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Alice Erh-Soon Tay and the Character of Legal Knowledge

Susan Bartie

Abstract

In 1975 Alice Erh-Soon Tay became the second woman law professor and the first woman Professor of Jurisprudence in Australia. Her career spanned almost the whole of the second half of the twentieth century. During this time she witnessed and contributed to both the rise of modern university legal education and the diversification of lawyers and scholars within Australia. Using Tay's career as an illustration I argue that life histories of prominent women legal scholars are extremely valuable for reasons that aren't typically acknowledged in law. Not only do they have the potential to identify important figures, they can also place the contributions of women into mainstream accounts of the character of legal knowledge.

1. Introduction

If writing life histories of legal scholars has taught me anything it is that academics never fully understand the contributions of their closest colleagues. Even when scholars sit within common fields, they rarely study the whole of their colleagues' scholarship, attend their classes or scrupulously study their broader activities. Frequently while interviewing scholars about their now-deceased colleagues, they will express regret that they had not asked more questions about their colleague's motivations and work. Often these scholars tell me that I had unearthed intellectual agendas that they knew nothing about. While it is pleasant to discover that my digging is worthwhile, this experience points to a larger lesson: our

understanding of the discipline (both past and present) should not be based on anecdotes and impressions. Instead the discipline needs more rigorous and probing studies of legal scholars. Such studies are, I argue, critical to the health of the discipline (Bartie 2014a, 2014b).

This lesson has particular importance for women legal scholars. Today we are familiar with attempts by various historians to rescue women from the 'enormous condescension of posterity' (Thompson 1964: 12). In law we are currently witnessing an unprecedented number of large-scale works that examine the achievements of women scholars, lawyers and judges (Schandevyl 2014; Bowman 2009; Schultz and Shaw 2003). Among other things, they attempt to increase the visibility of professional women. This growing body of work can fulfil a number of aims. For example, it encourages readers to reconfigure the history of the discipline and practice of law, acknowledging that women have been important, albeit marginalised, figures (Auchmuty 2015; Sugarman 2015; Cownie 1998). As Kathryn Kish Sklar elegantly points out:

> A group without a history is a group without an identity. By creating a history of women, historians do more than reconstruct the past in new ways. They transform the possibilities in women's present and future (1992: 21).

In this chapter I argue that life histories of women legal scholars should place greater emphasis on the way that women advanced intellectual agendas. Further I suggest that they should consider how these agendas contribute to the question whether the 'changing gender composition of the profession has made, or will make, a difference – not just to the nature of legal practice, but to the character of legal knowledge' (Thornton 1996: 2). I take this reference to 'knowledge' to mean the way that law is defined (what is it?), studied, taught and practised. It comprises of learning, attitudes and skills. And its content is what sets disciplinary boundaries (Vick 2004).

In her seminal book on women in Australia's legal profession, published in 1996, Margaret Thornton considered how changing gender composition changes the character of legal knowledge. Part of Thornton's thesis was that increasing numbers of women lawyers had not necessarily led to 'radical change in legal knowledge' (Thornton 1996: 268). She said that it 'may simply mean that we have more lawyers' (1996: 268). In this chapter I revisit Thornton's question.

In doing so I do not challenge Thornton's general impression that despite the increase in women lawyers in the second half of the twentieth century, the character of legal knowledge has not radically changed. Instead I suggest that it is worth considering whether women lawyers thought about law differently from their male colleagues. By proposing that such differences be explored I am not attempting to show the various ways that the discipline has become 'feminine' or 'feminised'. I do not wish to label contributions as either masculine or feminine. Similarly, I am not proposing that scholars make 'invidious comparisons between women and men' (Cownie 1998: 105). Instead, I want to bring out the complexity and rich nuances. Put simply, I wish to know what the contributions of women were and whether they were different from the status quo.

This investigation is a subset of a much larger question: have women within the legal academy changed legal culture? (Thornton 1996; Cownie 2004; Cownie 1998: 110). Learning more about changes to knowledge provides evidence to enrich studies on changes in culture. I am less interested in learning whether the contributions made by women were influential or led to large-scale changes in the way that law was taught and studied. It is because leading women have often been discredited that any attempts they may have made to change the character of legal knowledge have largely gone unnoticed. As Thornton points out, women have found it hard to earn respect as 'authoritative knowers' (Thornton 1996: 1).

It is only by investigating the lives and careers of women legal scholars that it is possible to discover the contributions that women have made to the character of legal knowledge.

