reader discover that the bill really concerned the Council's powers and duties in making grants to artists. No more than the 'golden thread' does abstract logic seem likely to serve readers who must use a bill.
- (c) **Accessibility and usability to the bill's prospective users.** Finally, this Manual recommends that drafters consciously classify a bill's prescriptions in a way likely to ensure that the bill's structure contributes to the bill's *accessability* and *usability*.

To understand a bill's logic, try to outline the grouping and ordering of its main elements.

The 'usability' criterion implies that bill should prove useful to *all* the relevant stakeholders. A bill to provide loans to small producers may contain one set of provisions directed to informal-sector urban borrowers; one to small farmers; and one to the banks which make the loans. The *usability* criterion suggests grouping in separate chapters the prescriptions for each of these three sets of role occupants.

Frequently, in grouping and ordering a bill's provisions, you must make a judgment call. Consider the grouping of the bill establishing an Arts and Culture Council ((see [b] Abstract logic, above). To help the Council's administrators understand their responsibilities for selecting grant recipients, the bill might include a single chapter devoted exclusively to their tasks. The artist's responsibilities for preparing grant applications, and their duties

once they have received a grant, could appear in another chapter. That grouping and ordering may serve the administrators' interests. The artists, however, might find it more convenient if the bill grouped and ordered the various steps in obtaining a grant chronologically, mixing in one chapter both the procedures applicants should follow and the administrators' responsibilities in making and monitoring grants. You must judge which grouping and ordering system seems more likely to prove useful to the bill's primary users.

In general, 'accessibility' and 'usability' criteria focus attention on the ease with which a user can find a relevant section, and understand the relationship between the behaviors that that section commands, prohibits or permits, and other prescribed behaviors.



*The less time readers must spend puzzling over why a section appears at a particular point, the less time they waste in page turning to understand the bill's prescriptions, the better.*

### **C. CHAINING WORDS TOGETHER TO ENSURE A LEGISLATIVE SENTENCE'S ACCESSIBILITY AND USABILITY**

Each legislative sentence should help to ensure the bill's accessibility and usability. If you cannot easily understand a bill's legislative sentences, neither will other non-lawyers. If drafters must use words that have technical meanings (see Chapter 4, p.50), they should explain those words' meanings in the bill's definition section.



1. Always write in plain language.

**Four rules help to ensure that legislative sentences increase a bill's accessibility:**

**1. Insist that drafters write bills in *plain language*.**

Over the years, in most countries, professional drafters have developed extensive detailed rules for writing legislative sentences. Unfortunately, some employ a strange language (see Chapter 4). If you receive a bill masked by sentences in a form that you cannot understand, insist that the drafter rewrite them ***in language that you can understand***. If you do not understand a bill's sentences, you should vote against the bill.

A bill should use a vocabulary easily accessible to its readers. A bill to strengthen peasant cooperatives should use words easily understood by those likely to use the bill daily: Department of Cooperatives officials, and cooperative officers and members who do not have lawyers at beck and call. A bill about banks, in contrast, may primarily aim to help judges and lawyers resolve disputes about and among banks (who usually have legal advisors).

A bill's subject matter may touch on that of an older law which used archaic or complex language. Rather than rewrite the old existing law to ensure consistency, the drafter may use the old law's language in the new bill. You must decide whether that new bill seems sufficiently accessible and usable, or whether the drafter should rewrite both the old law and the new bill in plain language. Remember, however: officials and others using the old bill probably have become used to its language, however archaic it may appear to you. Unless good reasons persuade you otherwise, adhere to the legislative vocabulary of related, existing laws.



2. Say clearly  
**WHO DOES  
WHAT.**

**2. Specify *who* does the action.**

Almost every section of a bill ***commands, prohibits, or permits*** (see Chapter 4). As commands, prohibitions, and permissions, almost all legislative sentences should explicitly state ***Who*** does ***What***. Ask, ***Who*** does the section command, prohibit or permit to act? (To answer that, you must discover ***What*** the section commands, prohibits or permits the actor to do.)

## THREE SUBORDINATE RULES HELP YOU TO ANSWER THE QUESTION, WHO?

- i. **A bill should specify the person who must behave as it prescribes.** A corollary: A bill should never – repeat, **never** – use the passive voice; for example, **do not use** “The application shall be filed with the Registrar.” Instead, use the active voice: “The mining company shall file the application with the Registrar.”

**NOTE:** A bill should never contain statements of 'rights' and 'duties'. A bill's statement that a person has a 'right' leaves vague **who does what** to implement the detailed measures required to realize the right. As a form of disguised passive (see ii, below), it grants a judge **discretion** to decide what agency – if any – should assume responsibility for acting – if at all – to protect or advance the stated right.

NEVER USE A  
PASSIVE

- ii. **A bill's sentence should never – repeat NEVER - use a passive voice.**

Most languages have two 'voices': The active and the passive.

In the **passive** voice, the sentence's **subject** appears as its **object**. 'A farm in an agent's district shall be visited not less than twice in one year.' The passive voice (much beloved by bureaucrats) too easily omits the actor. Even if, writing in the passive voice, a drafter indicates the actor: ('A farm in an agent's district shall be visited *by the agent* not less than twice in one year'), the sentence leaves unclear whom it commands to act. (The complex verb 'shall be visited' apparently aims its command at 'the farm.')

Much better to use the **active** voice in which the sentence's subject consists of the *actor* who does something: 'An agricultural extension agent shall visit a farm in the agent's district not less than twice in one year.' Here, clearly, 'An agricultural agent' constitutes the subject; 'a farm in the agent's district,' the object. The reader has no doubt about who *does* the action.

When you find a passive voice in a bill, **tell the drafter to try again!**

- iii. **A legislative sentence must give a command, prohibition or permission only to a person or body capable of acting as prescribed.** An inanimate object, an animal, or an infant does not have the capacity to act in response to a prescription directed to them.





DIRECT PRESCRIPTIONS  
ONLY TO A PERSON OR  
BODY WITH THE CAPACITY  
TO ACT

1. Suppose a bill's sentence reads: "An automobile driver's license shall contain the licensee's name, address, gender, age, height, color of eyes and color of hair." It gives the command, ("shall") to an automobile driver's license – an inanimate object, a piece of paper without the *capacity* to respond to the command. Instead, the sentence should direct its command to the person who issues the license – presumably, the Commissioner of Motor Vehicles: the Commissioner of Motor Vehicles shall include in an automobile driver's license the following:....
2. Consider further a proposed municipal by-law to keep dogs out of the park. The first draft read: "No dog may wander in a city park without a leash, subject to a fine of \$10." On consideration, the municipal councillors realised that a dog would not have the *capacity* to observe the prohibition. Instead, the sentence should direct the command to the person in charge of the dog at the time..
3. How would you assess a bill's sentence that reads: "While in an automobile in motion, a baby shall remain seated and strapped into a car seat"? The baby has no *capacity* to obey. The bill should address the command to the person responsible for strapping the baby into the car seat (presumably, the driver).



## EXERCISE: WHO DOES THE ACTION?

*(For answers and better formulations, see the end of this chapter, p. 154)*

How would you assess the form of the following four sentences:

1. "A person more than sixty-five years of age shall receive a pension."
2. "The subordinate legislation shall include rules regulating meetings of the Commission."
3. "A director shall be liable for mismanagement of corporate affairs to a person injured by the mismanagement."
4. "A woman has a right to equal treatment by an employer."



3. EXACTLY  
WHAT SHOULD  
I DO?

### 3. Limiting the *what*?

To assess a bill's form's adequacy, you should ask, does the bill clearly state **what** the law requires the specified actor to do? (See p. 54) That raises two subordinate questions:

- a. Does each section of the bill **adequately specify** its command, prohibition or permission? Do the bill's instructions seem detailed enough so that not only the primary role occupants, but especially the implementing agency officials, can understand how to behave?
- b. Does the bill **sufficiently limit** what the relevant actors do?

