

CHAPTER SEVEN: CAPTURING AND ASSESSING THE FACTS



This chapter focuses on how to assess whether, in the public interest, a bill's details appear grounded on available facts. Viewing the legal order mainly as a set of rules to guide judges in deciding lawsuits, most lawyers study only the laws-in-the-books. That makes sense when a lawyer seeks to solve a problem arising within an existing legal system ***Legislative theory, in contrast, requires studying the law-in-action; that is, analyzing why people behave as they do in the face of existing laws.*** Studying ***behavior*** in the face of a rule makes sense when you must decide what the law ought to be. In courts, the discourse concerns the interpretation of the law, the application of existing rules to a set of facts; for law-making, in contrast, the discourse centers on changing the behaviors that comprise social problems.

This chapter

- A. Reviews problem-solving as a guide to formulating hypotheses that provide criteria for finding relevant facts;
- B. Suggests shortcuts and the importance of stakeholder participation in finding those facts; and
- C. Considers the significance of different ways of gathering the facts: quantitative vs qualitative methods; representative samples; and foreign law and experience.

A. FINDING THE RELEVANT FACTS

At each of problem-solving's four steps, legislative theory suggests examining the facts as to existing problematic behaviors, their causes, and the the costs and benefits of the bill's detailed measures to change the. The drafters must show you that their hypotheses prove consistent with your country's realities. Otherwise, the bill may merely reflect their own assumptions. At best, they may address the symptoms of the problem, not its underlying causes.

A BILL MUST REST ON MORE THAN LOGIC OR THEORY– ASK FOR THE *FACTS*

Formally, the following syllogism’s logic has no flaws:

1. All cats have nine lives.
2. My cat, Tandy, is a cat.
3. Therefore Tandy has nine lives.

Despite its formal logic, the argument states nonsense. Its major premiss (“All cats have nine lives”) does not fit the facts. In the same way, a drafter’s justification for a bill, no matter how logical, may make no sense because its underlying hypotheses remain inconsistent with the facts.

Ask the bill’s sponsors for the facts you need to determine whether the law will serve the public interest!



If drafters base a bill’s substantive provisions on assumptions that **do NOT prove consistent with the available evidence**, either:

- (1) reject the bill;
- (2) require the bill’s sponsors to revise their hypotheses to fit the facts, and revise the bill’s details accordingly; or
- (3) suggest that the bill’s sponsors redraft the bill to direct an appropriate agency, pursuant to specified criteria and procedures, to undertake needed further research (see ‘intransitive laws,’ Chapter 6).

That a bill’s detailed provisions should rest on logic and facts argues that drafters should accompany an important bill with a research report that states its *underlying hypotheses and the essential facts, all tied together in a clearly articulated logical structure*.

Without hypotheses, which facts count as relevant? You have limited research resources. The facts stretch endlessly. Which ones should you try to capture? Your hypotheses guide you to the information which describes relevant behavior and their causes. Without hypotheses, you have no way of knowing where to start looking. Then ask: Do the available facts *falsify* the drafters’ hypotheses?



Why falsify?

WHY FALSIFY?

Try this: To test the hypothesis, that “Water boils at 100 degrees Centigrade,” boil water in an open pot **at sea level** 1000 times. Every time, the water will boil at 100 degrees Centigrade. If you boil the water just once in an open pot **at 5000 feet**, however, it boils at a lower temperature. By that one item of evidence that **falsifies** the hypothesis, you learn more than you learned by 1000 experiments that seem to warrant it. This story underscores two points:

1. You **learn much more by trying to falsify an hypothesis** than from evidence that **seems** to warrant it. **Make sure the drafters have considered all the facts that might prove their hypotheses false.**
2. Problem-solving’s fourth step, monitoring and evaluating the law’s social input reflects the importance of always treating **knowledge tentatively, experimentally, always open to the possibility of new evidence that may prove its underlying hypotheses false.**

B. GETTING THE FACTS

Usually – as does a drafter – you must rely on facts other researchers gather. You should know enough about social scientists’ fact-gathering techniques to intelligently **assess the facts** other researchers provide.

