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Fakultas Hukum Universitas Airlangga, Jalan Dharmawangsa Dalam Selatan
Surabaya, 60286 Indonesia, +6231-5023151/5023252
Fax +6231-5020454, E-mail: yuridika@fh.unair.ac.id

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The Essence of Legal Research is to Resolve Legal Problems

Peter Mahmudz Marzuki

Peter.machmud@fh.unair.ac.id

Universitas Airlangga

Abstract

Legal research is carried out to resolve legal problems. Since jurisprudence is a prescriptive science, legal research is conducted to produce prescription. The prescription may be the basis of resolving the legal problem. It is different from research for behavioral science or social research which is to verify a hypothesis. Data are needed to verify the hypothesis. On the other hand, legal research does not need data since it is not conducted to verify a hypothesis. Social research is to find coherence truth while, legal research is to discover coherence truth. Despite usage of induction in establishing argument, legal research does not use data to find the truth because the truth found is coherence truth. Legal research may be for practical purpose or for academic activity but is still like any other research and begins with problem, which is a legal problem. Legal problems in legal research should be clearly defined; otherwise, there will be misapplication of law to the problem. Consequently, the problem will not be solved. Legal problems may be causal relationship, functional relationship, or two propositions where the latter proposition gives clear meaning to the first proposition. The type of legal problem should be identified. It is necessary to collect legal research materials, which may be primary legal materials, secondary legal materials, and non-legal materials. The non-legal materials are supporting and complementary materials. Legal research may be carried out by using approaches as necessary. There are five types of approaches, statute approach, case approach, historical approach, comparative approach, and conceptual approach. The respective approach should be used appropriately.

Keywords: Prescription; Coherence Truth; Proposition; Legal Materials; Approach.

Introduction

The essence of legal research is not to verify hypothesis; rather, it is a know-how aspect of jurisprudence to resolve legal problems. Jurisprudence is a prescriptive science and does not belong to the realm of behavioral sciences. A legal problem is not social problem. Consequently, the research method for behavioral science is inapplicable for resolving legal problems.

This essay is to make known the essence of legal research. In fact, it is not unusual that legal research is assumed to belong to social research. However, legal research differs from social research in two things. First, legal research is carried out to discover coherence truth; while social research is conducted to find correspondence truth. Second, legal research is to settle legal problems, whereas social research is to verify hypotheses.

Epistemologically, there are four theories of truth, the correspondence theory of truth, the coherence theory of truth, the pragmatic theory of truth, and the semantic theory of truth.¹ Regarding this essay, it will discuss two theories of truth, the correspondence theory of truth and the coherence theory of truth. The pragmatic theory of truth and the semantic theory of truth are excluded from the discussion in this article. The pragmatic theory of truth deals with effective function in everyday life and the semantic theory of truth deals with the utilization of formal logics concerning language.² Both theories, therefore, are irrelevant to this article.

Legal research is also frequently confused with doctrinal research as stated by Terry Hutchinson.³ According to Hutchinson, doctrinal research is library based-study on reading and analyzing the primary materials and secondary materials.⁴ Hutchinson refers primary materials to authoritative materials, which are legislation and case law; while secondary materials are law treatises, either in textbook or law journal.⁵

Carried out to resolve legal problems, legal research is more than doctrinal research as supposed by Hutchinson. Resolving legal problems does not only deal with reading and analyzing primary and secondary materials. It needs skill to identify legal problems, ability to conduct legal reasoning, and capability of analyzing the legal problems at hand. Then, not only is legal research to find rules for or apply

¹ Robert C Solomon, *Philosophy Problems and Perspectives* (Harcourt Brace Jovanovich 1981).[176-179].

² *ibid.*

³ Terry Hutchinson, *Researching and Writing in Law* (Lawbook Co 2002).[9].

⁴ *ibid.*

⁵ *ibid.*

rules to the problems but it is also to establish new argument and to find new legal principle for settling the problems equitably.

Since jurisprudence is a prescriptive science, the output of legal research is prescription in the form of legal recommendation. It is not to state whether or not a hypothesis is verified as conducted in behavioral science research. It, therefore, should be clearly identified that the subject matter of the research is a legal issue or a legal problem. The output of legal research may be a reference for decision-makers concerning law.

This article begins with discussing the function of research. In this part, it discusses two kinds of theory of truth. Discussing the two theories of truth, it can be discerned that truth sought by legal research is coherence truth. The second part deals with the characteristic of legal research. In this discussion, it will be presented how legal research works. The third part of this essay discusses the nature of legal problems. This section talks about how to identify legal problems clearly. The fourth part deals with legal research materials. Unlike discussing about collecting data as in behavioral science research, this section will discuss about materials for legal research. The fifth part of this essay deals with approaches in legal research. This section will present five types of approaches in legal research.