In this chapter I therefore make an argument for life histories as a way of investigating changes to the character of legal knowledge. My argument draws from my experience of conducting a much larger study of the life and career of one of Australia's first women law professors, Alice Erh-Soon Tay (Bartie 2019). The chapter is divided into three parts. First, I provide a short introduction to the trajectory of women within the discipline of law in Australia. Second, I introduce some of Tay's defining features. Third, I identify Tay's contribution to legal knowledge and argue that while in some ways her contribution to legal knowledge was similar to other scholars of her generation, it was in other ways distinctive.

As the shape of legal knowledge in Australia is an under-studied area, it is only possible to draw out some tentative conclusions. However, I suggest that once we gain a stronger and more reliable account of Tay's character and personal life and pair it with her scholarly work, we can gain a stronger appreciation of Tay's distinctive contribution to the character of legal knowledge.

2. Women in Australia's Legal Academy

Since the 1960s, Australia's large professional legal academy has become a powerful gatekeeper to the legal profession. The vast majority of Australian lawyers are now university educated. Teachers of law therefore have the potential to exert a strong formative influence.

We know that the entry of women into the legal academy has led to some changes in the law curriculum. For example, the curriculum now includes subjects involving gender in the law and many criminal law scholars approach the teaching of sexual assault and rape from feminist perspectives (Anthony et al 2013). But far less is known about the other ways that women may have changed the way that law is taught and studied.

Alice Erh-Soon Tay rose to a leadership position in law long before Australia had its first female prime minister. She entered Australia's legal academy in the 1960s and was appointed to the Chair of Jurisprudence at the University of Sydney in 1975. She was the second woman Australian law professor and the first woman professor in any discipline at the University of Sydney. She was the first woman Professor of Jurisprudence and the first person from Singapore (she was born in Singapore in 1934 to Chinese parents and identified with her Chinese heritage) to be appointed a law professor in Australia. Tay was also the first woman President of the International Association for Philosophy of Law and Sociology (founded in Berlin in 1909) and towards the end of her career she was the first woman president of the Australian Human Rights and Equal Opportunity Commission (now Australian Human Rights Commission). Put simply, she was the first woman and person of Asian background to achieve international acclaim and prestige from the vantage point of Australia's discipline of law.

Tay's appointment to a professorship occurred at a time when women were only just beginning to enter Australia's legal academy en masse. While a number of women held academic posts prior to the Second World War, it was not until 1957 that an Australian university appointed a woman to a full-time academic position in a law school (Waugh 2007: 164). That it took longer for law to appoint women than many other disciplines can be explained partly by the fact that the legal academy was so small prior to the Second World

War. Just one or two full-time professors ran each of the law schools in each of the Australian states and to obtain one of these few professorships it was necessary to hold a qualification from either Oxford or Cambridge (Bartie 2014b). Women lacked both the means and encouragement to equip themselves for such a role. Also, some early law professors believed that women were ill-suited to careers in law and actively discouraged their advancement (Thornton 1996: 47–56). Only a few women graduated from law in the first half of the twentieth century and fewer still entered practice. Until the 1970s legal practice remained the province of men and even then the number of women lawyers remained small. Thornton explains that

> the number of women admitted to the legal profession in Australia between 1905 (when the first woman was admitted) and 1965 was minuscule. Amazing fortitude was required of women to persevere through the alienating years of legal education, articles, and practice, only to be labeled as 'penis-enviers' (1996: 19).

> Over a span of approximately seventy years, the minuscule numbers of women admitted had exerted little discernible impact upon Australian legal practice. They occupied a parlous position at the fringes of the profession. They were not treated as legitimate agents of legality, and they encountered difficulty in obtaining articles and employment (1996: 64–65).

> Partly in response to the hostility, and partly in response to the conventional pressures of the time, many of the early women law graduates devoted themselves entirely to marriage and children, and hence dropped out of the public eye (1996: 66).

> Generally, law firms were unwilling to hire women. If they did, women were treated less favourably than men. One elderly interviewee who was only the third woman to be admitted in Tasmania, was paid less than the firm's secretary (1996: 68–69).