In the past, ruling through secretive, authoritarian law-making and implementing processes, political elites too often enacted laws that reflected, not the facts, but their own views. In the two leading legal systems – that of the English Commonwealth and the Napoleonic codes – they justified their laws by claiming that their provisions only stated as law ‘the custom of the realm.’ Since everyone knew those customs, they argued, who needed research?

Today’s law-makers consciously enact laws looking towards development and transition. But for a country seeking to leap from a recently post-colonial society – perhaps retaining elements of hoe-agriculture, kin-organized society, depending on exporting raw materials and low - technology manufacturing – into a society with high standards of productivity, education, health, housing, recreation and good governance, laws that do not rest on facts

and logic too often end up in the 'good law but badly implemented' category.

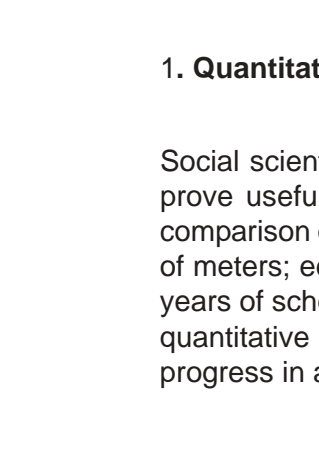
In the law-making or law-implementing process, someone – usually a ministry official, occasionally a fellow-legislator or a non-government organization's staff member – has evidence about an existing problem. To fulfil your duty as a law-maker, you must ask a bill's sponsors to demonstrate that they grounded the bill's details, not only on logic, but also **facts**. The trick lies in knowing what questions to ask these knowledgeable people.

By the late 20th Century, community activists and growing numbers of professional evaluators recommended engaging the stakeholders – those affected by the law, especially the poor and vulnerable – in drawing on their own experiences to make suggestions for improving legislative programs. As an elected legislator, you can help the stakeholders among your constituents to use the problem-solving methodology to gather and analyze the relevant facts as the basis of new rules. In the process, they may also figure out ways to improve resources to better their lives.



EXERCISE: STAKEHOLDER PARTICIPATION IN THE RESEARCH

1. Compare the advantages and disadvantages of asking stakeholders
 - (a) only to state their claims and demands compared to
 - (b) engaging them in an analysis structured by problem-solving's four steps.
2. Which stakeholders should participate in analyzing the causes and finding legislative solutions to particular social problems in your country?



Ask your constituents and leaders of civil society — church groups, trade unions, small enterprise associations, farmers' cooperatives — for help in gathering the facts.

- Encourage your constituents to provide facts about the nature and scope of problems that affect their lives; their own ideas as to the causes of the behaviors that contribute to them; and their suggestions as to how specific new legislative measures might induce new, more appropriate behaviors.
- Arrange hearings in your district to enable your constituents to talk directly with you and your colleagues about specific problems, their causes, and possible legislative measures.
- Encourage your constituents to survey community members' opinions to fill gaps in the available evidence relevant to solving social problems. To do that, urge them to use legislative theory's problem-solving methodology and the ROCCIPI checklist.

Can you think of other ways to involve your constituents in providing facts to help ensure that proposed transformatory laws will meet their needs?

C. SIGNIFICANT FACT-FINDING METHODS

Social scientists have developed a variety of techniques for gathering facts. You need to know enough about their methods to assess the implications of the facts they provide.

1. Quantitative and qualitative methods compared

Social scientists have developed quantitative and qualitative research techniques which prove useful for different purposes. **Quantitative methods** facilitate measurement and comparison of phenomena in terms of discreet units: Age in terms of years; height in terms of meters; economic inputs and outputs in terms of monetary units; education in terms of years of schooling. As societies became increasingly complex and monetized, gathering quantitative statistics served both to plan and administer resource use and to measure progress in achieving stated targets.

