CONFERENCE REPORT: SECOND ANNUAL CONFERENCE ON EMPIRICAL LEGAL STUDIES

MIRANDA FORSYTH*

The second annual conference on Empirical Legal Studies (ELS) was hosted by the New York University School of Law over two very full days on 9 – 10 November 2007. For readers unfamiliar with the term "empirical legal studies," it may be helpful to firstly define my understanding of what this field is all about.[1] To put it basically, empirical legal studies involve investigating the operation and effects of the law within a society or across societies in an objective and unbiased way. Such studies are therefore extremely important in the areas of law reform and policy making, as they can provide concrete information about the actual functioning and effects of legal systems, particular laws and legal institutions in practice.

There are two main groups of methodologies used to carry out studies into the operation and effect of law within society: quantitative methods and qualitative methods. Quantitative methods are primarily concerned with collecting empirical data in a numerical way, such as through questionnaires or through accessing original data sets, and often use mathematical models and formulae to analyse this data. These methods are frequently used by those interested in law and economics and econometrics. Qualitative methods, on the other hand, involve direct observation, in-depth interviews, group discussions, narratives and the analysis of documentary evidence, These methods are often used by those interested in the sociology and anthropology of law. Both aim to discover underlying meanings and patterns of interaction and relationship.

The scope of this conference was limited to studies of American law and society employing almost exclusively quantitative methods. This note briefly describes the conference and then discusses a number of different themes concerning empirical research that emerged from it.

The conference was structured into a number of different subject-matter streams that took place consecutively in different sessions throughout the two days. These themes were quite diverse and included: courts and judges, corporate, criminal law, environmental law, family law, intellectual property, civil litigation, torts and taxation. On the second day there was also a poster session, although the studies presented also fitted generally into the subject matter areas of the rest of the conference. I attended sessions mostly in the area of intellectual property and criminal law, along with some on courts and judges and race and sex.

* Lecturer in Law, University of the South Pacific

[1] Empirical Legal Studies, in the sense of a movement, currently appears to be internally defined as studies using quantitative methods and a mathematic presentation of findings. However, empirical legal studies can be used more broadly. In this paper I use ELS to refer to the movement and empirical legal studies or empirical studies to refer to the broader definition.

Each paper was followed with a detailed critique by a specially appointed discussant, and then the floor was opened up for general discussion. This structure has the potential to be extremely rewarding for the presenter as it may provide a great deal of well thought through constructive criticism and advice. However, I must say that I also found it to be at times highly confrontational and difficult for a presenter to grapple with in front of an audience. It appears to be a useful technique if used in a sensitive way, but of course this very much comes down to the choice of the individuals involved.

As the studies all concerned the U.S.A., their direct relevance to the South Pacific region was quite limited, although the general themes discussed below are more broadly relevant. Perhaps the most directly applicable studies came from the sessions on intellectual property laws, a field where the U.S.A has much experience and the South Pacific an increasing interest. In one paper presented by James Bessen and Michael Meurer, it was convincingly argued that the costs of the patent system in the U.S.A. in terms of administration and costs to patent holders outweigh its benefits, thus feeding into the current debate in America about this system.[2] Such studies should be closely reviewed by those seeking to develop patent systems in South Pacific countries where the costs of administration are likely to be proportionately far higher and of more dubious benefit than in America. A similar theme was pursued in a subsequent paper by Paul Heald who analysed the question of whether the extension of copyright protection for an extra 20 years under the *Copyright Term Extension Act 1998* (U.S.A.) could be justified on the basis that it makes works more available, the main argument used by Congress for this extension. He analysed best selling novels over two time periods, those where copyright had been extended and those where it had not, and concluded that the availability of the works was not affected by their copyright status, but that the costs to the consumer of copyrighted works were much higher than those in the public domain. This again is a very useful study for the South Pacific as it illustrates how careful policy makers need to be in making assumptions about the likely impacts when considering whether granting intellectual property protection is truly justified.

