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Understanding legal research in the built environment.

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CHAPTER 8

UNDERSTANDING LEGAL RESEARCH IN THE BUILT ENVIRONMENT

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SUMMARY

Legal research is often misunderstood by many a researcher in the built environment, especially beginners. Its role as a suitable research approach employing both primary and secondary sources of data to arrive at logically sound outcomes is often undervalued or even mischaracterised as a tool for preliminary enquiry. These misconceptions stem from lack of understanding of the province of legal research in the built environment and the procedures involved. This chapter seeks to dispel this misunderstanding by explaining the scope and the procedures involved in legal research. Doctrinal legal research is a dominant aspect of legal research. In its basic form, it is about locating, describing, interpreting and systematising legal principles and concepts, with the legal system as a conceptual framework. The resources for this exercise are primary data (legislations) and secondary data (e.g. law reports, legal commentaries and other law literature) and the outcomes are supported and based on sound reasoning.

Introduction

The built environment sector covers a wide spectrum of activities. These include design, procurement, construction and management of structures within human settlements. The success of these activities depends partly on the nature of the contractual relationships between clients, designers, contractors, the various professionals on projects and parties within the supply chain. Then there is compliance with relevant statutory and regulatory frameworks. The applicable principles here are largely normative and are concerned with value judgments based on, and resulting in, the making of valid prescriptive propositions. It has been argued that the tools of social science research based on empirical investigations are ill-equipped to determine true knowledge in law. Consequently, doctrinal legal research adopts methods which aim to identify and explain by logic, analogy and deduction what the law is. The resources for such exercise include legislations and case law. It may also entail reliance on secondary sources such as previous literature and legal commentaries. Legal research, therefore, relies on both primary and secondary data sources. There are significant lines of enquiry in built environment research which can legitimately benefit from the legal research, especially the doctrinal approach. These include enquiries relating to interpretation of contractual clauses, determination of breach, issues of compensation for breach, decisions relating to violation of statutory provisions etc. The built environment researcher familiar with legal research approaches will be richer for it.

This chapter aims to provide an overview of legal research by setting out how the doctrinal legal methodology in its basic form can be used in the context of built environment research for primary and secondary research. The chapter will begin by providing brief information on the nature of law and a legal system generally. This will be followed by a very brief examination of the philosophical perspectives of legal research and the different types of research approaches, with emphasis on the doctrinal approach, which is the focus of this chapter. The rest of the chapter sets out the basic processes of doctrinal legal research and flags key steps.

Nature and Relevance of Law

Modern societies require some degree of order to survive and thrive and this is mainly achieved by law. What then is law? This is a theoretical question that has been debated for centuries among lawyers. Different scholars have attempted to provide different definitions for law with limited successes. Some define law as universal, natural principles steeped in right reason (or better still, common sense). Others see law as a human creation. Austin (1832) defined law as a command of a political superior backed by sanction; a body of rules created and enforced by a sovereign or a political superior. Like the proverbial description of an elephant, each of these explanations of law are factual in some respects but do not capture every aspect of the nature of law. For the purposes of this chapter, the definition of law by Glanville William, a pre-eminent 20th century legal scholar, is adopted. He noted that "Law is the cement of society and also an essential medium of change." (Smith and William, 2006).

Laws are rules and regulations which govern individual behaviours, preserves orderly running of society and are veritable tools for all forms of social engineering. Two parties (an Employer and a contractor) intending to have a business relationship will require some arrangement by which they will spell out their rights and obligations.

Here, contract law provides the framework for that and regulates the parties' behaviour. All aspects of human settlements including how they are built - design, procurement, construction and management - are governed by different aspects of law. Consequently, built environment researchers ought to be interested in how legal research is conducted.

