COMPARATIVE LAW AND LEGAL CULTURE
A Tribute to David Allan and Mary Hiscock

*Malcolm Smith**

Introduction

In preparing this tribute to David and Mary, my mind automatically goes back to a signal event in the teaching of Comparative Law in Australia, when David and Mary decided to substitute Japan for France and Germany in the comparative civil law subjects they taught at Monash and Melbourne respectively. The year was 1969, and I had just started on my own career in the field of Japanese law, as a tutor at the University of Melbourne. I have traced this background before.[1] In this tribute I want to discuss the impact of research on Asian Law on the field of comparative law, and highlight some of the methodological challenges that have emerged. I then want to draw attention to the latest development in the evolution: the emergence of Asian scholars who are seriously working on each other's legal systems for the first time. The first version of this essay was presented at a Seminar at Kyushu University, Japan, in November 2002, at which scholars from Bangladesh, the PRC, Hong Kong, Indonesia, Japan, Korea, Malaysia, Pakistan, the Philippines, Singapore, Thailand and Vietnam discussed the future of comparative Asian legal studies in Asia itself.[2] The seed sown by Mary and David and nurtured over the last three decades continues to grow.

I would like to spend much of my paper outlining recent achievements of young scholars in the area of Asian legal systems and legal cultures from Australia, and setting some agendas for possible future cooperative work. I hope Australia's work is of interest to other researchers in the region, as I think many of the ideas are of great relevance to their work[3].

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1 Malcolm Smith, "Japanese Law in Australia and Canada: 1965-1987" in Fujikura (ed.) *Eibeihoo Ronshuu* (Collected Essays on Anglo-American Law) a volume of essays in honour of my mentor in Japan, Professor Hideo Tanaka, and Malcolm Smith, Australian Perspectives on Asian Law: Directions for the Next Decade" in Veronica Taylor (ed.) *Asian Laws Through Australian Eyes*, 1997, 3.

2 Kyushu University and the Japan Society for the Promotion of Science (JSPS) 2002 Asian Science Seminar on "Law and the Open Society in Asia" November 25-December 5, 2002. The convener of the Seminar, Professor Ago, Dean of the Law Faculty at Kyushu University, has kindly consented to me using most of the text of my paper in this tribute.

3 I will focus particularly on the publications from two seminars, Veronica Taylor,

The Kyushu Seminar was challenging. It linked comparative law and legal culture, so expressly confronted the main contemporary debate about comparative law: can it usefully contribute if it does not recognize the context of legal culture? It was sponsored by the Japan Society for the Promotion of Science, so implicitly it asserted that the study of comparative law and legal culture are amenable to scientific methods. It explicitly linked law to the "Open Society", challenging us to define the characteristics of the Open Society, and how law might be relevant to such a society. These are large issues indeed. Perhaps even more importantly, it was one of the first academic conferences in Asia asking serious questions about what Asian Law might mean to Asians. I was the only non-Asian to speak.

The themes of the Kyushu Conference are of everyday practical importance in Australia today, for three main reasons. First, since the *Mabo* decision of the High Court of Australia in 1992[4], our highest court has recognized the continuing presence of indigenous law in Australia, and forced our national Parliament to legislate to protect rights under those laws in the property law area. Since those indigenous laws are based on very different cultural and historical roots to the introduced English legal system, we are in new legal territory. National courts and tribunals must make decisions about a different legal culture, and whether it survives.[5] Second, in the same decision, the High Court recognized the relevance of international customary law in shaping the common law of Australia. The leading judgement said that in the absence of any settled Australian law to the contrary, we should strive to keep the common law consistent with international customary law.[6] This is an important gloss on the accepted position that international treaties and agreements are not part of Australian law until adopted by the national Parliament.[7] Third, in the last five decades, immigration has changed Australia from an essentially Anglo-Irish community to a multi-cultural community. It is said that over 140 languages are spoken in homes in my home

(ed.) *Asian Law Through Australian Eyes* (1997) and Tom Ginsburg, Luke Nottage and Hiroo Sono, *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions* (2001), key papers from which have been republished in (2001) 12 Zeitschrift fur Japanisches Recht (ZJapanR). I will also refer to a major recent European contribution on Comparative Law and Legal Culture, Mark van Hoecke, and Mark Warrington, "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" (1998) 47 International and Comparative Law Quarterly 495. I thank Professor Nobuyuki Yasuda of Nagoya University for drawing my attention to this article.

4 *Mabo v Queensland* (1992) 175 CLR 1.

5 See a recent report in the Japan Times newspaper on an Australian decision that found that the indigenous applicants' legal culture had been destroyed.

6 *Mabo v Queensland* (1992) 175 CLR 1, 42.

7 For a subsequent landmark decision of the High court that the signing of an international agreement creates an expectation in Australian residents that the Australian government will honour its word even before introducing legislation, see *Minister of Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

city, Melbourne. We can say we are developing a plural legal system within a multi-cultural society. How do we accommodate these new demands, except by focussing more and more on the essential features of legal systems and legal cultures?

In this essay I want to begin by asking

- what are the key skills for a lawyer embarking on this task?
- then discuss the "crisis" in comparative law, and the increasing attention to legal cultures,
- then outline the Australian claims that "Asian" law has supplanted comparative law as a discipline,
- then discuss the methodological skills that will be required in the future for research
- and for teaching in Law Schools in the areas of comparative law and legal cultures.

1. What Are The Key Skills of a Lawyer?

I would like to start at a basic level by briefly considering what is the essential difference between the discipline of law and other humanities and social sciences disciplines like anthropology, economics, sociology, political science, history, and philosophy, all of which examine laws. I would argue that the core skill of a lawyer is the understanding of what is law, what institutions make and apply law, and how those institutions make and apply law. A narrow lawyer might stop there, with a formal knowledge of which institutions make law and how they apply law in the narrow, positivist sense. Modern legal education, however, also demands knowledge of why each law is made and why the institutions that make law operate as they do.[8] So we now feel obliged to add to the core knowledge an awareness, and if possible a mastery, of the related social science disciplines that investigate reasons for social and economic activities. I would argue that you can be a lawyer without knowing all of these related disciplines, but you cannot be a lawyer without the core knowledge.

2. A Crisis in Comparative Law?

In the last decade, the basic traditional assumptions of comparative law as a discipline have come under attack. One crucial reason is that the old assumptions did not properly accommodate Asian legal systems. Of necessity I will have to be a little autobiographical, so that you understand where I am coming from. Since I

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8 The Australian parliaments in the period 1974-75 adopted legislative instructions to judges which told them they were to search for the Parliament's "purpose" whenever they interpreted legislation, and for the first time authorized the courts to use a wide range of extrinsic materials to help their search.

entered the academic profession in the early 1970s, I am probably thought of as part of the older generation of Asian law scholars, within the Japanese law sub-group[9]. But I don't identify with older ideas and methods. It will emerge in this paper that efforts to classify Asian legal systems, particularly the Japanese legal system have been very unsatisfactory.