Especially for purposes of transition and development, a bill must introduce carefully defined criteria and procedures to limit the the officials' discretion as to what to do (or not to do). Otherwise, officials too easily use their discretion to behave in corrupt and oppressive ways (see Chapter 6). If a bill fails to provide carefully-designed criteria and process to curb officials' discretion, insist that the drafters redraft it to provide them.

Sometimes, in conditions of rapid change or circumstances that vary widely from place to place, the bill cannot include detailed instructions to all the relevant actors. Instead, an **intransitive bill** may grant an agency power to supply the missing details by promulgating subordinate legislation, an Implementing Decree or regulations (see Chapter 6,9). In that case, ask: does the bill provide **detailed criteria** and **procedures for both formulating and implementing those rules**? Will these ensure that the agency acts in transparent, accountable, and participatory ways consistent with good governance?

The detailed commands, prohibitions and permissions of your bill and its associated regulations and implementing decrees define the the bill's policy. So far as possible, in the exercise of the legislative power, you and your colleagues should ensure the drafters specify those details in the bill. Only delegate rule-making power to a minister for sound reasons, and stipulate criteria and procedures that limit the minister's exercise of those powers (see Chapter 6).

### 4. Ensuring clarity and avoiding ambiguity.

4. Ask more questions to determine whether a bill's legislative sentences contribute to its accessibility and usability.



**Does the bill use:**

- a. Long sentences?** Long sentences make any writing difficult to understand. Only occasionally must a bill express a complicated idea that requires a long sentence. To achieve clarity in those cases, drafters should use tabulations (like the numbered questions about bill's sentences that we use here) or lists (like the lettered list of possible definitions for "a United States vessel" in the next section, b).
- b. Ambiguous words?** An ambiguous word has a several possible different meanings. Suppose a statute states that only "a United States vessel" may carry trade between ports in the United States. A 'United States vessel' might mean (a) a vessel registered in the United States; (b) a vessel built in the United States; (c) a vessel owned by a citizen of the United States, (d) a vessel owned by a corporation created under laws of the United States; (e) a vessel owned by a corporation created under a law of one of the states of the United States; or (f) a vessel owned by a corporation a majority of whose shareholders are citizens of the United States – and you might think of other alternatives. Although a word may have only a limited number of alternative meanings, its use in a sentence, unless clarified, leaves the sentence *ambiguous*. **Never approve a statute that contains a word that in context seems ambiguous.** Insist that the drafter clarify the word (probably by specifying a definition).
- c. Vague words?** A vague word, like 'reasonable,' 'appropriate,' 'properly', has nearly unlimited possible meanings. To grant an official the power to decide the meaning of a vague word gives the official equally undefined power. Suppose a statute states, "A person may not operate a motor vehicle on a highway at an unreasonable rate of speed." That empowers a police officer to arrest a person who in the officer's opinion operates a vehicle at a speed that seems unreasonable. Nevertheless, when a drafter cannot stipulate more detailed criteria, a word like 'reasonable' at least means that, if called to account, an official must explain on what grounds he considered a behavior 'reasonable'. A bill for example, may state: "The Commissioner of Labor Safety shall issue regulations setting reasonable standards for labor safety in the workplace." The use of 'reasonable' here makes it possible for a court or other review body to require the Commissioner to explain the basis for a regulation. In contrast, a rule which states in effect that the official may set whatever standard the official 'believes' appropriate remains so vague that a court would have difficulty in overturning it.
- d. Redundant words?** In the British tradition (see p. 51), drafters sometimes use redundant words like 'null and void,' or 'building or structure.' Whenever you discover that you may strike out a word without changing a sentence's meaning, ask the drafter to justify using that word, or leave it out.
- e. Same word for the same concept, different words for different concepts?** In drafting, an absolute rule holds: Same word, same meaning; different words, different meanings. If a bill uses different words to mean the same thing, make sure the drafter changes it.



## SUMMARY

***Four rules and their corollaries help to ensure that a bill's language tends towards easy accessibility by its readers.***

### **Ask:**

- (1) Does the bill come before you and your colleagues drafted in plain language?
- 2) Do the bill's prescriptions clearly specify **whom** it commands, forbids or permits to do **what** specified act?
- (3) Does each of the bill's sections (with a very few exceptions) adequately state a command, prohibition, or permission?
- (4) Does the bill place sufficiently precise limits on its commands, prohibitions and permissions?
- (5) Does the bill include any the following five '**no-noes**' ?
  - (a) long sentences?
  - (b) ambiguous words?
  - (c) vague words?
  - (d) redundant words?
  - (e) different words for the same concept?

## D. A BILL AS AN AMENDMENT TO EXISTING LAW

... we also need to amend existing laws.

A bill that amends (changes the text of) an existing law introduces two new issues: the use of 'tops' and the appropriate form of an amendment.

1. "**Tops.**" A bill that amends an existing law usually begins with a sentence (called a 'top') like this: "Section so-and-so of the



This- and That Law, 1993, is hereby amended by....” A ‘top’ prescribes how responsible officials should keep the law’s corpus in order. It instructs them that, as from the date that the amendment comes into force, they, they should consider the corpus of the law changed as the amendment prescribes.

2. **A bill embodying an amendment** may come in a variety of forms, some less accessible or usable than others. The amending bill’s text must tell the reader **clearly how the old law read, and how that law as amended will read**. The following box details some horror stories about how **not** to make an amendment, and suggests ways to meet the criteria of **usability** and **accessibility**.

## THE FORM OF AMENDMENTS

Suppose the Central Bank Act, 1999, section 77, reads as follows:

“In determining whether to increase or to decrease the money supply, the Board of Directors shall take into account the effect of the proposed change for the money supply for consumers, the availability of capital for investment purposes, and the stability of the banking system.”

Government proposes a bill to amend section 77 by adding a new consideration that when determining whether to increase or decrease the money supply the Board of Directors should take into account: ‘the demands of development.’ How as a matter of *form* might a bill state that amendment?

Many of these forms should have the same ‘top’, something like this: “This Act amends the Central Bank Act, 1999, section 77, as follows:....” What form ought the substance of the amendment take?

FORMS OF AMENDMENTS

### ***The amendment should NOT take the form of any of the following:***

1. **A Blind amendment:** This specifies the words to be changed without including the present wording of the section at issue. *Example:*

“1. Delete after the word ‘purposes,’ the word ‘and’.

“2. Add after the word ‘system’ the words, ‘the demands of development.’”

2. **An Indirect amendment:** This states in general terms the effect of the amendment. *Example:*

“Amend the Central Bank Act, 1999, section 77, so that in determining money supply, the Board of Directors consider also the demands of development.”

BAD AMENDMENTS

**The amendment** could take one of the following forms:

1. **Repeal and re-enactment as amended:** Repeal the old section and re-enact the new section as amended. *Example:*

“This Act repeals the Central Bank Act, section 77, and in its place enacts the following:

“In determining whether to increase or to decrease the money supply, the Board of Directors shall take into account the effect of the proposed change in the money supply for consumers, for the availability of capital for investment purposes, the stability of the banking system, and the demands of development.”

**Disadvantages:** Repeal and re-enactment as amended has two weaknesses:

- a. It does not on the face of the bill reveal the old wording of the Act amended.
  - b. In some legislatures, as a matter of procedure, an amendment opens up for debate everything mentioned in the bill. This form of amendment opens for debate the entire section, not merely the issues raised by the amendment itself.
2. **Strikeouts and additions:** (Probably the best method.) Print in the bill the entire section as existing, and with the amendments appearing as strikeouts and additions. *Example:*

“In determining whether to increase or to decrease the money supply, the Board of Directors shall take into account the effect of the proposed change for the money supply for consumers, the availability of capital for investment purposes, the stability of the banking system, AND THE DEMANDS OF DEVELOPMENT.”



## SUMMARY

When you vote for a bill, you vote approval of its ***inextricably linked substantive content*** and its ***form***. The bill’s ***substantive clauses*** must effectively alter or eliminate the causes of the problematic behaviors that comprise a social problem; otherwise, it will only by chance induce the new required new behaviors. The bill’s ***form*** must ensure its users understand its content; otherwise, they likely will not behave as the new law prescribes.

