Article

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Comparative Law, Anti-essentialism and Intersectionality: Reflections from Southeast Asia in Search of an Elusive Balance

Abstract: This paper explores the paradox of diversity and similarity within legal "traditions". More particularly, in looking especially at comparative law scholarship on Southeast Asia, it asks if there are any lessons that comparative law theory can learn about how to account for commonality and difference in large and diverse contexts from the perspectives of intersectionality and anti-essentialism that have been developed in feminist scholarship. The paper concludes that feminist scholarship does not resolve the paradox that comparative legal study makes evident but that it does make us better realise the importance of open-textured "narratives of affinity" and "contingent classification" in legal contexts.

Keywords: comparative law theory, Southeast Asia, feminism

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I. Introduction

My motivations for undertaking this paper were partly biographical. I was raised in Canada and took my initial legal training there. I then went to the U.K. for post-graduate studies and now work in Southeast Asia. By way of larger background, my family has roots in East Africa and before that in India. Through all of this geographical diversity runs the influence of English common law ("Common Law") such that lawyers in all these jurisdictions are acquainted with rotten snail-tainted ginger beer and why that helps to answer the question

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"Who is my neighbour?", and with the assertion that in summertime village cricket really is the delight of everyone. Lawyers in all of these jurisdictions would immediately know these references. At the same time, these jurisdictions are very diverse. They are historically and culturally shaped by different forces and incorporate in their legal systems very different influences. Canada has a written criminal code, but this is different from the written penal code in India and Singapore, although those last two are so similar that debates about section 377A of the *Penal Code* in Singapore would immediately be comprehensible to an Indian lawyer. An Indian, Singaporean, Australian and Canadian lawyer may also share a reference to the case of *Liversidge v. Anderson*,[1] though it is interpreted differently in these jurisdictions. If your "tribe" is the Kikuyu or the Kalenjin, for example, your customary or indigenous law will have a greater place in the contemporary law of your country (Kenya) than if your tribe is the Haida or Cree in Canada. Muslim personal law is officially recognised in India through the regular courts, and in Singapore and Kenya through the Sharia and Kadi courts respectively; it has a rather lesser role in Canada and the U.K. The list could go on.

In considering the jurisdictions with which I have personal connections, therefore, I am struck by the paradox of familiarity and similarity, on the one hand, and of opacity and difference on the other. Students at my university in Singapore, for example, have no problem in considering and receiving precedents from the U.K. or Canada or India, but they would hardly think of Cambodia or Thailand or Indonesia, jurisdictions that are geographically so much closer. In addition, when they travel to other "Common Law" environments on exchange, they know that they share a language – literal, legal and metaphorical – with their new classmates. Hence, there does seem to be something to what is shared notwithstanding all the differences.

Clearly, the seeming paradox of similarity and diversity is not particular to legal regimes. In this paper, I seek to explore it in the context of another environment where the effort has been made to look for commonality while having to encounter diversity: the case of feminist scholarship theorising about women's experience. More particularly, in this paper I attempt to see if there are any lessons that comparative law theory can learn from the perspectives of intersectionality and anti-essentialism that have been developed and explored in feminist scholarship. Intersectionality's major insight is that women participate in multiple identities simultaneously according to, for example, race, socio-economic position, educational background, sexual orientation and so their identities are variously formed by all of these contexts. Anti-essentialism

1 [1942] AC 206.

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makes the point that there is not one, single, essential, sense of "womaness" that can be identified. The investigation will show how these perspectives have changed feminist scholarship in the same way that broader comparative studies changed the understanding of legal diversity and contours of comparative law. I will use the scholarship of M.B. Hooker, a leading scholar on Southeast Asia, as a case study of comparative law scholarship. In this respect, I will argue that there is, perhaps, some methodological sharing that can take place between feminist theory and comparative law in terms of how to explain plurality and commonality. This paper will accept, however, that intersectionality and anti-essentialism have not been conclusive of how to address, and more importantly to make sense of, women's diversity and that these challenges are consistent and parallel with comparative law theory, which is still searching for its own narrative.