The study of Asian legal systems has exposed the weaknesses of traditional Euro-centric comparative law studies, and methodologies. The study of Asian legal systems has forced an examination of the very methodology of comparative law. I want to draw on my experiences over the last thirty years in researching law in Japan to trace some possible methodologies and to focus on what still needs to be done.

3. The Australian Contribution-Asian Law as a Discipline?

There are two recent publications that I would recommend to you all if you want to see the ideas of young Australian scholars at work in this field. The first is an edited volume by Veronica Taylor, then of the University of Melbourne, but now the Director of the Asian Law Centre at the University of Washington, Seattle. The book is called *Asian Law through Australian Eyes*, published in 1997[10]. It is the proceedings of a Conference held in Canberra in early 1994, which brought together for the first time all the people involved in teaching about Asian Law in Australia to talk about what they were doing and how they did it. The contributions are most notable for their critique of traditional comparative law scholarship. The second book follows on from the first, but is limited to researchers on Japanese Law. It is the proceedings of a conference at the Centre for Asia-Pacific Initiatives at the University of Victoria, British Columbia, held in 2000, organized by Luke Nottage with the help of Tom Ginsburg of the United States and Hiroo Sono of Kyushu University. Luke brought together the 1990s generation of Japanese Law scholars to compare their different world views, and methodologies. Published as *The Multiple Worlds of Japanese Law: Disjunctions and Conjunctions*[11], the contributors examine the various approaches to studying Japanese law around the world.[12]

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9 In the Japanese Law field outside Japan, among academics regularly employed in Law Schools, the late Professor Dan Henderson entered the field in the 1950s, Professors Gray (though he was a comparative lawyer much earlier), Haley, Upham, Young, Ames and I entered in the 1970s, Professors Bennett, Ramseyer, and Salzburg in the 1980s and Taylor, Alexander, Dean, Ginsburg, Marfording, Milhaupt, Nottage, and West in the 1990s.

10 Above, n.1

11 ibid

12 For current scholarship see *The Australian Journal of Asian Law*, published by The Federation Press and edited by a team from the Asian Law Centre at the University of Melbourne and Professor Barry Hooker at the Australian National University. See also the current research page of the Asian Law Centre at

Why this interest at the turn of the century in methodology? In large part it reflects a confidence among these young scholars that their work is now accepted in universities, as never before, and that they can strengthen their positions further by staking an intellectual claim for their research techniques. This reflected a view that earlier generations of comparative law scholars were on the periphery of their faculties, especially in North America. Having worked to establish Asian legal studies in universities in Australia and Canada in the 1970s, 1980s and 1990s, I agree with their assumption. Their interest also reflects a critical view of comparative law methodologies, in their old, narrow, legalistic style. More cynically, it also may reflect the requirement these days to state your methodology in Ph.D proposals or in research grant applications. We are more self-consciously aware of what we are doing. How did the interest develop in Australia?

In 1990, a group of us at the Asian Law Centre in Melbourne received a research grant to examine contracting in Asia. It was my original plan to test the extent to which private legal advisors were unifying contractual forms in practice in the region, in spite of the formal demands of the various legal systems. As a practical matter, all international business in the region did rely on a contractual base. What form did those contracts take in practice? Were they in writing? If so, did they look the same throughout the region, or were there differences? If there were differences, what was the explanation for them?

Without dignifying my approach by a theoretical basis, I was building my research around identifying a legal problem or activity that was common to a number of countries, and then asking how each country dealt with the issue. I understood this to be a functional approach, though I am not sure if that is what the leading text on comparative law from Germany, Zweigert & Kolz[13], meant by the term. Although we were called the Asian Law Centre, we had never believed that there was a unified thing called Asian Law, so we began by listing up the various legal systems that were at large in the region. This simple task soon demonstrated the limits of the approach of the then leading French text on comparative law, which divided the world's legal systems into "families"[14]. However, this concept of "families of law" just did not explain what we see in Asia today.[15] In particular,

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[www.law.unimelb.edu.au/alc].

13 Konrad Zweigert and Hein Kotz., *Introduction to Comparative Law* (2nd revised edn, transl. Weir, T,, 1987). They advanced comparative law by encouraging research into the function of law in the societies under study.

14 Rene David and John E.C.Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* (1985). David's major contribution was to advocate research into the social context of law in the societies he studied.

15 Indeed some Europeans do not really want to look beyond Europe, and so on the collapse of the East European socialist systems they celebrated a return to just two familiar families: the civil law and the common law. Eg Peter de Cruz, *A Modern Approach to Comparative Law* (1993) says "We have returned largely to the pre 1917

the lumping together of China and Japan into some sort of "traditional" Asian group was hopelessly inaccurate. It remains hopelessly inaccurate. In many countries there were plural legal systems in play. There was the impact of traditional systems when other systems had been adopted, supplanting those traditional structures. We had to identify which parts of the legal fabric applied to contracts. This was much more complicated than the legal families approach suggested, and much more delicate that the comparison of two provisions from two sets of legislation.

My colleague, Veronica Taylor, ultimately pursued these threads through a number of publications and in the process refined her critique of comparative law as a taxonomy of legal systems.[16] Many of the other contributions to *Asian Law Through Australian Eyes* highlight the insights that contemporary scholars bring to the task from other disciplines, such as anthropology, sociology, economics, feminism and postmodernism. This has enormous implications for legal education, and I will return to that theme later. But in 1997 Taylor was saying that instead of comparative law there was the new discipline of Asian Law, and by 2000, she is suggesting that scholars in the Japanese Law field do not see themselves as comparative lawyers at all, rather as "Asian Lawyers".[17]

In making this claim, my colleague is moving from what I had described as our research practice to make that practice itself a new discipline, albeit one without a narrow unifying methodology.[18] In this Taylor is true to her original academic training outside law, which was in Japanese Studies, itself a relatively new

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position of having only two main legal traditions or major legal systems". He then gives China and Japan a total of seven pages between them in a chapter on "Other" legal systems, which mainly deals with socialist Russia.

