

SESSION B-16

DRAFTING FOR GOOD GOVERNANCE AND THE RULE OF LAW II: TRANSPARENCY AND ACCOUNTABILITY

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OBJECTIVES OF THIS SESSION

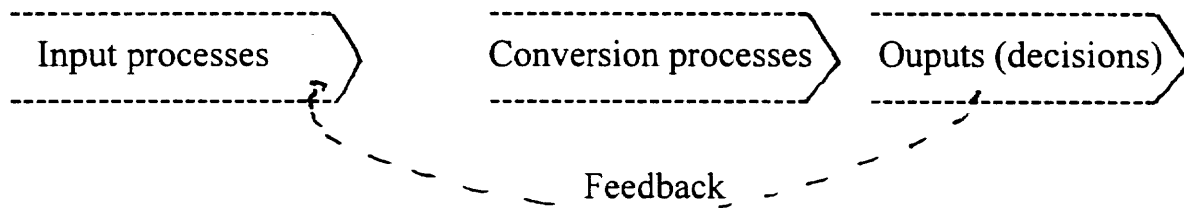
- In this session, we examine how to draft measures likely to induce decision by rule, transparency and accountability in government decision-making.

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WHERE WE HAVE BEEN AND WHERE WE ARE GOING

Recall yet again the decision-making input-output model by a complex organization – and that government always makes decisions through a complex organization.



- (1) In the last session we discussed briefly the question of stakeholders' participation in decision-making –
 - (1) mainly in the input and feedback processes,
 - (2) in some systems, in the conversion processes by
 - * representation on a decision-making board,
 - * referendum, or
 - * perhaps by supervised mediation and negotiation.

- (2) Here we discuss how to draft provisions likely to induce –
- (1) decision by rule;
 - (2) accountability; and
 - (3) transparency.

DRAFTING TO MAKE DECISION BY RULE MORE LIKELY

- Why requiring decision by rule *makes non-arbitrary decision-making more likely* -- even decisions requiring the exercise of discretion:

- (1) Ensuring decision by rule poses no problem when the rule is a “*bright-line*” rule.



Example: “The Minister shall withdraw the commercial pilot’s license when a pilot passes the pilot’s sixtieth birthday.”

- (2) *Diametrically opposed* to decision by rule lies decision by *unlimited discretion*

By definition, if a decision-maker may make a decision for any and whatever reason the decision-maker chooses, it counts as arbitrary.

Example: “The Minister shall withdraw the commercial pilot’s license of a pilot who in the Minister’s opinion ought no longer to pilot a commercial aircraft.”

- (3) Many, likely most governmental decisions require the official making a decision to *exercise some discretion*.
 - (1) Does that make non-arbitrary governmental decision-making *an impossible dream*?

- **Drafting to restrict discretion** – that is, to make it *more likely that discretionary decisions will become decisions by rule.*



The law grants an official power – that is, discretion – in order to achieve *public* purposes.

- **The drafting problem:** *How to draft rules that make it likely that the official will exercise discretion in the public interest?*
- Only *if rules constrain official discretion* – that is, require the decision-maker to apply a *substantive* rule in deciding an issue -- does *decision by rule become possible.*

- (1) **Two kinds of rules constrain discretion, *procedural and substantive.***

- (1) *The procedural rules to enhance participation* by stakeholders in governmental decision-making comprise *one set of procedural rules that constrain discretion.*
- (2) A substantive rule to constrain discretion *limits the considerations* that the decision-maker properly can take into account.

- (2) **Procedural rules have substantive consequences, and substantive rule, have procedural consequences**

- (1) **for the conversion processes, by limiting the considerations that a decision-maker may take into account:**
 - * **For example:** “When determining whether to withdraw a commercial pilot’s license, the Minister may take into account only the following considerations: the pilot’s reaction time, vision, mental alertness, physical condition and physical coordination.”

(2) For the **input processes**, by prescribing what categories of evidence the decision-maker may admit.

* **For example:** “When determining whether to withdraw a commercial pilot’s license, the Minister may admit into the record only evidence concerning the following matters: the pilot’s reaction time, vision, mental alertness, physical condition and physical coordination.”

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DRAFTING TO RESTRICT DISCRETION: PROBLEM

- Consider the problem of the municipal planning law considered in the last session (15) of this Stream B. Here, write a rule limiting the Planning Board’s discretion in making a city plan, in two ways:
 - (1) by stating the *considerations* the Board may take into account (a constraint on the *conversion* processes); and
 - (2), by stating the *evidence* the Board may admit (a constraint on *input* processes).



