

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?¹ 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.² 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.⁴

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 -

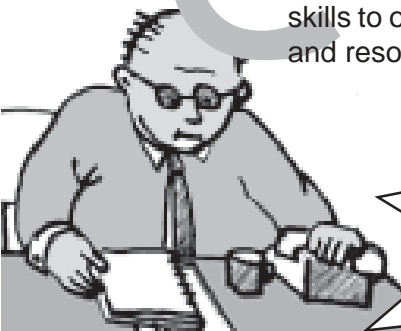
- 1) prescribe or expressly **permit** the problematic behaviors?
- 2) expressly or by vague or ambiguous wording grant **discretion** to its addressees to decide how they should behave?
- 3) specify **criteria and procedures** likely to ensure that implementing agency officials make decisions using 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?

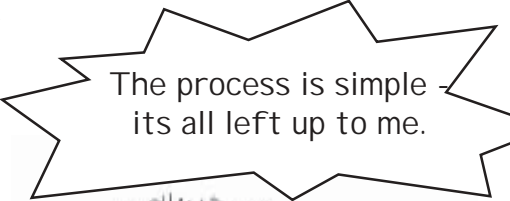
The category, 'Interest' (or incentives) refers to the actors' own perceptions as to how the existing law's costs and benefits affect them and people close to them. These may include material benefits, like increased cash or fringe benefits. They may also include non-material incentives, like power or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

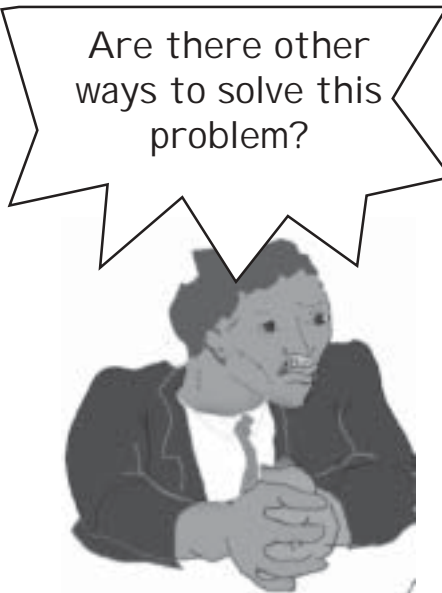
For example, to explain an official's arbitrary decision-making, the category 'Rule' might 'spark off' an hypothesis that the law grants that official unlimited discretion; the category, 'Capacity'; might suggest another hypothesis; the category, 'Process', a third. No matter which category inspires 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 .

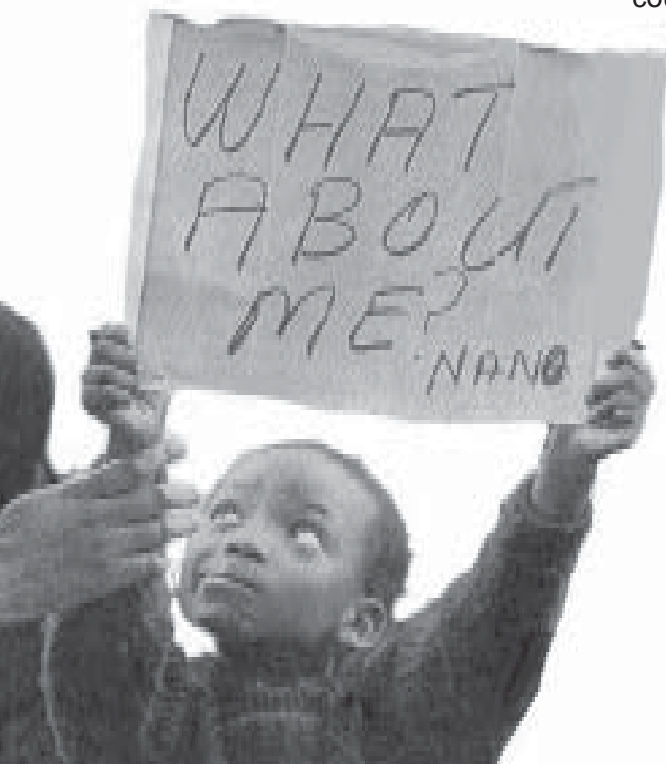
- (1) **On various social strata.** No law impacts all society's diverse social groups equally. Even a seemingly simple new law that requires drivers to change from driving on the right instead of the left side of the road imposes massive costs on the owners of existing automobiles, whose right-hand-drive 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 difficult. 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.'

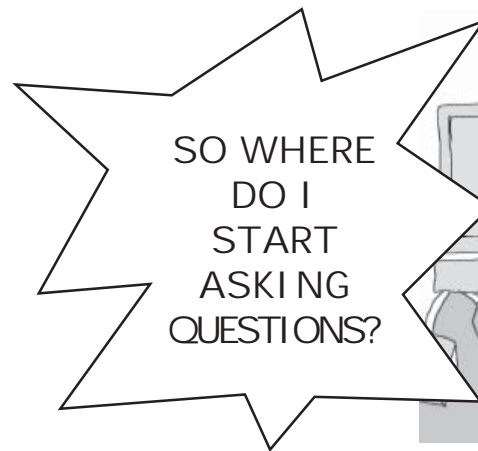
Conversely, to assess a bill with a seemingly narrow scope, ask about the general context within which the bill will fit. For example, if you receive a bill addressing only the problems of the central bank, ask how it fits into the legal regime for commercial and other banks, stock exchanges and insurance 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

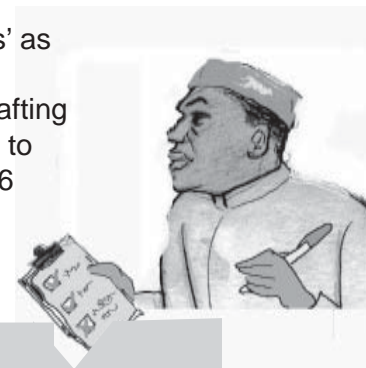
This checklist aims to remind a wise legislator of the factors to consider when assessing a bill. No matter the bill's subject-matter — the adoption of children, labor safety in coal mines, court procedures, or anti-competitive behaviors — it suggests the questions to ask to assess it.

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 ROCCIP 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:

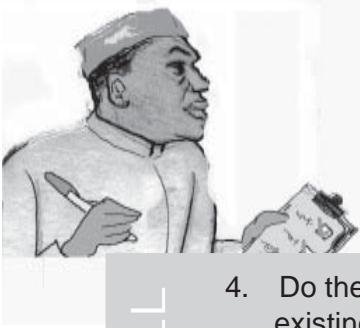
1. **Rules:** Do the existing rules forbid the problematic behaviors?
 - a. Do the present rules expressly require or permit the problematic behaviors?

- 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?

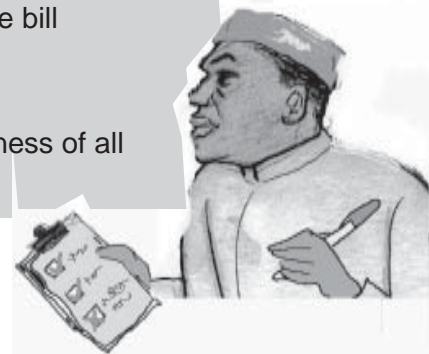
1. Request a detailed description and explanation of the bill's major provisions — in plain language.
2. Does a review of your country's **history** of efforts to use law, or **other countries' laws and experience**, provide insights into possible solutions, other than the one proposed in the bill?
3.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