16 Veronica Taylor "Spectres of Comparison: Japanese Law Through Multiple Lenses", (2001) 12 *ZJapanR* 11, 13, referring to her earlier work "Beyond Legal Orientalism" in Taylor, above n.1

17 Ibid

18 Compare my statement of our research practice in *Asian Law Through Australian Eyes*, above n.1, at 8-9 with Taylor's statement of a new discipline at 55. They are very similar. eg "Eschewing any 'master principle', and open to all possibilities, the late 20th century comparativist must be aware of the disciplines of anthropology, sociology, historiography, economics, linguistics, philosophy, and politics; their adaptations in feminist legal studies, critical legal studies, and economics and the law; and good old legal process." (Smith) "Unlike comparative law, 'Asian Law' asserts no unifying theory or methodology. Australian scholars working on Asian legal systems do more than simply compare legal rules or texts; they employ most of the standard tools of the trade: empirical data collection techniques; local languages; insights from philosophy, history, sociology, anthropology and linguistics; postmodernist social theory; feminist legal theory; and law and economics. They do so as a matter of course, rather than claiming that these can be aggregated into a specialization." (Taylor)

discipline within Area Studies in the Humanities and Social Sciences which draws on a range of disciplines to interpret Japan.

4. From Focussing on Families to Focussing on Methodology - The Critique of Typologies to Methodologies

What is fascinating about the University of Victoria Conference proceedings is that the participants seem to have moved from a taxonomy of legal systems to a taxonomy of methodologies. There is a fascinating debate about the "Multiple Worlds of Japanese Law". This discussion divides researchers into three groups. I will outline them here, as there may be similar groupings among those who study other countries and their legal systems. First, there are the Japanese specialists from the common law world outside Japan. Here the participants divided on methodological grounds into doctrinal Americans and theoretical others, including Australians who apparently are post modernists. However, most admitted to using multiple techniques. Second, there were the Japanese members of the Nihonhoo school, who reportedly care nothing for views from outside Japan, and routinely ignore them.[19] Finally, there is the Japanisches Recht, or the German School.[20] This group is supposed to adopt a more civilian approach to examining Japanese law. The problem, as many of the contributors suggest, is that they do not fit neatly into boxes, as many have been subjected to multiple influences during their legal training[21]. However, as Taylor points out, few see themselves as comparative lawyers.[22]

The questions for us all here at this Seminar are whether similar "multiple" worlds complicate the scholarship on each of our countries' legal systems and legal cultures, and what methodologies do each of us use?

The point to all this introspection is a belief that no one analyses law from a neutral perspective, and that intellectual honesty demands that you identify clearly your biases and your methodologies, so the reader can more truly evaluate your work. Even if we purport not to compare, by saying we are just looking at the Japanese legal system, or some other Asian legal system for its own sake, we are in fact applying a prism forged by our own perspectives. When I started my first teaching position in Australia in 1974, I joined a vibrant "International, Comparative and Foreign Law Interest Group". Earlier generations were very

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19 I personally recall once asking an eminent Japanese legal historian what he thought about the leading published work of American scholarship on Japanese legal history at the time. He replied "I don't think about it."

20 Apparently this taxonomy was Nottage's.

21 e.g., Kent Anderson, "Kent's World: A Personal Approach to the Varous Worlds of Japanese Law" , (2002) 12 ZJapanR 36, 36-34.

22 Taylor, above n.9, 13.

much aware of the possible distinctions between these three fields, but also of their common interest[23].

5. Legal Cultures

If there is a discipline of Asian Law, it clearly acknowledges the cultural context, both the broader culture of a community and its narrower legal culture. At this point may briefly I introduce a framework for analysis that Professor Yasuda of Nagoya University has developed, and combine it with some recent European discussions on legal cultures. It allows us to look more clearly at what we are comparing, and at what level we are focussing our discussion.[24] As I understand his scheme, Professor Yasuda has drawn a pyramid, or cone. At the top is the narrow area of "law as norms" or rules which are commonly observed in a society. At the next level is "law as institutions", which contains the rules governing the legal machinery, if you like, of the system. At the broadest end of the spectrum, is "law as culture" in which the social context of the system is found. I would like to return to this concept during my paper.

Professor Mark van Hoecke and Mark Warrington in "Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law" explore the link between Legal Families and Cultural Families.[25] Van Hoecke argues that the old "families" of legal systems approach is inadequate as a tool of analysis.[26] He argues that there are underlying "families" of legal cultures that are more helpful.[27] He divides the world into Western, Asian, Islamic and African cultural families. He sees the main differences in these legal cultures as revolving around i). their concept of law, ii). the role of law in each society, and iii). the way each society believes conflicts could and should be handled.[28] He sees the fundamental difference between Western and Asian legal cultures as grounded in individualism contrasted with collectivism and rationalism contrasted with an Asian belief in a natural order stemming from Confucianism. So, van Hoecke is thinking of Sinicised Asia, or North East Asia, when he thinks of Asia. His cultural families unfortunately ignore all of South East Asia, South Asia (and

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23 I have focussed on this in more detail in Malcolm Smith, "Australian Perspectives on Asian Law: Directions for the Next Decade" in Taylor, above n.1 at 8.

24 N.Yasuda, appendix 2 to "How can Law Interact with Society-A Note on Recent Law Reform Movements in Asia" a paper delivered at an International Workshop on Law, Development and Socio-Economic Changes in Asia, October 21-22, 2002, IDE-JETRO, Chiba, Japan. I imagine Professor Yasuda will devlop this theme himself when he speaks to the Seminar on Saturday.

25 (1998) 47 International and Comparative Law Quarterly 495 (hereafter van Hoecke).

26 Ibid, 498-502

27 Ibid, 502-508

28 Ibid, 508

Hinduism), and the countries of South America. He then argues that to compare legal cultures one must use legal-sociological and anthropological perspectives.[29]

Van Hoecke argues that "Comparative Law when viewed in its narrowest sense, appears to be feasible (in terms of the aims and objectives it can pursue) only when limited to an *intra-cultural* comparison, ie a comparison of legal systems within one and the same cultural family, sharing a basic common perception of law." He then identifies six areas of "shared understandings" in a common legal culture.[30]

The pure European comparative lawyers were focussing on comparisons at the level of Professor Yasuda's "Law as Norms" and "Law as Institutions" because over the course of the 20th century they assumed that the common law and the civil law systems (as well as the socialist systems) came from the one cultural family. Asian law specialists have never made that assumption, although "legal tourists" from Europe and North America have tried to explain particular Asian systems on the basis of the particular European legal transplant they found in the country they visited.

At the level of general norms, the common European intellectual heritage does in fact mean that there are few fundamental differences between the common law and civil law countries, and choices between norms were made within the same cultural and intellectual tradition. So European comparative lawyers then saw the main areas for discussion as the differences in "law as institutions". The fact that a lot of law was made by the judicial institution in England was seen as a major difference to continental Europe, where most law came from the legislative institution. The fact that the Parliament always made a lot of law in England, and that judges, in fact, made law in Europe, was glossed over. In fact, the convergence over the last century means to my mind that today there is only one significant difference in practice. An English judge is bound to follow the judgements of the court immediately above in the same hierarchy of courts, whereas a continental judge is freer to depart from the judgements of higher courts. The rest is detail, even though it might be important.