There were three main themes, as well as some general lessons about the use of empirical legal research that I took from the conference. The first was that there has been an explosion in empirical legal research over the past thirty years, and especially the last decade. This fact was commented upon by the keynote speaker, John Donohue, who discussed the way in which empirical legal studies are today regularly used by policy makers and legislators. The growth of the area was also illustrated by the creation of the Journal of Empirical Legal Studies in 2004 and the development of this conference in 2006. Much to the amazement of the organisers there were over 360 participants in the conference this year, many more than had been expected.

The second theme was the overwhelming focus on quantitative research. Not a single paper was concerned with qualitative research, and very little mention was made of qualitative research even by the discussants or the participants. This avoidance of

[2] This paper and all others for the conference are available at http://hq.ssrn.com/Conference/Reports/conf_preliminary_program.cfm?conflink=CELS-2007#1 (Accessed 18 December 2007).

qualitative research appeared to me to be both a weakness of the conference overall, and also a weakness of many of the studies presented. Many of these could have benefited enormously from combining some qualitative methods with their quantitative ones to make the results more readily understandable and useful to a wider audience. For example, in one paper a presenter attempted to analyse the question of whether the patent office was "just a rubber stamp." He did this by analysing the rate of patent approvals granted by the patent office. However, his final figures reflecting the percentage of patents granted in relation to the number of applications received were actually fairly meaningless by themselves, as they did not shed any light on the main question behind the study, namely whether there is a rigorous scrutiny of patent applications by patent office officials. If this study had been complimented with some qualitative methods such as observation of the processes in the patent office and in-depth interviews of patent office officials, it seems likely that far more meaningful results could have been achieved.

A third theme of the conference was the difficulties, and sometimes the dangers, of using the results of empirical studies. The point was often made that the result of a study is often highly dependant upon the modelling choices made in its design, the assumptions the study was based upon and also the empirical data collection methods employed. For example, in one study a researcher discussed the fact that greatly different responses had been recorded by formatting the same question in an open, closed or multiple choice manner. The keynote speaker also highlighted this, observing that it is very common to have studies of the same issue reach different conclusions. A classic example of this is research concerning whether the death penalty lowers the crime rate, which has been analysed for years in multiple studies producing different conclusions. Donohue warned that the problem is that a bad study may be used to justify a new policy or piece of legislation, but when in the future the study is found to be flawed that is seldom used as a basis to rescind the policy or Act.

A way to counter these potential pitfalls in the use of empirical studies was proposed by both Donohue and Lempert, who presented a session on empirical methods at the end of the conference and concluded with a number of lessons about applying empirical research to public policy. Donohue cautioned that when presenting the results of a study it is best to be humble about your results, and to always bear in mind that a few years of data may make your results look very different. Both of them advised that when making any policy decision based on empirical research, the entire literature should be relied upon, and not just a single study no matter how good it seems. Lempert also advised that policy recommendations should grow out of understanding the dimensions of the study and not just mechanically applying what worked in the study. He suggested this could be done by thinking about what the study results are saying on a broader level, and by looking beyond the researchers' bottom line to other relationships revealed in the data.

In conclusion, this conference presented many valuable lessons about the use and abuse of empirical research. It illustrated the importance of methodological choices in designing a study and the dangers that can come from sloppy or ill-considered design. Unintentionally, it also demonstrated the need for researchers to consider combining both

qualitative and quantitative research methodologies to achieve results that are more nuanced and of greater utility for policy makers. There is no reason why well designed quantitative studies cannot or should not be complemented by qualitative data, or why data should not be presented more narratively, so as to be more accessible to a wider audience. Similarly, there is no reason why qualitative studies cannot be complemented by quantitative data. Further, the emphasis that quantitative studies put on project design may usefully help to boost the design of qualitative studies. I sincerely hope as ELS develops, the gap between quantitative and qualitative methodologies can be bridged and that, in future, there may be a conference that brings together specialists of both types of research, so that we may all learn from each other. Not to attempt to bridge this divide is to lose the real potential of ELS.