Legal traditions and Systems

Different societies think about law differently. The diverse ways in which different cultures think about law is broadly referred to as legal traditions. Some of the major legal traditions in the world are the Common law, Civil law, Socialist law, Islamic Law and Customary law. The term 'common law' is used in many senses. As a legal tradition, it refers to the approach to law - its creation, development, organisation and application - by cultures which follow the Anglo-Saxon (English) way of thinking (Örücü, 2008). The laws of countries such as England, Australia, New Zealand, Nigeria, parts of Canada and the United States of America reflect this tradition.

Like the term common law, civil law also has different connotations. As a legal tradition, it refers to how people who follow the Roman-Germanic culture think about law. The laws of many countries in continental Europe including France, Germany and Italy operate under the civil law tradition. The differences in approach to how law is viewed and applied among legal traditions is enormous. For instance, whilst the common law tradition views the development of law mainly as an inductive process, the civil law tradition, on the other hand, see the same process as deductive in nature. Consequently, many legal principles under the common law tradition have come into existence through centuries of evolution and development from practices of local communities and groupings by a process of repeat application and refinement by courts. Comparatively, many laws in countries operating under the civil law tradition have been enacted by sovereigns or authorities, compiled into Codes and used as guiding principles for human transactions (Örücü, 2008). As a necessary consequence, the approaches to application of the law also differ from one legal tradition to another. Also note that some jurisdictions do possess features of one or two legal traditions mixed into a common system. These are often referred to as mixed or hybrid jurisdictions (Tetley, 1992-93) In this chapter, our focus will be on the common law tradition.

Law as rules or principles will achieve little if there are no structures or processes through which they are administered. This is where the concept of a legal system becomes important. A legal system has been defined as entailing a set of legal *institutions*, *procedures* and *rules (*Merryman, *1985)*. It has to do with a set of laws applicable to a person or particular jurisdiction, how these rules are administered (procedure or method) and by who (structures or institutions). The English legal system, for instance, applies to England and Wales. It has distinctive set of laws derived from legislation and judicial decisions mainly. The laws are administered through courts and quasi-judicial bodies. Individuals or entities seeking to enforce the law are required to follow certain procedures, depending on whether the enforcement type is criminal or civil. Anyone intending to carry out legal research in England, for example, must learn about the laws of England and Wales, the court structure and the procedure by which these courts operate. She must understand that there are different types of laws applicable to different situations. Criminal laws relate to matters concerning public safety, security and order. The civil law such as contract and tort regulate inter-personal, inter-entity transactions and resulting disagreements, which do not directly involve the State.

Again, it is important to note that the concept of 'hierarchy' is essential in English law. Both laws and courts have hierarchy. This understanding is crucial especially for researchers. The higher the law in terms of hierarchy, the more weight is attached to it. In this regard, legislations are superior to case law. However, the relationship between the two sources of law may be more symbiotic than is often admitted. Judicial interpretation of legislation may carry more weight in some instances as it may qualify what may appear to be the literal meaning of a provision of a piece of legislation. Further, the higher the court, the more weight accorded to its decisions. The decision of the Supreme Court, the highest court in the United Kingdom, supersedes that of the Court of Appeal and every other court below it. Similarly, the decision of the Court of Appeal, the second highest court in England, overrides the decisions of all other courts below it on a similar matter. A researcher using case law must be aware of this as it has implications for what may qualify as law.

Legal Research Approaches

Traditionally, legal research has focused on the nature and meaning of law and the methodology has been mainly doctrinal, relying heavily on textual analysis. That said, it is also true that the search for truth in law has also been about society's understanding and interaction with law. This kind of enquiry has often combined both doctrinal

and empirical approaches (Davies, 2020). There are those who hold the view that law is a social construct and should be studied empirically and contextually (Banakar,2011). Freeman (2008) states that law being a system of norms and a form of social control based on certain patterns of human behaviour, both the normative aspect and the social dimension of law are legitimate fields of enquiry. In this chapter, however, the focus is on the normative inquiry as it is assumed that readers of this book will already be familiar with the social science approaches to research.