The injection of government funding into universities in the 1950s led to the appointment of more full-time legal academics. The funding was part of the 'nation building' efforts of the Australian government following the Second World War and was founded on a belief that universities could play a role in protecting democracy (Forsyth 2014: 46–66). It

led to the emergence of what I have described elsewhere as Australia's first community of legal scholars and the birth of modern university legal education. Comments made at the time suggest that, although the number of women students was growing, there was a common assumption that for the foreseeable future law schools would be predominantly run and occupied by men. That Tay was one of the only women members of this first community raises some obvious questions, such as how was she let in? And '[w]hat led Tay to do more than lead a traditional woman's life?' (Wagner-Martin 1994: 6). Various letters about appointments suggest that the ideal candidate for a full-time academic post in the 1950s was not only a man, but also a married man. In the 1950s and 1960s Australian women were generally expected to be wives and homemakers. In some employment contexts laws prohibited women from continuing in employment upon the event of marriage (Strachan 2010: 1).

The fact that Tay was an Asian woman who grew up in poverty and succeeded in a field largely populated by intellectual elites (jurisprudence) makes her appointment all the more curious. Both the legal academy and universities generally were almost entirely white. Despite Tay's considerable accomplishments and her success in what was clearly a man's world, her life and career is not well known – even within Australia. There are many reasons that explain this lack of notoriety, several of them gendered. For example, it has been suggested that she succeeded because of her husband and her strong demeanour has often been put in negative terms, with the common use of descriptors such as 'fierce'. In the following parts I introduce Tay and explain some aspects of Tay's contribution to legal knowledge and how her contribution was both similar to and different from that made by her leading male counterparts.

3. Introducing Alice Erh-Soon Tay (1934–2004)

Presenting an account, let alone a short account, of any person's life is difficult. What parts of that person's life or attributes are the most revealing of the way that person occupied the world? When that person is a woman and the account is part of a feminist project, it is perhaps even harder. Several of Tay's well-known personal characteristics seem to play to, rather than challenge, cultural and gender stereotypes. By repeating them here I feel complicit in the subordination of her and other women. However, presenting Tay in any other way would constitute a rejection of the perceptions of those closest to her. And bringing some of the dominant perceptions of Tay into the light allows readers to scrutinise them and consider how they may have influenced her career and legacy.

There are two features of Tay's life that dominate reflections on her life. First, all people I interviewed about Tay concurred that she was a beautiful woman who took pride in her appearance and dressed extremely well. Almost all interviewees painted a vivid picture of her appearance. Even when she was dying of cancer she took care to dress in elegant suits and hats. Her beauty and dress, coupled with the fact that she was Chinese, made her stand out in the largely white male legal academy and legal profession. It presents as a defining feature. And yet, as I will soon explain, she was so much more than a beautiful woman.

Second, all interviewees thought that Tay's marriage to an Australian Professor of Intellectual History, Eugene Kamenka, was significant. Kamenka became the head of the 'History of Ideas' unit at the Australian National University (ANU). As Julia Horne has explained, the pair met in 1958 in Singapore when Tay was starting out in her academic career and Kamenka was a married man (Horne 2004: 25). They moved to Australia, via a

short time in London, in order to escape what they considered to be their colleagues' narrow-minded disapproval of their relationship (Horne 2010: 434). In academic terms, Kamenka was a few years ahead of Tay when they met. He had almost completed a PhD while Tay had never studied law at university, qualifying for practice at the Inns of Court in London. Kamenka's connection to Australian philosopher, John Anderson, his teacher at the University of Sydney, led him to develop a variety of networks throughout the world. He encouraged Tay to come with him to Australia so that they could both continue their careers as academics, with Tay embarking on a PhD at ANU in the Law Department. She became one of the few legal academics of the age to hold a PhD.

Kamenka was therefore the reason Tay came to Australia and also the reason that her academic agenda was far broader and more cosmopolitan than most Australian legal academics of the time (Horne 2010: 426–27). While Tay's background, as a Chinese woman who grew up in Singapore, encouraged her to take broader perspectives than other Australians, it was Kamenka who encouraged Tay to take up a type of sociological theorising and to engage in comparative studies of Soviet and Communist legal systems and the West. She accompanied him on his field trips to Russia and spent time as a visiting scholar in New York. Reflecting on her life Tay acknowledged that Kamenka helped her develop her intellectual agenda and that she benefited from his contacts and from the numerous social gatherings that the pair arranged with international scholars of high repute (Horne 2004). Her interests and international connections made her more qualified than most other Australian legal academics to become the Challis Professor of Jurisprudence at the University of Sydney.

