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Innovation The Research Concept

Different Types of Legal Research

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Abstract

Legal research is a field that most people think can only be performed by legally trained individuals. The worst is when nobody understands what legal research is all about. Some even look down when the research paper they read, which happens 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. One of the reasons for conducting legal research is to analyze 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 criticizing 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".

Keywords : Doctrinal Research, Non-Doctrinal Research, Report writing, Methods.

Introduction

The product of this research is a 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 scrutinize the applicability or inapplicability of the existing legal standards to the new format of contracting may suggest new legal standards. In addition, some studies are done to look at doctrinal or theoretical issues. The research finding is applied in advising courts or clients about the application of legal doctrine to specific cases, transactions or other legal events. 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 criticizes legal doctrine and practices from the perspective of different sciences likes economics, politics and sociology.

Objectives of the Study

1. To gain familiarity or to achieve a new insight towards a certain topic.
2. To verify and test important facts
3. To analyze an event, process or phenomenon
4. To identify the cause and effect relationship
5. To find solution of scientific non-scientific and social problems
6. To determine the frequency at which something occurs.

Review of Literature

The literature review has been described as, 'the foundation and inspiration for substantial, useful research'. The purpose of a literature review in this thesis is three-fold. Firstly, it provides an examination of existing pieces of research, thus it is the starting point to identify information and terminology relevant to one's own research and to become familiar with the subject area. Secondly, it allows the author to critically evaluate the quality of existing scholarly writings and to identify best research techniques and practices. Thirdly, a literature review can help to put the thesis in context by identifying how it will differ from that of other scholars, making it an original contribution to the subject area.

Types of Legal Research

McConville and Wing (2007) divided legal research into doctrinal and non-doctrinal research. Non-doctrinal research can be qualitative or quantitative while doctrinal research 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[1] 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. Researchers who dwelt in this type of research are concerned with the philosophy of law and the topics involved 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 Some researchers use this approach to study legal doctrine and the underlying theory behind the doctrine competitor.

Doctrinal or library based research is the most common methodology employed by those undertaking research in law[2]. In a nutshell, library-based research is predicated upon finding the 'one right answer' to a particular legal question or set of questions. Thus, the methodology is aimed at specific enquiries in order to locate particular pieces of information. For example, an investigation may be conducted into the legislation encompassing child abuse in a particular jurisdiction. It may also be sought to find out what specific section within the said legislation is actually applicable. All these questions have definite answers that can be found and verified. Such kinds of questions are the domain of doctrinal or library-based research. The key steps in library-based research are often infused. These steps include analysing and unpacking the legal issues in order to identify the issue or issues which need further research. This stage will often involve a significant amount of background reading in order for the researcher to orient herself or himself with the area of law being studied. Background reading will often include sources such as dictionaries for definition of terms (and possibly a list of cases or legislation where they have been used), encyclopedias for a summary of the legal principles accompanied by footnoted sources, major textbooks and treatises on the subject and journals. Secondly, having established the issue requiring further investigation, the researcher must determine the relevant rule or rules of law applicable to the identified issues. This stage involves locating and analysing the relevant primary material. Depending on whether the research is based on international law or domestic law, the primary material will include treaties, declarations, statutes and delegated legislation and case law. Although primary sources are adequate by themselves, it may also be useful to have regard to secondary sources. This observation is made light of the fact that oftentimes, the concepts and standards that are embodied in the international conventions, legislation and cases will have been investigated, analysed and elucidated by many different authors in a variety of contexts and from wide ranging perspectives. These writings constitute an important resource for understanding and elaborating the principles in the primary legislation. Consequently, use must be made of relevant books and journal articles on that particular area of law. Thirdly, having established the relevant rules, the research then must set out to analysing the facts in terms of the law. This is perhaps the most critical stage of the doctrinal or library-based methodology as it seeks to marry the issues that were identified with the applicable rules. All the issues that are sought to be investigated must be synthesized in the context of the applicable legal rules. Lastly, having conducted the analysis, the researcher must then come to a probable conclusion which is based on the facts established and the law considered.

Evaluating The Doctrinal or Library-Based Methodology Merits

There are several advantages associated with library based research methodology. Firstly, it is the traditional method for conducting legal research and is often taught during the early stages of legal training. Consequently, most legal researchers will be familiar with the techniques involved by the time they embark upon postgraduate research. Additionally, there will be no shortage of experts who are able to offer doctrinal research training to new postgraduates.