Doctrinal Legal Research

The doctrinal legal approach to research has dominated the field of law for centuries. It has intuitively been applied unquestionably until recently (Hutchinson and Duncan, 2012). It is a type of research which focusses on legal principles and concepts. An understanding of the concept of "doctrine" in law will make it easier for the reader to follow the nature and requirements of doctrinal legal research. The word has been defined as entailing 'a synthesis of various rules, principles, norms, interpretative guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law… (Mann,2010, p.197). Legal doctrine is central to the common law system of law. It plays a key role in the 'development of the conceptual framework of the legal order and its legal methodology' and serves as an organising concept, describing and systematising the law (van Hoecke and Warrington, 1998). Individual statutes and cases must fit into the existing legal framework. This essence of legal doctrine aligns with the concept of judicial precedent. There must be a clear explanation of how new situations or decisions fit into the well-established paradigm. From the foregoing, it is argued that the focus of doctrinal legal research is not only about how the law came into existence, who it affects, the impact of the law on society or indeed even pragmatic issues considered on a daily basis by lawyers; it is about finding out what the law is (describing the law), the process by which the normative character of specific legal concepts or principles is affirmed (interpreting the law) and how specific legal principles and concepts fits the broader legal order (systematising the law) (van Hoecke and Warrington, 1998). This understanding of doctrinal research approach is in line with the definition proffered by the Pearce Committee (1987) which identified four key areas of interest of doctrinal legal researchers, namely:

1. Systematic exposition of legal principles;
2. Analysis of relationships between legal principles/concepts;
3. Explanation of areas of difficulty; and
4. Predicting future developments and proffering recommendations.

Doctrinal legal research is not as simple and straightforward as it may seem. The skills for it is honed over a long period of training and practice. For novice (in the law) researchers from an interdisciplinary field like the built environment, it may be daunting. They stand the risk of furtively applying familiar social science research approaches to this enterprise without paying much attention to the peculiarities of doctrinal legal research. In that case, they may look for some signposting of what is required.

Further, there is no formulaic way of conducting doctrinal legal research; it is often an iterative process involving repeated engagement with the different elements of it. That said, there are steps or signposts in the legal research process which the built environment researcher will be familiar with; identifying questions for investigation, exploring previous research on the subject and using that information to clarify the research questions. The substance and focus of this exercise may differ for a social science researcher on one hand and a doctrinal legal researcher on the other. Table 1 sets out the key procedural elements of the doctrinal research process. Each component is stated and explained briefly with built environment related examples.

Table 1: Stages of Doctrinal Legal Research

Stages	Process
1	Identifying research questions or legal issues
2.	Exposition of law – Identifying and stating the law
3	Systematising the law – Analysis and application of the law
4.	Future predictions and recommendations

1. Identifying research questions or legal issues

It is important for a researcher using the doctrinal approach to understand the source of possible questions for investigation. These questions may arise as a result of an occurrence or development in society generally (such as the Grenfell Tower fire disaster) or a dispute and may require a legal outcome. In the context of built environment research, such questions may take following forms:

a. Seeking an understanding of the position of the law on a subject (e.g. what is the law governing liability of builders in relation to defects (or health and safety?);
b. Examining how existing law extends to new developments in society etc. (e.g. how does current law on property and intellectual property cope with the emerging issues in building information modelling (BIM) or smart contracting);
c. Explaining how old/new concepts should be interpreted and applied (e.g. the meaning of mutual trust and cooperation under NEC 3 or NEC4);
d. Evaluating the relationship between concepts – old and new (e.g. how are the concepts of mutual trust and cooperation related to the much more popular concept of good faith); and
e. Contract interpretation – dealing with difficulties and seeming contradictions.