Many of the Japanese law specialists from outside Japan who say they follow doctrinal techniques also are focussing their main attention on Professor Yasuda's middle level of Law as Institutions. They do analyse what parliaments, administrators and courts actually do in Japan. However, they are usually careful to explain what they find in terms of the Japanese context, and are aware of the problems of interpreting what they find through a western prism. Other Asian Law specialists are focussing on Professor Yasuda's third level and are consciously trying to explain what they see at the other two levels in terms of an

29 Ibid, 509
30 Ibid, 514

understanding of distinctive features at the level of legal culture. However, they have to be careful that they have the tools to undertake that analysis. In the process they have become critics of comparative law and advocates of "law in its cultural context". This trend is not limited to scholarship on Japan.[31]

6. A Final Taxonomy-Ugo Mattei and Transitional Societies

In her Ph.D. thesis and other publications,[32] Dr Pip Nicholson, of the Asian Law Centre, has surveyed the vast literature on comparative law and culture. In particular, she explored the work of Ugo Mattei[33] and adopted his taxonomy in her application of it to her research on the reform of the court system in Vietnam. In that work she has related the failure of the law and development movement in US law schools in the 1970s to the inadequate methodology of comparative law at the time. She also introduces a survey of post-modern critiques of the comparative law enterprise. I will not recover her ground, but she convincingly demonstrates the weaknesses of comparative law thinking until the 1990s and the need to explore legal cultures.

While I agree with Mattei's critique of the traditional comparative law taxonomy of legal families, and his insistence on the importance of legal culture, I am not convinced of his applications of his own suggested patterns of legal systems: those based on professional law[34], political law[35] and traditional law[36]. I much prefer

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31 My colleagues at the Asian Law Centre have continued their theoretical work since the 1995. The new Director of the Centre, Associate Professor Tim Lindsey, has developed a significant body of work on Indonesian law over the last decade. His contribution *to Asian Law through Australian Eyes* has been followed by a series of publications in which he analyzes law in its social context in Indonesia. In particular he researches the social context of corruption and the lack of a legal infrastructure and legal culture to support reforms thrust on Indonesia by the IMF and World Bank in recent years. See Lindsey, T. (ed.) (1999), *Indonesia: Law & Society*; Cooney, S., Lindsey, T., Mitchell, R. & Zhu, Y. (eds.) (2002), *Law and Labour Market Regulation in East Asia*; Lindsey, T. (ed.) (2000), *Indonesia: Bankruptcy, Law Reform & the Commercial Court*; Lindsey, T. & Dick, H. (eds.), *Corruption in Asia: Rethinking the Governance Paradigm*, (2002). See also the work of my other colleagues in Chinese Law, Sarah Biddulph and Sean Cooney. [www.law.unimelb.edu.au/alc].

32 Penelope Nicholson, *Borrowing Court Systems: The Experience of the DRVN, 1945 to 1976*, PhD thesis, The University of Melbourne, 2000; "Vietnamese Legal Institutions in Comparative Perspective: Contemporary Constitutions and Courts Considered", in Kanishka Jayasuriya (ed), *Law, Capitalism and Power in Asia*, (1999), 300-329; "'Routes and Routes' – Comparative Law in the Post-modern World" unpublished work in progress paper presented at Asian Law Centre, The University of Melbourne, 8 August, 2001

33 Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal Systems" (1997) 45 *American Journal of Comparative Law* 5-44.

34 By which he means western legal systems sharing the common features outlined by Schlesinger, particularly the separation of law into an autonomous zone, separate

the explanation in a footnote that in Mattei's view "professional law" and "rule of law" are interchangeable terms. Legal systems that follow the intellectual tradition of western liberalism and implement "the rule of law" have a great deal in common.[37] The problem with Mattei's approach, like all these approaches, is that it often does not fit specific countries, or his interpretation of systems in specific countries is based on incorrect assumptions. For example, I strongly agree with Professor Frank Upham in rejecting his classification of Japan as "traditional", apparently because he believes Japan is still a Confucian society[38]. However, his schema is there for you all to consider and use if you agree with it.[39] I think it is a valuable reference point for this Seminar's concern with the legal system and the open society.

So there is general agreement among my colleagues about the direction our research should take in exploring Asian legal systems. We investigate the systems in their cultural contexts, adopting as broad a view as possible, using as many insights as possible. What are the implications of the stronger theoretical underpinnings of the endeavour?

7. The Implications of the Study of Legal Contexts or Legal Cultures.

i. Research Skills, Especially in Other Disciplines

If we are to expand our inquiry beyond the traditional focus on "norms' and "institutions" it follows we must be very careful to ensure we have the skills to apply another discipline, or to apply the results gathered by research in another discipline. We can see emerging indications in the literature of disquiet among our academic colleagues. For example, anthropology has come to the fore in the attempt to prove the existence of legal systems in courts. This has the danger of turning anthropologists into advocates, instead of detached observers,[40] but lawyers must be careful of using anthropological studies, or straying into making

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from religion and morality, where law exists to regulate the rulers and where dispute settlement is achieved through the application of universal rules, Ibid, 25

35 By which he means systems where law and politics are not separated, and law is not binding on governments, Ibid, 28.

36 By which he means systems based on religion or a particular traditional philosophy, like Confucianism, Ibid, 35.

37 Ibid, 19, note 62. "Professional law" is a clumsy concept in my opinion, and introduces a lot of definitional issues which deflects the reader's attention.

38 Ibid, 36, note 137.

39 Ibid, 12-19.

40 See Jo-Anne Fiske, "Positioning the Legal Subject and the Anthropologist: The Challenge of *Delgamuuwk* to Anthropological Theory", (2000) 45 *Journal of Legal Pluralism* 1

their own sweeping anthropological assumptions.[41] Again, investigating legal cultures may involve empirical studies, the focus of a recent 300 page paper symposium in the University of Chicago Law Review.[42] In that issue, Epstein and King[43] vigorously attack the efforts of lawyers to do empirical research, and note the ease with which legal academics ignore the work, and methodologies, of those in other disciplines. The law and economics movement has also produced questions about the quality of the economic analysis conducted by lawyers, or relied on by them.[44]

Some examples from debates about Japanese law that I have used over many years show the effect of applying (or misapplying) some of these different approaches:

A. Dispute Resolution Litigation Rates and ADR Techniques.

a. ADR and "Legal Culture"

One area where cultural distinctions have been identified in practice in classifying and studying legal systems is the area of resolving disputes. How do the arguments apply here? I would have to argue, for example, that van Hoecke's analysis of Asian culture is based on a very limited range of sources.[45] The discussion occupies one page in print. He puts forward only two main distinguishing features: collectivism vs. individualism and rationality vs.