Tay was the third person to become the Challis Professor of Jurisprudence. The position was created in 1920 and for the first 55 years was entitled the Chair of Jurisprudence

and International Law. Archibald Charteris first held the position, Julius Stone succeeded him in 1942 and Tay took on the jurisprudential half of the role in 1975 (Mackinolty 1991; Starke 1979). The University of Melbourne was the only other Australian institution to create a chair in jurisprudence. The position commenced in 1927 and was extinguished in 1975 with the death of the last professor to hold the post. Following the Oxford model, the post suggested that Australian law schools were not merely training schools but that they also had liberal dimensions. It suggested that scholars should go beyond the rules and principles to broader reflections of law, drawing from learning from other disciplines, especially philosophy. Those who held the chair at both Sydney and Melbourne drew inspiration from leading jurisprudential scholars of their time in the United States and England. It was an elite, prestigious post but it was not without controversy. As legal reasoning was traditionally conceptualised as a craft rather than intellectual pursuit, many lawyers saw little point in broader theorising and viewed the post as a threat to prevailing norms within Australia's legal system. At Sydney the post eventually led to the creation of deep divisions within the Law School. While it is not possible to outline the various dimensions of these divisions here, it is clear that Tay's appointment to the position was controversial and that her decision to maintain the Department of Jurisprudence fuelled hostilities within Sydney Law School. In other words, Tay took on a controversial role that in time defined her position within Australia's legal academy.

Acknowledging Kamenka's role in Tay's ascendancy to Professor of Jurisprudence is an important part of any explanation of Tay's life and career. Were it not for Kamenka, Tay's career would clearly have been very different and it is doubtful that she would have come to Australia and pursued her particular brand of scholarship. However, it is important not to overstate the degree of assistance Kamenka provided or suggest that the support only flowed in one direction. Several close acquaintances considered the pair were intellectual equals.

Kamenka was at a disadvantage because he had not studied law and yet the role of law was a critical aspect of his studies of various societies. Tay's knowledge of the law and familiarity with legal theories contributed crucially to these studies. Any suggestion that Tay simply took advantage of Kamenka's academic successes can be easily dispelled by pointing to the fact that most of her early work, including her PhD, was sole authored and dealt with matters that fell within the heartland of the discipline of law. Rather than diminishing Tay's achievements, acknowledging Kamenka enriches our understanding of Tay's exposure to ideas from outside law and highlights how their partnership underpinned an interdisciplinary agenda of mutual benefit, with each scholar drawing on the other's strengths.

If we are to say that Tay succeeded because of Kamenka then it follows that we must also say that Kamenka succeeded because of Tay. As Julia Horne, drawing from an oral history of Tay's life, points out, few obituaries of Kamenka acknowledged Tay's contribution to Kamenka's career (Horne 2010: 426). This is regrettable. Any telling of Tay's life should involve a story of a very successful intellectual partnership that was mutually advantageous.

4. Tay's Contribution to Legal Knowledge

4.1. Assessing the Character of Legal Knowledge

Assessing the way that any Australian legal scholar contributed to the shape of legal knowledge is difficult. There has been a tendency within Australia's legal academy (at least in the twentieth century) to assume that foreign, rather than Australian, scholars created all the important scholarly theories. Like many aspects of Australian life and culture, the discipline has suffered from a cultural cringe (Philips 2005). For example, in a 1987 article

Chesterman and Weisbrot said that there were no distinctively Australian theories of jurisprudence (1987: 724). They did not, however, explain what research was undertaken to draw this conclusion or what exactly they were looking for.

At the time that Chesterman and Weisbrot's article was published the modern Australian legal academy had existed for around 30 years (if we include some of its early stages of development). It began in the decade following the Second World War. During this time each law school in Australia began employing full time academic staff to replace the legal practitioners who had taught law on a part-time basis. As I have explained elsewhere, there are clear signs that these academics were ambitious and wished to move beyond English models (Bartie 2010). However, at the same time they felt that they had a responsibility for providing Australian legal materials, primarily textbooks, that the profession and students could draw from to gain a basic appreciation of Australian laws (Bartie 2010). This sense of responsibility along with the fact that few publishers were interested in anything other than textbooks, restricted this generation's ability to produce monographs and engage in broader reflections about the nature of law. Further, given the small size of the academy in the 1950s through to the 1960s, and with legal academics specialising in a range of different fields, it is difficult to appreciate how this generation might have created clubs, moods or schools similar to those that emerged in the United States.