Push the PAUSE button: *Draft a rule in both ways.*

(1) *A possible rule for controlling conversion processes:*

“In making the draft City Land Use Plan, the Planning Board may take into account only the following:

- (a) existing land uses; and
- (b) present and projected educational, health, recreational, retail shopping, manufacturing, water, sewerage disposal and transport needs.”

(2) *A possible rule for controlling input processes:*

“In making the draft City Land Use Plan, the Planning Board may admit into written or oral evidence only the following: Evidence concernng –

- (a) existing land uses; and
- (b) present and projected educational, health, recreational, retail shopping, manufacturing, water, sewerage disposal and transport needs.”

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DRAFTING TO ENSURE ACCOUNTABILITY

- **Meaning:**

- (1) ‘To account’ for an action means to give an *explanation or justification* for it.
- (2) an ‘accountable’ governmental decision comprises a decision for which the *responsible official regularly gives an account to an institution* that reviews it, and if the decision violates the law –
 - * *holds the official responsible* for it,
 - * *rectifies* the decision, or
 - * *both* holds the official responsible and rectifies it..



(3) Accountability remains closely related to **Evaluation** (problem-solving's fourth step.)

- * Evaluation reviews what officials do under a law in order to determine whether the law adequately addresses the social problem at which it aims.

● **Why require accountability?**

(1) Accountability helps ensure that officials exercise governmental power according to law.

- * Recall the *ultra vires* rule, that no official can so much as lift a little official finger unless a law authorizes it.
- * Reason for the *ultra vires rule*: To ensure that officials exercise public power in the *public* interest, not in the official's private interest.
- * In order to implement the *ultra vires* rule, good governance requires accountability.

(2) As to *financial accountability*: Necessary to avoid the illegal expenditure of government funds (including corruption) and to ensure the wise use of funds.

(3) As to *other, non-financial governmental decisions*: Necessary to ensure that, at the end of the day, through law, the electorate controls the exercise of state power.

- * Recall that *decision by rule* excludes decisions made in unrestricted discretion.

(4) Where the law limits the exercise of discretion by specifying procedures and limiting the factors that an official may consider, *accountability aims to ensure that the official follow those procedures*, and take those factors and no others into consideration.

- * **Without accountability to some other body**, a decision nominally made pursuant to a rule even with seemingly very limited discretion in fact may *constitute an exercise in uncontrolled discretion*.
- * **For example**, suppose in the face of a bright-line rule requiring the Minister, in retiring a pilot, to take into account only whether the pilot has passed his or her sixtieth birthday. If the Minister for reasons of personal bias and corruption purports to retire the pilot at age 55, without review by some other body, the Minister effectively has retired the pilot not by rule, but by whim.

(5) **Accountability requires *institutions* that review governmental decisions, and ensure that they conform to law.**

- * Like other governmental institutions, the *law structures institutions of governmental accountability* by inducing appropriate repetitive patterns of behavior by the officials who comprise those institutions.

- **Financial accountability:** Good governance requires three different sorts of *financial* accountability --

- (1) Rules ensuring that a person who holds government funds *gives accurate receipts of expenditures* made out of those funds.
 - ▶ That requires rules ensuring *good accounting practice* (usually requiring periodic audits of accounts by officials of the Treasury).
 - ▶ Rules ensuring that a person who holds government funds *expends them only for purposes authorized by law*.



(2) In most countries, the *accounting rules* seek to ensure this as well.

* In British practice, the rules require the *senior civil servant in a Ministry* to agree in writing that a proposed expenditure falls within the authorizations of existing law.

+ In theory, the *civil servant stands personally liable* for an expenditure not authorized by existing law which the civil servant authorized without objection.



(3) Some institutions that ensure accountability in the sense of ensuring the effectiveness of the *ultra vires* rule also *review whether ensuring that a person with discretion to spend government funds does so wisely*.

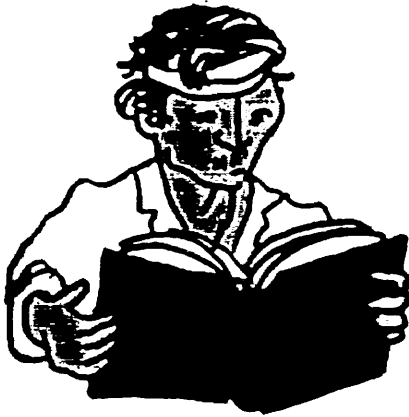
* In some countries, a *special research bureau reports directly to the legislature* (for example, in the US, the General Accounting Office) about the expenditures of a Department.

