

Understanding Legal Research

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ABSTRACT

Legal research is a field that most people think can only be performed by legally trained individual. The worst is when nobody understands what legal research is all about. Some even looked down when the research paper they read which happen to be a legal research paper does not contain the familiar format such as the research problem, literature review and research methods. In reality, legal research is as valid as other types of research with its own purpose, method, and technique. Sometimes it may be performed using methods that are employed in other research fields. Therefore, this paper intends to highlight some characteristics of legal research in hope to introduce legal research to non legal researchers.

Keywords: Legal research, Doctrinal, Non Doctrinal, Comparative

Introduction

Research is basically a systematic, thorough and rigorous process of investigation that increases knowledge (Collis and Hussey, 2003). This definition apparently portrays research as a general process of enquiry applicable to everything from simple to sophisticated and from sciences to legal field. However, it is suggested that research in legal and non legal fields differ because in non-legal fields the researcher has to demonstrate the relationship between his research and the prior research while in the legal field they only have to show what they are saying is something new (Rubin, 1988). But is this the only difference between legal and non-legal research? If the answer is in the affirmative it means they may share some similarities. Thus the next question is how do legal and non-legal researches differ and where is the meeting point? With these questions in mind, it is the intention that this work will introduce to the readers the nature of legal research; hoping to highlight the basic characteristics of this type of research. However, this article does not attempt to give a comprehensive account of legal research.

The Purpose of Legal Research

Kissam (1988) listed six overlapping purposes of legal scholarship. One of the reasons for conducting legal research is to analyse the law by reducing, breaking and separating the law into separate elements. It can be as simple as examining and explaining new statutes and statutory schemes or as complex as explaining, interpreting and criticising specific cases or statutes.

Another reason is "to fuse the disparate elements of cases and statutes together into coherent or useful legal standards or general rules" (p 232). The product of this research is legal standard that is consistent with, explains, or justifies a group of specific legal decisions. For instance, the analyses of cases and regulations which govern contract formation in view of electronic commerce development to scrutinise the applicability or inapplicability of the existing legal standards to the new format of contracting may suggest new legal standard. In addition, some studies are done to look at doctrinal or theoretical issue. The research finding is applied in advising courts or clients about the application of legal doctrine to specific cases, transactions,

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or other legal events (p.234). It may also criticise judicial opinions and in case of conflicts between the decisions of different court, suggests the resolution to those conflicts.

Furthermore, legal research can also be performed by scholars who wanted to provide teaching materials for students. The end products include books and modules. Similarly, some scholars performed legal research to understand the legal doctrine and the law as it is. To achieve this objective the researcher examines the causes, the consequence and the interpretation of the relevant legal doctrine and legal practices in its social context. The result of the research highlights among others the practical usefulness of the law and the significance or insignificance of any given theory.

Finally, the last reason for doing legal research is to acquire an understanding of the legal subject while arguing for a better way of doing things. A researcher who performs this type of research critics and comments legal doctrine and practices from the perspective of different sciences likes economics, politics and sociology.

The Format of Research

McConville and Wing (2007) divided legal research into doctrinal and non-doctrinal research. Non-doctrinal research can be qualitative or quantitative while doctrinal is qualitative since it does not involve statistical analysis of the data. Both types of research may overlap. There is also a third format of legal research which consists of either doctrinal or non-doctrinal or a combination of both performed using a comparative legal method.

Doctrinal Research

Doctrinal research asks what the law is on a particular issue. It is concerned with analysis of the legal doctrine and how it has been developed and applied. This type of research is also known as pure theoretical research. It consists of either a simple research directed at finding a specific statement of the law or a more complex and in depth analysis of legal reasoning (McConville and Wing, 2007).

Researchers who dwelt in this type of research are concerned with the philosophy of law and the topics involve are restricted. They mostly focus on the nature of law and legal authority; the theories behind particular substantive areas of law, such as torts or contracts; and the nature of rights, justice and political authority. Others may study the legal decision making process, and the theories of legal interpretation and legal reasoning (Gordon, 2008). An example of a pure theoretical work is found in *The Principles of Justice* by Wright (2000). In this article the researcher examined the concept of justice by looking into the distributive and corrective theories of justice. Meanwhile, in *Implying Good Faith in Contracts: Some Recent Developments*, Shaikh (1993) examined the application of the good faith principle in Malaysian Contract Law.