Social scientists also use quantitative techniques to learn about people's ideas or opinions. The people questioned, however, contribute only those small bits about their behaviors about which the researcher asks – not necessarily the facts that the informants consider important.

THE USES OF QUANTITATIVE EVIDENCE TO JUSTIFY A BILL

The case of an (hypothetical) proposed Land Reform Bill

To help assess whether to vote for a proposed land reform bill, you should ask for *detailed quantitative evidence* to answer two kinds of questions:

(1) Do the existing land-holding patterns block the poor majority of farmers from increasing their productivity and improving their quality of life?

Quantitative data might include facts as to:

- how many farmers comprise 'the poor majority';
- the average size of their land holding and per capita incomes compared to the large farmers;
- the existence of unused land on the larger farmers' holdings;
- the limits imposed by the majority's low incomes on the domestic market.

(2) Will the new bill's provisions likely increase socio-economic benefits that outweigh the probable economic costs?

Quantitative data might also include fact-based estimates of:

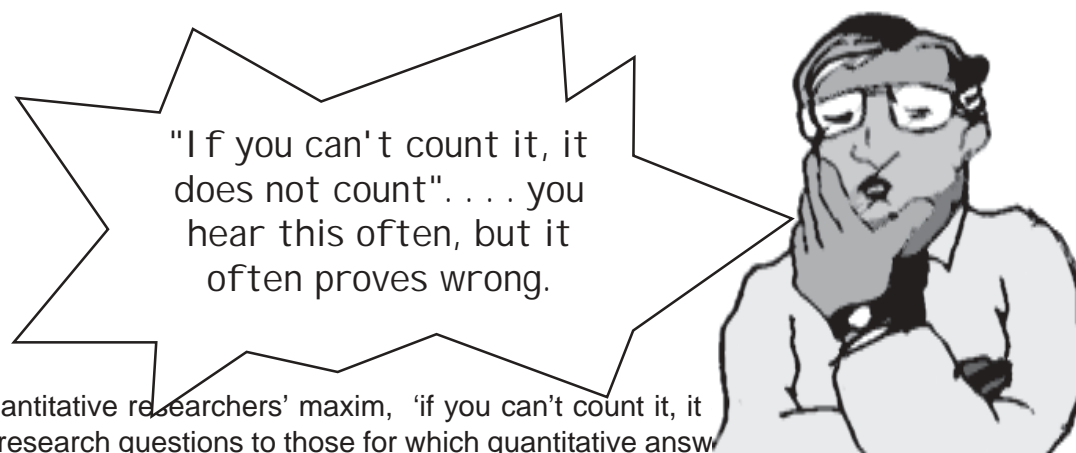
- the expected increased agricultural productivity per farmer;
- the resulting rise of poor farmers' per capita incomes;
- increased domestic sales of foodstuffs and agricultural exports (increasing foreign exchange reserves);
- increased domestic manufacture sales resulting from a more equitable distribution of rising incomes.

To warrant hypotheses concerning behaviors, surveys of large numbers of cases encounter obstacles. First, problematic behaviors reflect not one cause, but many interrelated causes. That makes it difficult to isolate one causal factor and gather data about

but what does this mean to my life?



it. Second, even if available techniques permitted gathering data about many causes, gathering the data often requires more resources than available. For those reasons, law-makers often rely primarily on research findings provided by **qualitative methods**.



The hard-nosed quantitative researchers' maxim, 'if you can't count it, it limits the choice of research questions to those for which quantitative answers are possible, so many tons of output, so many dollars (rands, yen) of goods sold, so many individuals trained. Only sometimes, and with great difficulty, can a researcher get quantitative answers, for instance about the quality of goods produced or sold, or the kinds and effects of 'training' on the individuals' behaviors.

To assess a bill, you need *all the facts* relevant to describing and explaining problematic behaviors, and to devising socially-desirable programs to change them. You must often ask questions about social actors' behaviors that researchers can only answer in terms of *unmeasurable qualities*.

