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Doctrinal and socio-legal methods of research: merits and demerits

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Abstract

Research is an academic activity and as such the term should be used in a technical sense. Research is an original contribution to the existing stock of knowledge making for its advancement. It must be of high quality in order to produce knowledge that is applicable outside of the research setting with implications that go beyond the group that has participated in the research. Legal research provides an understanding of the basic types of law, legal resources, and subject terms will aid the process. The methodology used by legal scholars may be doctrinal or non doctrinal (socio-legal). In this paper, focus has been taken on two methodologies that are often employed by legal researcher. They include doctrinal or library-based research and socio-legal methods. Merits and demerits of these research methodologies are also described.

Key words: Legal research, methodology, doctrinal, socio-legal.

INTRODUCTION

According to Collis and Hussey (2003), “Research is basically a systematic, thorough and rigorous process of investigation that increases knowledge”. The methodology of legal research denotes the exposition, the description or the explanation and the justification of methods used in conducting research in the discipline of law (Agarwal, 1973). Legal research may be carried out by utilising one or more of number of different techniques or methodologies. These different methodologies include, inter alia, doctrinal or library-based research, comparative law methods, socio-legal methods and philosophical legal methods.

Methodology of doctrinal research

Doctrinal or library based research is the most common methodology employed by those undertaking research in law. 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). In a nutshell, library-based research is predicated upon finding the ‘one right answer’ to a particular legal questions 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 analyzing 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 her or he with the area of law being studied (Surrency, et al., 1983). 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, analyzed 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 analyzing 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.

Merits of doctrinal research

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 (Price et al., 1979). 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 of doctrinal research

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 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 utilized in other subjects in order to have 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.

Methodology of socio-legal research

The law is a critical part of our social world. Commenting on this observation, Leslie Scarman has emphatically stated that: There is no cozy little world of lawyers’ law in which learned men may frolic without raising socially
controversial issues—I challenge anyone to identify an issue of law reform so technical that it raises no social, political or economic issue. If there is such a thing, I doubt if it would be worth doing anything about it. Thus, the recognition that the law operates in a wider social context has led to the development of socio-legal methodology as a framework for conducting legal 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 (McConville and Wing, 2007). In a nutshell, socio-legal methodology embraces disciplines and subjects concerned with law as a social institution, with the effect of law, legal processes, institutions and services, and with the influence of social, political and economic factors on the law and legal institutions (Goode and Hatt, 1986). Consequently, because of its association with so many dynamics, the socio-legal method is diverse and encompasses a wide range of theoretical perspectives.

The first step in socio-legal inquiry is the selection of a topic after a review of relevant literature and preliminary discussions with those with practical experience of the issues. Once the topic is selected, the researcher must then come up with general problem statement and a possible hypothesis for dealing with the said problem. This step is then followed by concentrated exploration and literature review aimed at further refining the problem statement and hypothesis.

Once, this preliminary stage is completed, the researcher selects and designs his or her research methodology. This is a very important step in the methodology process as this step ultimately determines the validity and quality of the research findings that will be produced at the conclusion of the project. Postgraduate socio-legal scholars may adopt quantitative or qualitative research techniques or both depending on the subject matter under investigation.

Quantitative research may be construed as a research strategy that emphasizes quantification in the collection and analysis of data. It entails a deductive approach to the relationship between theory and research in which the emphasis is placed on testing of theories. It also incorporates the practices of natural scientific model. In other words, quantitative research methods insist on the control of the research to limit the number of variables affecting the outcomes; exact measurement and precision; the ability to repeat the experiment with similar outcomes and the testing of the hypothesis through statistical means. By contrast, qualitative research may be construed as a strategy that emphasizes on complete and detailed description rather than quantification in the collection and analysis of data. It predominantly stresses an inductive approach to the relationship between theory and research in which the emphasis is placed on the generation of theories. Significantly, qualitative research rejects the practices and norms of the natural scientific model in preference for an emphasis on the ways in which individuals interpret their social world and it embodies a view of social reality as constantly shifting emergent of individuals’ creation. Thus, qualitative research methodology acknowledges that there is not one reality but rather that reality is situational and personal, and may therefore vary between individuals and between situations.

Once the postgraduate researcher adopts the research technique suitable for the inquiry in question, he or she must then proceed to collect his or her data using the research design. At this stage qualitative and quantitative techniques will differ. Qualitative research interviews, for example, are less structured than their quantitative equivalent, and consist ideally of an exchange of ideas between the researcher and the interviewee on a particular theme. The process is not directed towards quantifying the issues being researched but rather towards providing new insights and awareness of the issue under discussion.

This difference is apparent when one compares the tools that are utilized when employing the two techniques. Quantitative research will often employ devices such as surveys and questionnaires to collect the required data. These may include closed questions, which result in easy statistical summaries, or open questions, which allow for a lengthier, qualitative and individual response. There are advantages and disadvantages to the reliance on surveys in undertaking socio-legal research. On the positive side, surveys or questionnaires are relatively easy to draw up and administer and they provide a bulk of straight information that is easy to analyze. It is a good method for gathering opinion information and further to that, the anonymous nature of questionnaires may lead to candid responses. On the other hand, questionnaires make it impossible to find out additional information once the instrument is returned as they are usually anonymous. Furthermore, since questionnaires and surveys result in a bank of data, they do not provide the richness and depth of information available with other methods and if there is something missing from the form, then it is very expensive in time and money to fix the errors (Payne, 1951).