The Function of Research

The function of research is to find the truth. But *quid est veritas* (what is the truth)?,⁶ asked Pontius Pilate when he discharged Jesus Christ from punishment because he found him not guilty of anything. Nevertheless, as a politician, he did not want to lose his popularity; so, he opted out and handed over the Christ to the Jews to be crucified while he was washing his own hands.

In fact, the truth is existent. It is not the truth from religious and metaphysical perspectives. Instead, the truth in this discussion is perceived epistemologically. Epistemologically, there are four theories of truth, the correspondence theory of

⁶ Nova Vulgata, 'Libreria, Editrice, Vaticana' (1998) 18 Ioanem.

truth, the coherence theory of truth, the pragmatic theory of truth, and the semantic theory of truth. Each theory of truth has its respective basis. The correspondence theory of truth is based on fact or reality. The coherence theory of truth stems from what is believed in the mind. The basis of pragmatic theory of truth is consensus and the semantic theory of truth is about language. Both the pragmatic theory of truth and the semantic theory of truth are not discussed in this essay since they are irrelevant to the subject matter of this article.

The coherence theory of truth is the oldest theory of truth, which was developed since Aristotle's time. According to this theory, the statement is true if it conforms to reality. The statement that there is an apple in the refrigerator is true if it is found that there is really an apple in the cold storage.⁷ By the same token, if there is a statement that my name is Peter, it is true if my name really is Peter. This theory was reinstated by St. Thomas Aquinas, a 13th century philosopher and theologian: *Veritas est adaequatio rei et intellectus*, which may be translated as 'Truth is the correspondence between what is said and what is in the mind'. According to the modern thinkers who hold empiricism, however, truth is something obtained through experience. The correspondence theory of truth, therefore, is apt for empirical sciences.⁸

Empirical sciences rely upon observation and experiment in seeking the truth. Observation and experiment are the methods of verifying hypothesis. There should be data for verifying the hypothesis which are collected from observable phenomena or materials. As a hypothesis is verified, the hypothesis is empirically tested. This is the basic idea of empirical sciences. Empirical sciences are natural sciences and behavioral sciences.

In the 19th century, the development of the natural sciences reached a prestigious level and influenced other fields of study. Using scientific method, other disciplines began following in the footsteps of natural sciences to find the truth based on empirical facts. Auguste Comte, a philosopher and mathematician,

⁷ Solomon (n 1).[178].

⁸ *ibid.*[176-177].

was the first to use the method applied to natural sciences for explaining social evolution in his book *Cours de Philosophie Positive*. He is regarded as the founder of positivism.

According to him, there are three stages of human thought evolution. The first stage is the theological stage. In this stage every phenomenon is explained by referring to the supernatural cause and the Divine being interference.⁹ The second stage is the metaphysical stage. In this stage, the human mind is referred to as the nature of basic ideas of existence.¹⁰ It is in this stage that the human mind begins working to ask what the reality is. The third stage is the positive stage. This stage rejects all speculative thinking and limits itself to the empirical observation and relationship between facts by employing methods used in the natural sciences.¹¹

Since the second half of the 19th century, positivism as suggested by Comte became a pattern of social sciences. As a matter of fact Comte was not alone. John Stuart Mill, a philosopher, economist, and political scientist influenced by Bentham, even refused all decisions based on value. In his opinion, all decisions and truth should be based on empirical facts. As a natural sciences admirer, Mill believed that social life is governed by law of causality as in physics.¹² In his book *A System of Logic* (1843), he applied a method employed in natural sciences to social sciences. It makes sense, therefore, that what Mill has done is called '*naturalistic social science*'.¹³

Furthermore, Mill developed an experimental design in which two groups should be matched. The first group, which will be given treatment, is called the experimental group. The other group that is not treated is called the control group. For example, research is carried out to find the correlation between the success of family planning and the degree of entertainment. There are two highly populated

⁹ Edgar Bodenheimer, *Jurisprudence. The Philosophy and Method of the Law* (Harvard University Press 1962).[89].

¹⁰ *ibid.*

¹¹ *ibid.*

¹² Lord Lloyd of Hampstead and MDA Freeman, *An Introduction to Jurisprudence* (English Language Book Society 1985).[8].

¹³ *ibid.*[7].

villages, say *Desa Karang Dowo* and *Desa Plosokandang*. Both villages are located at two different sub-districts. *Desa Karang Dowo* was made as the experimental group and *Desa Plosokandang* was determined as the control group. *Desa Karang Dowo* was given treatment by introducing rural electrification to the village while no rural electrification was introduced to *Desa Plosokandang*. Three years later, it was found that the birth rate at *Desa Karang Dowo* declined significantly; on the contrary, the birth rate at *Desa Plosokandang* remained stable. The result of the research indicates that there is a correlation between the success of family planning and the degree of entertainment. It is the correspondence truth, which is based on empirical data.