Whilst setting the scene and raising questions for investigation may be common to built environment and doctrinal researchers, the latter will be guided in the process by a totally different conceptual framework; the legal system. Similarly, where and how the social science researcher and the doctrinal researcher look for answers to the research questions will also differ. The former may look to observation of natural phenomena or statements from persons affected by the relevant issues but the later will have her eyes firmly fixed on the existing legal framework, legal norms and judicial precedents for answers. The data for the doctrinal researcher will include a review of the relevant literature but also, and more importantly, a search for the relevant applicable law. This aspect of the exercise is what the next stage of the process – legal exposition – is about.

2. Exposition of law – Identifying and stating the law

The idea of exposition of law involves, among other things, what Van Hoecke and Warrington (2008) refer to as 'describing the law'. The 'law' here refers to the legal principles relevant to finding answers to the legal issues or research questions identified. The process of describing the law entails a literal description of the law, an interpretation of it and the determination of its validity. For instance, if a researcher wants to know about the rules on safety at a construction site in the UK, she may ask, 'which legal rules provide this information?'. She may discover that there are Regulations passed pursuant to the Health and Safety at Work etc. Act 1974 - the Construction (Design and Management) Regulations 2015 - which address this question. To have a deeper understanding of the current state of the law, she may decide to look at previous Regulations and how the current position of the law has evolved. She may choose to examine the motivations for changes which culminated in the current law. All these inquiries will constitute part of the process of describing the law. To establish the validity of the current Regulations, she may ask whether the provisions of this law are consistent with the content of the parent legislation, that is, the Health and Safety at Work etc. Act 1974. If not, a court is likely to invalidate the offending provisions of the Regulations at some point. The foregoing example confirms Van Hoeke and Warrington's (2008) argument that 'describing the law' necessarily entails interpreting and validating the law.

The exercise of legal interpretation is carried out within a certain legal framework. What is acceptable as law or material facts (or indeed, reality in law) is determined by and seen through the lenses of the conceptual framework referred to as the legal system (Van Hoeke and Warrington, 2008). In this sense, what is considered a relevant fact is not determined by what parties affected by the law think but what the law (taking account of what needs to be established in order to satisfy a legal threshold) requires.

Exposition of law is not a mere exercise in logical reasoning. It is based on data; primary and secondary. In the legal context, this data may be in the form of legislations and judicial decisions. This explains why an effective legal exposition is only possible if the researcher has reasonable knowledge of sources of law. In the United Kingdom, sources of law include legislation, delegated legislation and judicial decisions (cases). Legislations are laws passed by Parliament. There are thousands (if not millions of legislations) in force in the UK covering wide spectrum of subjects including construction, health and safety, the environment, procurement etc. Examples of domestic legislation include the Health and Safety at Work etc Act 1974; the Human Rights Act, 1998; Housing Grants, Construction and Regeneration Act 1996 and the Local Democracy, Economic Development and

Construction Act 2009. Then there are EU legislation which remain applicable regardless of BREXIT. Delegated legislation refers to regulations and by-laws enacted pursuant to powers conferred on a minister by legislation. An example of delegated legislation is the Construction (Design and Management) Regulations 2015. Both legislation and delegated legislation could be accessed in hard copies in libraries and online through dedicated databases. Again, special skill is required to find legislation in hard copies. Librarians can be of immense help with this but ideally, the researcher should be able to use the library catalogue to track where in the library the relevant resources are located, then there is the question of where specifically in the hefty bound and loose-leaf books a particular legislation is located. Alternatively, the built environment researcher in the UK can rely on the online database of UK legislations at the following address: http://www.legislation.gov.uk/. Similar databases for legislation may exist in other jurisdictions.

Cases are records of judicial decisions over the years. Case law therefore, refers to legal principles which have developed as a result of consistent exposition and application of the law. These principles, like legislations, run into thousands (if not millions) and apply to different subject-matters in society. A typical example of case law is the '*neighbour principle'* in *Donoghue* v *Stevenson*. This principle addressing what will constitute negligence was popularised by the then United Kingdom House of Lords in a decision in 1932. Since then it has been explained, refined, qualified and expanded by other courts. Like legislations, cases are reported in volumes called Law Reports. The Law Reports contain 'processed data' from primary records of cases heard by courts. In a sense therefore, the Law Reports could be viewed as secondary data. These secondary data are the staple of many a doctrinal legal researcher.