Some researchers use this approach to study legal doctrine and the underlying theory behind the doctrine. In *A Corrective Justice Theory of Antitrust Regulation*, (Robertson, 2000), the author focused on the use of classical corrective justice principles as an explanation for *per se* rules that categorically prohibit concerted and unilateral business activity that unfairly injures economic competitors. Meanwhile, Spector (2006) in his work *Promises, Commitments, and the Foundations of Contract Law: A Contractarian Approach to Unconscionability*, concentrated on the freedom of contract theory and the rules that govern the unconscionability of a contract. Finally, Chahil (2005) examined the application of the natural law theory in the Malaysian Constitution in the *Relationship between Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated within the Federal Constitution*.

Non-doctrinal Research

Non-doctrinal research, also known as socio-legal research is a legal research that employs methods taken from other disciplines to generate empirical data to answer research questions. It can be a problem, policy or law reform based. Non-doctrinal legal research can be qualitative or quantitative. Doctrinal and non-doctrinal research could be part of a large scale project (McConville and Wing, 2007).

Non-doctrinal approach allows the researcher to perform inter disciplinary research where he analyses law from the perspective of other sciences and employs these sciences in the formulation of the law. For

example, a work by Becher (2007) on *Behavioral Science and Consumer Standard Form Contract* examined the psychological phenomena that contribute to (i) consumers' tendency not to read standard form contract, (ii) consumers' inability to correctly evaluate contract terms once they do read them; and (iii) sellers' ability to manipulate consumers.

Because non-doctrinal legal research uses empirical data, it provides vital insights into the law in context, i.e. how the law works in the real world. Empirical legal research is valuable in revealing and explaining the practices and procedures of legal, regulatory, redress and dispute resolution systems and the impact of legal phenomena on a range of social institutions, business and citizens (Genn, *et al*, 2006). Similarly, an empirical research in law and economics applies legal analysis, statistical inference and economic modelling to fundamental areas of national and international law such as tort liability, property, contracts, criminal law, law enforcement and litigation. An earlier work which used economics analysis of the law is a work by Posner (1972) on *A Theory of Negligence*. In this work Posner developed a theory "to explain the social function of negligence concept and of the fault system of accident liability...". He then tested the theory on a sample of more than 1,528 of the United States appellate decisions from 1875-1905.

Another example is the work of Landes and Posner (2001) on *Harmless Error* in which the researchers developed an economic model of harmless error and tested the implication of the model against some rules governing reversible and nonreversible error of criminal convictions. The researchers collected and analysed data from 963 appellate decisions in which the majority opinion discussed harmless error to identify the impact of different type of errors on the appellate courts' decisions.

Finally, there is a work by Lim (2007), on *Copyright under Siege: an Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works*. Lim looked into copyrights law and its impact on competition. In particular, he examined whether compulsory licensing through the essential facilities doctrine of competition law provides an acceptable solution to the potential problem of copyright owner harming competition in the software and database industries by refusing access to copyrighted work.

Comparative Research

The third research format is comparative legal research. This format is used to study legislative texts, jurisprudence and also legal doctrines, particularly of foreign laws. It stimulates awareness of the cultural and social characters of the law and provides a unique understanding of the way law develops and works in different cultures (Walker, 1981). It also facilitates better understanding of the functions of the rules and principles of laws and involves the exploration of detailed knowledge of law of other countries to understand them, to preserve them, or to trace their evolution (Palmer, 2005). Accordingly, comparative legal research is beneficial in a legal development process where modification, amendment, and changes to the law are required.

The most common comparative legal scholarship is cross jurisdictions comparison of laws of different legal systems. It is typical for researchers who undertake this research to examine the law as it is while at the same time provide ideas and views for future legal development.

Kierkegaard, (2007) in *E-Contract Formation: U.S. and EU Perspective*, for instance, examined the rules applicable to the formation of electronic contracts in the United States and the European Union. Another example is found in *Pure Economic Loss in Europe* (Bussani and Palmer, 2003) where a group of researchers took a painstaking task of comparing laws governing pure economic loss in 13 different legal systems across the European Union. Nowadays, comparative approach also refers to the study of specific aspects of the law from the perspective of Shari'ah in comparison to civil law.