Since the correspondence truth is based on empirical data, it is inapplicable to value-loaded discipline. Actually, in real life, not only is a visible thing taken into account but things on mind and values are also considered by human beings. Truth, therefore, does not only deal with observable things but also concerns something that can be reasoned and values that are acceptable to society. Perceived from an epistemological perspective, truth dealing with something that can be reasoned and values that are acceptable to society is the coherence truth. Then, something is true not only because it is observable but it is also in conformity with values accepted by society. Such truth is coherence truth.

In fact, the coherence truth deals with values; it is appropriate, therefore, as to what Dale Dorsey stated, that if science links with observation, upon which a correspondence theory of truth is applied, the coherence theory of truth is in the realm of ethics.¹⁴ Dorsey's statement signifies that the coherence theory of truth is for issues in the domain of morals or is for problems that deal with values. In ethics and values, there are axiologies in the forms of provisions and prohibitions, which are a system.

The function of research in finding the coherence truth is to find the conformity between what is studied and values or rules or principle as a reference. If it conforms

¹⁴ Dale Dorsey, *A Coherence Theory of Truth* (Philosophical Studies 2006).[493].

to the reference, then truth is found. On the contrary, if what is studied does not conform to the reference, truth is not found. It is falsity.

Legal research is to find the coherence truth. The truth is found to resolve legal problems. Legal problems may be the conformity between legal rules and principle, the consistency between legal rules and other legal rules, and the compliance of human conducts with laws. Legal rules should not contradict legal principle. In case of conflict between legal rules and legal principle, the legal principle shall prevail. Legal rules should be in harmony with other legal rules. Otherwise, there may be legal uncertainty because it is possible that two contradictory provisions are applied to a case and, if it happens, the question is which provision shall prevail. It is also possible that there may be overlapping between provisions if there is no interweaving of different rules concerning the same case. Then, human conduct should comply with the law. In this case, the notion of law is not only legal rules or statutory provisions but also best practices in society and legal principle.

The interesting example of finding coherence truth in legal research is the United States Supreme Court Decision of June 4, 2018, on *Masterpiece Cakeshop, Ltd. et al. v Colorado Civil Rights Commission et al.* The case began when, in summer 2012, Charles Craig and Dave Mullin, a homosexual couple, accompanied by Craig's mother came to Jack Philips, the owner of Masterpiece Cakeshop, to order a cake for their wedding celebration in Denver, Colorado. Craig and Mullin told Philips that they had registered their marriage with the state of Massachusetts because at that time homosexual marriage was unlawful in the state of Colorado. Philips refused the order and he explained to them that he does not make cakes for homosexual marriage. Craig, his mother, and Mullin left Philips without saying anything.

The following day, Craig's mother called Philips asking why he did not meet her son's order. Encountering such a question, Philips answered that, as a devout Christian, he does not make cakes for homosexual wedding parties because it is against his faith. Furthermore, he told her that, according to his faith, making a cake for celebration that directly contradicts the Bible verses is just the same as approving and participating in the celebration.

In August 2012, Craig and Mullin sued Philips and Masterpiece Cakeshop. They filed the lawsuit with the Civil Right Division of the state of Colorado. They asserted that they were denied the same and full service due to their sexual orientation. According to them, Philips' standard business practice was unwilling to meet the order of making a cake for a homosexual wedding celebration.

The Civil Right Division investigated. The agency found that, in some cases, Philips refused prospective buyers based on sexual orientation. He stated that he cannot make a wedding cake for a homosexual wedding reception because his faith prohibits it. The division found that there had been six prospective buyers, who were homosexual couples denied service from Philips for the same reason. The Civil Rights investigators also thought carefully about affidavits submitted by Craig and Mullin, in which it is stated that Philips' shop also refuses to sell cakes to lesbian couples who will celebrate their commitment because it is the stance of the shop not to sell cake or bread to homosexual couples for such celebration. Based on the findings, the Civil Rights Division presumed that Philips had violated Colorado Anti-Discrimination Act (CADA). Consequently, the case was transmitted to the Civil Rights Commission.

Enacted in 1885, the Act to Protect All Citizens in Their Civil Rights, which is commonly called the Colorado Anti-Discrimination Act (CADA), guarantees all state citizens to fully and equally enjoy public accommodation regardless of race, skin color or slave descent. In 2007 and 2008, the law was amended, by which it prohibits discrimination based on sexual orientation. The relevant provision specifies as follows:

“It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation”.

