

Outline for legislative theory workshop

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Boston University

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OUTLINE FOR A NINE DAYS' WORKSHOP IN LEGISLATIVE THEORY,
METHODOLOGY AND TECHNIQUES IN LAO PDR

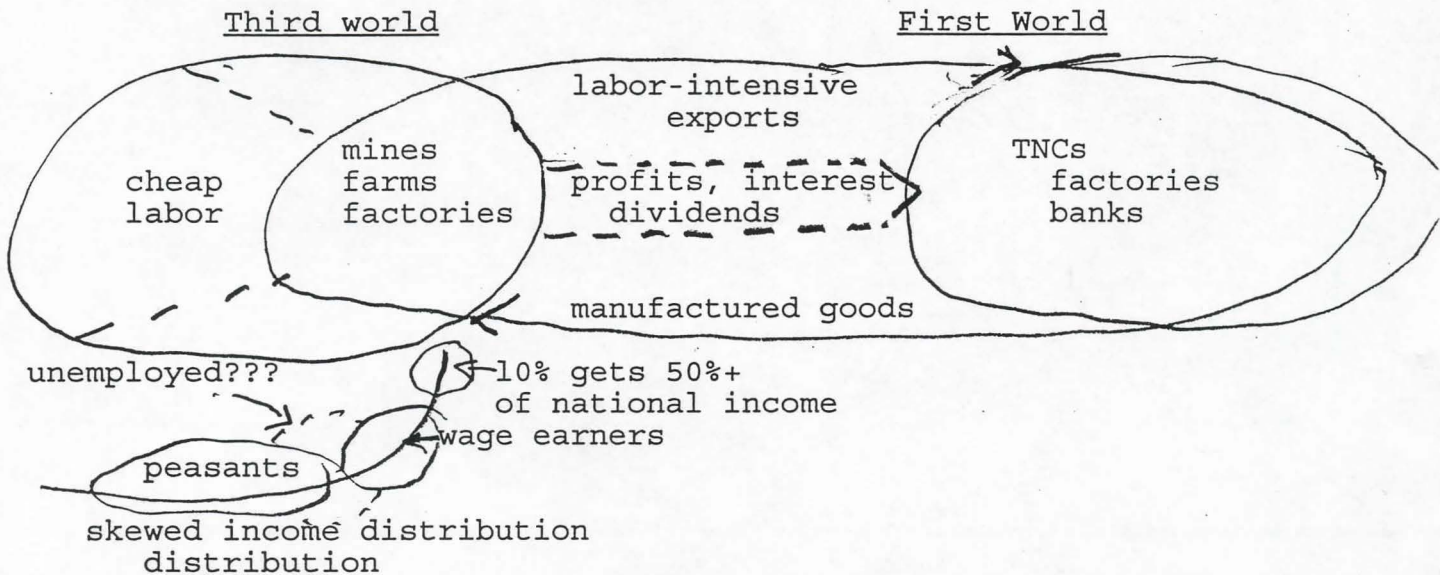
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DAY ONE

I. DIFFICULTIES LIKELY TO HINDER CREATING INSTITUTIONS REQUIRED FOR NEW ECONOMIC MECHANISM

A. Third World dependency (does this exist in Lao PDR?)

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Fig. 1: Model of Third World Dependency



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B. Emergence of bureaucratic bourgeoisie in the Third World (do the same tendencies exist in Lao PDR?)

II. LAW, AS AN INSTRUMENT FOR SOCIAL CHANGE, CAN ONLY TRY TO CHANGE INSTITUTIONS BY CHANGING PEOPLE'S BEHAVIORS

A. Dependency and bureaucratic bourgeoisie are shaped by institutional relationships

1. Institutions are repetitive patterns of behavior partly shaped by existing laws.
2. Creating NEM requires new institutions (new patterns of behavior).

B. Debate over the functions of law:

1. Law declares rights and duties

2. Law reflects the economic base

3. Law is government's principal tool for changing behaviors and therefore institutions

C. If a law is to change behaviors (institutions), then from the beginning drafters must consider how it will be implemented.