In the work of critical legal scholars (including feminist legal scholars) other generalisations have been made about this generation that are also misleading. In these critiques, scholars of the 1950s and 1960s are often portrayed as narrow formalists (Bartie 2010). Such critiques imply that this generation of scholars ignored the dominant Western jurisprudential debates from the 1920s to the 1950s and instead adopted a conception of law

associated with American and English scholars from the late nineteenth and early twentieth centuries – such as Langdell and Frederick Pollock (for a similar argument see Walker 2009: 246). A closer investigation of Australian legal scholarship reveals that this is simply not true. As I have suggested elsewhere, several leading legal scholars of this generation followed the latest jurisprudential currents and endeavoured to develop dynamic ways of thinking about law and law reform (Bartie 2010; see also, Lunney 2012). Many Australian scholars wished to move away from narrow conceptions of law and legal scholarship that they associated with some English writers. American Legal Realism fascinated many Australian legal scholars. Several members of this generation held high ambitions. Some believed that modern Australian law schools could be greater than the law schools in the United States (see, eg, Derham 2009; Sawer 1950). In short, these generalisations wrongly discredit a substantial body of thinking within Australia's discipline of law.

To understand the character of legal knowledge during this formative stage it is important to consider individuals separately. It is also important to consider the environments of the different law schools. For example, the Law School at the University of Melbourne was very different, both in terms of intellectual agendas and collegiality, from the University of Sydney (Mackinolty 1991; Waugh 2007). A full understanding of the character of legal knowledge should also take into account ideas within the legal profession and judiciary. Judges and the profession have generated their own ideas about the nature of law and legal practice that are not necessarily consistent with those of the legal academy. Indeed, drawing out comparisons and contrasts between how the legal academy and the profession have conceived of law could make for a very interesting study.

As no one has undertaken large-scale investigations of the character of legal knowledge in Australia and misleading generalisations persist, it is difficult to assess the

effect that diversity has had on legal knowledge. To identify possible change we need to better understand what legal knowledge in Australia was like before women entered the legal academy. However, the rapid changes to legal education in the 1950s and 1960s and the significant differences between institutions make this task difficult. Recent revisionist histories of the discipline of law in the United States provide a lesson to scholars who wish to work from simple propositions about the nature of legal scholarship or legal theory. The generalisations that have been made about American legal scholars have attracted so many qualifications that they have ultimately proven misleading and unhelpful (see, eg, Rabban 2013; Priel and Barzun 2016).

Instead of working from existing generalisations or creating new understandings of make-believe orthodoxy, scholars should identify and examine the intellectual endeavour of central scholars. While this is necessarily a messy and incomplete approach, I believe that it has the potential to reveal important differences between scholars. It can provide deeper insights into their contributions, including identifying how women, as distinct from men, have shaped the character of legal knowledge. Below I illustrate this point by explaining some distinctive aspects of Tay's intellectual agenda.

4.2. Tay's Contribution

4.2.1. Feminist Legal Scholarship

Tay made a number of distinctive contributions to legal knowledge in Australia. However, before describing some of these contributions, I should make clear from the outset that Tay contributed very little to feminist legal scholarship. While she was one of the first Australian

scholars to write an article on women and the law (Tay 1972), in later articles she openly discouraged Australian legal scholars from studying or philosophising about law through a feminist lens (Tay 1987). There are signs that she supported women's rights and advancements, however, she considered the type of feminist legal theory advanced by Catharine MacKinnon and others to be of little value. She believed that such studies distorted understandings of law and society rather than enriching them and she was convinced that women would be better helped through specific practical initiatives rather than scholarly endeavour (Tay 1987). Tay was not a radical. In light of this fact some feminist legal theorists would argue that by remaining within, rather than challenging, liberal paradigms Tay must not have changed the character of legal knowledge in Australia in any meaningful way, and therefore she is not worth studying.

This is not a position I accept. While criticisms of liberal perspectives have a clear place in the discipline, this focus should not subsume broader attempts to fully explore and understand the agendas of women scholars. The idea that women only contributed to knowledge through the advancement of feminist legal theory misrepresents the discipline and women's place within it and will ultimately leave women who have influenced law in other ways invisible. In other words, we need richer and more nuanced understandings of the discipline and women's place in it that fully recognise women's contributions to legal knowledge irrespective of feminist credentials. It is vital that the discipline has accounts of scholarly agendas that counter current perceptions that women contributed little to the character of legal knowledge.