The law defines 'public accommodation' broadly so that it includes all venues of transactions of services and excludes churches, mosques, synagogues, or other places for worship.

Having received the case from the Civil Rights Division, the Civil Rights Commission carried out a formal examination and transmitted it to the Administrative Law Judge (ALJ). Since the ALJ did not find any difference in material facts, it only learned dossiers submitted by the parties, both petition and rebuttal. The ALJ granted the homosexual couple's petition. In contrast, it rejected Philips' argument who stated that refusing to make a wedding cake for Craig and Mullin's marriage did not violate state of Colorado law. In fact, it is undeniable that a shop is subject to state law on Public Accommodation. The ALJ, however, determined that what Philips had done led to discrimination based on sexual orientation, which is prohibited by law, instead of making a wedding cake for a homosexual marriage as he argued. The Civil Rights Commission fully affirmed the ALJ decision. Based on the decision, the Commission ordered that Philips stop discriminating against homosexual couples, by which he now had to sell cakes to them just as to those who are heterosexual couples.

Philips relied upon the First Amendment, in which freedom to carry out one's religious obligation is guaranteed. He then appealed to the Colorado Court of Appeal. The Appellate Court, however, also upheld the Commission judgment. It is understandable, therefore, that Philips appealed as the last resort to the United States Supreme Court.

In handling the case, the US Supreme Court stated that American society has recognized that gays and gay couples may not be treated as persons who are kept away from social intercourse and they are considered as persons whose dignity is lower than common people. Based on the idea, law and the Constitution provide them to exert their civil rights. The court should honor them in executing their rights as respecting other people in carrying out their rights. At the same time, however, from philosophical and religious perspectives objection to gay marriage should also be guaranteed. The First Amendment guaranteed that religious organizations and religious people are free to exercise their faith.

The US Supreme Court asserted that what the Commission had done to Philips was a state violation to the obligation because the First Amendment to

the US Constitution prohibits laws and regulations that contain hostility toward religion or faith. According to the highest court, based on the Free Exercise Clause, the Commission should proceed neutrally and impartially Philips' faith. The court concluded that, based on the First Amendment to the Constitution, Philips has the right to fully exercise his religion without undermining gays' dignity. Consequently, the US Supreme Court reversed the Colorado Court of Appeal decision.

The issue of the case is whether or not refusing to make a wedding case for a homosexual wedding party coheres the fundamental principle underlying the Constitutional provision. There should be legal research carried out to find the coherence truth. As the truth is found, it is applied to resolve the problem.

The Characteristic of Legal Research

According to Morris L Cohen, legal research is the process of finding the law that governs activities in human society.¹⁵ Through research, lawyers find necessary resources to predict what shall be done by the court, for which they can take certain actions.

Applying law to a certain situation needs skill in legal analysis. A lawyer is skillful in analyzing factual situation and applying laws and regulations or established legal doctrines. The doctrines may, however, contradict each other. The lawyer, therefore, shall consider carefully which doctrine is relevant to the case at hand. The ability to make a choice of the doctrines to be applied aptly to the case indicates the capacity of the lawyer.

At a glance, Cohen's statement is for practicing lawyers. Actually, it is not so. Enid Campbell, an Australian author, states, 'In his or her professional career, the lawyer as well as legal scholar will find it necessary to discover the legal principle relevant to a particular problem'.¹⁶ The statement inferred that not only is legal research carried out by a legal practitioner, but it is also conducted by a legal scholar. Ian McLeod correctly stated that legal method is applicable to legal practice

¹⁵ Morris L Cohen and Kent C Olson, *Legal Research* (West Publishing Company 1992).

¹⁶ Enid Campbell and others, *Legal Research* (The Law Book Company 1988).[271].

and legal scholarship.¹⁷ The result of legal research for both practical purpose and academic activity is prescription in the form of legal opinion and recommendation.

Since jurisprudence is a prescriptive science instead of descriptive science, legal research carried out either by lawyers or legal scholars does not begin with hypothesis. It does not need data. As a result, the terms qualitative and quantitative research are not terminologies for legal research. Nor is grounded research applicable to legal research because such a research is for social sciences. Thus, all procedures taken in descriptive sciences are not procedures in legal research.

