Critical analysis of black letter and socio-legal research methods

Name

Institution

Introduction

There are various approaches and methods of conducting legal research, the most common being the traditional black letter research methods and the socio-legal research methods. These methods often create confusion to researchers, in deciding on what method to use in independent legal research exercises. This paper describes and critically discusses the differences that exist between the two most common categories of legal research methods. It also discusses the advantages and disadvantages of both methods, as well as applicability in legal research, before concluding with a recommendation on what research method is best especially in postgraduate research studies.

Black letter research methods

This is probably the most basic legal research method, which relies on a doctrinal attitude in the study of law in a substantive manner. It's a rigid research method in which researchers follow certain established processes often characterized by a review of both primary and secondary sources. The term black-letter signifies this inflexibility in the description of legal matters and characterizes the 'basic standards', policies and principles that are specific to a particular area of law.Researchers using black letter research methods use scholarly tools in their analysis of law, that is 'dependent on fact' (Tiller,2006). It also seeks to distinguish between standards and rules, whose utilization is determined by a 'balance' of various factors.

Black letter research methods involve the reading and interrogation of existing legislation, regulations and case laws in a given area, a method referred to as 'classical doctrinal analysis of law and is a useful method for independent legal research. These primary sources directly refer to the positivistic jurisprudence legal authority, and what is laid down in law, and written in

'black and white'. This, therefore, means that the traditional black letter researcher will look into existing legal precedent that is recognizable in case law and continually examine content with the aim of establishing the reasoning behind a given legal opinion and the implication of such opinion or decision on future legal issues. Other forms or sources of information such as authorial observations are considered secondary in research and would be found in sources such as legal journals, text, and articles. These sources seek to 'explain' the law to those that are uninitiated and often prove to be vital research sources in gaining insight into the current and emerging issues in a specific legal area.

Socio-legal research methods

Unlike the black letter legal research methods, this is a divergence from the traditional doctrinal research tools. It places emphasis on theoretical concepts of law, which significantly changes the way legal research in produced and presented. As a complete departure from the tenets of black letter methods, this method falls under the broader umbrella of an inter-disciplinary approach to research that incorporates other social science disciplines such as anthropology, sociology, and psychology.

In a more succinct manner, Daintith notes that socio-legal research methods comprise all forms of law and institutions of law and tries to understand how they are organized, constructed and their operations in a political, economic, social and environmental context.The large pools of cultural disciplines and theories that can be utilized in socio-legal research give rise to the description of these research studies as interdisciplinary due to its splintered approach in the conduct of legal research. These approaches also give rise to more diverse methodologies of

conducting independent legal research.   In a socio-legal research method, for instance, researchers are free to conduct their research in more flexible ways such as research interviews, design unique questionnaires, telephone interviews and other quantitative and qualitative methods in order to gather information regarding their specific research subject.

While black letter relies mostly on secondary sources such as existing laws and statutes, precedents and case studies, socio-legal research methods are more flexible, relying mostly on primary sources such as those listed above. This not only makes it easy to conduct research but is also easier to come up with novel legal knowledge, especially on emerging issues that may not be captured in black letter research methods.

Advantages of socio-legal research

The above descriptions and definitions point at various positive aspects of socio-legal research. Due to its broad spectrum approach, it encourages diversity within legal research which helps in conducting expansive intellectual inquiries. Conceptually, socio-legal research methods enable the legal researcher to approach research within a wider social-legal context which views the law as a complex institutional network of systematic processes that influence conduct in the society. According to Friedman, such legal research methods are interested in inquiry as to 'why legal systems work?

The freedom to use theories, methods, and practices that are drawn from other subjects such as those discussed above enable the researcher to be more adventurous in the conduct of independent legal research through various methods of data collection, interpretation, analysis, and presentation. Baldwin and Davis identify the use of socio-legal methods of research as the

'the study through direct methods rather than secondary sources, of the institutions, rules, and procedures of the law' with the aim of establishing and measuring the impact and effects of the legal system. According to Cotterrell, socio-legal research methods are advantageous as 'social legal scholarship promise better legal findings, novel legal knowledge and generation of new skills in legal research.This is corroborated by Baldwin and Davis who promote socio-legal research as a method that can help in influencing 'many aspects of legal practice' such as the practical impact of legal research and advancements of the development of substantive law.

Social legal research methods are a powerful tool useful in the discovery of new and intellectually challenging information in the performance of independent legal research. Its emphasis on the use of more empirical based research methods is an important aspect that 'helps in the better understanding of law' and also allows for the 'enrichment' of inter-disciplinary research which fosters a new and exciting individual research. The many approaches to socio-legal research methods are beneficial as they stress on the plurality of research techniques and the importance of choices in research in order to gain invaluable knowledge about a particular subject area.

Socio-legal research methodologies are also supported by universities and other research institutions over black letter law research methods due to the ease of coordination of research practices in order to foster the recognition of any important inter-disciplinary research findings among students and tutors among most subject areas. The advantages that are inherent in socio-legal research methods as independent research methods are amplified by the increasing involvement of policy makers and funders who are constantly looking for avenues to generate new knowledge through various avenues of research and inquiry.The modern time's

policymakers and government insistence on relying on 'evidence based policy making' is a clear endorsement of the socio-legal research methods which has enhanced its status as the most effective and up to date method of carrying out independent legal research.