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41 Two major American contributors to research on Japan, Walter Ames and Taimie Bryant both have PhD's in anthropology.

42 Exchange: Empirical Research and the Goals of Legal Scholarship", (2002) 69 *U.Chicago Law Review* 1.

43 "The Rules of Inference", ibid., 1, 57, n.165, quoting Mark Graber "One would never know from the [legal scholarship]…that there has been a flood of literature in [the social sciences] on constitutional theory, doctrine, history and politics."

44 See footnote xx below, discussing the contribution to Japanese legal studies of Mark Ramseyer.

45 The article bases its view of Asian legal culture on the following sources: Noda, "The Far Eastern Conception of Law" (1971) 2 *Int. Encyclopedia of Comp.L.*, 120; Chin Kim and C.M.Lawson, "The Law of the Subtle Mind: The traditional Japanese Conception of Law" (1979) 28 *ICLQ* 49; G.D.MacCormack, "Law and Punishment: The Western and the Traditional Chinese Legal Mind", in N.MacCormack and P.Birks,(eds) *The Legal Mind* (1986) 235-251; L.Y.Lee and W.W.Lai, "The Chinese Conceptions of Law: Confucian, Legalist and Buddhist" (1978) 29 *Hastings Law Journal* 1307; Y.Taniguchi, "Between Verhandlungsmaxime and Adversary System-in Search for Place of Japanese Civil Procedure", in P.Gottwald and P.Prutting (eds) Festschrift fur Karl Heinz Schwab zum 70. Geburtstag (1990) 496; M.Oki, "Schlichtung als Institution des Rechts: Ein Vergleich von europaischem und japonischem Rechtsdenken" (185) 16 *Rechtstheorie* 151; Dai-Kwon Choi, "Western Law in a Traditional Society Korea" (1980) *Korean Journal of Comparative Law* 177; and J.Llompart, "Japanisches und Europaisches Rechtsdenken" (1985) 16 Rechtstheorie 131.

irrationality. He is clearly talking of those cultures linked to the Chinese civilization. The Mattei analysis is based on many more sources, but still the classification of Japan is very doubtful.[46]

In the 1990s other voices were urging the cause of more general "Asian values". I understand one of the basic interests of this group is to explore whether there are any common features of "Asian legal systems", traditional and modern, so the inquiry is relevant to that interest as well. They were voices from both Chinese influenced and Islamic cultures. The crucial role of other religious traditions, like Buddhism, Shintoism and Hinduism was also observable. These voices did not always spell out positively what they meant by "Asian values", but when they did they stressed a non-confrontational approach to resolving disputes and a respect for elders or authority. They stressed a desire for social order and harmony, rather than discord and struggle. To my knowledge there is literature exploring the theme of dispute resolution in Japanese legal studies, Chinese legal studies, Vietnamese legal studies, Indonesian legal studies, and also in Malaysia and Singapore. This has led to calls for a "new Paradigm" of dispute resolution based on the "Asian way". These traditional values were then being matched to a range of judicial processes based on European and Anglo-American models.

This is where culture can be confusing, because there are often conflicting cultural strains within the one society over time. While "Western" thought may be marked by individualism, it also gave us Marxism, and the first "modern" collectivist experience in the 20th Century, the Soviet Union. While China is synonymous with Confucianism, it also produced the Legalists of the 2nd Century BC who first unified the empire, and the socialists of the 20th Century AD. In Australia today, three systems of law are recognized simultaneously by our courts and Parliaments: indigenous law, national law and international law. Equally, we need to be aware of the ideological bases of cultures, and their manifestations. If we accept that in most of the literature the 19th and 20th Century European law (including Anglo-American law) represents "modern" legal culture, how do we compare traditional Asian dispute resolution techniques with post-modern ADR techniques in the West? Has the West recently copied an Asian system and called it post-modern, or are there significant distinctions in the power relationships involved in the different processes?

If we analyse traditional Japanese approaches to dispute resolution we see the following features:

- Deference to authority by individuals in all situations
- Official focus on public disputes and the exclusion or minimization of public assistance to resolve private conflicts (eg family or commercial disputes).

46 See pages 35-38 and the accompanying footnotes in Mattei, above, n.33.

- The expectation that a superior would provide a solution to the dispute, no matter what the process was called.
- Social coercion to accept the decision, once it was delivered.
- A complex array of different levels of status among disputants which seldom resulted in equality between the parties.
- No reliance on universally applied principles, as opposed to individualized responses by the decision maker.

In the above context the "rule of law" does not apply in the extended Western sense that all human relationships in society should be resolved by reference to law, not by arbitrary power. In Japan it was said that the 1889 Constitution imposed "rule by law" in that it gave public officials legal authority to govern the people. In the 1946 Constitution that was change to "rule of law" in the sense that those who governed were now subject to the law and to legal checks. However, the history of the last 60 years has seen the gradual extension of the rule of law into the private sphere, aided by a Bill of Rights in the constitution. The principles of private law, as adopted in Japan, seem to be taking hold in the resolution of problems in daily life. The traditional approach to dispute resolution has been gradually transformed in the process. When Japanese lawyers speak of "mediation (*assen*)" of securities disputes in the context of the 1998 Securities and Exchange Law amendments, we must ask if they mean the same thing as a Tokugawa era dispute resolution process translated as "conciliation", or something else.[47]

How would they differ? In the post-modern western world, ADR techniques generally have been developed to supplement the litigation process where it has failed. The reasons for failure are varied, and so provide different policy rationales for experimenting with ADR. At one level, ADR combats problems of access to justice. As the litigation process becomes more expensive, alternatives are sought at the lower end of the scale of social disputation. As dispute resolution theory advances, the litigation process in adversary systems is declared unsuitable for specific types of disputes, particularly family matters. Here more non-confrontational methods are sought. At another level, delays in the court processes have encouraged the use of ADR techniques to resolve cases that have not moved quickly through the process because of their complexity. Thus, ADR becomes an aspect of sophisticated judicial case management. At the international commercial level, arbitration and other ADR processes have gained popularity as national legal systems have recognized the autonomy of the parties to choose their own process, freed from the national system of any one party. For

47 These issues, and the various approaches to ADR in traditional and contemporary Japan are explored by Professor Yasunobu Sato in his London University Ph.D. thesis, published as *Commercial Dispute Processing in Japan* (2001). See Chapter 7 for different approaches to "conciliation" over time. For the securities dispute resolution process see pages 303-304.