It is possible, however, in establishing argument by induction based on a fact. The fact in legal research is not data for verifying hypothesis. On the contrary, fact in legal research is the subject matter to be researched. It should be identified whether the fact is just a fact or legal fact. For example, Robert is an electrician who works on a call basis for 'The Light', a registered installer limited partnership company. When he was assigned to do his job at Heng Ming Restaurant, he was electrically shocked and fell down from the third crosspiece of a ladder. He then became incapable to do his job because his right hand was broken and dysfunctional. The issue arising out of this case is whether it is a fact or legal fact. If it is a legal fact, there may arise some legal problems out of the fact. The legal problems should be clearly defined because they involve one's fate. The first thing to be identified in this occurrence is whether there is an employment agreement between Robert and The Light. If it is so, the installer company should rely upon clause concerning payment for work accident compensation. It coheres the agreement clause as Cohen suggested that the clause is applied to the problem. Then, the case is settled. Since Robert works for The Light on a call basis, he did not enter into an employment agreement with The Light. The legal problem is whether The Light is obliged to pay work accident compensation to Robert. The absence of employment agreement results in a no agreement clause serves to be a reference. To find the coherence truth in legal research, there should be something as a reference. Since there is no

¹⁷ Ian McLeod, *Legal Method* (Macmillan 1999).[13-14].

agreement clause is referred to, the legal principle is called to be a reference. It is a legal principle that one who works for another is entitled to get payment. Relying upon this principle, it is found that under no circumstances is The Light free from liability to pay work accident compensation to Robert. It is recommended, therefore, that The Light pay work accident compensation to Robert despite the absence of an employment agreement.

Just as legal research for practical legal settlement is carried out to prescribe, so legal research for academic purpose is conducted to give prescription that law coheres legal principle, which is the praxis of moral. For example, George Sipa-Adjah Yankey in his thesis '*International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria.*' when he obtained his Doctoral degree at School of Law, University of Warwick, found the weakness of Patent Laws in both countries for transferring technology.¹⁸ The Patent Laws do not cohere the idea of technology transfer. Patent Law grants the inventor a monopoly right to exploit the patent until certain time specified in the law. As the patent protection expired, the disclosed description of invention becomes public domain and it can be exploited by anyone without obtaining licensing from the former patent holder. It is the principle of Patent Law to give balance protection to both the inventor and society. Within the patent tenure, the inventor may exploit the invention and get economic benefit from the patent. It is equitable that, as the patent expires, the public has the opportunity to exploit the expired patented invention. In the academic work, he recommended that there was a need to develop a domestic technological infrastructure and the creation of the right economic environment for technology transfer. In addition, he suggested that there be political direction and support to enable technology transfer through Patent Law.¹⁹

The author raised a problem of the weakness of Patent Laws in Ghana and Nigeria. He found that the laws failed to be an instrument for the indigenous citizens

¹⁸ George Sipa-Adjah Yankey, *International Patents and Technology Transfer to Less Developed Countries: The Case of Ghana and Nigeria* (Avebury 1988).[311-312].

¹⁹ *ibid.*

of the respective country to develop technology invented by them. Consequently, practically, the Patent Laws of both countries justify under development of both countries, on the one hand, and undeveloped technology of indigenous citizens of both countries on the other. The law, obviously, is incoherent to the essential idea of law that is justice, which is a reflection of moral. Therefore, according to Yankey, it coheres legal principle and is applicable.

Legal Problem

Legal problem is pivotal in legal research just as problems in other research. Since legal research is carried out to resolve legal problem, identifying legal problems incorrectly may lead to failure of establishing legal argument applied to the legal problem and, consequently, the problem will be unresolved. In a trial, if a plaintiff fails to establish legal argument as a basis of the subject matter of the lawsuit, the petition may be dismissed. Likewise, a public prosecutor who could not establish legal argument to prove what the defendant has committed may cause the defendant to be found not guilty. The failure of identifying legal problem, therefore, may make inaccurate judgment, which may produce injustice. In an academic work, failure to identify the legal problem will result in inaccuracy of legal recommendation. Such a legal research is, academically, unacceptable. To identify a legal problem accurately, one should be proficient in law.

Legal problems arise out of two relational propositions. The relationship may be causal, functional, or the relationship by which the latter proposition confirms the meaning of the first proposition. Identification of the kind of relationship is necessary for the purpose of conducting legal research.

The causal relationship of two propositions, for example, the laying down of Article 4 in the French Civil Code that states '*Le juge refusant de juger pour ne pas interpréter une loi insuffisante, obéissant strictement au principe de la séparation des pouvoirs, se rendrait coupable de déni de justice*',²⁰ under no circumstances does

²⁰ Translation: The judge refusing to try so as not to interpret an insufficient law, strictly obeying the principle of the separation of powers, would be guilty of denial of justice.

it make French courts refuse to try a case. In an interview with Nicolas Bustamante under the title '*Le juge n'est plus uniquement la bouche de la lois*' published in *Blog de Doctrine.fr* on March 29, 2017, Dominique Lottin, Chief of Versailles Appellate Court, answered some questions concerning the position of case law in France and whether the judge is the voice of statute.²¹ The answer was '*L'adage disant que "Le juge est la bouche de la loi", c'est terminé depuis longtemps. Le code civil a évolué*'.²² The legal problem of this research is whether or not the development of civil code causes the French judges' stance on Montesquieu's doctrine of the separation of power. It is found that due to Article 4 of the French Civil Code, the judges no longer stick to the doctrine.