4.2.2. Tay's Contribution to Legal Knowledge

Tay's most obvious contribution to legal knowledge in Australia was to advance a particular brand of law and society scholarship that also constituted a form of intellectual history (Bartie 2019: 143–49). Tay and Kamenka sought to understand the major political and social trajectories of societies in the twentieth century. They concentrated on Australia, Russia and China and their studies involved spending time in each country, conducting informal interviews and drawing from a range of rare materials that they obtained both within those countries and through their networks. This enriched their work and the strength of their contribution. The secrecy surrounding China made it more difficult for Tay to obtain material for her studies on China. However, she was well acquainted with the major works on the topic and was in contact with other leading scholars in the field (Tay 1969). As there were so few Western scholars writing on China or conducting broader sociological comparative theorising of this kind, Tay and Kamenka were clearly pioneers in these fields.

Tay and Kamenka sought to conceptualise the law within each of these societies and explain its ability to restrain and influence political regimes. They also considered the role of intellectuals and their capacity to influence these regimes. In the case of Russia, for example, Tay and Kamenka explained how certain intellectuals chose to advance ideas that supported Stalin's regime while others refused and were executed (see, eg, Tay and Kamenka 1970). Their work provides much material for reflection on both the role of law and the role of intellectuals within society.

Tay and Kamenka's greatest scholarly contribution was to devise a conceptual apparatus for comparing communist and other modes of governance that went beyond traditional distinctions (Bartie 2019: 143–49). The apparatus is imaginative and unique in that it combines the pure sociology of European social scientists, Weber and Tönnies, with Marxist legal theorising about Western law (see, eg, Tay and Kamenka 1970). Its foundation

consists of the two types of legal-administrative-social regulative systems, *Gesellschaft* and *Gemeinschaft*, that Tönnies devised as conceptual tools to understand the transition from ancient to modern society. Tay and Kamenka's use of these types are, however, in accordance with Weber's who commandeered them in his work *Economy and Society* (Weber 1978). Rather than mere conceptual tools Weber used them as 'ideal types.' Weber said that 'an ideal type is formed by the one-sided *accentuation* of one or more points of view' according to which '*concrete individual* phenomena … are arranged into a unified analytical construct … in its purely fictional nature, it is a methodological utopia [that] cannot be found empirically anywhere in reality' (Weber 1904: 90). Weber's ideal type is said to validate and provide a suitable vehicle for ascertaining and describing subjective values: for 'only as an ideal' can subjective value – 'that unfortunate child of misery of our science' – 'be given an unambiguous meaning' (Kim 1904: 107). As Tay and Kamenka explain, these are 'mental constructs, but constructs derived from observable reality, suggesting hypothesis and lines of investigation in dealing with reality' (Tay and Kamenka 1980: 111).

By building upon Weber's and Tönnies's types of legal-administrative-social regulative systems, *Gesellschaft* and *Gemeinschaft*, Tay and Kamenka sought to make a contribution to applied sociology, providing theoretical conceptions that they believed were needed to understand society. To Tönnies's two types they added a third, 'administrative-bureaucratic', drawing on Weber's detailed writing on the phenomena of bureaucratisation, as well as Marxist theorising. And in their later work they added a fourth 'extra-legal' type that they named 'domination-submission' (Tay 1971). Their work was unique in that it attempts to apply these types to both Soviet and Western legal systems. By recognising that all legal systems, from the democratic and stable to the revolutionary and tyrannical, share similar characteristics they sought to enable comparisons and contrasts that would allow for

more serious considerations of both systems and the identification of the attributes that erode rights and freedoms.

Tay and Kamenka's knowledge and, in Tay's case, first hand experience of living under tyrannical regimes shaped their contribution to legal knowledge. Being a woman of Chinese descent living first in Singapore and then in Australia, meant that Tay experienced prejudice first hand. In Singapore she grew up under a tyrannical regime that deprived her father of his job and left the family in a state of poverty (Horne 2004: 16–17; Humphrey 1984: 10; Bartie 2019: 117–18). These experiences left Tay with a strong respect for Western legal and political arrangements that she believed adequately guarded against overt forms of discrimination. This commitment stayed with Tay throughout her life and scholarly career.

For example, Tay and Kamenka associated the *Gesellschaft* ideal type with Western law and the rule of law and their studies suggest that its prominence within a legal system is essential to the stability of Western law and its capacity to keep governments in check. While in Singapore, Tay had written scholarship that indicated that she held Australia's judiciary in high esteem and it is apparent that she admired Fuller's conception of the rule of law (Tay and Heah 1960).