A bill's form must conform with the **criteria of completeness, accessibility and usability**. To assess a bill's form, first examine its structure (or outline). Second, ensure the bill articulates **Who** does **What**, and the nature and extent of the **limits** it imposes on what those actors do. Third, check on each sentence's clarity. If relevant, make sure that an amendment's **form** proves accessible and useable.

To effectively exercise your legislative power, you must do more than assess a bill's substantive content; you must ensure that its form facilitates users' efforts to behave in ways likely to contribute to good governance, transition and development.



## EXERCISES

1. This Manual asserts that just as substance determines form, so form determines substance; the two have inextricable linkages. Do you agree? Why or why not?
2. The Manual further asserts that the unity of form and substance implies that you should assess a bill's **form**, not only in terms of the rules relating to the use of language, but with sensitivity to the implications of the use of language for the bill's **substance**. Again: do you agree? Why or why not?
3. In the developed world, where the law has as its principal purpose to guide a judge in deciding lawsuits, most persons who have considered the matter use a bill's **clarity** as the principal for assessing its form. In contrast, expressly focusing attention on the use of law as an instrument of social change, this Manual asserts that, in assessing a bill's form, a legislator should use the criteria of **completeness, accessibility and usability**. Does the difference between using the law as a guide to deciding lawsuits, rather than using it as an instrument of social change, justify these different criteria?
4. Why, to assess a bill's form, should you:
  - a. Examine its outline ('structure' or 'architecture')?

- b. Ensure that its detailed provisions specify who does what, and when and where they should do it?
- c. Check on each sentence's clarity?
- d. Ensure that an amendment proves accessible and useable?



## SOME ANSWERS: BETTER FORMULATION OF SENTENCES (exercise on page 146)

1. The bill commands the subject — 'a person more than sixty-five years of age' — to — 'receive' a pension. To receive something does not constitute action. The action here consists of *giving* of the pension. The sentence should state, for example, "The Commissioner of the Pension Fund shall pay a pension to a person more than sixty-five years of age."
2. This sentence directs a command to an inanimate object — the —'regulations.' You should propose an amendment that directs the command to whomever the bill grants the power to make and promulgate the regulations.
3. The sentence does not state who does the action. Presumably, the bill's drafter assumed that, in a properly brought lawsuit, a court would order the director to pay damages to a person injured by the director's mismanagement. The bill should say so.
4. The sentence does not command, prohibit or permit. Instead, it declares that a woman has a 'right.' Elementary jurisprudence teaches that a 'right' always has a correlative 'duty'. Here, the employer apparently lies under a duty to accord a woman 'equal treatment' — but that duty seems stated indirectly, and very vaguely. To improve the bill, the drafter could write the sentence as a direct command to the employer to act as necessary to accord women equal treatment with men in the employment relationship — for example, commanding the employer to pay equal wages for work of equal worth, to promote women by the same criteria as the employer promotes men, etc.

*Will a bill's details defend against corruption? Will these details make corrupt behaviors more difficult?)*

## CHAPTER NINE: ENACTING LEGISLATION TO FOSTER GOOD GOVERNANCE



In some countries, people complain that a veritable culture of official corruption undermines development efforts. That poses a major challenge to legislators: How to ensure that a bill's provisions reduce the ever-present danger of officials' arbitrary decision-making and corrupt behaviors? No law can entirely eliminate corruption. The laws you enact, however, can make it more difficult for officials to behave corruptly. This chapter gives you the tools to assess whether a bill's detailed provisions will likely reduce corrupt behaviors.

Merely by examining a decision – of a court, a minister, an agency official – no one can determine whether it accords with the Rule of Law. To reduce the probability that a bill will permit arbitrary, corrupt decision-making, it must prescribe decision-making structures in which the decision-makers:

- (a) receive the relevant **inputs** and **feedbacks** from the entire population of stakeholders (and exclude irrelevant or prejudicial matter);
- (b) take into account **specific criteria** that they must consider;
- (c) employ a methodology that ensures they ground their decisions on **facts and logic**; and
- (d) reach their decisions using transparent, accountable procedures.

Following problem-solving's four steps, this chapter examines:

- A. The most common and serious sorts of corrupt officials' behaviors;
- B. Some explanations and possible legislative remedies for those corrupt behaviors, emphasizing that their roots lie, not merely in weak individuals, but also in weak institutions;
- C. Legislative devices to structure official discretion;
- D. Mechanisms to enhance transparency and accountability;
- E. A general strategy and specific laws to combat a 'culture of corruption' by controlling government procurement, reducing officials' conflicts of interest, and implementing codes of conduct for officials.

## A. CORRUPT PRACTICES UNDERMINE GOOD GOVERNANCE

### CORRUPT PRACTICES

Corrupt practices always involve officials' **exercise of public power for their private purposes**. Five types of corrupt behavior seem most common:

- (1) **Bribery:** An official receives value for exercising discretion in the payer's favor.
- (2) **Embezzlement:** An official takes money from entrusted funds for personal use.
- (3) **Speculation:** An official uses knowledge from his or her work to make an unfair profit.
- (4) **Patronage and nepotism:** An official uses official power to provide jobs to family members and friends, regardless of merit.
- (5) **Conflict of interest:** Consciously or unconsciously, an official makes an official decision motivated, not by public good, but by personal or material interests.

All constitute examples of arbitrary decision-making; they all undermine good governance.



### EXERCISE: CORRUPT PRACTICES

Have you seen any evidence of these kinds of corrupt practices in your country? Into which category of those listed above do you think it fits?

## B. EXPLANATIONS FOR CORRUPTION

This section explores

- (1) the many different causes of corruption;
- (2) the inadequacy of remedies directed solely to 'subjective' causes; and
- (3) the necessity of reducing 'objective' causes by ensuring transparent, accountable and participatory decision-making.

## 1. No one-size-fits-all explanation, no one-size-fits-all remedy.

In different times and places, different factors cause different kinds of corruption. Not only does bribery differ from embezzlement or nepotism; the nature and causes of bribery differ in different times and places. A number of distinct and separate role-occupants, behaviors, and explanations lie behind different incidents of corruption that may appear similar. Consider, for example, these different kinds of bribe-taking: by education ministry officials to favor particular textbook publishers in Zimbabwe in the 1980s; by judges in Nepal to decide in a party's favor; a Nigeriann clerk-of-the-works to accept concrete containing more sand and less cement than required; an Indonesian customs officer to classify an importer's goods in a lower-taxed category than the regulations stipulate. Explanations for corruption also vary with official rank: why a highly-paid minister demands a bribe of millions to award a warship contract to a particular firm does not explain why a poorly paid hospital nurse demands a shilling to provide a patient with clean sheets.

## 2. Why do legislative solutions seldom work when they assume subjective causes for corruption?

Too often, law-makers assume (implicitly if not explicitly) that officials behave corruptly only for **subjective** reasons – that they are greedy, or they have no moral integrity, or that they value kinship over merit. Because they see no objective mechanisms to change these corrupt official's minds, many law-makers resort to drastic criminal sanctions – including the death penalty. They ignore the fact that, as a general deterrent, capital punishment never works (not to mention that it violates human rights).

Some criminal sanctions may convey the message that the state does not tolerate corruption. The nature of corruption, however, frustrates effective implementation of such sanctions, if authorities try vigorously to enforce them. As in gambling, prostitution and drug crimes, the parties to corruption receive the benefit, but usually no specific 'victim' exists to report the crime to the police. Even where whistle-blower statutes establish huge rewards, hot-line telephone numbers, and efficient specialized enforcement units, criminal punishment has rarely eradicated an entrenched culture of corruption.

Some experts recommend a whole slew of platitudes to deal with these subjective evils of corruption: 'the passage of time', 'the spread of education', "the evolution of public opinion," "the growth of commerce and industry," 'the growth of the professional class', 'the diffusion of power' from politicians to all of society, 'democracy', 'the increased prestige of accountants and auditors, the 'rigorous enforcement' of anti-corruption laws, and 'the personal witness of individuals who are opposed to bribery and corruption'. These bromides do little to help people whose government officials daily sell favors and pick their pockets.