The functional relation of two proposition is when the first proposition works for the latter proposition. As an example, the researcher wanted to find the function of discretionary power of administrative agency to maintain citizens' wellbeing. In principle, the administrative agency exerts its power based on laws or regulations. It is possible that sometimes administrative action is not based law but on the ground of discretionary power. In some cases, the administrative agency is given discretionary power to make decision.²³ About the discretionary power, Kuntjoro Purbopranoto states that the administrative organ is flexible to perform its function based on law or discretion.²⁴ Furthermore, he expressed his opinion that administrative action shall not be carried out rigidly based on law but should be immediately taken as necessary to address urgent situation provided that it is done prudentially and not excessively.²⁵ Relying upon both Article II Section 3 of the US Constitution²⁶ and French Government,²⁷ administrative agency discretionary power is significant to

²¹ Nicolas Bustamante, 'Le Juge n'est plus Uniquement La Bouche de La Loi' Interview de Dominique Lottin, Première Présidente de La Cour d'appel de Versailles' [2017] *Blog de Doctrine.fr*.

²² Translation: 'The adage that the judge is the mouth of the law has long been terminated. The Civil Code has developed'.

²³ EA Damen, *Bestuursrecht Deel 1* (Boom Juridische Uitgevers 2009).[316].

²⁴ Kuntjoro Purbopranoto, *Beberapa Catatan Hukum Tata Pemerintahan Dan Peradilan Administrasi Negara* (Alumni 1985).[43-44].

²⁵ *ibid.*

²⁶ Legal Information Institute, 'Section III' <<https://www.law.cornell.edu/constitution-conan/article-2/section-3>>.

²⁷ Encyclopedia Universalis, 'POUVOIR DISCRÉTIONNAIRE' <<https://www.universalis.fr/encyclopedie/pouvoir-discretionnaire/>>.

realization of the end of state. The main purpose of the establishment of state is to protect and empower its citizens. In case of a dangerous emergency situation and the law does not provide, there should be action taken by the administrative organ to cease the situation, thus the action is carried out based on discretionary power. It is found that there is a functional relationship between discretionary power given to the administrative organ and the maintenance of citizen wellbeing.

The relationship by which the latter proposition confirms the meaning of the first proposition becomes a legal problem when there is a provision that should be interpreted in such a way that is applicable to a case. A good example is the *Microsoft* case. In the case, the District of Columbia Circuit Court of Appeal affirmed fact disclosed by Judge Jackson at the District of Columbia Court. The court found a fact on November 5, 1999, that the dominant position of marketing of operating systems for personal computers meant Microsoft created a monopoly and that Microsoft had pressured those who threatened the monopoly, including *Apple*, *Java*, *Netscape*, *Lotus Notes*, *Real Networks*, *Linux*, etc. Using the rule of reason, the Appellate Court judgment refers to the provision concerning anti-monopoly laid down in Antitrust Law. The decision, then, answered the legal problem that dominant position violates anti-monopoly provision.

Legal Research Materials

In answering legal problem, there should be legal research materials. The legal research material may be primary legal materials and secondary legal materials. The primary legal materials are authoritative materials, which are laws and regulations, case law, and treatise on law making, while, the secondary legal materials are all publications concerning law other than official treatise and practices accepted as laws. Publications concerning law include law textbooks, law journals, and commentaries on court landmark decisions. In addition, if necessary, non-legal materials may be used as complementary to the research.

In using laws and regulations as legal research materials, it should be borne in mind the preferential principles of laws, consistency between the laws and

regulations, and the coherence of laws to legal principle. Preferential principles of law are *lex superior derogat legi inferiori* (superior law supersedes inferior law), *lex specialis derogat legi generali* (special law supersedes general law), and *lex posterior legi priori* (posterior law supersedes prior law). Regarding consistency between laws and regulations, the legal researcher should discern whether they are overlapping or conflicting each other. In some cases, it is possible that statutory provision does not cohere with legal principle. In such a case, the legal researcher determines that the statutory provision is invalid due to not cohereing the legal principle. In some other case, the idea behind a statutory provision is unclear. Faced with such a provision, the legal researcher should refer to the treatise of law making. Doing it that way, the researcher may find the idea and the purpose of laying down the provision.

