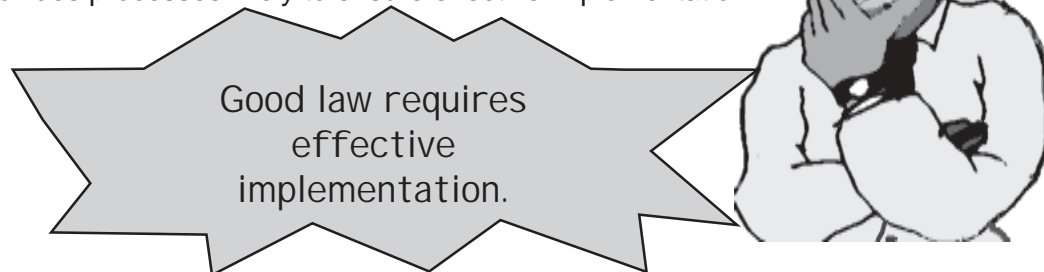


# CHAPTER 6: ENSURING A LAW'S EFFECTIVE IMPLEMENTATION

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

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



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

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

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

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

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

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



Most new laws address old problems.

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

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

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

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

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

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

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

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

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

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



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

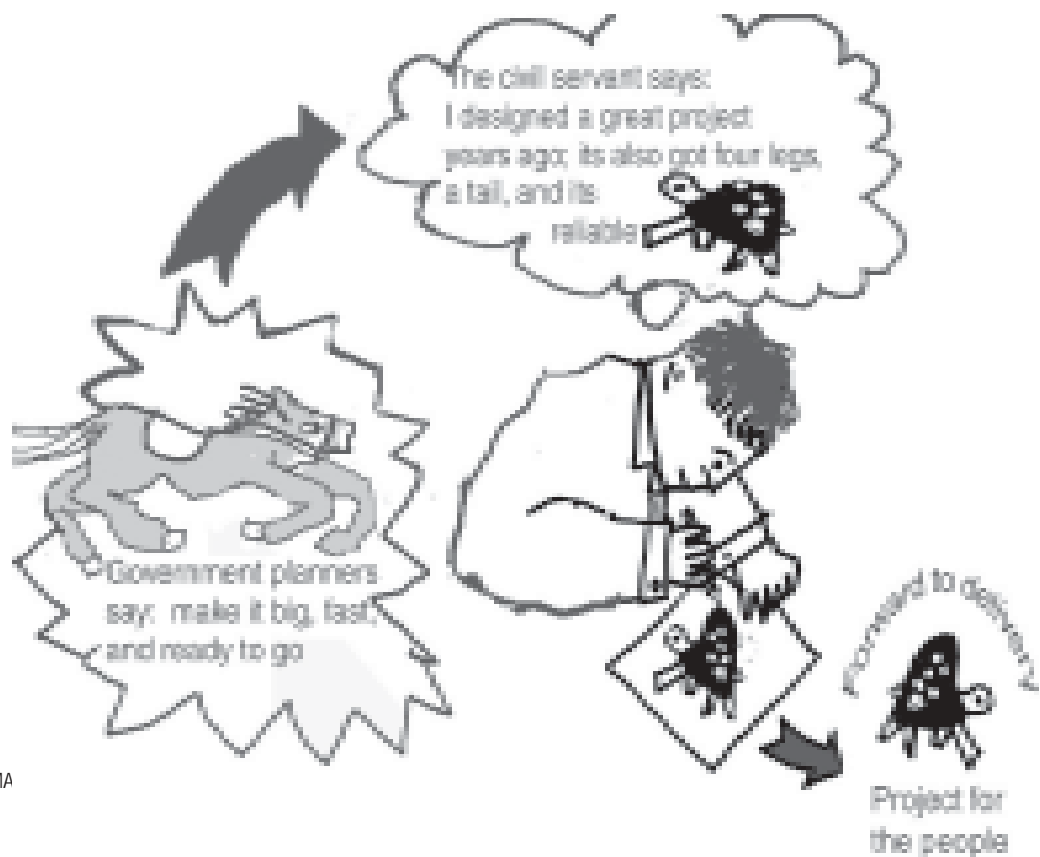
Based on weaknesses in most implementing agencies' **structure**, two hypotheses frequently prove useful in explaining officials' behaviors: mechanisms do not exist adequately to implement rules addressed to officials; and some officials' prescribed duties conflict with their personal interests, ideologies,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

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

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

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

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



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

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



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

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

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



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

CHECKLIST: OFFICIAL'S BEHAVIOUR

**CHECKLIST: EXPLAINING OFFICIALS' PROBLEMATIC BEHAVIORS**

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

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

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

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



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

**II. Explanations for problematic official behaviors**

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

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

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

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

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

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

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



## CHECKLIST: OFFICIAL'S BEHAVIOUR

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

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

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

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

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

a. What form do these domain assumptions take?