Secondly, because of its omnipresence in law schools and law offices, research carried out under this design is likely to be more accepted as having the character of legal research. Doctrinal research still represents the 'norm' within legal circles, and most operational, undergraduate and even higher degree work will be based on the doctrinal framework. For practical purposes, and for resolving day-to-day client matters, doctrinal research is the expected and required methodology. The busy practitioner (and the standard product of law schools) tends to be concerned with the law 'as it is' and rarely has the time to consider research that does not fit within that paradigm and timeframe.

Furthermore, because of its focus on established sources, doctrinal research is more manageable and its outcomes more predictable. For a postgraduate researcher this may help with meeting deadlines as surprises may be contained.

Demerits

Several criticisms may be leveled against doctrinal or library based methodology. For example, it is too theoretical, too technical, uncritical, conservative, trivial and without due consideration of the social, economical and political significance of the legal process.

Secondly, it must be observed that doctrinal research is too restricting and narrow in its choice and range of subjects. The legal profession is increasingly being pulled into the larger social context. This context encompasses legal and social theory, and it encompasses other methodologies based in the natural and social sciences. In studying the context in which the law operates and how the law relates to and affects that context, doctrinal methodology does not offer an adequate framework for addressing issues that arise because it assumes that the law exists in an objective doctrinal vacuum rather than within a social framework or context.

Thirdly, doctrinal research is sometimes described as trivial because it is often conducted without due consideration of the social, economical and political significance of the legal process. As noted above the law does not operate in a vacuum. It operates within society and affects the society. There is, therefore, scope for adopting and adapting other methodologies utilised in other subjects in order to have a more illuminated view of the law and its functions. For example, there is scope for further research regarding the workings of legal institutions, such as the courts in order to increase their efficiency. As Julius Getman has commented, 'empirical study has the potential to illuminate the workings of the legal system, to reveal its shortcomings, problems, successes, and illusions, in a way that no amount of library research or subtle thinking can match.'

It is obvious from the above criticism that lawyers may need more than doctrinal or library based research skills in order to make their research more relevant for the wider world. One of the methodologies that may be employed in this regard is the socio-legal method.

Non-doctrinal Research OR Empirical research

Non-doctrinal Research is research that derives its data by means of direct observation or experiment, such research is used to answer a question or test a hypothesis. The word 'empirical' means 'based only on observation or experiment.' So 'empirical evidence' is evidence that is based on observation. The results are based upon actual evidence as opposed to theory or conjecture; as such they can be replicated in follow-up studies. Empirical research articles are published in peer-reviewed journals. Such research may also be conducted according to hypothetico-deductive procedures, such as those developed from the work of (R. A. Fisher).

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.[4]

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.

Empirical research helps us understand how the law works in the real world – the impact that law, legal institutions, legal personnel and associated phenomena have on people, communities and societies, as well as the influence that various social, economic and political factors have on law, legal phenomena and institutions. These are critical issues: "…we need to know how law or legal decision making or legal enforcement really works outside the statute or text book" (Richardson).

As the approach of a legal scholar undertaking non-doctrinal research is much broader and the questions he asks are more numerous, the data necessary to attempt an answer is not ordinarily available in conventional legal sources. The sources of data are less and mostly new techniques have to be used. Hence, field work is usually required for this type of research.[5]

A good example of the use of empirical legal research can be from the Supreme Court of Japan which has a judicial research arm. This arm consists of 40 experienced officers who have expertise in various areas of law and sociology and make their knowledge available to the judges[6].

When a judge sees a case from other angles,e.g. from the angle of a sociologist (Roscoe Pound held the view that the law is there to strike a balance between the demands of people and lawyers are the social engineers who help the judges in deciding the disputes) , judge sees the problem in a much broader way which helps him in deciding the case in a better way.

Aims of Non-Doctrinal Research

Non-doctrinal research seeks:

1. To assess the impact of non-legal events (e.g economic developments, growth of knowledge, technological changes etc..) on law,
2. to identify and appraise the factors which influence the outcome of legal decisions,
3. To trace the consequences of the outcomes of legal decisions this has an impact on the economy, society and polity.

Steps For Doing Empirical Legal Research

There are seven steps for doing empirical legal research which are as follows-

1. Identification of problems.
2. Drawing a tentative hypothesis.
3. Descriptions of study design (scope of study).
4. Designing technique of data collection.
5. Specification of the method of data collection.
6. Classification and tabulation of data (processing of data).
7. Conclusion and interpretation i.e. Report writing.