1. This is true even where local practice separates law from its implementing decree (as in Lao PDR).

D. Small groups¹: How does the problem your bill aims to solve fit into Figure 1? How might your bill help to prevent emergence of a bureaucratic bourgeoisie? What questions will you ask foreign consultants about similar problems in other countries?

III. HOW MIGHT LAO PDR DEVELOP LAWS TO CREATE AN APPROPRIATE LEGAL FRAMEWORK FOR ITS NEW ECONOMIC MECHANISM (NEM)? .

A. Debate about three general strategies

1. Copy laws from other countries

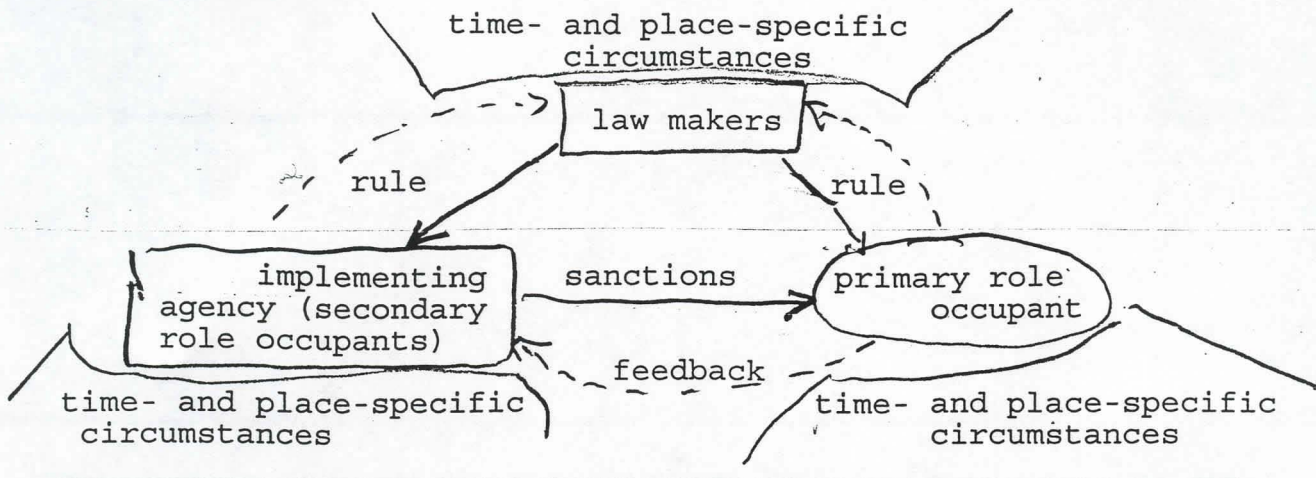
2. Follow 'international standards'

3. Develop law specially for Lao circumstances.

B. Is it possible for a country to copy law from another country, or to follow 'international standards', and achieve the same results in the new country as the law apparently achieved in its original country or countries?

¹ The workshop will break into small groups at points indicated throughout this outline. Each group will deal with specific issues relating to their research report and bill and, taking turns, report on their conclusions (including their questions for their consultants) to whole workshop for general comments. Members of the other groups will be assigned to make constructive suggestions, drawing on their own groups' discussions, for improving specific aspects of those reports.

Figure 2: MODEL RELATING LAW TO THE BEHAVIOR OF ITS ADDRESSEES



1. Model shows how time- and place-specific circumstances affect social actors' (role occupants') behaviors in face of law;

2. 'Law of Non-Transferability of Law': A law that leads to one kind of behavior in one time or place will only accidentally lead to the same behavior in different circumstances.

C. Small groups: What strategy was first used to draft your bill? What questions will you ask foreign consultants about the strategies used to draft similar laws in other countries? How should a Lao drafter deal with a proposed bill drafted by a foreign consultant based on foreign models?

DAY TWO

IV. A PROBLEM-SOLVING METHODOLOGY FOR DRAFTING NEM BILLS

A. Three available agendas; each uses research differently:

1. Ends-means: select goals, do research only about means of achieving them.

2. Incrementalism: use law only to make small changes, gathering facts as you go. Theory explicitly viewed as of no practical use.