"post-modern" national governments, all these situations have provided the opportunity to engage in a process of privatizing the dispute resolution process and to reduce the cost of operating the courts. This may be moving in the opposite direction to countries trying to develop civil societies based on the rule of law, by strengthening the judicial institution.

However, post-modern ADR differs very much from traditional processes often called by the same name:

- Modern ADR recognizes the autonomy and equality of the parties.
- Modern ADR is generally a voluntary procedure, though increasingly governments are requiring it as a prior stage to litigation, to ease the burden on the courts.
- Modern ADR carefully defines the role of the third party whose assistance is sought. In mediation and conciliation we see a non-binding process, while arbitration does deliver a binding decision.
- Modern ADR may not involve a decision by the third party, as, crucially, mediation in the West usually means that the third party will facilitate, but not impose a resolution.

b. "Arbitration" and "Law as Institutions"

The comparative analysis of dispute resolution techniques demands more than the simple equation of terms. It requires a detailed analysis of the actual process and an analysis of the structure of the processes, including their underlying ideologies. The literal approach to interpreting legislation in Australia used to involve identifying the key terms in the legislation and then looking up a dictionary for their literal meaning. As any interpreter will attest, that does not work well across languages. You need to know the process, or concept, that lies behind a term to translate it correctly. This is even more so when translating across cultures. While "conciliation" and "mediation" are currently words that mislead in the Western-Asian comparison, "arbitration" caused more than its share of confusion in the period 1950-85 in United States-Japan business transactions. The word was regularly inserted in dispute resolution clauses in contracts between the United States and Japan (and between Japan and Australia). What did it mean to the parties?

At the "Law is Culture" level in Japan, it seems that there was no traditional concept of arbitration as a voluntary, binding resolution of a dispute that would then be enforced by the judicial authorities. The analogy was conciliation, but it was not necessarily voluntary. At the level of "Law as Institutions" the civilian concept of arbitration was introduced from France and Germany into Japan's Code

of Civil Procedure in the 1890s, and it remains unchanged today.[48] That civilian concept differed in two key respects from common law arbitration. First, the arbitrator could act consistently with the civilian inquisitorial process. Second, the arbitrator did not have to make a decision consistently with the law. The tribunal could act as *amiable compositeur* and decide the matter *et bono et aequo*. Both of these concepts were probably functionally consistent with traditional conciliation in Japan. However, both were alien to the common law concept of the arbitrator as an umpire in an adversary situation, an umpire required to apply the law.

Here was a genuine candidate for comparative analysis on the old model of comparing words and rules and institutions. Unfortunately, few American or Japanese contract draftsmen thought to ask what the word meant in the other system, or what the process would be in an arbitral tribunal in the other country. The problem was resolved in the mid-1980s when common law systems adopted the new UNCITRAL Model Law on Arbitration and accepted that the parties could elect for their arbitrators to adopt an inquisitorial process, to act as an *amiable compositeur* and to decide *et bono et aequo*. I am not at all sure that many lawyers on either side understand what has happened. If they know the law, they would be more careful about how they identify the details of their preferred dispute resolution process in their contracts, rather than rely on undefined, ambiguous words.

c. A Deeper Problem: Med/Arb and Concepts of "Fairness"

Recently the sophisticated international contract manager has experimented with multi-tiered dispute resolution clauses, and the process of linking mediation and arbitration has evolved. In practice, the process can move in either direction. The contract can call for mediation first, and if it fails, the parties can move on to arbitration. Alternatively, the process can provide that the parties can go to arbitration, but the tribunal can refer the dispute to mediation. The major criticism of the technique has come from the common law side, with doubts being raised about "natural justice" or "due process" being endangered. Professor Sato discusses this issue, and indeed calls for a consideration of natural justice issues in the reforms of Japanese ADR.[49] However, he does not really define what "natural justice" is, except to say it relates to "procedural justice" which allows "fair solutions".

His argument would be clarified a lot if he had included a systematic description of how "natural justice" or "due process" concepts have evolved in the United Kingdom and the United States. At the level of "Law as Norms", procedural

48 Though perhaps not for much longer as it is the next item of reform in the civil procedure area.
49 Sato, above n. 47, 328-329.

fairness has been advanced in the common law countries as the only way to maintain social cohesion when it is recognized that in a plural society there may no longer be agreement on fundamental norms. In that situation, people who disagree with the norm may maintain social stability if they think the norm was arrived at fairly, by an acceptable process. What then is procedural fairness? At the level of "Law as Institutions" we see these concepts being developed by the judiciaries in the common law systems. Not surprisingly, the judges' concepts of procedural fairness in decisions affecting peoples' rights have mirrored the processes they themselves have traditionally followed in adjudicating cases.

If you read the cases in which these concepts developed, you will see common law judges applying the essence of their own familiar adjudicative process to administrators making decisions on peoples' rights, and to private bodies which have the power to affect peoples' livelihoods. Fairness involves knowing what is being alleged, or decided, about you, having the right to a hearing to put your side, having the right to test the other side's arguments, having the right to legal representation, and being entitled to reasons for decisions. Fairness follows the Adversary process. Once you state this clearly, you can see at the institutional level how civilian systems based on an inquisitorial process automatically raise alarm bells in the minds of common lawyers. The suggestion in Professor Sato's work is that there is no functional equivalent in Japan to procedural fairness. To prove this would involve a detailed analysis of procedural protections afforded in the Japanese system, if any. If there are no equivalent protections, then an awareness of both Law as Institutions and Law as Culture would be needed to predict if the introduction of adversary style safeguards would work. What is considered "fair" in Japanese culture? What is considered "fair" in an inquisitorial civil procedure process? The two questions involve different levels of analysis.

d. Summary

I think these examples show the need to clearly identify the essential elements of any process or principle and try to put them in their legal and cultural context, if we are to understand the dispute resolution process in any society. The content of "procedural fairness", in my view, is one of the key elements of an open civil society. We need to be able to state and justify our bases for claiming any system is "fair" or "unfair".

B. Corporate Governance - The *Keiretsu* - Getting The Disciplinary Skills Right

Another good example of methodological problems arises in a recent set of articles by Professor Miwa, an economist from the University of Tokyo, and Professor

Mark Ramseyer, the Mitsubishi Professor of Japanese Law at Harvard.[50] In my own research on corporate governance in Australia and Japan, I have argued that managers will pay most attention to those who can directly affect their jobs. I have used the standard shareholder control model to describe the Australian system. I have argued that Japanese law (Law as Institutions) has largely adopted the shareholder model, but that Japanese corporate practice (Law as Culture) operates in a way that minimizes the shareholders' influence. I have based my arguments on a set of common assertions by anthropologists, sociologists, economists and lawyers alike.