Methods

Non-doctrinal research is not like doctrinal research based on information available in a library. The methods used in this research are questionnaire, observation of behavior of persons, groups or organizations and their products or outcomes, interview, survey, existing records or data already gathered for purposes other than one's own research[7]. Etc.

Outcome of Research

The outcome of this research does not have universal application, as the social problems are peculiar to a particular society. For example, the problem of dowry is particular to India where the results of the research will be applicable to India only, not on any other country.

Advantages of Empirical Research

Following are the advantages of Empirical Legal Research:

1. It makes us understand the law in practice and tells us inadequacies existing in law so that they can be reduced. Sometimes it happens that logically a particular law seems adequate but in practice it turns out the other way round. So it helps in identifying these inconsistencies in law.
2. It gives a holistic view of the area researched and so it gives a broader picture of the problem.
3. It involves factual study, the examination of actual functioning of law in society which is extremely useful for ascertaining the acceptance of a new law or ascertaining the course of law reform
4. It gives us insight for understanding as to what kind of law the present day society needs. It has given rise to the sociological school of jurisprudence.

Disadvantages of Empirical Legal Research

1. If a researcher does not have financial support for doing research of empirical nature then it will be difficult for him to do empirical research if not impossible. Because in doing it, one needs a lot of money as it involves data collection, field work etc.
2. Empirical legal research takes a lot of time unlike doctrinal research as it involves certain steps like planning which takes considerably long time.
3. It presupposes the knowledge of various concepts of law in research. Sometimes these concepts are so technical in nature that they are not understandable by the researcher or will take a lot of time for the researcher in understanding those concepts which he cannot afford to lose.
4. Sometimes the research may turn out to be a failure. Though the chances of failure are remote but they do exist as it takes a lot of time in doing the research, by the time the research is complete conditions undergo substantial changes making the result of research value less or redundant.
5. Empirical research methods are easy to grasp but difficult to implement. Theoretically speaking, social sciences methods like natural sciences proceed from particular to general. It is inductive method of reasoning for reaching to major premise if the major premise i.e. generalization, is based upon facts or if there is a flaw in reasoning the whole conclusion derive from this process would be meaningless

Comparative Research

The third research format is comparative legal research[8]. 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 . 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 . Accordingly, comparative legal research is beneficial in a legal development process where modification, amendment, and changes to the law are required.

Quantitative and Qualitative Research

Quantitative research is based on the measurement of quantity or amount. It is applicable to phenomena that can be expressed in terms of quantity. It involves the generation of data in quantitative form which can be subjected to rigorous quantitative analysis in a formal and rigid fashion. For example, survey research where a sample of population is studied (questioned or observed) to determine its characteristics, and it is inferred that the population has the same characteristics.Qualitative research, on the other hand, is concerned with qualitative phenomenon,i.e. phenomena relating to or involving quality or kind. For instance, when we are interested in investigating the reasons for human behavior (i.e. why people think or do certain things) research done is qualitative research. We therefore, analyse the various factors which motivate people to behave in a particular manner or which make people like or dislike a particular thing.

This type of research aims at discovering the underlying motives and desires, using in depth interviews for the purpose. Also the techniques of focus group interviews, projective techniques etc. are also used[9]. As studied earlier, for law reform, research is a very important component and one of the major tools for any project of law reform. Therefore, for the purpose of law reform legal researches are divided on the following categories:-

Analytical Research

Analytical means finding out the existing law .i.e. what the law is. Where the law to be reformed consists of statute law, this research would mainly mean locating the relevant statutes. The researcher should have the knowledge of law making institutions and the distribution of subjects among them. He should be familiar with the scheme of distribution of legislative powers between the Centre and the States under the Constitution. The researcher has to turn his eyes towards the statute under consideration. There are different Acts such as Evidence Act, Indian Contract Act, Transfer of Property Act. etc. For these sources, the researcher has to hunt various sources. Also he has to locate the needed statutory material. He has to use the libraries extensively with the help of official indexes to the Acts and Manuals published by private publishers[10].

A researcher has to study the prevailing customs. Custom is an important source of law. Valid customs can override the specific law. Both in Hindu law and Muslim law, the overriding importance of custom has been well recognized for about a century. In Hindu law, customs law which are at variance with the Shastric law can still override the specific text(in the absence of statutory provision), if they are valid customs. The Hindu marriage Act 1955, for example, expressly preserves the validity of customs to a limited extent.