Each case is assigned a citation making it possible for researchers, lawyers and judges to identify and retrieve copies when required. There are different forms of citation. Each citation system encapsulates some vital information about a case. This includes the name of the parties (title of the case), the year in which the decision was made or reported, the court which made the decision and the page where the decision could be found. For instance, the citation for *Donoghue* v *Stevenson* is '[1932] A.C.562'. This citation means the case was decided in 1932, reported in the law report known as the 'Appeal Cases' and can be found on page 562 of that report. Sometimes cases may be reported in multiple Law reports. So, *Donoghue* v *Stevenson* is also reported in the 'All England Report' with the citation [1932] All ER 1.

Modern reports use what is referred to as neutral citations. This essentially means no reference is made to specific law reports. The citation mentions the date of the decision, which court made the decision and a special case number. For instance, here is the citation of the Supreme court case *Robinson* v *Chief Constable of West Yorkshire Police*: [2018] UKSC 4. This citation means this is the decision of the UK Supreme Court delivered in 2018 with a unique reference number 4. This case was heard by the Court of Appeal before it made its way to the UK Supreme Court. The citation of the Court of Appeal decision is: [2014] EWCA Civ 15. This citation means the decision was made in 2014 by the civil division (Civ) of the Court of Appeal of England and Wales (EWCA). Many law reports are now easily accessible online through dedicated databases such as Westlaw, Lexis Library and Bailii.

Navigating these sources of law to find which laws or legal principles are in force or are applicable to a specific situation requires special skills. In this regard, the built environment researcher venturing into doctrinal research must acquire, at least, basic aspects of these skills such as finding the law, reading it along with relevant commentaries and background materials, and identifying the hierarchy or status of the relevant law in relation to others (Finch and Fafinski, 2019). Much of what is covered in the preceding paragraphs is about finding the law.

Reading the law requires different set of skills. It requires an understanding of how both legislation and cases are structured. A case may run into hundreds of pages. The ability to identify was is relevant in a case is therefore a very useful skill. Though there may be slight differences between structure of judicial decisions, majority of them will follow a common structure:

Table 2: Case structure

	Case Structure	Explanation
1.	A title	Ordinarily the names of the parties who were in court. In some instance, the names of the parties are not used.
2.	Head notes	A summary of the facts and principles applied or established in the case
3.	Material Facts–	Detailed description of established and controversial facts relevant to the dispute
4.	Issues/ points of law	The legal questions that the court must address if it is to arrive at a conclusion one way or the other
5.	Statement of the Law	A discussion of relevant legal principles, often in generic terms and at times, analogically
6.	Legal Analysis and application (judgment)	Application of the law as discussed to the facts established (by evidence) Discussion of the facts and evidence and application of the general legal principles as discussed to the specific case before the court leading to a judicial decision. This is where you will find the ratio decidendi and the decision and orders of the court.

The part of every judicial decision which is relevant for purposes of identifying the law is the ratio decidendi (the legal principle on which the decision of a court is based. When dealing with case law, one judicial decision may affirm, qualify or build on another. Consequently, the search for a legal principle applicable to a research question or legal issue necessarily entails some form of analysis of one or more relevant cases and or legislation(s).

3. Systematising the law – Analysis and application of the law

Stating the law relevant to addressing a research question does not imply that the relevant legal issue has been resolved. The researcher must demonstrate how, in practical terms, the relevant law applies to or addresses the research question. This is achieved through various forms of legal analysis. Chynoweth (2008) identifies four of these namely deductive, analogical and inductive reasoning and policy consideration.