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

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

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

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



**B. Conversion processes:**

In particular, ask about conversion process officials:

1. **Rule:**

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


## 2. Opportunity and capacity

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

## 3. Process:

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

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



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

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

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

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



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

This section discusses questions directed at assessing:

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

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

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

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

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

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

### ROUNDAABOUT MEASURES

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

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

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



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

## A TALE WITH A MORAL

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

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

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

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

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



Moral: Punishment does not solve every behavioral problem.



Avoid over-criminalization of the law.

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

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

## 2. Punishments vs. rewards

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

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

### EXAMPLE: TAX SUBSIDIES

#### TAX SUBSIDIES

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

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

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

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

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

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

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



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

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

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

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

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



**b. New or old agency?**

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

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

**c. What kind of agency?**

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

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

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

FOUR KINDS OF IMPLEMENTATION AGENCY

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

## I. DISPUTE-SETTLEMENT INSTITUTIONS AS IMPLEMENTATION AGENCIES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**Government administration through implementing agencies — disadvantages**

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

**III. IMPLEMENTATION THROUGH A STATE CORPORATION**

**State corporations as implementing agencies — advantages**

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

**Disadvantages**

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

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

## IMPLEMENTATION THROUGH A PRIVATE AGENCY

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

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

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

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

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

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

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

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



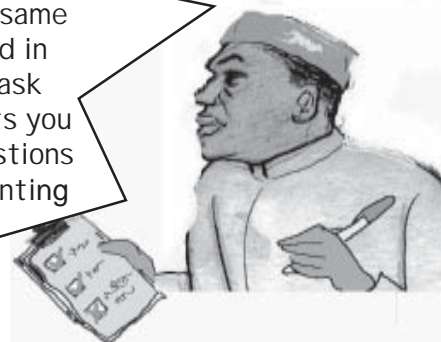
2. A few times a winter, **Maine**, one of 50 states in the US, experiences heavy snowstorms. To clear snow off the roads quickly after a blizzard requires many trucks or tractors equipped with snowplow blades. Maine communities could either (a) purchase many trucks and tractors, most of which would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



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

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

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



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

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

CHECKLIST: AN IMPLEMENTING AGENCY'S STRUCTURE AND PROCESS

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

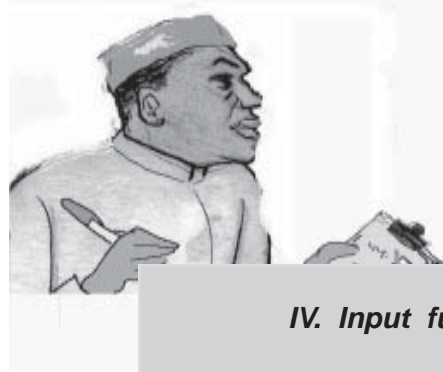
1. If an old agency (for example, an existing ministry), which agency?
2. If a new agency, what does the bill prescribe about its title and location in the existing bureaucracy? Do these seem appropriate?

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

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

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

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



CHECKLIST: ON AN IMPLEMENTING AGENCY'S STRUCTURE AND PROCESS

**IV. Input functions:**

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

**V. Feedback functions:**

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

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

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

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

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

#### VII. Appeals:

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

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

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



## C. TRANSITIVE VS. INTRANSITIVE BILLS

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

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

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

**DEFINITIONS: TRANSITIVE AND INTRANSITIVE LAWS**

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

How can you assess a bill for an intransitive law?



**That assessment requires two steps:**

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

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

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

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

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

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

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

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

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

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

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





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

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

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

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

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



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

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

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

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

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



## 2. When to write intransitive bills?

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

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

### a. *Difficult subject matter*

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

When is this kind of law really necessary?



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

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

**c. Widely differing circumstances**

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

**d. Rapid change**

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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



## EXERCISE: TRANSITIVE OR INTRANSITIVE?

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

### 3. Assessing an intransitive bill.

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

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

Always ask:

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

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

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

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

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

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

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





## CHECKLIST TO ASSESS AN INTRANSITIVE BILL

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

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

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

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

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



## SUMMARY

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

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

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

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

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

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

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

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

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



## EXERCISES:

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