THE USES OF QUALITATIVE DATA

Qualitative techniques focus on **interconnectedness**, requiring researchers to view people as **subjects**, with all the individualized complexities of whole human beings. Open-ended, rather than structured interviews; stories, rather than snippets of information; observations made by participants in group activities; focus groups: these kinds of qualitative methods tend to provide insights, not merely into narrow slices of reality predetermined by the researchers' questions, but into all the **interrelated circumstances of the subjects' lives**. Using problem-solving's four steps to structure their analyses, a group enquiry or participant- observers may generate deeper insights into causes of relevant actors' dysfunctional behaviors. These may lay a basis in facts for more effective legislative measures.

QUALITATIVE
DATA

To describe a social problem, qualitative evidence often seems sufficient. Whether the murder rate in a particular country totals 14 or 100 per 100,000 population per year, you would undoubtedly vote for a statute prohibiting murder. A surprising number of bills originate in a single anecdote: a person on parole for a sex crime conviction, by committing another sex crime, sparks new and repressive sex offender registration laws. A single coal mine collapse spurs enactment of new safety measures.

If a bill's sponsors provided more detailed information, however, you could more easily decide whether the relevant facts and logic **demonstrate that the bill's social benefits exceed its social costs**. For that, you need as much quantitative evidence as possible: the number and composition of the people the problem affects; their percentage of the total population; and the problem's present and probable future impact on their lives' quality.

You need facts to assess a bill's drafters' (often implicit) hypotheses as to **whose and what behaviors** constitute the social problem. Qualitative evidence may prove sufficient. That *some* industrial managers countenance the disposal of chemical wastes that pollute the underground water system focuses attention on their behaviors' causes and the likelihood that the proposed legislative solutions would change them. A survey showing the numbers of industries that discharge chemicals into the water, and the percentage of the water supply affected (i.e. quantitative evidence), however, might more effectively persuade you and your colleagues to vote for a proposed anti-pollution bill.

For generating information concerning the **causes of problematic behaviors**, 'focus groups' – small groups of stakeholders conversing together – quickly arranged and relatively inexpensive, may provide useful insights backed by anecdotal evidence. For example, a farmers' group may point out that many farmers cannot increase their crops' low yields because they do not have sufficient inputs to grow high-yielding varieties. Even without data on the precise number of farmers whose low productivity results from that cause, you might justifiably vote for a bill to help farmers obtain the essential inputs. To demand quantitative evidence to prove that hypothesis at a higher level of probability might unnecessarily delay legislative action.



Sometimes, you just have to ask.



USING A FOCUS GROUP TO GET FACTS ABOUT POLLUTING BEHAVIORS

Consider a focus group in your constituency of representatives of the community, plant workers, company managers and relevant implementing agency personnel. They could provide facts from their own experience as to the causes of industrial polluting behaviors. They might have useful insights on a proposed law's likely social costs and benefits.

The group's conclusions' validity, of course, would remain restricted to their own experience. Their analysis might however reveal that some plants lack the technology to dispose of particular toxic wastes in less polluting ways. That might suggest that, in addition to prohibiting the dumping of wastes into the underground water, the bill's provisions should assign a government agency to assist plant managers to acquire available non-polluting disposal technologies. Alternatively, the group might provide information about the possibility of prohibiting the manufacture of products using the toxic components, and requiring substitution of another, already-available non-toxic component. If these legislative provisions seemed likely to have no more than affordable costs, you might reasonably adopt them, even without further research.