Of course weak people help to explain corruption. So do weak institutions.



## EXERCISE:

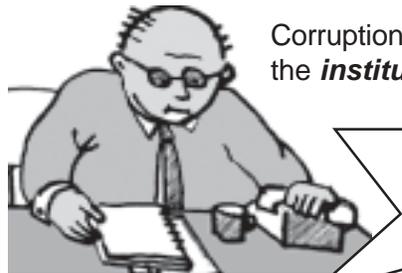
To try to stamp out corruption, has your country's government relied primarily on the criminal law? If so, has it effectively reduced the incidence of corrupt behaviors?



Legislative theory argues that you can help reduce corruption by ensuring that every bill contributes to reducing corruption's objective, *institutional* causes.

### 3. Objective explanations for corruption

Corruption breeds where institutions permit it. A bill's provisions may help to alter or eliminate the *institutional causes of corruption* suggested by the ROCCIPI categories.



In particular, we highlight here the importance of Rule, Opportunity and Capacity in explaining corruption.

**Law can cause corruption.** By granting officials discretionary power to dispense scarce government goodies in high demand, **poorly drafted laws** help to create circumstances that breed corruption. Official Secrets Act and the Civil Service Regulations often have secrecy provisions that permit corruption to flourish in the dark. Lack of accountability, especially fiscal accountability, breeds corrupt behavior.

**Opportunity and Capacity can also cause corruption.** More than two millennia ago, the Greek philosopher Aristotle articulated government's great paradox: Law cannot avoid granting officials power (that is discretion) to make crucial decisions. How to avoid the exercise of power for selfish reasons? In the 20th Century, the American jurist, Roscoe Pound, observed that **all jurisprudence concerns discretion and its control.**

Unaccountable power to allocate official favors – in procurement, in licensing, in deciding disputes, in granting zoning and planning exceptions, in locating government facilities, in ruling whether a farmer has brought to a marketing board office sixteen kilos of cocoa or only fifteen kilo (enabling the official to pocket the price of the extra kilo), in deciding who gets credit in a government loan scheme to aid small farmers and start-up industries, in running a government electricity or steel or airlines corporation, a thousand others – all of these present officials with opportunities to behave corruptly. Circumstances differ. A Director of the Navigational Aids Division of the Coast Guard may have fewer opportunities to milk the job for corrupt advantage than a Ministry of Mines official who approves oil drilling licenses.

Neo-liberal writers claim that corruption's basic cure lies in getting government 'out of business'. Where government has no favors to give away, they argue, there can be no corruption. The market's 'invisible hand' ensures the best possible allocation of resources.

Without appropriate laws and institutions, however, the market's 'invisible hand' everywhere too often enables powerful oligopolistic interests to charge excessively high prices, limit entry, restrict market information, produce shoddy and sometimes dangerous goods, use insider information to benefit insiders – a litany of abuses which exhibit many of the same features as government officials' corrupt behaviors. Over the years, industrialized country governments have come to use law to restrict market actors' mis-behaviors. ***How can legislators both protect against market abuse and reduce the danger of officials' corrupt behaviors? That constitutes the issue you face.***

Of course, the law should punish corruption – if the police can catch the culprits. Laws to reduce the objective causes suggested by the ROCCIPI categories of Rule, Opportunity and Capacity will likely prove more effective. The next section emphasizes the necessity of imposing limits on officials' discretion to make decisions.

To reduce officials' opportunity and capacity to reap personal advantage through corrupt behaviors requires ***laws that create decision-making processes which limit official discretion.***



## C. LIMITING THE SCOPE OF OFFICIALS' DISCRETION

Unaccountable, secret and unnecessarily broad discretion creates opportunities for arbitrary and corrupt decision-making. First, always ask, does a bill contain rules that require the decision-maker to ***take into account a specified range of factors — and only those factors?*** Second, make sure the bill permits decision only by ***procedures authorized by the law.***

This section reviews the input-output process model of decision-making to identify the key points and ways in which a bill's details can limit officials' discretion (see chapter 6).



**1. Input and feedback processes.** A law may limit the scope of officials' discretion by specifying criteria as to whose and what kinds of facts and ideas they may consider.

**a. Limit the issues agency officials may decide.** If a law permits agency officials to decide only specified issues, the *ultra vires* rule forbids them from deciding other issues. If a law says, "The Mining Environment Agency may issue rules concerning the control of the environment in coal and in hard-rock mining locations," that Agency cannot legally issue a rule regulating the drilling of oil wells ('hard-rock mining locations' does not subsume 'oil wells').

**b. Specify who may supply inputs and feedbacks.** Bent on making an arbitrary decision, officials may limit facts and opinions they consider to those that support their predetermined position (on a factory safety inspection, an industrial safety inspector may have lunch with the employer, ignoring the union leadership). Similarly, an official bent on corruption invariably holds secret meetings with the corruptors, and ignores other stakeholders' inputs. To prevent officials' arbitrary or corrupt behaviors, a law might require the officials to hold a public hearing; solicit facts and ideas from vulnerable groups that the law would likely affect; and refrain from contacting one affected party without the presence of other affected parties.

EXAMPLE

Suppose a law empowers a ministry to make regulations to facilitate disabled persons' access to a public building, and requires that the ministry first consult disabled groups' representatives. A building inspector (taking a bribe from the contractor, and without further consultation with groups representing disabled persons) might permit the contractor not to provide wheelchair access to a public building. If a disabled person complained, a court would likely insist that wheelchair access be provided, on the grounds that the building inspector had no power under the law to exempt the contractor.

A law may limit inputs by specifying who has standing (the right) to appear and present evidence and argument. It may require that agency officials respond in writing to a stakeholder who complains about a decision. If the officials fail to respond to a proper complaint, a court could upset the decision.

**c. Limiting substantive inputs to decision.** A law may specify criteria that directly or indirectly limit the inputs admitted into the decision-making process.

In a proceeding to determine whether an agency should identify a particular species as endangered, a statute might state **directly**, "The hearing officer may not admit evidence of the economic importance of harvesting the species"; or **indirectly**, "The agency may not consider the economic importance of harvesting the species."

In either case, the *ultra vires* rule forbids a hearing officer from admitting or considering the forbidden evidence (see Subsection 2(b), below).

**2. Procedural and substantive limits on the conversion process.** A bill may also limit discretion by structuring the conversion process.

**a. Requiring a justification for a decision.** To reduce the danger of corrupt influence, a law might limit the conversion process by several procedural devices:

- require agency officials to state in writing the facts and logic on which a decision rests;
- require officials to follow agency precedents ;
- require that two or more officials make decisions.



## EXERCISE:

Can you think of other procedural limits on the conversion process?

### **b. Limiting factors officials consider**

Most frequently, bills limit discretion by specifying the factors that decision-making officials may or may not take into account.

For example, “In issuing or denying a mining permit pursuant to this section, the Agency may take into account only the following factors: The potential of the proposed mining activity for injuring the physical environment, cultural or architectural monuments, and archeological treasures; the potential of the activity for polluting air, water, sound, or the natural aesthetic qualities of the environment; and the potential of the activity for destroying rare species of wild plants and animals.”

Suppose the agency admits evidence that the proposed mining activity “will unduly interfere with agricultural pursuits,” and later, declines to grant the permit in part on the grounds of the mine’s probable interference with farming in the locale. Because the agency took into account a matter (interference with agricultural pursuits) which the applicable law by implication excluded from the factors the agency might consider, a court probably would not uphold its decision. If farmers object, they should seek a change in the law.

EXAMPLE

In a variety of ways, a bill may stipulate the factors an official must or may take into account when formulating regulations. At one end, a 'bright-line' rule might give officials a minimum of discretion – for instance, a law might require aircraft pilots to retire at age 60. At the other extreme, the law might give the agency discretion to retire a pilot 'when the agency deems it desirable'. Many alternatives fall in between. But the further from a bright-line rule, the more discretion the rule permits — and the greater the possibility for corruption.