The actual situation in Japan, we have long been told, is different to the shareholder model in practice.[51] In Japan, individual shareholders count for close to nothing as they provide a minority of a company's capital. Only twice in the last fifty years have shareholders contributed a significant proportion of corporate funds, in the late 1940s and in the middle 1980s to the middle 1990s. The majority of funds have come from retained earnings and from loans mediated through financial institutions. Thus most discussions of corporate governance in Japan have revolved around the role of the banks, both in providing capital, and in keeping the managers honest. A second main pillar has been the alleged role of friendly cross-shareholdings among friendly companies that have fireproofed those companies from takeovers. The third pillar is that public companies in Japan have boards of directors made up predominantly of employees of the company. They are executive boards. These are cultural traits, we are assured, which are ingrained in the Japanese business culture. They mean that managers look to banks and friendly companies ahead of shareholders.

I am not an economist or a sociologist by training, so I tended to accept these assertions about the Japanese company structure, and then draw my own legal conclusions. The main conclusion I made was that most of the reforms of company law in Japan in the last fifty years, to the extent that they were premised on shareholder governance, were missing the mark. Japanese managers were almost certainly going to evade the rules if they had a higher economic interest to serve other masters.

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50 Yoshiro Miwa and Mark Ramseyer, "Corporate Governance in Transitional Economies: Lessons from the Prewar Japanese Cotton Textile Industry" (2000) 29 *Journal of Legal Studies* 171; "The Value of Prominent Directors: Corporate Governance and Bank Access in Transitional Japan" (2002) 31 *Journal of Legal Studies* 273; "The Fable of the *Keiretsu*" (2002) 11 *Journal of Economics and Management Strategy* 169; "Banks and Economic Growth: Implications from Japanese History" (2002) XLV *Journal of Law and Economics* 127; "The Myth of the Main Bank" (2002) 27 *Law and Social Inquiry* 401.

51 For an excellent summation of the accepted theories see Curtis J. Milhaupt, "A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law", (1996) 37 *Harvard International Law Journal* 3, 21-30.

I do not think that conclusion has been affected by some exciting research published over the last three years by Professors Miwa and Ramseyer. In a series of related articles, they have demonstrated from economic data some astounding assertions.[52] First, that Japanese companies prior to the World War 2 raised most of their funds from shareholders, so there is no cultural aversion to capital raising from shareholders.[53] Second, that so-called Main Banks have never controlled capital raisings, rather that companies have used a number of different banks.[54] Third, that the much touted Keiretsu groups never in fact existed, at least in economic terms.[55] More importantly, they severely criticise the quality of the economic analysis that produced the original theories. For example, they conclude their critique of the economists' work that had created the "fable of the *keiretsu*" as follows:

"There is a lesson here, and it goes both to Grilliches' law 'know thy data,' and to the importance of good theory for good empirics. A glance at the data should have shown both the absence of any informational link among the banks and the keiretsu members, and the absence of any mechanism for enforcing collective action among members. … A bit more careful empirical inquiry and a bit more attention to basic theory, and we might have avoided this morass entirely."[56]

Whether the absence of an economic base nevertheless did not prevent managers and companies in Japan operating on commonly held perceptions that they were part of a group, must now be demonstrated by further research. Another important sociological statement about Japanese companies is that they have been the modern equivalent of the *mura*, the modern village for Japanese workers.[57] This argument also impacts strongly on corporate governance, as the assertion is that relations within the company have been a continuation of pre-modern relationships based on superior-inferior statuses, and not on equality of economic bargaining power. If true, this argument would tend to reduce the actual power of employees within the company (as they occupy a lower status than managers). It also would increase the power of larger entities, or entities to which the company owed something, in the case of *keiretsu* type main bank systems or interlocking shareholdings and directorships. I don't think these issues have been explored deeply, but the Miwa and Ramseyer argument discounts their importance.

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52 Above, n.50

53 "Banks and Economic Growth: Implications from Japanese History" (2002) XLV *Journal of Law and Economics* 127

54 "The Myth of the Main Bank" (2002) 27 *Law and Social Inquiry* 401.

55 "The Fable of the Keiretsu" (2002) 11 *Journal of Economics and Management Strategy* 169

56 ibid, 213.

57 John Haley, *Authority without Power: the Japanese Paradox.* Haley's argument is discussed by Sato, *Commercial Dispute Processing in Japan* (2001).

Whatever the results of future research, the admonition from Miwa and Ramseyer is clear. We must use and understand high quality work in the related disciplines if we are not to misrepresent the legal cultures we seek to explain. Equally, we must be able to discount shoddy work.[58]

Mark Ramseyer is a model for a young scholar working on the system of another country. He has lived for long periods in Japan. He was educated at school level in Japanese, so has a brilliant command of the language. He is accepted as a first rate economist. He has published extensively in both Japanese and English. He also has been accused of thinking that culture is irrelevant. I recommend the Preface to his 1999 work with Professor Nakazato, *Japanese Law: An Economic Approach*.[59] It is entertaining reading. It is also interesting to contrast their views on what they are doing with their reviewers' reactions. Ramseyer and Nakazato say:

"We offer no 'essence of Japanese law in this book. We capture no 'core' of the Japanese legal system. We propose no generalization about the gist of Japanese law that distinguishes it from other advanced capitalist legal systems. We offer no essence, no core, no gist-because there is none."[60]

Having stated their economic approach, they anticipate criticism that they the economic viewpoint is not enough, and continue:

"The same readers will probably insist that we cold explain more if we added culture to our spare model. What we would add in explanatory breadth, however, we believe we would lose in theoretical parsimony. Consider this book an exercise in parsimony in comparative law. Consider it, in other words, an attempt to show just how far extremely spare economic models go toward explaining the world of law-related behavior."[61]

However, the eminent Richard Posner, Chief Judge of the United States Court of Appeals, 7th Circuit, in a boost on the back cover describes the work as:

"This is a model work of comparative law and legal sociology. It renders the Japanese legal system with great vividness, in terms that European and American lawyers can understand, yet without concealing the profound foreignness of the Japanese legal culture."

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58 This is echoed in the Epstein and King article, above, n.42 where they point out the dangers of both academics and courts accepting bad empirical work, often over much better work.

59 (1999).

60 Ibid, Introduction xi.

61 Ibid, xiii.

In a final message to this Seminar, Ramseyer and Nakazato argue:

"Most of the apparent differences between U.S. and Japanese law, we believe, are not differences in the way courts decide cases. Instead they capture differences in the ways academics explain the law to their audience. … Neither way of comparing the two systems is better than the other. It all depends on what one wants to do. One way contrasts the internal logic, and one contrasts the end result. For most lawyers, it is the end result that counts."[62]

i. Implications for Teaching Law in General

A legal culture in a society depends heavily on the education people receive about law. More specifically, the legal education of professionals has a very heavy impact on the legal culture. The legislation adopted by the House of Representatives in Japan on Tuesday November 12 heralds a new era in professional legal education in Japan. How will that new structure impact on the legal culture in Japan?