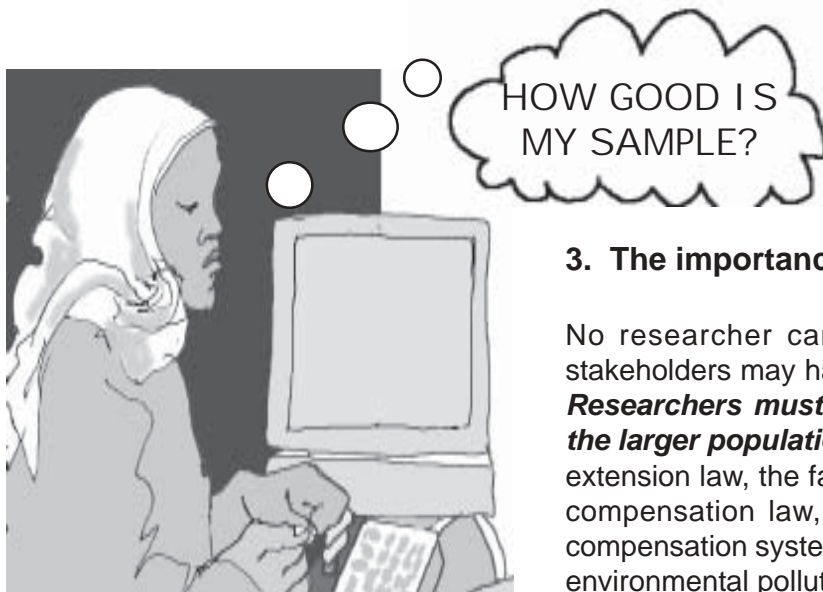
On the other hand, if the participants provided facts to show that prohibiting the use of the toxic chemicals threatens large social or out-of-pocket costs (like lost jobs, lost essential products, or high enforcement costs), you might consider a law to commission an agency or research institute to explore the possibility of using alternative manufacturing techniques.

To obtain evidence as to the generalizability of the focus group's analysis, the agency might undertake a quantitative survey of industries using the toxic chemical. The group might provide facts to help weigh the costs of making that survey — in terms of time, human and financial resources — against the likelihood that the proposed measure would reduce the pollution hazard. The group might suggest ways in which stakeholders might help to monitor and evaluate the proposed law's implementation and its social impact.

Quantifiable data proves valuable for ***weighing social and economic cost and benefits*** (see Chapter 4). If half of all farmers, rather than only 3 per cent of them, reaped low crop yields because of poor seed quality, you and your colleagues would more likely vote for a law to require the agricultural extension agency to give them access to modern seed strains.

Still, many ***social factors*** which you must assess in making a cost-benefit analysis defy quantitative measurement. Given time and resource constraints, you may have to rely on qualitative information. Remember to reduce the dangers of bias by ensuring that researchers who provide qualitative information use high level multi-disciplinary skills and employ carefully designed procedures and criteria. If a proposed law appears likely to

prove expensive in terms of implementation costs or possible negative consequences, you may wish to grant an agency power to undertake further necessary research, and, on that basis, to promulgate new administrative regulations. (See intransitive law, Chapter 6; and remember to limit agency rule-making power by specifying criteria and procedures.)



HOW GOOD IS
MY SAMPLE?

3. The importance of sampling techniques

No researcher can gather all the information that individual stakeholders may have about the causes of problematic behaviors. **Researchers must choose samples that adequately represent the larger population's relevant stakeholders:** for an agricultural extension law, the farmers and the extension agents; for a workers' compensation law, workers, factory managers and the existing compensation system personnel; for a law directed at some kinds of environmental pollution, members of the neighboring community.

The larger population of stakeholders almost never comprises an homogeneous group. Age, gender, ethnic, religious and class differences may significantly impact the way the causes suggested by the ROCCIPI agenda may influence the relevant actors' behaviors. Whether researchers select stakeholders to participate directly in designing and implementing the research process, in focus groups, or as informants in a broader survey, they should choose a sample that, as far as possible, represents all of the larger population's relevant segments.

Social scientists have designed techniques to minimize the danger of bias in selecting samples. Researchers decide which technique to use by comparing costs in terms of time, finances, and human effort. Always check: Did the researchers select a sample that adequately represented the groups and strata in the relevant population?

4. Learning from foreign law and experience

Since social actors' behaviors reflect unique country-specific realities, simply reading another country's legal text proves of little value. Factual studies about a foreign law's **social impact** (although not easy to find), on the other hand, may provide real insights into the possibilities and difficulties of introducing similar legislative measures in your own country.