Deductive reasoning in law is quite similar to what pertains in the social sciences. Here, a general principle is applied to a factual and specific situation, when the facts satisfy all relevant conditions. To succeed in establishing general negligence against a contractor on site, the aggrieved party must establish that the contractor owed it a duty of care in law, which has been breached and that the said breach has caused injury to the claimant or harm to her property (Giliker, 2017). Assuming there is evidence that all the legal conditions are satisfied, deductive reasoning will require that the judge or researcher concludes that negligence is established. Nonetheless, in practice more analysis will be required before such conclusions could be drawn. Consequently, deductive reasoning is only of limited assistance. A researcher or a judge faced with such a dispute will likely look to previous decisions, preferably of a higher court, on similar facts and apply that decision to the case. This style of legal analysis - analogical reasoning - is by far, the common method of judicial reasoning (Chynoweth, 2008).

The decision and reasoning in a case by a higher court may be extrapolated to future cases. Eventually, the 'single case' becomes generalised crystallising into an established legal principle, and even a doctrine. Again, this approach to legal analysis - inductive reasoning - is well-known in scientific research. It is particularly common in single case experiments where outcomes have in many instances been replicated and ultimately become accepted propositions (Flyvbjerg (2006). There are also instances where a mix of the approaches to legal analysis described above are deployed by the courts or researchers. In negligence cases judges have employed the different forms of legal analysis – deductive, analogical, inductive and policy considerations - to connect the facts in those cases to the relevant law. From the case of *Donoghue* v *Stevenson (1932),* the Courts have consistently employed analogical and deductive reasoning, applying the ratio of that case to similar fact situations. In 2018, the UK Supreme Court clarified the criteria for establishing duty of care in negligence cases, again relying on the different types of legal reasoning identified above. It decided in *Robinson* v *Chief Constable of West Yorkshire Police*

(2018), a case involving alleged police negligence, that in cases relating to established category of liabilities, courts are to consider what had previously been decided and follow existing precedents (analogical reasoning). The Supreme Court held that in novel situations the use of combination of different legal reasoning is warranted. Starting with the analogical reasoning, some sort of deductive reasoning and policy considerations should enable the extension of established existing rules to novel situations. The key is to maintain coherence. Doctrinal researchers follow a similar process as described, challenging existing assumptions in the process and proposing new ones.

4. Future predictions and recommendations

Note that legal analysis is not just about harmonising the application of specific legal principles across similar scenarios. It also about how new laws fit into existing categories and how existing legal principles are re-interpreted to take account of recent or future developments in society. In some instances, the common law has been extremely efficient in setting out frameworks to address novel and future scenarios. In other instances, a more radical approach to re-systematising the law may be required. A typical example will be how the existing concepts of the law of contract can respond to the emerging issues in smart contracting. This will necessarily call for 're-systematising of existing doctrines such as consideration and intention (meeting of minds). Van Hoeke and Warrington (2008, p.525) suggest that the process of re-systematising can be undertaken by "a (re)interpretation of the differing legal rules, in the light of a coherent unity, on the basis of a number of basic concepts and principles" such as judicial precedent.

Conclusion

Doctrinal legal research in its basic form, is about locating, describing, interpreting and systematising legal principles and concepts, with the legal system as a conceptual framework. The tools for this exercise are legislations, cases, legal commentaries and other law literature. Though some of these sources are classified in social science terms as 'secondary data', the data employed in doctrinal legal research are a combination of primary and secondary sources. What is different about doctrinal research, compared to broader social science research, is that data, whether primary or secondary, are processed differently with a different conceptual framework as a backdrop. Similarly, the outcomes of legal research may not look like that of a typical quantitative or qualitative research but what is certain is that the outcome of a well-conducted doctrinal research is robust, logical and consistent with the norms of its conceptual framework. Conclusions drawn from the process of identifying and stating the law, analysing and applying the law and making future predictions, would often supply a clear and robust normative response to any research question. The analytical process in doctrinal research has stood the test of time partly for these very reasons.

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