Qualitative techniques on the other hand rely on devices such as ethnography, biography or case studies in the process of data collection. These methods allow the researcher to get the insider’s viewpoint of the matter in issue and not necessarily the objective truth. They allow the researcher to conduct in-depth studies of a specific group or individual chosen to represent social phenomena and allow the researcher to ‘access the reality behind appearances’. These techniques have the obvious advantage that they provide opportunities to verify responses by comparing a number of different approaches in resolving an issue. They allow for the
complexities of social, legal and political interaction to be seen and for the relationships between these and the effects of one on the others to become more obvious. Furthermore, qualitative techniques allow the researcher to delve deeper into inconsistent responses and analyze significant situations at greater depth. The drawbacks for these techniques include the absence of statistical validity of a proper sample and objective quantitative proof. Furthermore, there is the omnipresent risk of people changing their positions or acting up because they know they are being studied. The data may also be more reflective of the researcher’s views rather than the subjects’ because there is more latitude for researcher bias in the actual choice of the individual or case to be examined.

Despite the shortfalls associated with quantitative and qualitative research techniques, they offer the socio-legal scholar important tools for analyzing the law within its operational context. As was noted earlier, these methodologies do not exist in isolation from each other and may be employed to reinforce the shortcomings of one approach.

Having collected the relevant data from the field, the researcher must then analyze and interpret the data and come up with his or her conclusions. This is an important stage of the research as the researcher will be able to comment on the state of the law, whether it is effective or changes are needed, and obviously if there is need for more socio-legal work.

Merits of socio-legal research

There are a number of benefits associated with adopting socio-legal research methods. First of all, it allows legal practitioners and academics to experience the law in action. This is hardly possible within the realm of doctrinal research.

Further to that, socio-legal research avoids too much attention on rules of law and instead affords systematic and regular reference to the context of the problems which laws were supposed to resolve, the purpose they were to serve and the effect they in fact have. This serves to counter the charge that law is conservative and aloof from the social context within which it operates. Socio-legal research is significant because in linking the law to society, it functionalizes law, rendering it an effective instrument for the achievement of social, political and economic objectives. Socio-legal research is important for and impacts upon government policy-makers, regulators, industry representatives and other actors concerned with the administration of justice and the legal system.

More importantly, socio-legal methodology is by nature inter-disciplinary and, therefore, allows the building of bridges between the law and other disciplines such as economics, history, sociology, politics, etc. This is beneficial because it adds more relevance to the law as well present the law appropriately, that is as a small part of a larger social world.

Demerits of socio-legal methodology

The manner in which socio-legal research is carried out contributes towards both its strengths and its weaknesses. Statistical information is acquired through quantitative use of questionnaires or surveys which can document relationships between victims of criminal offences distinguishing between both social class and gender. Social science findings are perceived as malleable and unstable and the perception seems to be that the outcomes from socio-legal research are dependent on the way in which the results have been interpreted. Consequently, confronting lawyers (most of whom possess an almost instinctive doctrinal mindset) with the results of socio-legal research is as hard a task as any.

It is possible to arrive at different conclusions on the same question when employing socio-legal methods because of differences in specification within the research design, or because of different methods of collecting data, or perhaps simply because the questions being researched are marginally different and this is unrecognized. This uncertainty in outcome only serves to reinforce lawyer’s bias against socio-legal methods. However, it must also be noted in this regard that the objectivity and neutrality of the law, which has been assumed by most lawyers has come under attack. Thus, the same anxieties that exercise lawyers minds over the objectivity of doctrinal methods also apply to the socio-legal tradition.

Further to that, socio-legal enquiry is perceived as being unsuitable for the work that practicing lawyers do. This tribe of lawyers is used to dealing with specific cases as opposed to investigating the broader aspects about the world and events affecting society generally. Lawyers and their clients generally want definite answers to particular questions as opposed to generalized responses. Socio-legal methods usually state results in terms of generalities and this is obviously unsuitable for practical legal application (Hyman, 1965).

Socio-legal research is quite difficult to carry out because the majority of lawyers simply do not receive adequate, if any, instruction in the intricacies of this methodological regime. Most lawyers commencing postgraduate work will be products of ‘straight’ law degrees and will often have no appreciation of the existence of other methodologies, apart from doctrinal legal research.

Lastly, socio-legal methodologies require a large amount of time for locating the issues and carrying out research (Young, 1962). To compound this, there is always the likelihood of failure especially if there are problems with the research design. As was noted above,
there is an extensive number of techniques available. Time must, therefore, be spent choosing the most suitable method for collecting data. Even a small survey can require a lengthy preparation period for drafting and redrafting the survey questionnaire, testing the survey, producing and printing the questionnaire, selecting a valid sample, applying the questionnaire, collecting the data and then organizing it according to category. Only after this has been done can the researcher reflect on the results in relation to the original hypothesis. This laborious process makes socio-legal methods less attractive.

Conclusion

To sum up we can say that it is easy to target a particular methodology and outline its strengths or weaknesses. However, it must be noted that all legal research methodologies are ultimately a means of arriving at answers raised in the course of attempts to understand issues arising within the law (Payne, 1965). There is no hierarchy amongst methodologies as all of them are equally important for the development and understanding of law. What is crucial is that researchers should try and equip themselves with the necessary skills to enable them comfortably suit their research requirements. A well-versed researcher will without doubt be alive to the merits and demerits of any particular methodology and will work to counter these negatives resulting in better quality work. Often, the combination of methodologies such as doctrinal and socio-legal (or even techniques within a particular methodology such as quantitative and qualitative methods) serves to bring about a better understanding of the law and postgraduate scholars would do well to equip themselves with alternative research methodologies.

Recommendations

For research purpose quantitative and qualitative research methodologies should be followed in combined way.

- Sufficient time should be spent for selecting proper research method like drafting questionnaire, survey and data collection.
- Audio-visual aids can be utilized.

References