3. Problem solving: guided by theory, use facts at each of four steps

a. **Identify difficulty**: Whose and what behavior constitutes the social problem bill aims to change?

(1) Get facts about nature and scope of difficulty and role occupants' behaviors

(2) Note: role occupants will usually include not only the primary role occupants, but also the implementing agency, (or secondary role occupant).

countries;

b. The causes other countries identified for those problems;

c. The solutions other countries tried, and their social costs and benefits;

d. The systems of monitoring the solutions other countries used, with what success.

C. Small groups: As a first step in drafting your research report,

1. Outline the first major section: a) describing whose and what behaviors constitute the social problem your bill aims to address; and b) the facts you will need to get about those behaviors.

2. List questions to ask your consultants about whose and what behaviors comprise similar social problems in other countries.

V. THE FORM OF A COMPETENT RESEARCH REPORT :

A. To ensure research report's readers follow your arguments, your final draft report will need (1) a general introduction; (2) connectives between major sections, (3) mini-introductions and mini-conclusions to major sections, (4) topic sentences to each paragraph, and (5) a general conclusion.

B. Always provide references to tell readers where you found important facts.

DAY THREE

VI. LEGISLATIVE THEORY AS A GUIDE FOR DRAFTING RESEARCH REPORTS AND BILLS .

A. Three ways of using theory: As metaphor, as critique, as guide.

B. Criteria for assessing theory:

1. Uses reason informed by experience;

2. Facilitates popular participation;

3. Has capacity for self-correction

C. Elements of theory: Methodology (see IV above); perspectives; categories of possible relevant explanations.

VII. PERSPECTIVES: THE FUNCTION AND KINDS OF GRAND THEORY.

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b. **Formulate explanatory hypotheses** (educated guesses) as to causes for role occupants' behaviors (including existing implementation agencies); and gather facts to test them.

- (1) An adequate explanation for primary role occupant behavior will almost always include a description of implementation agency behavior.

c. **Propose solution (bill):**

- (1) List possible alternative measures logically likely to overcome causes of unwanted behaviors;
- (2) List possible agencies to implement measures, and sanctions they might use;
- (3) Gather facts as to social costs and benefits to decide which measures and agencies to put into bill;
- (4) Check to be sure the solution selected will likely change or eliminate each cause of the unwanted behaviors.

d. **Monitoring implementation:** gather facts as to effectiveness of implementation of law, once enacted, and its social impact.

B. Using a problem-solving approach drafters must write a detailed report of research:

1. Research report has three functions:

a. writing report pursuant to a required outline guides the drafter in conducting the research needed for sound decisions

(1) see Attachment #1 for outline of research report for a transitive law [next week we will discuss possible reasons for drafting intransitive laws which may require a somewhat different research report outline].

b. research report demonstrates that the drafter has completed the necessary research;

c. research report enables lawmakers better to decide if the bill will likely help make desired institutional changes.

2. Research report should include possible relevant lessons from foreign law and experience. While other countries' experiences never exactly match Lao PDR's circumstances, report should discuss the facts as to:

a. How similar problems appeared in other

4. Feedbacks.

C. Non-legal constraints and resources (always time- and place-specific):

1. Subjective factors: incentives ('interest') and values ('ideology').

a. Note that 'interest' may include the threat of sanctions imposed by an implementing agency.

2. Objective factors: Opportunity, Capacity, Communication, Process

D. ROCCIPI (in English) helps to remember these categories.

E. Small groups:

1. To begin outlining the section of your research report on the causes of the social problem your bill will address,

a. use ROCCIPI to formulate explanatory hypotheses for one set of the primary role occupants' behaviors. Be sure to consider whether and how the behavior of an existing implementing agency helps to explain that primary role occupant's behavior;

b. identify facts you will need to test your hypotheses.

2. List questions to ask your consultants about possible explanatory factors for similar role occupants' behaviors in other countries.