EXAMPLE:

***The long road from "bright-line" to agency discretion***

The law might require aircraft pilots to retire at age 60. The law might give the agency discretion to retire a pilot 'when the agency deems it desirable'. A whole range of alternatives fall in between. To set a standard against which a court might later measure an official's exercise of discretion, the law might require the agency to retire a pilot 'when the pilot becomes physically unfit to fly'. Or the law might list factors for consideration, leaving the factors' relative weight to the officials who make the decision. (For example, the agency may retire a pilot when no longer fit to fly, taking into account eyesight, reaction time, hearing acuity, hand-eye coordination and cardiological health). The law might reduce these factors into a series of bright line rules: A pilot may not retain a license to fly if the pilot has less than 20-20 vision in each eye when corrected; blood pressure within specified limits; ability to do thirty-five sit-ups without pause; and so forth.

The legislation may give the agency officials discretion to experiment with (and alter) criteria by changing the factors they must take into account. At the same time it may require officials always to keep a list of criteria in force, and to give reasons for changes made. To enhance consistency and add relevant factors case-by-case, the law may require officials to follow agency precedents .

Finally, the bill's General Purposes Section in effect imposes criteria for decision. Whether to specify criteria or to rely on a general purposes clause depends upon what seems required to resolve the kinds of issues the official must decide, and whether sufficient reasons exist for granting the officials discretion to decide them.

By definition, specifying criteria for highly complex decisions seems difficult if not well-nigh impossible. The greater the number of factors likely to affect decisions, the more criteria seem necessary; but how can a bill state all those likely to prove relevant? Even a vague criterion, like 'reasonable,' may seem better than none. Yet vague criteria create two dangers:

- (1) On appeal, a generalist court may substitute its relatively inexpert judgments for those of a specialist agency (see Chapter 6);
- (2) Where the law requires courts to defer to agency judgment, vague criteria may hinder a judge from questioning a corrupt or arbitrary agency decision.

As a possible solution, a law may require the agency to accompany its decision by an impact statement, listing along with its decision the factors its officials considered in assessing that decision's probable consequences. On appeal, a court or reviewing agency may then 'second guess' the agency about the sufficiency of the reasons given. Unless some organization — usually an organization of civil society — can afford to bring a case to court, an impact statement provision dies a-borning. In some countries, an ombud (see p. 169) may hear complaints against administrative decisions.

Remember: unless, in your country, a bill effectively structures its grants of discretion, it too easily fertilizes the field for corruption. Ensure that, as far as possible, every bill contains adequate criteria and procedures to limit implementing agency discretion.

## D. ACCOUNTABILITY AND TRANSPARENCY

### 1. Institutions of accountability

To reduce the ever-present danger of corruption, a bill's details must require officials to provide reasons for all important decisions, especially those relating to finances.

#### a. *Accountability for decisions.*

A bill may establish institutions that require :

- (i) **on-going** accountability;
- (ii) accountability in response to an aggrieved party's **complaints**;
- (iii) **upwards** accountability to an office higher in the hierarchy of authority (an administrative superior, a judge); and
- (iv) **downwards** accountability, for example, to a legislative committee, a stakeholders' general meeting, or a town meeting.

Some useful devices include requirements for:

- **written, published reasons** for decisions so legislators and the public can make sure administrators have taken into account the relevant factors.
- **regular evaluations of a law's social consequences** by requiring a 'sunset clause' (which terminates the law on a set date unless renewed by the legislature); annual reports laid before the legislature; a legislative oversight



A bill should require decision-makers to follow accountable and transparent procedures.

committee.

- **dispute-settlement systems** so aggrieved parties can make internal and external appeals from administrative decisions.
  - In particular cases, **review of proposed decisions by a bureaucratic superior**.
  - Accompanying important bills (including administrative regulations) by a **research report** that demonstrates that the bill contains an adequate system of accountability appropriate to its subject-matter.
- b. **Financial accountability.** In the Anglophonic tradition, an Audit and Exchequer Law usually provides the basic framework for fiscal accountability. If, in your country, no such law exists, check every bill to ensure that it provides basic financial accountability. Its provisions might require:
- **annual audits** by an independent auditor;
  - identification of **a senior civil servant who must certify** before payment that an expenditure meets the requirements of the laws;
  - the agency to **keep its funds on deposit with the Treasury** and keep up-to-date **account books available for inspection**. Avoid giving an agency sole power over special funds.



Laws can require either secrecy, or transparency.

## 2. Institutions of Transparency

From their former authoritarian rulers, some governments have inherited official secrecy laws. In contrast, Sweden's Constitution includes a public information section that, in practically all matters, forbids government secrecy. A bill's provisions may induce greater transparency by requiring an agency to:

- **advertise its meetings in advance**, notifying the public of their right to attend;
- on demand to **make available to interested persons relevant information** from its files;
- widen the rules of standing to **permit interested persons to appear and speak in agency proceedings** that may affect them; and
- **broaden the concept of 'interest'** to permit, not only by those with a material but also an ideological interest to intervene in a proceeding (for example, in a proceeding to determine whether to sell a national park, permitting, not only



I want to find out what the government says in my file!

neighboring landowners but also non-government organisations concerned with the preservation of national park lands, to intervene).

### ENSURING PARTICIPATION IN THE RULE-MAKING PROCESS

A bill can make corruption more difficult by increasing participation in the decision-making process (and thus decreasing the likelihood that a briber can ‘buy’ a favorable decision or rule). In addition to the points mentioned above, a bill might include these mechanisms:

**Notice and comment:** The agency must publish a proposed regulation in specified media, inviting the public to submit written comments before a stated date. After receiving the comments, the agency reconsiders and, if necessary, redrafts the regulation. When it promulgates the regulation, it must accompany it with a statement on each comment received, and, with reasons, its disposition.

PARTICIPATION



## EXERCISE 1:

***A draft bill concerning the allocation of water resources reads in part as follows:***

**“Section 17. Allocation of River Water.**

(1) Where a river, stream, or irrigation channel has two or more users of its water flow, the Minister shall by order determine what percentage of the water flow a user may take from the river, stream or irrigation channel.

“(2) A person may not appeal from the Minister’s order.”

***Critique the draft in terms of the likelihood that it will produce results in conformity with the Rule of Law.***



## EXERCISE 2:

**1. The following excerpts from a bill contain all of its substantive provisions for creating a National Service Agency within the Ministry of Defense. How would you assess whether these provisions make compliance with the Rule of Law probable? What changes, if any, would you recommend?**

After providing for appointments to the Agency, their terms of office, etc., the draft bill states:

**“Section 23. Powers and duties.** The Agency shall have the following powers and duties:

- (1) To create, operate and run a National Service system which will employ graduates from the nation’s universities for one year after graduation on works of national importance.
- (2) The Agency may make regulations to carry out the power granted in subsection (1).

***The bill contains no other substantive provisions.***



## EXERCISE 3:

**2. The draft bill that follows proposes that under certain conditions, an official or agency may base subsidiary legislation on negotiations between stakeholders.** For example, the electrical appliance industry requires a high degree of standardization in order to function. A consumer must have confidence that when the consumer purchases an electrical plug, the plug will fit the outlet in the consumer’s home. That will only happen if the industry has standardized the sizes and shapes of plugs and outlets. There seems no strong objection to letting the various elements in the electrical appliance industry bargain out the regulations to create those standards, and having the agency then promulgate them as subsidiary legislation to regulate the sale of electrical plugs and outlets in the country.

***Critique the following bill in terms of the likelihood that it will produce results in conformity with the Rule of Law and good governance. Taking your critique into account, how would you ask the drafter to rewrite the bill?***

### EXERCISE 3 *continues:*

The draft bill reads as follows:



#### “REGULATORY NEGOTIATION

“(1) Any official or agency who is empowered to issue proclamations or to enact subordinate legislation in terms of this Act may choose regulatory negotiation as a pre-adoption procedure either as a supplement to the procedure set out in section xx (concerning notice and comment) or as a procedure on its own, if such official or agency is of opinion that such a procedure would be appropriate in the public interest.