Disadvantages of socio-legal research methodologies

Just as there are criticisms for the classical methods of research, there are consequently shortcomings in the social legal research methods. The most important pitfall of socio-legal methods is the diverse range of methods and practices as well as the inter-disciplinary areas from which these methods draw their inspiration. Consequently, not every research is able to entirely familiarize themselves with such challenging subjects such as sociology, economics, and philosophy. Bradney and Cownie note that the socio-legal research methods, due to their broader approach to research, present a danger where what is learned, is only learned superficially, at best. This is because it's practically difficult to conduct pluralisticresearch and effectively retain any useful theory or conduct the research in a considerably accurate manner.

Second, the larger breadth of the available social legal research methods, there is a considerable difficulty that researchers experience in their attempts to draw appropriate legal research boundaries.For instance, Bradney and Cownie argue that the abundance of the theoretical texts and references can easily blur the distinction between what can or should be considered legal or not. For instance, if the examination of a traditional dispute resolution mechanism is extended to consider 'the various social, religious and ethnic parameters was used to undertake a localized process that is parallel to the applicable state law, it presents challenges in drawing distinctionsof what is considered law or non-law which presents potential strain in the legal research process.

Lastly, the data collection and research methods often present significant challenges to the nurturing of reliable, independent and innovative legal research. According to Cooper, most social science subjects utilize empirical data as a means of evaluation and interpretation of research findings and these need to be done using the most appropriate and suitable methods., which helps in sustaining the viability of information that is gained through social research methods. The use of varying data collection and analysis methods is a source of significant criticism, thereby calling into question the resultant research findings.It is, therefore, important to acknowledge the shortcomings of the research methodology used and any issues that may qualify the research findings in the assessment of any empirical independent research study.

Advantages of black letter

Despite the apparent inflexibility, the black letter legal research method is not without a number of positive aspects. Cownie and Bradney note that this is the most dominant method of instruction in the UK, whose impact still filters down to independent legal research. The continued use of black letter research methods is responsible for the development of factual skills that can be used in the sophisticated interpretation and debate thus enabling legal researchers to 'think like lawyers' in their research endeavors. To date, black letter law is still considered to be the 'real law' as it provides a practical basis through which independent legal research can be undertaken. It also leads to the development of core research skills such as 'retrieval, assessment and analyzing of legal texts as vital legal practices.

Second, black letter research method is a necessary research method for any researcher involved in either academic or professional research. For a researcher to understand any area of law, the

use of procedural and substantive methods of analyzing case laws, decisions, precedents and legal opinions forms a critical element in the understanding of the difficulties that are experienced in law, and therefore help in the development of the necessary problem-solving skills. In fact, Bradney and Cownie argue that the black letter research methodologies are genesis and foundation of 'everything else'. Thus, it follows that doctrinal research methods form an important foundation in any legal effective legal research.

Lastly, doctrinal research methodology provides coherence in the understanding of the law, its current status and application.It's useful in groundingresearchers on what is 'fixed and certain' for independent legal research and for those researchers that look beyond research to a successful legal career. It presents pragmatic approaches to legal scholarship which must be taught; otherwise legal students would be significantly limited in their practical set of skills and their understanding of the intricacies of the law.

Disadvantages of black letter

Feldman noted that the main undoing of the doctrinal legal research methodology is its perceived narrow approach to research as it's confined to substantive and procedural legal processes. Such focused narrowness and inflexibility are criticized for its inability to allow research scholars to chart their own lines of inquiry, which constricts the research process and therefore focuses on judicial opinions, procedures, and decisions, which in effect eschews the attendant societal impacts of such decisions or opinions.Critics of the doctrinal research methods also argue for the researchers need to cultivate wider theoretical research skills and not merely restrict themselves to the descriptive, practical and substantive areas of law.

The validity of research findings, according to Bradney and Cownie can be brought to question, due to the researcher's reliance on secondary sources of information that rely heavily on statutes, case laws and judicial opinion which can erroneously be equated with what is 'factual' or' correct'. An investigation into the nature of law through the use of secondary material such as legislation, cases, and statutes is often governed by what is referred to as ' the internal criteria of the law itself', and should therefore not be assumed to be the only effective method of studying and analyzing legal aspects. While it provides an important starting position in the study of law, the doctrinal legal analysis is fundamentally an 'ideal type' as it describes what is applicable in terms of rules, principals etc. and is therefore a one dimensional research methodology which would be grossly inadequate in the extensive research of the nature of law.

Conclusion

The above discussion points to the various strengths and weaknesses of both black letter and socio-legal research methods, with a clear pointer that there is no single research methodology that can be regarded as the 'correct' approach in the conduct of independent legal research. The apparent advantages and disadvantages of both legal research method lead to the promotion of an integrated research methodology that incorporates both black letter and socio-legal research skills, in order to bridge the widening gap between theory and the practice of legal research. As Horrigan noted the basis of law and legal research in inherently multi-disciplinary, allowing for multiple theories and methods of analysis to be utilized in legal research. This paper, therefore, fronts the necessity for an integrated instruction policy that combines both doctrinal and socio-

legal research methodologies in order for the researcher to be able to recognize the many ways in which law is viewed and applied in modern times.

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