DAY FOUR

IX. EXPLAINING IMPLEMENTING AGENCIES' BEHAVIORS .

A. Can a law be at the same time both "a good law" and "a badly implemented law"?

1. Rule: Never draft a law without simultaneously drafting the implementation decree!

B. Explanations for implementing agencies' behaviors

1. Implementing agencies as complex organizations (see Figure 3)

A. Three ways to control discretionary choices in problem-solving:

- 1. 'Values and attitudes'.
- 2. Ideal types (or 'vision').
- 3. Grand Theory (or very general explanations of the world).

B. Three sets of Grand Theories: Market theories and economic liberalism; basic needs/structuralism; transforming institutionalism.

C. Grand Theory as a guide to identifying significant difficulties, suggesting explanations and the range of solutions.

D. Small groups: What kinds of difficulties, explanations and solutions would each Grand Theory suggest for your bill? Can you gather facts to test them? What questions will you ask your consultants about the use of grand theories in other countries in the course of designing laws?

VIII. RELEVANT CATEGORIES OF POSSIBLE 'MIDDLE-LEVEL' EXPLANATIONS FOR BEHAVIORS THAT CONSTITUTE SOCIAL PROBLEMS YOUR LAWS SEEK TO OVERCOME

A. Legislative theory proposes categories of possible explanations for behaviors:

- 1. 'Middle level' explanatory hypotheses are those that purport to explain relatively narrow sets of behaviors.
- 2. Note: Behaviors almost always result, not from one, but from several causes.

B. What categories for explanations does Figure 2 suggest?

- 1. Rules addressed both to the role occupant and to the implementing agency.
 - a. Existing law always constitutes one explanation for behavior. Behavior always takes place within an existing framework of laws. Those laws always have some effect on behavior -- i.e., they help explain it.
- 2. Sanctions and sanctioning behavior by the implementing agency.
- 3. Non-legal constraints and resources of role occupant and of implementing agency (an extremely vague category).

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FIG. 3: MODEL OF A COMPLEX DECISION-MAKING ORGANIZATION
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inputs
processes

conversion
processes

outputs
(decisions)

feedback processes
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a. Note that each of these 'processes' consist of sets of role occupants behaving in repetitive patterns of behavior, usually in the face of explicit laws or regulations.

2. To explain an implementing agency's behavior (that is, what it does or does not do to implement the law) consider the agency as a role occupant in terms of Figure 2. Under 'process' in the ROCCIPi agenda, consider the agency as an input-output decision-making process in terms of Figure 3. That requires you to examine the behavior of particular officials who occupy places in the input, feedback and conversion processes.

C. Small groups:

- 1. Outline for your draft research report a section on
a. what seems wrong with the behavior of the agency presently responsible for implementing the existing laws relevant to your difficulty;
b. your explanatory hypotheses for that agency's behavior; and
c. the facts you should gather to test your explanatory hypotheses.
2. List questions to ask your consultants about implementing agencies in other countries.

X. SOCIAL SCIENCE RESEARCH TECHNIQUES: THE IMPORTANCE OF HYPOTHESES

- A. 'Hypothesis' defined.
1. Descriptive and causal hypotheses distinguished
B. The function of hypotheses: To guide the search for facts.
1. What count as 'facts'?

DAY FIVE

XI. SOCIAL SCIENCE RESEARCH TECHNIQUES: GATHERING THE FACTS

- A. First review already-known facts:

- 1. Assess their relevance to proving your hypotheses.
- 2. Assess their reliability. That depends mainly on methods used in gathering facts (how 'reliable' must facts be for drafters' purposes?)

B. If already-known facts prove irrelevant or unreliable, need enough knowledge of methods to critique proposals for new research.

C. Methodological issues related to reliability of facts:

- 1. Sampling: given stratification by class, sex, age, ethnicity, how should a researcher select representative examples of 'role occupants'?
- 2. The uses of quantitative evidence and qualitative evidence.
 - a. 'Qualitative evidence' distinguished from mere anecdotes.

D. Methods of gathering facts:

- 1. Interviews
- 2. Focus groups
- 3. Participant observation
- 4. Survey data

E. Small groups:

- 1. List facts you now have as to nature of role occupants' problematic behaviors and as to your explanatory hypotheses as to the causes of those behaviors.
- 2. Identify additional facts you may need and how you might get them, including: a) additional possible sources of information; b) further research that might be necessary.
- 3. List questions to ask your consultants about kinds of research conducted to obtain facts about similar social problems and their causes in other countries?