The next primary legal material referred to by the legal researcher is case law concerning legal problem at hand. To understand the significance of judicial decision to legal research, it is appropriate to cite the drafter of the French Civil Code, Potalis, at *Discours préliminaire du Projet de Code Civil* in 1804:²⁸ ‘*Un code quelque complet qu’il puisse paraître, n’est pas plus tôt achevé que mille questions inattendues viennent s’offrir au magistrat. Car les lois, une fois rédigées, demeurent telles qu’elles ont été écrites. Les hommes au contraire, ne reposent jamais*’.²⁹ From the statement, he admitted that, in court proceedings, it is possible new problems arise that are not provided in the code.

Regarding the authoritativeness of judicial decision, Paul Scholten stated, ‘*aan het oordeel van de rechter buiten de verhouding aan zijn beslissing onderworpen geen gezag toekwam*’³⁰ Scholten pointed out that there should be a relationship between reasoning and the decision. According to Scholten, the basic idea of division of legislative power and judicial power with the last resort of appeal is nothing but

²⁸ PJP Tak, *Rechtsvorming in Nederland* (Samsom HD Tjeenk Willink 1984).[123].

²⁹ Translation: ‘A code, how complete it may appear, is no sooner completed than a thousand unexpected questions come before the judge. For laws, once written, remain as they were written. Men, on the contrary, never rest’.

³⁰ Paul Scholten, *Mr. C Asser’s Handleiding Tot de Beoefening van Het Nederlands Burgerlijk Recht. Algemeen Deel* (WEJ Tjeenk Willink 1974). [85] Free translation: ‘the judge’s disproportionate reasoning to the decision makes no authority’.

to make case law authoritative.³¹ It is undeniable that the Dutch Supreme Court reasoning is honored. It can be seen in the court proceeding how great lawyer's confidence is when he/she refers to a Supreme Court decision. In the Netherlands, therefore, compilation of cases is available. It may lead to make a comparative study on past and present decisions. This indicates that case law is authoritative.

The secondary legal materials are mainly law books including academic writings such as term papers, thesis, doctoral thesis, and law journals. In addition, commentaries on judicial decisions are also referred to. The usefulness of the secondary legal materials is to designate a researcher to take an initial step in doing research. If the secondary legal material is a thesis or any other academic writing, it may be an inspiration for the researcher as a starting point to begin carrying out his/her research. For practitioners, the secondary legal materials may serve to be references to establish argument presented in court proceeding or laid down in legal opinion. Any reference shall be relevant to the subject matter of the research. Moreover, the researcher picks out books or articles written by highly qualified authors. Nevertheless, not all qualified authors wrote law books. The researcher, therefore, shall learn the Introductory Notes or Preface of the book because in the section it is declared that the idea of the book is written. An example is a book titled *The Legal System. A Social Science Perspective* written by Lawrence Friedman, a jurist and retired judge, but is not for studying law. In its Preface, it is stated that:

“... There are, of course, many valid ways to look at law. The lawyer looks at it mostly from the inside. He judges law in its own terms; he has learned certain standards against which he measures legal practices and rules. Or he writes about practical affairs: how to use law, how to work with it. This book falls into another category. It looks at law from the outside. It tries to deal with the legal system from the viewpoint of social science...”

The book was published by the Russell Sage Foundation, a foundation founded to improve social life and conditions in the United States.

The next research materials that may support and complement the outcome of the research are non-legal materials. Take an example, a new-built bridge collapsed

³¹ *ibid.*

when a big transport vehicle passed by. The lawyer, who represented the municipal government, sued the contractor. Despite post-construction service as stated in the contract, the lawyer presumed that the construction was inappropriate. In his petition, he asserted that the contractor had breached the contract and consequently, he sought reimbursement twice as much received by the contractor pursuant to the contract and the rest of money that had not been paid will not be paid. As a plaintiff's counselor, the lawyer should establish evidence. In this case, he may call for a civil engineer to explain before the court according to his/her expertise. The explanation supports the outcome of the research.

Non-legal material may also support legal research for academic purpose. For instance, a Doctorate Candidate who wanted to carry out research about whether or not passive euthanasia violates law. Inevitably, the candidate needs a medical doctor's advice and reads some relevant literatures. As a jurist in criminal law, the candidate is proficient to identify the nature of euthanasia from the criminal law perspective, by which he can answer the subject matter of his research.

There are also some other research materials in the forms of interview and expert deposition. In interview, it is recommended that the interviewer, who is the researcher, prepare structured questions about legal problems he puts forward. If the interviewee gives legal opinion in writing on the questions, the legal opinion becomes a secondary legal material. Likewise, expert deposition may serve to be the secondary legal material because it is noted and recorded.