* In most countries, in principle the *legislature* (usually through a specified committee) *exercises an oversight function*. That requires that the relevant Ministry or Department report to the Committee at regular (usually annual) intervals on the Ministry's or Department's work, and its costs.

● **Institutions of accountability for decisions by government officers.**

(1) *Accountability to higher authority:*

- * **Intra-agency appeal**
- * **Appeal to a court from agency decision**



- ▶ Should *appeal involve only the record* of the case before the agency, or should it permit either side to present new evidence to the court?

Strong policy arguments hold that *one opportunity to present evidence* ought to suffice. Repeated evidentiary hearings entails unnecessary expense.

- ▶ *Scope of appeal:* Should appeal lie on the merits (permitting the court to substitute its discretion for the agency's), or should the court review be limited to review for bias, corruption, or error in law?
- ▶ On whom should *onus for taking appeal* lie: On the defeated party, or by the agency, on an application for enforcement of its decision?

DRAFTING RULES TO ENSURE ACCOUNTABILITY: PROBLEM #1

The Minister of Water Resources instructs you to draft a law to ensure that municipal-owned and operated sewerage treatment plants do not discharge sewerage effluent that exceeds pollutant minimums that the Minister will set by regulation. After research, you decide to provide for irregular 'surprise' inspections of treatment plants by Ministerial officials. If an inspector finds that a plant's effluent has a greater bacteriological or chemical content than permitted, the inspector will impose a fine as defined by a schedule annexed to the legislation. Write provisions for an intra-agency appeal, with an evidentiary hearing at the appellate level within the agency, and a restricted further appeal on the record to a court

PAUSE, and draft a law



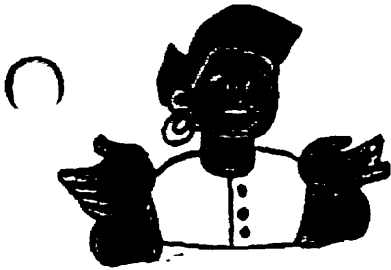
A possible draft:

"1. **Appeal to the Minister.** By a petition filed with the Minister's Administrative Director within 30 days after the Inspector serves the Inspector's decision upon the manager of the sewerage treatment plant, the municipality may appeal the Inspector's decision to the Minister.

2. **Appeal to the Minister: Procedure.** (1) On the appeal, the Minister shall hear evidence from the Inspector and from the municipality concerning the chemical and bacteriological composition of the effluent at the time and place of the inspection.

(2) The Minister shall have a record made of the evidence submitted on the appeal.

(3) Within two weeks after the closing of the evidence, in writing and stating reasons, the Minister shall render a decision, affirming, reversing or modifying the Inspector's decision, and shall forthwith serve the decision upon the municipality.



3. Appeal to court. (1) Within 30 days after the Minister serves the decision upon a municipality, a municipality aggrieved by a decision of the Minister made pursuant to section 2 may appeal to the District Court within whose jurisdiction the sewerage treatment plant lies.

(2) Within ten days after receipt of notice of the lodging of the appeal mentioned in subsection (1), the Minister shall file with the Court a certified copy of the record of evidence before the Minister.

(3) After oral and written argument, the court shall decide the case on the record before the Minister.

(4) After hearing the appeal and considering the record of evidence before the Minister, the court may either affirm the Minister's decision, reverse it in whole or in part, or return the case to the Minister for further proceedings, on grounds only of fraud, bias or corruption, mistake of law, or because the Minister's decision did not rest on substantial evidence in the record."

DRAFTING RULES TO ENSURE ACCOUNTABILITY: PROBLEM #2

The Minister instructs you to draft clauses to add to the Administrative Procedures Act to provide *accountability*. Following the country's legislative practice, bills ordinarily speak in very vague and general language. The President then issues an Implementing Decree which contains most of the necessary detail. The existing Administrative Procedures Act defines in considerable detail the input functions for making those Implementing Decrees, providing for notice and comment for all regulations and, in especially sensitive matters, public hearings as well. Now the Minister asks for additions to the Implementing Decrees that will provide for *accountability*.

PAUSE: Write draft regulations for the Minister .

Three possible formulations of the regulations for problem 2:

I

“1. **Action to set aside an Implementing Decree.** Within ten days after the President makes and promulgates an implementing decree in terms of section yy (*requiring specified procedures in making an Implementing Decree*) and section xx (*requiring publication of an implementing decree in a newspaper of general circulation in the country*) an aggrieved person may bring an action in the High Court to set aside the proposed Implementing Decree.