“(2) In making a decision to use regulatory negotiation exclusively or as a supplement to the procedure set out in section xx, the official or agency must take into account the following considerations, whether: —

- (a) there is a need for a rule;
- (b) there are a limited number of interests that will be significantly affected by the rule;
- (c) there is a reasonable likelihood that a negotiating committee can be formed with a balanced representation of persons who —
  - (i) can adequately represent the interests identified under paragraph (b); and
  - (ii) are willing to negotiate in good faith to reach consensus on the proposed rule;
- d) there is a reasonable likelihood that the committee will reach a consensus on the proposed rule within a fixed time period;
- (e) the agency has adequate resources and is willing to commit such resources, including technical assistance, to the negotiating committee; and
- (f) in the event that the agency chooses to use the negotiation as a supplement to the notice and comment procedure as contemplated in paragraph (1):
  - (i) the use of negotiation will not unduly delay the notice of the proposed rule making and the issuance of the final rule; and
  - (ii) the agency will, to the maximum extent possible consistent with its legal obligations, use the consensus of the committee as the basis for the rule proposed by the agency for notice and comment.”

***Critique the draft in terms of the likelihood that it will produce results in conformity with the Rule of Law and good governance.***



What can legislators do to transform a 'culture of corruption' into a 'culture of good governance'?

## E. COMBATING A 'CULTURE OF CORRUPTION'

This section first proposes a general strategy and then reviews measures which elsewhere have reduced corrupt behaviors in government procurement, conflicts of interest, and civil service codes of conduct.

### 1. Combating hopelessness about corruption: a general strategy.

Transparency International emphasizes adopting a positive approach, expressing confidence in public servants and a desire to assist them to fulfil their responsibility for acting in the public interest. The checklist below suggests questions you might ask about every bill.

#### CHECKLIST: A BILL'S DEFENSE AGAINST CORRUPTION

##### A CHECKLIST FOR ASSESSING A BILL'S DEFENSES AGAINST CORRUPTION

To assess whether a bill's proposed safeguards and controls seem adequate to prevent corrupt behaviors you might use this checklist:

- A. Does the bill's provisions for the implementing agency's general control environment permit corruption? Does the bill contain provisions that make it likely that –
  1. the management will commit the agency to a strong system of internal control?
  2. the agency's units will have appropriate reporting relationships?
  3. the agency will have a staff of people of competence and integrity?
  4. the agency employees will understand and work well together to implement its policies and procedures?
  5. the agency will budget and report on its finances according to well-specified and effectively implemented procedures?
  6. the agency will have well-established and safeguarded financial and management controls – including the use of computers?
- B. Does the bill properly delegate and limit the agency's discretion?
- C. To what extent will the agency's activity carry the inherent risk of corruption?
  1. Does the bill's prescriptions for the agency program seem vague or complex? Will the agency likely become heavily involved with cash dealings, or in the business of approving licenses, permits or certifications? (The more an agency engages in these activities, the greater the risk of corruption.)
  2. In light of the agency's activities, does the amount required for funding the

agency seem large? (If corruption exists, the bigger the budget, the greater the loss.)

3. Will the agency's activities have a significant financial impact on non-government interests? (The greater the 'rents,' the greater the incentive for corruption.)
4. Does the agency implement a new program? Does it work under a tight time constraint or an imminent expiration date? (If so, corruption seems more likely.)
5. Does the agency's level of centralization seem appropriate for its activity?
6. Does evidence indicate previous illicit agency activity?

*Source: Office of Management and Budget [U.S.], Internal Control Guidelines (1982), Ch. 4, cited in Robert Klitgaard, CONTROLLING CORRUPTION (1988).*

New legislation can require seminars and other means of engaging agency leaders and staff in constant discussions about the necessity, as well as ways and means, of combating corruption.

Do bills provide devices to improve transparency, helping to make the criminal law somewhat more instrumentally effective by incorporating 'whistle blower' statutes? incentives for clients to report attempts to obtain bribes? better auditing and control systems? more highly trained evaluators and evaluation systems? Has your government established an Ombud or its equivalent, an office to which anyone can bring complaints and which itself may proactively investigate corrupt behavior?



## AN OMBUD OFFICE?

The effectiveness of an ombud to police the administration depends on the provisions of the law that establishes it. Some commentators view the ombud as a radically new approach to ensuring administrative accountability, an institution simpler and easier for ordinary citizens to approach than the courts. Others say that, too often, the rules establishing an ombud limit it, like courts, to dealing with corruption, not on an institutional level, but only on a case-by-case basis. In effect, they only reduce the high cost of court suits to end bureaucrats' misbehavior.

Review the detailed rules for an existing or proposed ombud office to ensure that its officials-

- may proactively investigate alleged corrupt practices;
- that they receive inputs and feedback from all stakeholders, especially the most vulnerable ones;
- that they publish reasons for their decisions; and
- that they make annual reports to you, as legislators, on specific issues on which they decide, and on remaining areas of potentially corrupt behaviors, if necessary accompanied by drafts of new rules.

## 2. Three general kinds of laws to combat corruption

This section reviews the causes of corruption in three areas where, as national markets have expanded in an increasingly complex global economy, corruption has appeared especially pronounced: government procurement and sale of assets; senior officials' conflicting interests; and the expanding public service.

**a. Government procurement and sales of assets.** Everywhere, to build the socio-economic infrastructure for expanding markets and to foster socio-economic development, governments must purchase a seemingly endless list of goods and services: roads, railroads, bridges, ports, schools, textbooks, hospitals, preventive care measure, military equipment and supplies, parliament and government office buildings, covered markets, dams, electrical systems, water systems. In recent years, as governments have begun to sell off their assets, private companies and individuals have dangled before responsible public officials opportunities for enrichment almost beyond belief: plush cars, fancy new housing, overseas jaunts, outright cash payments.

### CORRUPTION IN PROCUREMENT AND SALES

Many countries' experiences in using law to reduce corruption in government purchases and sales of assets suggests that an adequate procurement law should incorporate six elements:

1. Rather than permitting each ministry to do its own procurement or sales of assets, require decisions relating to major assets (defined by specified criteria) to pass through a single, specialized agency.
2. Require open bidding for practically all government contracts for the purchase or sale of assets.
3. Prescribe procedures to make open bidding a reality (for example, advertising requests for bids, and written reasons for choosing the winning bidder).
4. For unavoidable negotiated contracts, prescribe criteria and procedures ensuring transparency, accountability and stakeholder participation in decision-making.
5. Detail provisions for ensuring contract performance.
6. Establish specialized research agencies to provide information concerning the prices and costs of goods, services and expertise acquired internationally. To facilitate this, and to take advantage of economies of scale, some governments have cooperated to establish regional research and information units.

International agencies and some industrialized country governments have begun to introduce measures to prohibit corporations from bribing other countries' officials in return for favors.

Both the giver and the receiver are part of corrupt practices.



## INTERNATIONAL MEASURES TO BLOCK 'SUPPLY SIDE' CORRUPTION\*

By the last decades of the 20th Century, the rapidly growing international anti-corruption movement mainly focused on corruption's 'supply side'. In 1978, the U.S. Congress enacted a Foreign Corrupt Practices Act that made it a crime for U.S. firms to pay foreign bribes. In 1997, representatives of 29 member governments of the Organization for Economic Development and Cooperation (OECD) signed a Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Until governments formally enact national laws to enforce the provisions, the convention will remain a 'soft' law. By 1998, several emerging market economies, including Argentina, Brazil, Bulgaria, Chile and Slovakia, had signed the OECD convention.

In 1998, an international NGO, Transparency International, then only five years old, had established 70 chapters around the world. Linked with other NGOs and international agencies, Transparency International works to reduce corruption.