The Research Design

Legal research is descriptive, explanatory or exploratory depending on the research aims, objectives and many other factors (McConville and Wing, 2007). Descriptive analysis of law sets forth the facts, the holdings, and the courts' analysis of a case, or of a series of cases in a given subject area, without attempting to offer an independent explanation of why the courts decided the cases as they did. It is the study of the

law as it is. The question of why the law is like this or that is answered using the explanatory design as the finding can explain the reason for some occurrences and interpreting cause and effect (McConville and Wing, 2007).

Exploratory research on the other hand aims at gaining general information for the purpose of defining the research topic, operationalising or explaining variables or aspects of the topic, or generating hypotheses (Sarantakos, 1998). Exploratory research is useful if the researcher intends to gather preliminary information to define problems and suggest hypotheses (Kotler et al., 2006). For example, a researcher may perform an exploratory research to describe and evaluate child protection law in a given jurisdiction over a certain period of time. Since exploratory research suggests directions for additional research the work could be a background for a larger research on the relationship between child protection law and social changes.

The Research Process

Legal research process is unique. Although the researcher begins his work by finding the research question which he wishes to study, the process at the later stage is distinctive to legal research. Having found the research question the researcher selects bibliographic databases to identify secondary sources which could be anything from text books, bar review, scholarly articles and legal encyclopaedias. Secondary sources are important in legal research because they point the researcher to primary sources of the law namely legislations and cases. Secondary sources also reveal current development in the respective area of law, hence may have instigated the research in the very first place.

In legal research the data are screened to differentiate the most authoritative from the least authoritative based on either the quality or relevancy of the data to the research issue (McConville and Wing, 2007). To be able to grade the data the researcher must analyse the legislations to understand its meaning and also the judicial decisions to derive the principle(s) of law.

A researcher involves in doctrinal research must study the law in details. Due to the uniqueness of the statutes, the analytical method applied in legal research relies on specific interpretation methods namely the mischief, literal and golden rules. These rules assign to the words of the statutes their true meaning.

Literal rule allows the statutory word to be interpreted by considering its dictionary meanings supplemented by basic rules of grammar (*Kon Fatt Kiew v PP* [1935] MLJ 239). Therefore, if the words of a statute are clear, they must be followed, even though they lead to a manifest absurdity.

On the other hand, golden rule is used to interpret the words of the statute by modifying the grammatical and ordinary sense of the words. The purpose is to avoid absurdity and inconsistency. It begins with finding the ordinary meaning of the language in its textual context followed by finding by clear indication whether the words used have permissible meaning other than the ordinary. (*Re Advocate* [1964] MLJ 1)

Finally, when there is need, the rules are interpreted by using the mischief, rule which construes the words of the statute to suppress the mischief, and advance the remedy that the legislature intended to create (*Lim Moh Joo v PP* [1970] 2 MLJ 113). This rule produces a purposive approach to statutory interpretation; an approach which looks at the reason the legislation was passed by the legislator to assign meaning to the respective provision (*United Hokkien Cemeteries, Penang v Majlis Perbandaran, P Pinang* [1979] 2 MLJ 121). For instance, in case of ambiguity the words in the Consumer Protection Act 1999 would be interpreted by considering that it was enacted as a consumer protection statute.

Other than legislations, cases must also be analysed. The process requires the researcher to carefully study the facts of the cases and the reason(s) behind courts' decisions to identify the legal principles applied by the courts in reaching to their decisions. (In legal terminology the reason given by the court in its decision is known as *ratio decidendi*). Although the issues raised in a particular case may be identical to previous cases, every case is unique. Therefore, the facts of each different case may lead to different decisions. To have a valid finding, the researcher must be able to identify the similarities and differences of the facts of different cases. More importantly, he should be able to understand and appreciate the impact of the distinctive facts of the cases on the principle(s) applied by the courts in arriving at particular decisions.