The last thirty years have seen a marked change in legal education in Australia.[63] When I studied law in Melbourne in the mid1960s, we spent little or no time on the social or cultural context in which the legal system operated. The majority of law students followed a yearly program of four years' of legal studies, including only two subjects chosen from another discipline. [I chose Political Science.] Two major social and cultural changes have occurred in Australia since then. First, the massive immigration since the late 1940s has forced an essentially Anglo-Saxon community to embrace multiculturalism. As mentioned before, there are now over 140 languages spoken in the homes of Melbourne. Australia has chosen the Canadian path of encouraging a cultural mosaic, not a melting pot like the United States. There has been significant political opposition to the idea of valuing diversity, but it has happened. This has challenged cultural assumptions in law. Who now is the cultural standard of the reasonable man (now person of course) in tort law? What cultural standards set the levels at which people can be provoked for the purposes of the criminal law? While our courts have accepted the idea of diversity, in some cases they are yet to fix adequate standards of evidentiary proof of the content of cultures.[64]

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62 Ibid, xiii-xiv. The authors cite Hiroshi Oda, *Japanese Law* (see now 2nd edition, London, 1999) for an approach that focuses on the internal logic, they way they say Japanese professors explain the law.

63 And also in Canada, where I also have taught.

64 See Jo-Anne Fiske, "positioning the Legal Subject and the Anthropologist", (2000) *45 Journal of Legal Pluralism* 1, 1-4 for problems of proving indigenous customs and laws. There has been a problem in Australia of courts accepting statements about cultures in the adversary context of the defence of provocation which have been refuted later by the communities concerned.

This criticism can also be levelled at academics who have introduced the cultural issue into legal debates, but made sweeping assumptions on shaky evidence about the actual defining characteristics of those cultures. The debate about the Japanese character and its impact on law is a long and interesting one. It is a debate marked more by assertion than scholarly evidence. If our traditional techniques of comparative analysis of law had acquired some degree of acceptability over the last century, have our methods of analyzing culture reached the same levels? If so, how do we teach about them in the Law School?

The second change was the status of our indigenous peoples, and their laws. In 1967, our indigenous peoples were granted constitutional recognition. In 1992, in the landmark *Mabo* decision of the High Court of Australia, their laws, though not any claims to sovereignty, were recognized.[65]

Two other major evolutions also occurred in these last forty years which also impact heavily on our law and culture. We have cut our legal ties to our parent culture in the United Kingdom. Women have claimed an equal place in our society and have attacked laws that embed inequality.

Exposure to the reality of indigenous legal systems on the one hand, and the diversity of experiences of our immigrant populations on the other, have meant we have had to focus as never before on the core values of our Australian system of laws and culture. Cutting our ties to the United Kingdom also forces a revaluation of what elements of law and culture are truly Australian. Gender equality had exposed many of the underlying inconsistencies in our claimed implementation of the western liberal democratic value system, anchored in the rule of law and equality. How do we deal with these changes in Australian legal education? Part of the answer at my Law School is in a first year subject I now co-ordinate that I think might be taught in all law schools, the History and Philosophy of (Australian) Law.

a. The First Year Class

The first year law student in Australia today is very different to the student of forty years ago. Apart from more than one in two being women (as against one in ten in 1960), their cultural diversity mirrors the general society, with about 10-15% being international students (almost none forty years ago). Eighty percent of undergraduate students are undertaking combined degrees, so they have at least two years' of studies in another discipline in parallel with their law degrees. At least another ten percent are already graduates in another discipline. In this context, they are all required to undertake the HPL subject.

b. History and Philosophy of Law (HPL)

65 *Mabo* v *Queensland* (no.2) (1992) 175 CLR 1.

The aim of HPL is to ask our students at the outset of their law course "What are the fundamental philosophies driving our legal system and how do we prove their influence?" The course begins with a contrast between the newly recognized indigenous legal systems, and their cultural values, and the law brought to Australia by the English settlers. We focus on concepts of property, which were at issue in the *Mabo* case.[66] Our students cannot escape the link between law and the culture that has given voice to it. There is of course a third legal system directly relevant in Australia: International Law. In HPL we also look at the relevance of International Law and Institutions to the situation of indigenous peoples, and to Australians in general. We also look at the cultural and philosophical underpinnings of current International Law.

Having set up this framework, we naturally have to discuss the fact that the dominant core values in the present Australian legal system do have their roots in the Western liberal idea of law. This is so for our municipal laws and for current international law. In the balance of the course, we present the critiques of that intellectual system, from the perspective of law and economics, Marxism, feminism, critical legal studies, minorities and post modernism. At the end of the process, our students have a much better idea than I did in 1964, at the end of my first year, of the context in which laws operate, and the various intellectual tools available to evaluate those laws.

In attempting to evaluate the western liberal idea of law, we have used comparisons from Asia, both historical and contemporary, whenever I have taught the subject. Traditional Confucian thought is a good contrast to liberal thought. The British activities in Malaysia and Singapore contrast strongly with their approach in Australia to the indigenous populations. The Chinese experience is relevant when teaching about the Marxist critique. These examples not only are intellectually challenging to Australian students, but they are very interesting to international students from the region, as they are the great majority of our international students.

In the structure of our degree, students can return to history and philosophy of law, and to comparative and Asian legal systems in the optional part of the program, which accounts for about 40% of the available credits. There are also extensive offerings at the graduate level.[67]

The crucial thing I think this subject is giving our students is a concept of the intellectual context in which the current Australian law operates. If I was to try and locate the Australian legal system in Asia, would the intellectual context be more important than the geographic context? Is the intellectual context the same

66 Ibid.

67 For an introduction to the content of the Melbourne degree programs please visit our web site [www.law.unimelb.edu.au].

as the cultural context? This was the immediate problem from a lawyer's perspective with the claim by the Australian Prime Minister some ten years ago that Australia was now part of Asia. Our legal system was one key aspect that was thought to set us apart from Asia, at least at the level of "Law as Culture".

That is why the thoughts of Asian scholars on the essential elements of Asian legal systems now are so interesting to me. They always were interesting to David Allan and Mary Hiscock, who thirty years ago asked Asian legal scholars to explain their systems for commercial securities. Thirty years ago the culture of the Australian legal system was a given. Today, thanks to work on comparative law and Asian Law, we are far more sensitive to the cultural context of any rule. The impact of Mary and David through their research and teaching has been a major factor in this evolution.