The spread of money laundering — in 1998 estimated by IMF Managing Director Camdessus to equal in value some 2-5% of the global output of goods and services — persuaded many governments to improve mechanisms to supervise banking institutions and detect corrupt behaviors. The OECD Financial Action Task Force began to seek cooperation among national authorities and financial institutions to pool intelligence, to strengthen regional anti-money laundering agreements, and to provide greater transparency and regulation. The World Trade Organization (WTO) initiated exploration of a possible multilateral investment agreement, including provisions for dealing with corruption.

MEASURES TO BLOCK SUPPLY-SIDE  
CORRUPTION

In addition to a general government procurement law, legislation should specify transparent and accountable procurement and sales practices in particular sectors. A bill dealing with road construction should incorporate provisions to block road building companies' attempts to influence officials to overlook their shortcomings. The Armed Forces bill should include provisions to prevent corruption in military procurement.

You should never copy another country's government procurement law. From other countries' efforts to use law to combat corrupt procurement practices, however, you

How *does* one ensure transparency in the acquisition of secret weapons?



can learn a lot about the nature and scope of corrupt procurement practices likely to emerge as your national economy expands. You can also learn about the possible causes of corrupt procurement behaviors of government officials and private sector actors, including domestic and foreign investors; the probable social costs and benefits of measures that logically seem likely to reduce or eliminate those causes; and possible measures for monitoring the social consequences of the procurement practices they incorporate into their proposed law.

**b. Conflicts of interest legislation.** Senior government officials typically comprise many of a country's most educated citizens, with extensive personal ties to civil society's leaders, including private entrepreneurs. Aspects of their personal concerns inevitably tend to conflict with the public interest.

## THE MANY FORMS OF CONFLICT OF INTEREST

### THE MANY FORMS OF CONFLICT OF INTEREST

1. *Private employment:* In some countries many officials and political figures hold part-time jobs or operate side-line businesses. These private concerns frequently conflict with their public responsibilities. Government regulations may affect their private business. As officials, they must deny privileged access to official information to persons whose favor they need in their private affairs. The potential conflicts seem innumerable.
2. *Gifts, hospitality, and other personal benefits:* Persons or organizations may offer officials gifts, invitations to social affairs, holiday travel opportunities – supposedly innocent symbols of friendship. Too often, these become transformed into no-nonsense cash bribes.
3. *Employment after leaving a public post:* On retiring from public office, officials may take private sector jobs from firms that do business with their former offices. As private contractors or consultants, some do business with their former offices or help unauthorized private sector actors gain access to privileged information and contacts.
4. *Shareholdings, directorships, and commercial partnerships:* Holding shares or serving as directors or partners in private sector firms, officials may make decisions favoring not the public's but those firms' private interest.
5. *Travel perks:* Officials may make unnecessary trips within their country or abroad in order to claim per diem payments, or to accrue airplane mileage benefits for themselves.
6. *Preferential treatment:* Officials may accept preferential treatment from private interests in exchange for favors to an individual or organization. Over more competent applicants, an official may employ a family member or a friend (the act of nepotism).

## SPECIFIC CONFLICT OF INTEREST PROVISIONS

Many countries' laws include provisions to make it difficult for officials to conceal conflicts of interest or to participate in decisions where conflicts exist. Some or all of these might appear in a general conflicts-of-interest law:

1. *Make specific corrupt activities criminal:* Giving and receiving bribes, preferential treatment of family or friends, accepting gifts above a small minimum, accepting a job with a former client of the official's department within a stated period after leaving the public service; taking kickbacks from suppliers; and others. To reduce officials' interest in violating these provisions, many laws threaten heavy fines, and encourage detection by giving whistle-blowers a major share of fines collected. As a cure for corruption, however, these rules suffer the same disabilities as general criminal law.
2. *Eliminate other potential causes of corrupt behavior,* like low official salaries, secret decision-making processes, and unaccountable decision-making procedures.
3. *Improve transparency* by requiring officials publicly to disclose their outside commercial and property holdings and relationships and gifts larger than a specified minimum; and, on important issues, to accompany their decisions with an adequate published justification.
4. *Provide for an implementing agency with the opportunity, capacity and incentives to enforce these kinds of provisions* (see Chapter 6).
5. *Prohibit potentially compromising ties:* No person running for public office may hold dual citizenship or declare allegiance to another government; no person seeking to become a legislator or minister may already hold another legislative or ministerial office.
6. Specify negative consequences for exposed conflicts of interest, including provisions to
  - require an appointed official holding a government contract to resign;
  - remove the official from business operations;
  - render the contract void;
  - establish monitoring mechanisms to ensure that in their private capacities officials do not derive undue advantages from their official positions;
  - require the official to declare a personal interest to an appropriate body. (*Critics argue this reduces the negative consequences for officials who declare their interest, and permits elected officials to participate in commercial activities.*)

What does your country do - and does it work?



**c. General codes of conduct applicable to the public service.** A Code of Official Conduct either as a separate law or as part of the Civil Service Regulations may serve as a general deterrent to conflicts of interest.

**1. Substantive:** Most codes focus on helping ministers, legislators, and public servants to avoid corruption-producing circumstances. Some governments combine these into one well-publicized code applicable to all government personnel.

The more detailed a code (including its implementing measures) the more likely its effective enforcement.

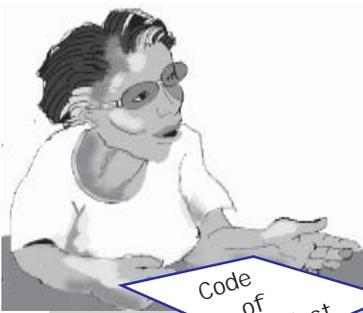
### POSSIBLE GUIDELINES FOR DRAFTING A CODE GOVERNING LEGISLATORS' CONDUCT

I. A code should begin with a clear statement of its purpose. A code for legislators might emphasize that service in the legislature constitutes a public trust. In that context, it might state as its aims:

1. maintenance of public confidence in the legislature's and individual legislators' integrity;
2. guiding legislators in reconciling their private interests and public duties; and
3. fostering consensus among the legislators by providing common rules and establishing an independent non-partisan advisor to answer questions relating to conduct.

II. The code then might stipulate rules prohibiting legislators from —

1. using for private purposes the influence or confidential information they obtain in the course of their legislative responsibilities;
2. accepting compensation for services that, in their legislative capacity, they render to an individual or group;
3. participating in official actions dealing with issues in which they have a personal (financial or otherwise) interest;
4. attempting to restrain others from performing official duties;
5. in specified circumstances, accepting gifts or honoraria for speeches, articles, or other employment; and
6. referring to their legislative role to advance their professional or occupational pursuits.



## POSSIBLE ELEMENTS OF A CODE OF CONDUCT FOR MINISTERS AND SENIOR PUBLIC OFFICIALS

- I. A code for ministers and senior public officials might include any or all of the following provisions.
  1. *Limit participation in business enterprises:* Require ministers and senior public officials to dispose of all interests on taking public office by transferring business interests to a blind trust (see below); establishing an authority to decide when they may retain business; or withdrawing from daily business operations.
  2. *Restrict vocational, professional and other private employment:* Use devices similar to those relating to participation in business enterprise.
  3. *Prohibition on holding directorships:* Require withdrawal from all except perhaps family companies (and in those cases, require withdrawal if conflict of interest seems likely to arise).
  4. *Shareholdings:* Require disposal of shares beyond a minimal threshold amount; deposit of shareholdings in blind trust (see below); or declaration of shareholdings to Registrar to detect danger of conflicts (difficult to monitor and enforce, this has proven relatively ineffective).
  5. *Gifts, hospitality, sponsored travel:* Limit the value of any one of these that ministers and senior officials may receive; require declaration of gifts above that amount, or turn them over to state property (apply that ruling to close family members, too).
  6. *Prohibit use of government property or resources (including employees) for personal purposes or for ministers' political parties or constituencies.*
  7. *Prohibit nepotism in government appointments:* Establish standards for appointments.
  8. *Decide permissible limits on family ties:* Define the extent to which ministers and senior public officials must publicly disassociate themselves from activities of family members, associates, and non-public organizations which might conflict with government policy.
  9. *Blind trusts:* require a public official to place assets in a trust in which trustees make investment decisions concerning management of trust assets with no direction from or control by the public official concerned, and may not give information to the official other than required by law or relating to total value of trust assets. (*A cautionary note:* Blind trusts have many advantages, but also pose significant problems — including designing devices that effectively prevent the official from learning of the trust's holdings and activities. If you contemplate legislation to create blind trusts, study these problems carefully.).

