

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

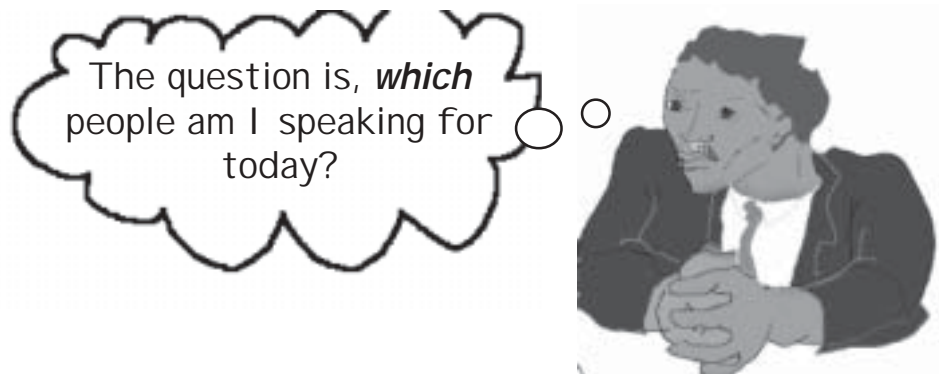
In nearly every country (particularly in the developing and transitional worlds) newly elected legislators exercise only limited independence. Long ago, Gilbert and Sullivan made great sport of the English MP who “...always voted at his Party’s call, and never thought of thinking for himself at all.”

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.

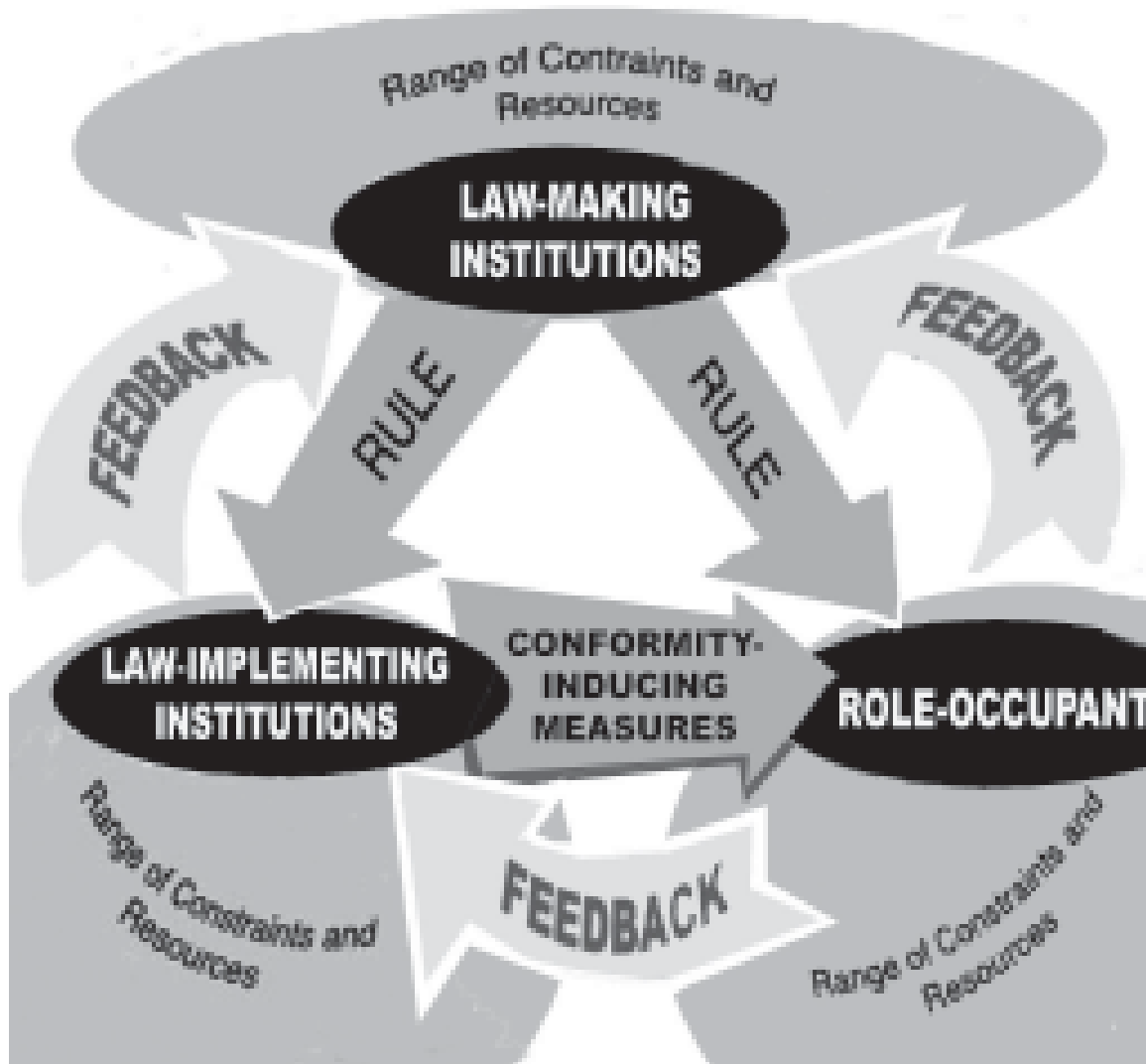
D. WHY DO PEOPLE BEHAVE AS THEY DO IN THE FACE OF A RULE OF LAW?

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?