I had hoped in conceiving of this paper that the insights from feminist jurisprudence could and would provide comparative law a means to deal with the paradox of familiarity and difference. What I have discovered, however, is that feminist jurisprudence perspectives also struggle – albeit in a different way – with what I think is the same issue. My conclusion, therefore, is that the intractability of this struggle and its implications may indeed be the important point, though some useful work can be achieved by adopting a framework of "contingent categorisation."

II. The challenge

As others have noted, comparative law seems both more important and more confused than ever before. Catherine Valcke, for example, speaks about comparative law's malaise, noting:

> Much ink has been spilled on what is now commonly labelled the "malaise" of comparative law. This malaise – perhaps the most serious crisis to strike the discipline since its inception – is not about quantity: the comparative law literature is voluminous by any standard. Rather, it relates to the fact that this literature has yet to congeal into a "discipline" proper, that is, into "a shared body of information and theory" with a designated set of tools and methodology, "a scholarly tradition susceptible of transmission to succeeding generations", a "shared foundation on which each can build".[2]

In a like manner, Esin Örücü has written that:

2 Catherine Valcke, "Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems" (2004) 52 Am. J. Comp. L. 713, 713.

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> During the past decade we have witnessed increasing interest in all forms of comparative law, international law and transnational law. The character, quality and quantity of the work have increased and changed, but the basic problems have remained the same. There is no one definition of what comparative law and comparative method are.[3]

There is a lack of consensus it seems not only about what comparative law can do but also over what it might mean. Is this a problem? To some it may not be. One view may be that the enterprise of classification was always going to be a fool's errand and that what comparative studies have shown is that legal systems are sites of such great diversity and, to use Örücü's language, "mixing" such that they each must be taken on their own terms: "The new mixes are like cake mixes, where the outcome is not precisely known until the cake is fully cooked."[4] Of course, all the mixes are different – a little more sugar here, less vanilla there and maybe a surprise sprinkling of cinnamon somewhere else – just like all legal systems will have their own peculiarities and, even if they draw or seem to draw from the same sources, they may do so in different and distinctive manners. Indeed, on this line of argument, one of the important contributions of comparative law, of which M.B. Hooker's scholarship[5] has been a leading source for Southeast Asia, has been to expose and explicate the level and variety of this mixing. Hooker has been a leading expositor of the plurality of law in Southeast Asia both before and after the influence of European laws, stating directly that "[t]he structure of the South-East Asian legal systems is pluralistic in nature"[6] and remarking that, in the pre-European period "there was co-existence of legal ideas which occasionally resulted in a blend of principle; conflict was not inevitable."[7] Indeed, even though Hooker has noted that the impact of European laws has been a reformulation of much of the "indigenous" legal cultures of Southeast Asia, this did not lead to a straightforward replacement of the indigenous "old" for the European "new,"[8] so even though much of the formal law in Southeast Asia has been reshaped by European influence (and is similar to these European models) it is not identical to Europe, retaining distinctive features of its historical and cultural contexts.

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3 Esin Örücü, "Developing Comparative Law" in Esin Örücü & David Nelken, eds., *Comparative Law: A Handbook* (London: Hart Publishing, 2007) at 43.

4 Esin Örücü, "A General View of 'Legal Families' and of 'Mixing Systems'" in Esin Örücü & David Nelken, eds., *ibid*. at 178.

5 Classically in M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: OUP, 1975) and see also his *A Concise Legal History of South-East Asia* (Oxford: OUP, 1978).

6 M.B. Hooker, *A Concise Legal History of South-East Asia*, *ibid*. at 13.

7 *Ibid*. at 9.

