ularly in regard to Community law, it is the attitude of practitioners which in this area is perhaps most in need of assessment if a new legal culture is to be promised. Once again, we shall find that this can only begin to be dealt with in the law schools, and only if they themselves perceive the problem as being more than just a question about which black letter law techniques should be learned. In that regard, the issue must not just be reserved for the domain of postgraduate work, but forced through into considerations for undergraduate teaching. So Roy Goode, Professor of English Law at Oxford, may be well-founded in this sense when he writes: 'I wonder whether we are right to begin a study of European Community law with Community law itself rather than with the history and development of legal ideas in one or more jurisdictions on a comparative basis'.

Goode's remark raises a second problem. How are such comparative studies to be carried out, given that the way in which law generally is perceived in different countries, by both lawyers and citizens, may vary greatly. In considering differences between Italian and English attitudes David Nelken has recently drawn attention to the way in which the respective communities react differently to the institution of law and, in particular, to the differences in how they conceive the role of the State in personal and political life. As he points out:

> In England, for many purposes, it is an ideal of law (and even the rule of law) that it should be linked to the supposed 'common sense' of (certain sections of) the community. In Italy, partly as a result of differences in the history and conception of 'the State', law's role is seen as necessarily opposed to many normal social and business practices.

The real difficulty here is whether, given that these great attitudinal differences must be picked up in any comparative work, a common legal culture can surmount such apparently ingrained differences. More important than that, however, is the democratic issue of whether such an attempt would be desirable in itself, for the implications of change run straight to how people choose to run their lives, with how they try to assert their political identities, and with how they rank the institution of law in facing up to these questions.

In thinking about these issues we must reassess how we are to view law and its study within the university. Importantly, if research is indeed to be concerned with the study of legal culture it must shake off the residual vestiges of overly positivist-inspired philosophy, with its ideas of a rational and scientific unity of knowledge and its association with statist politics. Law cannot be seen as an island of modernity in an otherwise fragmented collection of local traditions and knowledges. As such I would imagine the most interesting and fruitful work could be carried out in the area of critical and comparative anthropologies of law. For only in this way can the work of the university be seen to properly inform and be informed by its wider setting. As moral philosopher Alasdair MacIntyre reminds us, this can only be done:

> when and insofar as the university is a place where rival and antagonistic views of rational justifications are afforded the opportunity both to develop their own enquiries, in practice and in the articulation of the theory of that practice, and to conduct their intellectual and moral warfare.

Putting conflict at the heart of universities' teaching and research is the only way to make the study of law at all viable.

Conclusion

My aim here has been to show a small part of a much broader and ongoing debate. It is only fair to say that while the signals from the Academy are clearly hopeful, they would not be shared by all scholars, far less by all politicians. But it is certainly warming to find that more complex theoretical issues are not being abandoned in what some might see as simply the relentless pursuit of the ideals of the free market in the European Community. Conflict and cooperation between legal systems, competing theories of democracy, and the recognition of tradition are thus at the heart of debate in Europe. But, of course, not only there. Similar and different problems relating precisely to these issues are being faced in Australia. What is important about the Academy is its commitment to legal education and research, and the promotion of theory as integral to how we see our legal and political futures. This is always a lesson worth listening to.

LEGAL STUDIES

Based on 'Confessions in the High Court' by Andrew Palmer, p.203

Questions

1. What do you think a fair trial is?
2. What procedures should police follow to ensure fairness to an accused before a trial?
3. How does the common law attempt to ensure that the trial is fair?
4. '[I]f the police infringe one of the rights of a suspect in custody or any of the procedural rules designed to protect a suspect against unfair methods of obtaining evidence, the fact of this infringement should, *prima facie*, lead to the exclusion of any resulting confession on the grounds that it would be unfair to allow its use at trial.' If this is the effect of *Pollard* and *Foster* is that a good thing?
5. The author discusses the imbalance of power between police and accused, particularly in the context of an Aboriginal accused person. What do you think could be done to redress that imbalance?

(a) in relation to accused people generally; and

(b) in relation to Aboriginal accused people in particular?

6. (a) When will 'fairness' demand the exclusion of a confession?

(b) When will 'public policy' demand the exclusion of a confession?

Should the courts exercise their direction to exlcude confessions either on the basis of a 'fairness' or on the basis of 'public policy' more liberally? Justify your answer.

7. 'In Australia, where there is no Bill of Rights, the "cat out of the bag" approach must instead be pursued by broadening the concerns of the fairness discretion from a solely reliability-based conception of fairness, to a protective one.' Would an Australian Bill of Rights provide more effective protection to an accused than does the common law? What provisions would need to be included in such a Bill of Rights in order to provide such protection?

Research

'In *Pollard*, Brennan, Dawson, Gaudron and Toohey JJ said that the breaches by police of their statutory duties were relevant to the public policy discretion.' What statutory obligations are the police under in your jurisdiction in relation to the obtaining of confessions?

Debate

That the public interest in seeing the guilty brought to justice is more important than the interest of the public in ensuring that the police themselves respect the law.

Paula Baron and Sandy McCullough

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