DAY SIX

XII. PROPOSALS FOR SOLUTIONS: DRAFTING YOUR BILLS TO ADDRESS CAUSES OF PROBLEMATIC BEHAVIORS AT LOWEST POSSIBLE SOCIAL COST

A. Sources of possible solutions:

- 1. Foreign law and experience;

2. Scholarly books and articles;
3. Lao experience
4. Your own ingenuity.

B. Two kinds of bills: Transitive and intransitive

1. Transitive bills tell role occupants in detail how they should behave. (for general outline see Attachment #1);
2. Intransitive bills direct a Ministry or other agency to write detailed regulations, identifying the agency's subject-area and powers, and specifying general criteria and procedures for their decisions (for a general outline see Attachment #2).

Some typical reasons for for drafting an intransitive bill: (1) Too many different role occupants for the bill to deal with directly; (2) the role occupants' circumstances differ a great deal from place to place; (3) further research is needed to provide adequate rules.

C. Small groups:

1. Tentatively decide if you plan to draft mainly a transitive or an intransitive bill, and outline the reasons for your decision for the research report.
2. If you propose to give any agency power to make rules, outline a section of the research report describing and giving reasons for its proposed structure; its powers and duties; the criteria and procedures for its rule-making powers.
3. List questions to ask your consultants about transitive versus intransitive laws in other countries?

XIII. CONFORMITY-INDUCING MEASURES ('SANCTIONS')

A. Three kinds of measures may induce role occupants to behave as desired:

1. Direct measures (rewards and punishments)
2. Roundabout measures (to change factors causing problematic behaviors)
3. Educative measures (to change values, attitudes)

B. Small groups:

1. Outline section of research report describing conformity-inducing measures you propose to use for your bill. Show how each measure seems logically likely to help change or eliminate causes of undesired behaviors.

2. List questions to ask your consultant about foreign experience with various kinds of conformity-inducing measures.

XIV. CHOOSING AND STRUCTURING AN IMPLEMENTING AGENCY: ISSUES YOU MUST ADDRESS:

A. Old or new agency?

B. Proactive or reactive agency?

C. Methods of implementation (through dispute settlement; through bureaucracy; through public corporations)

1. Note limits on courts' utility as implementing agencies

D. How to finance the agency?

E. How will aggrieved parties appeal agency's decisions? What criteria and procedures should govern decisions of appeals body?

F. Devices to encourage popular participation in agency's decision-making (for example, public hearings and other forms of popular input processes, decentralization of decisions, reducing government secrecy, periodic public reports by officials bodies)

G. Form of the section of the bill setting up a new implementing agency (See attachment #3).

H. Small groups:

1. Outline the section of your bill concerning the implementing agency you propose: its size; appointment and terms of members; powers; duties; method of finance; system of appeals; etc.

2. List questions to ask your consultants about relevant foreign law and experiences in establishing implementing agencies?

DAY SEVEN

XV. DRAFTING FOR THE RULE OF LAW: CONTROLLING OFFICIAL BEHAVIOR (INCLUDING THE CONTROL OF CORRUPTION)

A. Two sorts of official misbehaviors:

- 1. Officials who violate rules in their own self-interest -- especially corruption.
 - a. Corruption as a world-wide phenomenon; its importance in developing a bureaucratic bourgeoisie and in destroying popular anti-colonial revolutions.
- 2. Officials who enforce rules in ways that violate the rules' purposes.
 - a. This is actually the typical case of improper implementing agency behavior; its explanation and solution we discuss throughout this workshop.

B. Corruption: In terms of the ROCCIPI research agenda, what explanations would you give for corruption?

C. Solutions for corruption: Drafting your bill to avoid the ever-present potential for corruption.

1. Controlling officials' discretion

- a. The meaning of 'discretion'
- b. The uses and abuses of discretion.
 - (1) Basic rule: As little discretion as the nature of the bill will allow.
- c. Six devices to control discretion:
 - (1) Bright line rules (or as close as possible!)
 - (2) Considerations to take in to account in coming to decision
 - (3) Requiring the agency to keep in force regulations to guide its discretion
 - (4) publishing opinions and following precedent
 - (5) Procedural devices (examples: (i) requiring written decisions; (ii) permitting appeals; (iii) providing mechanisms for inputs from specific sets of interested parties, or the public (for example, public hearings, or notice-and-comment).
 - (6) Impact statements.