Some governments' codes regulate political party officers' behaviors. Political parties may play a significant role in law-making and implementing processes. South Africa's post-apartheid government introduced a code of conduct to control political donations and set standards for lobbyists. Canada's 1997 Lobbyist Code, administered by an Ethics Counselor, established general principles and a list of rules to ensure transparent decision-making.

**2. Disclosure of private interests.** To enable responsible authorities and the public to assess the danger of potential conflicts, as a *minimum*, officials should disclose their interests. Because of difficulties in administration and supervision, however, the code should limit (probably to legislators, ministers, and senior public service officials) the number of officials required to declare their interests. To prevent officials from shifting assets to other family members, the definition of 'potentially conflicting interest' should include family members' holdings. The officials should declare their interests under oath, under penalties of perjury.

Some governments have found it useful to engage department officials in determining the scope of declaration of interests relevant to that department's particular concerns. Three categories of interests seem important:

- (a) *Assets*: The registrar should specify the value of assets required for disclosure. These might include real property, shareholdings, business interests and partnerships, directorships, other investments and assets, trusts, gifts, sponsored travel and hospitality (and perhaps others specific to a particular country's circumstances; the United Kingdom's House of Commons Register requires legislator-barristers or solicitors to declare their clients' names).
- (b) *Liabilities*: Since creditors may exercise undue influence over large debtors, the legislative provisions should require officials to declare liabilities. Country circumstances will determine the size of the debts that require listing.
- (c) *Income*: The law should require officials to declare the amounts and sources of their income.

**3. Ethics training.** Combined with other measures, ethics training may help. As a start, a law might require officials to participate in formulating a code's details, both to legitimize its provisions and deepen their awareness of their own responsibilities for good governance.

**4. Assigning an agency to implement the code.** For effective enforcement, every anti-corruption law should specify relevant standards; identify the responsible implementing agency; institutionalize appropriate sanctions; and establish an appeals system (see Chapter 6).



## EXERCISE: PUNISHING CORRUPT BEHAVIORS

Drawing on your knowledge of the circumstances in your own country,

1. For one of the three general types of anti-corruption laws discussed in this chapter, outline the section of a research report that identifies the nature and scope of the corruption problem, and whose and what behaviors seem to comprise it.
2. Outline the primary factors that seem to cause the public officials' problematic behaviors.
3. For one of the three areas, outline for your own country the structure of a bill incorporating appropriate measures (including those for its implementation) that logically might help to overcome the causes of official's corrupt behavior. If an anti-corruption law already exists, assess the likelihood that its provisions seem sufficient to overcome corrupt behaviors' causes.

**5. A checklist for corruption control:** Given the qualitatively different conditions prevalent in differing government departments, enactment of laws in the three most problematic areas — government procurement, conflicts of interest, and public service regulations — although necessary, may not prove sufficient. To combat a 'culture of corruption,' the following checklist suggests the kinds of anti-corruption measures which every law you enact should contain.





## A CHECKLIST FOR MEASURES FOR COMBATING 'A CULTURE OF CORRUPTION'

A review of the ROCCIPI categories of possible causes of corrupt behaviors suggests measures that you should consider incorporating in all of your country's laws as part of an effort to mount an effective campaign against corrupt behaviors. These kinds of provisions should:

- I. Reduce officials' opportunities for behaving corruptly by restructuring their role in decision-making processes to limit their discretion:
  1. Where possible, change the agency's mission, product, or technology to reduce agents' corruption opportunities;
  2. More strictly define the objectives, rules, and procedures relating to input-, conversion- and feedback-processes;
  3. Require agents to work in teams and subject their decisions to review by higher authority;
  4. Where possible, divide large decisions into separate tasks.
  5. Rotate agents functionally and geographically
- II. Open decision-making processes to public view:
  1. Eliminate secrecy provisions;
  2. Require public hearings and other forms of inputs and feedback from stakeholders;
  3. Require written decisions accompanied by reasons that underpin them.
- III. Organize client groups/stakeholders
  1. Where appropriate, require open, competitive behaviors among private or government clients.
  2. Engage clients in reducing the likelihood that their members will attempt to corrupt agency officials;
  3. Create an anti-corruption lobby.
- IV. Reduce agents' capacity to behave corruptly:
  1. Select agents for 'honesty' and 'capability';
  2. Screen out dishonest candidates (past records, tests, predictors of honesty);

3. Exploit outside 'guarantees' of honesty (networks for finding dependable agents and ensuring they stay that way).

V. Improve auditing and management information systems:

1. Publish evidence that corruption has taken place (red flags, statistical analyses, random samples, inspections);
2. Strengthen 'information agents';
3. Beef up specialized staff (auditors, investigators, surveillance, internal security);
4. Create a climate where officials or stakeholders will report improper activities ('whistle blowers');
5. Create new units (ombuds, special audit committees, agencies to register officials' non-official interests, anti-corruption agencies);
6. Use information provided by third parties (media and banks);
7. Use information provided by clients and the public;

VI Reduce agents' potential interest in behaving corruptly: Change rewards and penalties confronting agents and clients:

1. Raise salaries to reduce need for corrupt income;
2. Reward specific actions and agents that control corruption;
3. Vary the rewards of officials according to their achievements as defined in their employment contract;
4. Penalize corrupt behaviors:
5. Where an agent appears to have behaved corruptly, change the burden of proof to require the agent to demonstrate innocence.
6. Raise the general level of formal penalties;
7. Increase the principal's authority to punish;
8. Calibrate penalties in terms of deterrence (as a function of the size of the bribe and the size of the illicit profit).





## SUMMARY

The world around, officials' corrupt behaviors threaten to undermine effective implementation, good governance and the Rule of Law. This last chapter offered guides for using reason informed by experience to propose defensive measures against that ever-present danger. It underscores two overarching commands to all law-makers: First, anti-corruption measures must aim not merely to change individuals' weak moral fiber, but fundamentally to alter the institutions that foster corrupt behaviors; and, second, since no one-size-fits-all-remedy exists, you, in your own country, must explore your own way through the morass.

These two commandments thrust on you, as member of your nation's primary law-making body, two critical responsibilities: you must ensure that every bill you enact specifies first the criteria that limit officials' discretion; and second procedures to ensure transparency, accountability, and as much participation as possible, especially of the historically disadvantaged and vulnerable, in the law making and implementing processes.

To reduce the ever-present danger of corrupt official behaviors, this chapter has recommended a two-pronged strategy. First, enact three general anti-corruption laws (or assess and revise existing ones) to limit discretion and ensure transparency and accountability in the three areas in which corrupt officials most commonly seek to advantage their private interests at the public's expense: government procurement and sale of goods and services; potential conflicts between senior officials' own and the public's interest; and public servants' opportunities, at all levels, to misuse government resources to advance their personal welfare.

The second prong — briefly stated, but requiring eternal vigilance — proposes that you always scrutinize *every* bill's detailed form and substance with an eye to blocking officials' opportunities and capacities to decide public issues for private reasons. Using the ROCCIPI agenda, always ask yourself whether a proposed bill's substance and the detailed articles, indeed the specific words in each sentence, sufficiently close the door against the ever-present corroding danger of officials' corrupt behaviors.

The issue of corruption encapsulates this manual's central theme: that the Rule of Law lies at the heart of good governance and development. Good laws alone do not guarantee development and good governance; poor laws, however, do constitute a major cause of their defeat. At every stage in the law-making process, you and your colleagues must explicitly assume primary ethical and professional responsibility for enacting bills that seem likely to prove effectively implemented and facilitate good governance and development.