Having completed the statutory and case analysis, the researcher is now able to answer his research question(s). Because the finding is supported by authoritative data - data gathered from appropriate

sources, and analysed by using appropriate methods and technique, the answer to each research question produces a valid finding. The above process is replicated in non-doctrinal legal research, though of limited scale. Because non-doctrinal research also involves an examination of a specific legal rule, it is necessary for the researcher to find primary source of the law. However, having found the law, he can perform all the other steps used in non legal research without the need to interpret the rules or analyse the legal principles in details. Interestingly, in non-doctrinal legal research, the bulk of the research process involves method and technique used in fields other than law, hence, knowledge of and experience with those methods and techniques are required.

Conclusion

"Assume differences until similarity is proved" is the gist of this paper. This paper has explored the nature of legal research and its distinctive character compares to the other fields of research. While showing its unique character, the paper had also highlighted some similarities between a legal and non-legal research.

References

- Becher, S. I. (2007) Behavioral Science and Consumer Standard Form Contracts. *Louisiana Law Review*, **68**:117-179.
- Bussani, M and Palmer, V.V. (2003) *Pure Economic Loss in Europe*, Cambridge University Press: Cambridge
- Chalil, S. K. (2005) Natural Rights Theory and the Doctrine of Constitutionalism Encapsulated Within the Federal Constitution. *Malayan Law Journal*, **6** : 1
- Collis, J. and Hussey, R. (2003) *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* (2nd edn), Palgrave MacMillan: Basingstoke England
- Daryl, L. (2007) Copyright Under Siege: An Economic Analysis of the Essential Facilities Doctrine and the Compulsory Licensing of Copyrighted Works, *Albany Law Journal of Science and Technology*, **17** : 481-558
- Genn, D.H. Partington, M. and Wheeler, S. (2006) *Law in the Real World: Improving Our Understanding of How Law Works, Final Report and Recommendations*, The Nuffield Foundation: London
- Gordon, T. F. (2008) Artificial Intelligence and Legal Theory at Law Schools, <http://www.tfgordon.de/publications/Gordon2005b.pdf> Accessed on 25th July 2008
- Kierkegaard, S.M. (2007) in E-Contract Formation: U.S. and EU Perspective, *Shidler Journal of Law, Communication and Technology*, **3** :12. <http://www.ictjournal.washington.edu/Vol13/a012Kierkegaard.html> Accessed on 25th July 2008
- Kissam, P. C. (1988) The Evaluation of Legal Scholarship. *Washington Law Review*, **63** : 221-225
- Kotler, P. Adam, S. Brown, L. and Armstrong, G. (2006) *Principles of Marketing*, (3rd edn.) Prentice Hall: Frenchs Forest, NSW
- Landes, W. M. and Posner, R. A. (2001) Harmless Error, *Journal of Legal Studies*, **30**:161-192
- McConville, M. and Wing, H. C. (Eds) (2007) *Research Methods for Law*, Edinburgh University Press: Edinburgh
- Palmer, V. V. (2005) From Lerotholi to Lando: Some Examples of Comparative Law Methodology, *American Journal Comparative Law*, **53** : 261
- Posner, R. A (1972) A Theory of Negligence, *Journal of Legal Studies*, **1** :29-96
- Robertson, E. L. (2000) A Corrective Justice Theory of Antitrust Regulation, *Catholic University Law Review*, **49** :741
- Rubin, E. L. (1988) The Practice and Discourse of Legal Scholarship, *Michigan Law Review*, **86** :1835-1905

Sarantakos, S. (1998) *Social Research*, (2nd edn), Macmillan: South Melbourne

Shaikh, M.N.A. (1993) Implying Good Faith in Contracts: Some Recent Developments. *Current Law Journal*, **3**: xii.

Spector, H. (2006) Promises, Commitments, and the Foundations of Contract Law: Article: A Contractarian Approach to Unconscionability. *Chicago- Kent Law Review*, **81**:95-118

Walker, D. M. (1981) *The Scottish Legal System: An Introduction to the Study of Scots Law*, (5th edn), Revised, W. Green and Son Ltd: Edinburgh

Wright, R. W. (2000) The Principles of Justice. *Notre Dame Law Review*, **75**:1859.