A researcher has to study the case on particular Acts. This usual method is to take a commentary and take case law from the source. He can use the commentaries as the statutory point. Later he has to go for the case laws and also use digest for tracing cases. He must take note of the judicial pronouncements that come out continuously and has to be alert at every stage. A researcher has to face a peculiar problem of conflict of decisions of the High courts. Until the conflict is resolved by the Supreme Court or legislation has passed, conflict will be there. Conflicts may arise because of defects in drafting or the nature of language employed. It may also arise due to different views as to matters of policy taken by various High courts. Whatever be the source of the conflict, the researcher will have to devote serious attention to it and (where appropriate) suggest a clarification of the law.

Historical Research

Historical legal research[11] means finding out the previous law in order to understand the research behind the existing law and the course of its evolution. The present day problem will have to be linked with the past events and useful conclusions should have to be derived. The primary aim of the researcher is not to make a deep study of the history but to confine himself to that part of the legal aspects which is relevant to his study.

Historical research is useful in law where the present statutory provision or rule of law has raised meaningful queries and it becomes necessary to explore the circumstances in which the present position came about. An exploration of the historical material gives a clue to the reasons why a particular provision was framed in the form in which it now appears. This often removes certain doubts, or even supplies to the researcher the reasons that justify the present provision-reasons which may not otherwise be apparent. Historical research often shows that a particular existing law, fully justifiable at the time when it was passed is no longer justifiable.

Sources of Historical Research

Study of historical materials such as Indian legal history and Constitutional history, history of particular branches of law etc. Also relevant legislatives debates, earlier commentaries in the archives, statutes etc. A researcher has to study the social aspects of the law also. He has to use the legal libraries exhaustively and thus use a secondary source of data.

Limitations of Historical Research

1. Usually historians cannot write dispassionately. The statements cannot be accepted as it is and so they seem to favor one or the other side. Personal bias and private interpretation often enter unconsciously.
2. Not all happenings in time and space can be known at the time of writing. They cannot conclude all the details in their narration.
3. Historical material is difficult to collect.
4. Historical methods may not be applied to all legal issues.

Statistical Research

Statistical research[12] is the collection of statistics to show the working of the existing law. It comprises measuring socio-legal phenomenon with the help of figures. In the words of Odum," Statistics, which is the science of numbering and measuring phenomena objectively, is an essential tool of research." It can be used where the problem can be expressed in quantitative terms.

Collection of statistics to show the working of the existing law is the main aim of statistical research. A researcher on law reform may have to seek the opinion from the public where statistics are required. Even apart from that the researcher would often wish to gather statistics which give an idea of the actual working of the law.For example, when one is concerned with a fact of judicial administration, one may need figures about the nature and volume of judicial business, its rise and fall, the institution, pendency and disposal of cases and the like.In order to collect statistics, the researcher has to construct sample design. He has to select the technique of the collection of data such as questionnaires, interview schedules, opinion polls, etc. The socio-legal issues require sociological knowledge and this ty

pe of interdisciplinary subject requires skilled researchers.

Statistical method has limitations as the problems are qualitative and non-quantitative. The data collected may be biased and collected through secondary sources and not reliable.

Critical Research

In critical research[13], the researcher studies the present law and the present needs of the society and finds out the defects in the existing law. He also makes concrete suggestions based upon the evaluation. The researcher can collect materials from the secondary source of data such as judicial pronouncements; academic writings etc. and have to use his wisdom and experience to gather the material. Opinion or expression of people in general plays a major role in formulation of law and legislation.. Researchers or Law Commissions generally follow the following methods to gather public opinion regarding a particular legal issue taken up for their critical analysis:

1. Issue of working paper;
2. By way of issuing questionnaires;
3. By way of press communiqué inviting opinions and comments;
4. Oral discussion;
5. Direct participation by laymen;
6. Information provided by mass media like newspapers, T.V's and documentaries.

Conclusion

Research is an investigation in depth of a particular subject. No doubt that various approaches are followed while conducting research on various subjects, sometimes the problem is so complex that various approaches are to be followed and we cannot keep these researches in water tight compartments. Sometimes these research methods are in an overlapping situation. As complex the problem is, the more complex the methodology becomes. Inspite if application of various research methods, one should not forget the original research problem and area of subject. As the society is a dynamic one and it changes with the passage of time and with the changes and complexity in society, the complexity of the problem will also increase. To solve and understand these problems we have a vast research methodology. So we should apply these methods keeping in mind the nature of the subject.

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