Tay and Kamenka's studies suggested that Australian legal scholars can and should break away from English analytical jurisprudence and engage in broader sociological theorising. They suggested that Australian scholars should study law and legal systems beyond their own and should challenge traditional paradigms that separate law from politics. Tay believed that legal scholars should engage directly with the major political events of the day and consider law's relationship to them. Tay's predecessor, Julius Stone, and some of his contemporaries had written about Soviet and Communist legal systems but they had not approached the task in the same way that Tay and Kamenka did. Tay therefore created a new

model for legal scholarship in Australia that broke with traditional moulds (Bartie 2019: 127–29, 143–49).

In these ways Tay challenged some of the traditional disciplinary boundaries within Australian law schools. She encouraged Australian scholars to look abroad and engage with a range of leading thought from other disciplines. Although she admired many aspects of Australia's legal systems, Tay believed that insularity within Australian culture, laws and the legal academy provided conditions for prejudice and discrimination to flourish (see, eg, Tay 1984: 34; Tay 1980: 142). Tay was twice elected President of the International Association for Philosophy of Law and Social Philosophy (IVR) and in 1988 was the first Australian elected a full member (Academicien Titulaire) of the Paris-based International Academy of Comparative Law. These posts gave her the opportunity to arrange international conferences in Australia and to invite her colleagues to overseas events. She was the first Australian scholar to create a masters programme in law with a foreign university and she arranged student exchanges. Along with Klaus Ziegert, Tay established a masters of law programme with Friedrich Schiller Universität Jena, Germany. The pair also arranged student exchanges to Vietnam.

4.3. Tay and the Australian Legal Academy: Similarities and Differences

It is, however, important not to exaggerate the differences between Tay's contribution and that of other scholars of her generation. While she may have been the only Asian woman and the ultimate 'outsider', she was not the only scholar to be affected by tyranny and the Second World War. The Australian legal scholars who emerged in the 1950s had either served or lived through the war and we see in their work themes and perspectives that were common

among this post-war generation. For example, several studied issues of law and morality and were wedded to the creation and maintenance of a legal system underpinned by liberal values that could curtail oppressive regimes. Some of Tay's post-war motivations and perspectives were therefore the same as her male counterparts.

Identifying these similarities suggests that the contributions Tay made were a curious mix of post-war drivers and her own experience as an outsider. Like her peers she viewed law schools as a means for greater social and political reform and her scholarship addressed issues of law, morality and justice. However, her distinctive experience as an Asian woman in an all-white male legal academy encouraged her to both critique the trends motivating other Australian scholars, devise measures to curtail the insularity that was prevailing within the legal academy and explore fields that her contemporaries were neglecting. In these ways her contributions broadened the character of legal knowledge within Australia.

As Tay's Australian academic career spanned over four decades, from the 1960s to 2004, it is also necessary to consider how her work compared with subsequent generations of legal scholars. Tay arguably had more in common with the post-war scholars than she did with many of the second wave of legal scholars who emerged in the 1970s, 1980s and 1990s. These new scholars believed that their law teachers had shown too much deference to the legal system and had ignored the way that the law and legal system privileged and empowered elite white men over various marginalised groups, particularly women and Aboriginals. To these new scholars Tay and Kamenka's comparisons between Australia and Russia and China and their associated warnings must have seemed distracting, overblown and conservative. The possibility that Australia's political system would become unstable and ruled by successive dictators surely seemed remote to these scholars and they believed that Tay and Kamenka's focus and criticisms took attention away from more pressing and

immediate concerns.

Tay stood opposed to the radical reform of Australia's law and legal system. Not only did she disapprove of the central agendas of this new wave of scholars, during the late 1970s her scholarly agenda expanded to include a critique of some of their central ideas and methods (see, eg, Tay 1984: 27). This manifested in strong and repeated scholarly opposition to the bulk of critical legal scholarship. Tay objected to the idea of radical reform and considered that the arguments made by some critical legal scholars that marginalised groups should be given different treatment under law would only entrench their disadvantage. Her own experience as a marginalised outsider who conquered various obstacles to exceed all expectations led her to believe that marginalised groups ought to capitalise and draw strength from their difference. For example, in a speech she gave as Human Rights and Equal Opportunity Commissioner she said that 'Indigenous and immigrant women have learnt to use their marginality in an extraordinarily powerful way. They have seen it is a site of radical possibility. To convert disadvantage into an advantage, a tool' (Tay 1998). Tay believed that she had succeeded in both Singapore and Australia because she adopted values and pursued goals drawn from outside her immediate environment and circumstances. For example, in a speech given towards the end of her life she said:

> When I was a child, growing up in a family that knew little English and not much of Western tradition or of culture in China, deprived for four years of food, books and schooling by a brutal Japanese occupation, I was quite clear what I and my family admired – a concept of culture, of the significance of literature and philosophy, history and art, of the possibility of transcending one's situation. This culture is a critical attachment to the abiding forms of human achievement, to be found in the past as in the present, in India, Greece and China, as in France, Germany and England; it is the finding of a way of life as contrasted with the mere acquisition of a number of arts and accomplishments.
>
> It involves a principled and unending fight against the values of the barbarians and the philistines and against the indifference of much of the populace; it means not only getting ourselves out of the way in exercising criticism, but shaping ourselves, allowing culture and culture-heroes, classical works and works of wisdom to transform our desire and our capabilities. It does not mean asking 'society' to help us become great; it means often, rejecting the values of 'society' in the here and now and comparing them with other times and

other climes (1987: 27–28).

This philosophy is illustrated within the body of Tay's own work. She either ignored or critiqued prevailing trends and advanced scholarship that sat within foreign models from other times. To Tay the way that critical legal scholars emphasised disadvantage invited a sense of hopelessness and defeat that worked against, rather than for, those who were marginalised.

Tay's opposition to the central ideas and modes of the critical legal studies scholars, including feminist legal scholars, had two consequences. First it heightened the distinctiveness of her contribution to the discipline. Tay's intellectual agenda was a critique of the prevailing scholarly agenda of her younger peers. Second, as one would expect, it alienated her from this younger generation and meant that her contribution to the discipline – the scholarly model that she advanced – is now neither well known nor well understood.

There are several criticisms that can be levelled at Tay's work. For example, in the later years it became repetitive and could have been further developed. Her scholarly endeavour did not manifest into a monograph, although there are rumours of a lost manuscript. It seems that Tay kept busy with teaching and the organisation of symposiums and various foreign delegations. In the final two decades of her life these activities reduced her capacity to produce large bodies of scholarly work. However, when compared with other Australian scholars of the late twentieth century there is no doubt that her work was in many ways exceptional and that she created an adventurous scholarly model that expanded the breadth and character of legal knowledge in Australia. This exercise of uncovering some of Tay's central commitments does not seek to elevate Tay's position on the merits of various legal systems. My point, instead, is to bring to light her methodology – her sociological theorising and turn to intellectual, social and political history – and scholarly ambitions. She

is a significant figure in the Australian discipline of law for several reasons including that her work significantly expanded the frontiers of law. She made an important contribution to Australian legal knowledge.

5. Conclusion

The discipline of law needs more studies of the ways in which women have contributed to knowledge. This will further both better understandings of the legal academy and bolster feminist critiques. There is much more that should be said about Alice Erh-Soon Tay and her contribution to legal knowledge and the discipline. However, rather than provide an extensive account of Tay's life, career and ideas, the point of this chapter has been to provide just enough evidence to mount an argument for more life histories of women, focusing on their contribution to knowledge. I agree with Nicola Lacey, an accomplished feminist legal scholar and intellectual historian, that 'conceptual analysis needs to be contextualised' (Lacey 2008: 1062–63), that to understand the concepts and intellectual contributions of legal theorists we need to understand the context in which they worked and what it was they were responding to. I would add that an account of a scholar's personal life, environment and career – especially a woman's – should not bury their intellectual contributions. Beyond the realm of feminist legal theory, we know little about the way women have shaped or expanded thinking about the law. Standard textbooks and established ways of teaching legal theory and jurisprudence may misleadingly suggest that in the area of legal theory women have made few contributions beyond advancing feminist theory.

Tay is interesting partly because the strategy she applied to overcome her

marginalised status led her ultimately to critique feminist legal scholarship. Her experience prompts questioning about other women legal scholars. How might they have drawn strength from their marginalisation and applied it to their thinking in law? And how has this changed the nature of legal knowledge?

This is not an appeal to 'celebrate' the scholarship of women legal scholars. Like all intellectual endeavour, such scholarship ought to be subjected to close critical scrutiny. An extended examination of Tay's work must include an explanation of some of its considerable shortcomings as well as the strengths that have been noted here. What I hope is that by drawing out some of the connections between Tay's scholarly agenda and her status as an Asian woman who had lived as an oppressed minority in Singapore, others will consider the possibility that similar connections might be found within the experiences of other women legal scholars. In other words, we may find that the lives and experiences of women and their endeavours to progress through the academy, whether outsiders like Tay or not, influence the contributions they make to legal knowledge.

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