Approaches

In legal research, there are five types of approaches. Employing the approaches, the researcher will obtain information about the legal problem to be answered from many aspects. The approaches are statute approach, case approach, historical approach, comparative approach, and conceptual approach.

Statute approach is conducted by studying all laws and regulations concerning the legal problem that should be addressed. Legal research is carried out for lawyering, the statute approach enables the researcher to observe the

consistency between the legislations, the non-contradictory any statutory provision to any Constitutional provision, and the harmony of regulations with any statutory provision. The outcome of the study becomes the basis of argument, by which the problem is settled. Different from legal research for settling practical legal problems, in legal research for academic purpose, the researcher should find *ratio legis* behind any statutory provision and ontological basis of enactment of the law. Grasping the *ratio legis* and the ontological basis, the researcher comprehends the philosophy behind the law. The researcher, then, may reach a conclusion whether or not the legal problem academically coheres or contradicts the philosophy of law.

Case approach is conducted by studying cases that have been *res judicata*, in which no legal redress may be exhausted to appeal. The cases should be relevant to the legal problem that is the subject matter of the research. The main point of this approach is to study the *ratio decidendi* or reasoning of judicial decision. In this approach, many similar cases are studied. From the study, it may be found an argument to resolve the legal problem.

The third approach is historical approach. Historical approach is carried out by searching the background of the subject matter of the research and the development of laws and regulation concerning the legal problem. This kind of approach is needed when the researcher wants to find a philosophy or school of thought that brings about the subject matter of research. It is badly needed if the researcher considers that the philosophy is relevant to the current situation. Today, some countries promulgate law concerning attorney at law or advocate to litigate in court. From an historical point-of-view, attorney at law or advocate is *officium nobile* or noble office. If the researcher wants to find the background of promulgating law concerning attorney at law or advocate to do his/her service in litigation, the researcher should study the origin of attorney at law or advocate in Roman Law and should find the philosophy as to why the litigator is called *officium nobile*, which is a prestigious occupation.

The next approach is comparative approach. This approach is conducted by comparing law of a certain country with law of more than one country concerning

the same subject matter. Comparative approach may also be done by comparing judicial decisions of one country and court judgment of other countries of similar cases. This approach is useful for obtaining similarities and differences between the laws of the countries. Conducting comparative approach, the researcher may find consistency between the philosophy and the law of the countries. By the same token, comparing judicial decisions of different countries for similar cases, the researcher gets reasoning of the judgments, which may be the answer of the legal problem of the research.

The last type of approach is the conceptual approach. This approach departs from doctrines and schools of thought in jurisprudence. Learning the doctrines and the schools of thought, the researcher may find ideas that create notions of law, legal concepts, and legal principles that are relevant to the legal problem he/she faces. The understanding of doctrines and schools of thought in jurisprudence will be the backbone for the researcher to establish a legal argument to resolve the legal problem.

Conclusion

Legal research is more than doctrinal research. Doctrinal research is only the study on reading and analyzing the primary materials and secondary materials. Legal research is carried out to resolve legal problems. The outcome of legal research is to prescribe what shall be done to resolve the legal problem.

The function of research is to find the truth. Social research and legal research are different in terms of truth. The social research is conducted to find the correspondence truth, by which hypothesis is verified. In contrast, legal research is carried out to resolve legal problem. Therefore, it discovers the coherence truth.

Legal research is applied research whose result is prescription in the form of legal opinion and recommendation. This is because it is a know-how aspect of jurisprudence, which is prescriptive science. There are no data in legal research. Notwithstanding induction based on fact, legal research is to establish argument that relates to the legal problem.

The legal problem is created by two relational propositions. The relation may be causal relation, in which the first proposition causes the latter proposition. Another form of relationship of the two propositions is functional relation. In this relationship, the first proposition works for the latter proposition. The third form of legal problem is the relationship by which the latter proposition confirms the meaning of the first proposition. In this relationship, the latter proposition explains the meaning of the first proposition.

Carrying out legal research, the researcher needs legal research materials. These may be primary and secondary legal materials. In addition, if necessary, non-legal materials are also employed to support and complement the outcome of the research. The primary legal materials are authoritative materials. The secondary legal materials are all law publications.

In conducting legal research, five types of approaches may be used. Statute approach is used to observe the harmony of laws and regulations dealing with the subject matter of research. Case approach is to study the reasoning of judicial decisions that have been *res judicata*. Historical approach is conducted when the researcher wants to know the development of law concerning the subject matter of research. Comparative approach is utilized to get known similarities and differences of law of many countries. Conceptual approach is conducted to understand doctrines and schools of thought in jurisprudence, by which it may inspire the researcher to establish an argument.

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