“2. **Grounds of challenge.** In a written decision stating reasons, after written and oral argument and hearing evidence, the High Court may either approve the Implementing Decree, or set it aside in whole or in part on the grounds only of (a) fraud, bias or corruption in its making, (b) its unconstitutionality, (c) that it does not fall within the provisions of the law that it purports to implement, or (d) that it does not rest on substantial evidence.”

II

“1. **Enforcement of agency order.** If a Minister or agency orders a person to comply with an order made pursuant to an Implementing Decree made and promulgated in terms of section yy (*requiring specified procedures in making an Implementing Decree*) and section xx (*requiring publication of an implementing decree in a newspaper of general circulation in the country*), and the person does not comply with that order, the Minister or agency may apply to the district court within whose district the person resides for an order compelling the person to comply with that order.

“2. **Hearing and decision.** The court may enforce the order, or amend or refuse to enforce the order, on either of the following grounds: That the agency lacked power to make either the Implementing Decree or the order, or that either the Implementing Decree or the order resulted from fraud, bias, or corruption, or that either the Implementing Decree or the order does not rest on substantial evidence.”

III

“1. Laying before the Parliament for approval. (1)
 The President shall lay before Parliament an implementing decree made and promulgated in terms of section yy (*requiring specified procedures in making an Implementing Decree*) and section xx (*requiring publication of an implementing decree in a newspaper of general circulation in the country*).



(2). If in terms of Parliamentary rules the relevant Parliamentary Committee does not sooner place the Implementing Decree on hold, the Implementing Decree goes into effect one week after Parliament receives it.

(3) . If pursuant to subsection (2) the relevant Parliamentary Committee places the Implementing Decree on hold, within two months after Parliament receives the Implementing Decree, the Parliament may by resolution approve it.

(4). If the Parliament approves the Implementing Decree, the Decree goes into effect immediately thereafter. If the Parliament does not approve the Implementing Decree, the Implementing Decree does not go into effect.

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DRAFTING TO ENSURE *TRANSPARENCY*

- **Transparency defined:** With respect of decision-making procedures, ‘transparency’ means that, with respect to a particular decision or the general run of decisions, a stakeholder can learn about --
 - (1) the *decision-making processes*,
 - (2) the *inputs* to decision-making, and
 - (3) the *considerations* the decision-maker takes into account.

- Why require transparency?

- (1) As earlier discussed, *decision by rule* constitutes an essential element in ensuring that officials use their power in the *public* interest – that is, an essential element to ensure that at the end of the day, the electorate controls the exercise of state power.
- (2) Whatever limits the rule nominally places on the decision-maker, *unless either a higher organ controlled by state power, or the stakeholders* themselves know about the exercise of state power and the details of the decisions that led to its exercise, the *decision-maker can decide entirely in terms of subjective discretion.*
 - For example, suppose a bright-line rule requiring the Minister, in retiring a pilot, to take into account only whether the pilot is in good physical condition. If the Minister nevertheless retires a pilot, not because of physical condition but because the pilot has reached age 65, unless the Minister announces her reasons, the pilot has probably very little recourse.

- The institutions of transparency.



- Like accountability, *transparency does not just happen*; it requires *institutions* to ensure its presence, and that calls for laws and regulations.
- Some, probably most *states have in force laws that contravene transparency*; a drafter considering a transparency issue should consider *amending some or all* of these:
 - The *Official Secrets Act* or the *Espionage Act* frequently makes it a felony to disclose anything learned in the course of official employment.
 - *Public Service Regulations* frequently contain analogous provisions.

- (1) *In the absence of laws that affirmatively require transparency, an*

official lies under no legal duty to disclose anything.

- Some laws and institutions *require officials either regularly or on demand to make public* their decisions and their input, feedback and conversion processes and their substantive content.
- *Freedom of Information Acts* require government officials *on demand* to disclose anything in government files (a small range of information excepted, for example, sensitive defense material).
- *Open Meetings Acts* require officials to admit members of the public to all governmental meetings (again, a small range of meetings excepted, for example, meetings on specific personnel)
- *Public Records Acts* require officials to write down many kinds of decisions, and to make those records available to the public.
- Requirements in some statutes that *decisions be in writing, stating reasons*.