2. Transparency for all official business
3. Audit and control systems
4. Rewards to informers
5. Civil suits to persons injured by corruption (for example, other bidders for a public contract).
6. The criminal law (the weakest control over corruption).

D. Small groups: (1)

1. Draft a provisions of your bill dealing with the discretion of an official in the implementing agency.
2. Draft provisions in your bill to make corruption less likely?
3. List questions for your consultant about other countries' devices to reduce corruption.

XVI. MAKING A SOCIAL COST/BENEFIT ANALYSIS TO SELECT MEASURES FOR YOU BILL.

A. To explain choice of measures for bill, research report should assess likely social costs and benefits of the major possible measures (for example, (i) money costs; (ii) effects on quality of life and environment, especially for vulnerable groups (women, children, poor, minorities); (iii) impact on various groups in the population, for example, farmers, businessmen, labor, civil servants, etc; (iv) impact on stratification between rich and poor; etc.).

B. Small groups:

1. Outline the social cost-benefit section of your research report.
2. List questions to ask your consultants about how social cost-benefit assessments are made in other countries.

XVII. CHECKING YOUR PROPOSED BILL AGAINST ROCCIPI RESEARCH AGENDA.

A. Research report should show bill includes measures likely to eliminate each cause of role occupants' problematic behavior

B. Small groups:

1. Using ROCCIPI agenda, outline the section of your research report to show how the proposed bill will change

the causes of existing problematic behaviors of at least one role occupant.

2. List questions to ask your consultants about this kind of analysis in other countries?

DAY EIGHT

XVIII. DRAFTING THE BILL: FORM

A. Guides to interpretation

- 1. General Principles
- 2. Title
- 3. Preamble
- 4. Legislative findings

B. Parts, grouping and ordering

- 1. General outline for a transitive bill (see Attachment #4); general outline for an intransitive bill (see attachment #5).

C. Rules for clarity and elegance

- 1. Use a simple vocabulary
- 2. Short sentences
- 3. Tabulate to simplify

D. Small groups:

- 1. Outline overall draft bill.
- 2. Write the general principles, title, and legislative findings.
- 3. What questions will you ask your consultants about the outline of the bill?

XIX. DRAFTING CRITICAL SECTIONS OF YOUR BILL

A. Focus on the Who and the What:

- 1. Which role occupants does bill tell to behave in what kinds of ways?

2. Small groups:

- a. Draft a provision of bill to tell one set of

primary role occupants' behaviors how to behave.

b. List questions to ask your consultants about foreign laws' experience relating to provisions prescribing role occupants' behaviors?

B. Establishing the implementing agency:

1. See Attachment #3 for suggested outline of main features;

2. Small groups:

a. Draft the part of your bill setting up an implementing agency.

b. List questions to ask your consultant concerning experience of foreign laws that establish implementing agencies dealing with similar problems.

DAY NINE

XX. MONITORING PROVISIONS IN BILL

A. The necessity of monitoring provisions

1. Monitoring and evaluation = essential fourth stage in problem-solving;

2. Devices for monitoring:

a. Supervision, regular reviews, reports, etc.

b. Enabling those affected (especially vulnerable groups) to participate in evaluation process.

B. Small groups:

1. Draft bill's provisions dealing with supervision and evaluation of your bill.

2. Write section of research report to give reasons for choosing these provisions.

3. List questions to ask your consultants about other countries' systems of feedback?

XXI. Definitions of key words used in bills:

A. Importance of consistent use of words

B. Theory of definitions

C. Forms for definitional sections

D. Rules for definitions

E. Small groups:

1. List words in your bill that require definitions. Write the definitions for a special section of your bill.

2. List questions to ask your consultants about the definition section?