Keep a lookout for the four practices that might limit the usefulness of evidence about other peoples' experiences with laws that, on their face, seem similar to the bill at hand:

Actually, in my country we tried to do exactly that. Of course I can tell you what happened to us. It's a long story and we learned a lot of things along the way None of it was easy. First, back in 1984 we tried to pass a law to lessen the amount of corruption on welfare grants, but the same officials continued to help themselves,,,,



- 1. Different concepts.** To make inter-country comparisons, researchers must use concepts with the same meanings. In particular, economic concepts used for statistical purposes in different countries may have quite different meanings — with significant social implications. For example: A government report that defines as 'employed' only those who work in the so-called 'modern' sector may lead to ignoring the way a new law, permitting imported goods to flood domestic markets, has caused growing numbers of informal sector workers to lose their jobs.
- 2. Different country circumstances** may cause informants in different countries to give misleadingly different answers to the same questions. Some may untruthfully answer survey questions about their family incomes because they fear increased taxes. To assess ability to handle tools, United States researchers might ask the difference between a screwdriver and a wrench; in developing countries, where many people have never used either, their answers would indicate nothing about their ability to use tools.
- 3. Interpretations of words.** Differences in language translations — ranging from different meanings for the same words to different culturally-determined answers to the same questions — may lead to misinterpretation of cross-cultural research findings. Ask, in different countries: Did the questionnaire's words mean the same things to those who answered them?
- 4. Sampling techniques** used in different countries may produce non-comparable conclusions. Try to discover the extent to which, in each country, the researchers used comparable population samples.

LIMITS ON USING OTHER
PEOPLE'S EXPERIENCES

You may learn a great deal by examining studies of specific laws' social impact in other countries. But to do so, you not only need an adequate legislative theory, but also sufficient knowledge about social science research methods to determine whether other countries' researchers' evidence really proves comparable to facts about your own country's realities. Only if it does can you justifiably rely on their findings to assess a similar law's likely impact in your own country.





SUMMARY

That transformatory legislation aims to facilitate important social change holds significant implications not only for the **kinds of facts** you need to assess proposed bills, but also for the **process** used to obtain those facts.

First, did the drafting process follow criteria and procedures that facilitated inputs and feedback from the relevant stakeholders, especially those usually excluded from the halls of power: women, old folk, the poor, disabled, and ethnic minorities?

Second, participatory research may produce enough qualitative information about problematic behaviors' causes to contribute to the design of effectively implementable bills. To weigh alternative possible legislative measures' socio-economic costs and benefits, however, may require more quantitative evidence.

As legislators, you need to know enough about both qualitative and quantitative techniques to assess the implications of the facts – however gathered – which the bill's drafters claim as justifying their bills' details. Ask: Did the researchers use sufficiently representative samples to avoid one-sided conclusions? Did they avoid culturally biased responses? How did they define the particular indicators they used? Did language differences affect the answers' implications? To assess the implications of another country's experience, ask all these questions and more.

In short, you need to understand enough about research techniques to assess the available evidence. Sound legislation must rest on sound facts. To assess what someone reports about the facts, assess the methodology used to capture those facts



EXERCISES:

1. Why should you ask questions designed to discover the quality of the facts (that is, the evidence) on which a bill's sponsors relied in justifying the bill's detailed provisions? By what criteria should you assess that evidence?
3. Why should you enquire about the extent to which the bill's sponsors and drafters have engaged the stakeholders – those affected by the bill, especially the poor and the vulnerable – in providing evidence: about the nature of the social problem and whose and what behaviors it involved? the explanations for those behaviors? the range of possible solutions? and the socio-economic costs and benefits of the bill's solution (including its possible adverse consequences) compared with the leading alternative solution?
3. What do you understand as the differences between quantitative as compared to qualitative evidence? For purposes of a research report justifying a bill, what constitute the advantages and disadvantages of each?