(2) **Three common sets of laws and institutions help to ensure transparency in financial transactions**

- *Public procurement laws* that require open, public bidding for government contracts.
- *Conflict of interest laws* that require officials to reveal conflicts of interest related to matters in issue.
- *Leadership Codes* that prescribe rules for the conduct of political leaders, including both elected and senior appointed officials. (See *Manual*, Box 14 .5)



- A checklist for corruption control (See *Manual*, Box 14.7 based on ROCCIPI agenda)



- (1) **Reduce individual agents' discretion:**
 - Where possible, *change the organization's mission, product, or technology* to reduce agents' corruption opportunities;
 - *Define objectives, rules, and procedures* relating to input-, conversion- and feedback-processes more tightly;
 - Have agents' *work in teams* and subject them to *hierarchical review*;
 - Where possible, *divide large decisions* into separate tasks.
 - *Rotate agents* functionally and geographically
- (2) **Open decision-making processes to public view:**
 - *Eliminate secrecy* provisions;
 - *Require public hearings* and other forms of inputs and feedback from stakeholders;
 - Require *written decisions* accompanied by *reasons* that underpin them.
- (3) **Organize client groups/stakeholders**
 - Where appropriate, require *open, competitive behaviors* among private or government clients.
 - Engage *clients* in reducing the likelihood that their members will attempt to *corrupt agency officials*;
 - Create an *anti-corruption lobby*.
- (4) **Reduce agents' capacity to behave corruptly:**

- Select agents for '*honesty*' and '*capability*';
- *Screen out dishonest candidates* (past records, tests, predictors of honesty);
- Exploit outside '*guarantees*' of *honesty* (networks for finding dependable agents and ensuring they stay that way).

(5) **Improve auditing and management information systems:**

- Publish **evidence of corrupt behaviors** (red flags, statistical analyses, random samples, inspections);
- Strengthen '*information agents*' ;
- Beef up *specialized staff* (auditors, investigators, surveillance, internal security);
- Create *climate* where officials or stakeholders will *report improper activities* ('whistle blowers');
- Create *new units* (ombuds, special audit committees, agencies to register officials' non-official interests, anti-corruption agencies);
- Use *information provided by third parties* (media and banks);
- Use *information* provided by clients and the public.
- Where have identified a likelihood that an agent behaved corruptly, *change burden of proof* to require agent to demonstrate their innocence.

(6) **Reduce agents' potential interest in behaving corruptly:**

- *Change rewards and penalties* confronting agents and clients:
- *Raise salaries* to reduce need for corrupt income;
- *Reward specific actions and agents* that control corruption;
- Use *contingent contracts* to reward agents as a function of their eventual success or failure (analogies, forfeitable nonvested pensions performance bonds);



(7) **Penalize corrupt behaviors:**

- Increase the *principal's authority to punish*;
- Raise the *general level of formal penalties*;
- *Calibrate penalties* in terms of deterrence (as a function of the size of the bribe and the size of the illicit profit);
- Use *nonformal penalties* (transfers, publicity, loss of professional standing, blackballing).

(8) **Change agents' ideology (*attitudes*) about corruption:**

- Use *training, educational programs, and personal examples*;
- Promulgate a *code of ethics* (civil service, particular organizations);
- *Change the organizational culture.*

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SUMMARY

- This constitutes the *final session* in the Distance Course, **Legislative Drafting for Democratic Social Change** which focuses on the *reality that transition and development require laws to change the behaviors that comprise dysfunctional institutions*:



- (1) The **A Stream** aimed to equip you with a *legislative theory and methodology* to guide you in conceptualizing how to translate policy into effectively implemented law – that is, to prepare a *research report* that, using facts and logic, demonstrates that your bill will likely help to resolve to the social problem addressed;
- (2) The **B Stream** aimed to give you the *legislative techniques* to draft a bill's detailed provisions to make it probable that the responsible officials would implement them and induce the primary addressees to change their behaviors in appropriate ways.

- In **this session**, we have underscored again the necessity of *drafting defensively against arbitrary official decision-making (especially corruption)*; and
- offered several *devices for limiting official's discretion* and ensuring the *transparency and accountability* essential for the good governance required to attain development or transition to meet the basic needs of your country's citizens.



- We prepared these audio-presentations some months ago, and *hope they have proved helpful*.

- (1) In this **B Stream**, we have tried, in particular, to give you an opportunity, not merely to study drafting, but *to do drafting*.
- (2) Now you have had an *opportunity to critique* your own and eachothers' bills and research reports, and in so doing to



- *assess what you have learned*, and
 - to think through *how you may use legislative theory, methodology and techniques* in your own future work.
- (3) We would *appreciate your suggestions*, based on your own experience, for enabling future participants to gain more from --
 - the audio-presentations,
 - the Study Guide, and,
 - the entire course.

- We wish you all the best, and very much look forward to hearing from you!