8 M.B. Hooker, *The Laws of South-East Asia* (Singapore: Butterworths, 1988) at iv.

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In other words, comparative law scholarship has made evident the legal pluralism – to use what has now become the term of art – that is present in the world beyond just the paradigms of European legal systems which emphasised the Common Law-Civil Law duopoly.[9] Thus,

> [it] follows from the foregoing that awareness that law is not static, that it moves and changes and that legal systems today are at a crossroads, is essential. Irrespective of whether the future holds confluence or divergence for legal systems, one thing is certain: more and more systems will be mixed and mixing, be they in Europe, in South East Asia or in the Middle East. In line with these developments, comparative research is itself is at a crossroads, and the new point is to study this process of "mixedness" in order to facilitate an understanding of current and future patterns of legal development.[10]

This conclusion promotes an embrace of particularity away from categorisation.[11] Accordingly, we would assess any legal system, as any cake, on its own terms and merits and it should not matter that system "A" has some of the same elements in its mix as system "B", any more than we would judge two cakes the same way just because both recipes called for eggs, for example. This approach has much to commend it. After all, using just my "biographical" systems as examples, it is clear that each legal regime can be understood properly only by a concerted study of its own rules, principles and, context and history. One cannot fully understand Canada's legal system by studying Australia's legal system notwithstanding their similarities, nor understand Australia's legal system by studying the legal system in the U.K.

Nonetheless, such an approach misses something that one can actually experience, namely a familiarity – not just with ginger beer and village cricket- but with methods of thinking about law and of organising the legal landscape conceptually. Indeed, the above seems to premiate difference without enough regard (in my view, at least) for similarity. This raises a challenge well-articulated by Roger Cotterrell:

> Comparative law's central orientation today, I suggest, should be to balance the promotion of similarity in arrangements between legal systems, on the one hand, and the defence of differences in legal arrangements, styles, outlooks and ideas.[12]

9 Örücü (2007), *supra* note 4 at 181.

10 *Ibid*. at 185.

11 In the case of Örücü's referred to at note 3 above, her main target was the categorisation coming from the "legal families" approach.

12 Roger Cotterrell, "Seeking Similarity, Appreciating Difference: Comparative Law and Communities" in Andrew Harding & Esin Örücü, eds., *Comparative Law in the 21st Century* (London: Kluwer Law International, 2002) at 53.

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Cotterrell refers in the above excerpt to legal systems more broadly than just my biographically inspired examples with their Common Law influence but his point surely applies even more where the similarities may be more marked. The key point, and the challenge, is to find that analytic and explanatory fine point of balance between observable differences and elements of similarity.

It is to this end that I turn to the insights of intersectionality and anti-essentialism scholarship in feminist legal discourse. While it may seem surprising to say this, I find that this material displays a commonality with comparative law work inasmuch as both lines of scholarship have pointed out blind spots in the understanding of their subjects, which when exposed generate new, if still evolving, theoretical perspectives upon their fields.

III. Intersectionality and anti-essentialism

Kimberlé Crenshaw is one of intersectionality's leading and early scholars. Her locus of concern and case study is the experience of Black American women. In "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,"[13] Crenshaw addresses the habit of thinking in single-axis categories of identity: if a black woman is discriminated against, can she clearly prove she was discriminated against because she is black, or because she is a woman? If her experience is different from black men, then she cannot easily prove the former. If her experience is different from that of white women, then she cannot easily prove the latter. And it does not help that feminists who try to isolate the experience of gender discrimination do so by removing race from the equation – which means the experience of gender discrimination is defined by the experiences of *white* women, and excludes the experiences of black women. The intersection is marginalised because it does not definitively belong to the one or the other protected group. Crenshaw speaks about her project as follows:

> I will center Black women in this analysis in order to contrast the multidimensionality of Black women's experience with the single-axis analysis that distorts these experiences. Not only will this juxtaposition reveal how Black women are theoretically erased, it will also illustrate how this framework imports its own theoretical limitations that undermine efforts to broaden feminist and antiracist analyses. With Black women as the

13 [1989] U. Chi. Legal Forum 139.

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> starting point, it becomes more apparent how dominant conceptions of discrimination condition us to think about subordination as disadvantage occurring along a single categorical axis.[14]

To counter the domination and marginalisation that comes from the single-axis perspective, Crenshaw argues that:

> [t]hese problems of exclusion cannot be solved simply by including Black women within an already established analytical structure. Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.[15]

Intersectionality thus involves the idea that there can be multiple axes of identity and discrimination: it is less a fully fleshed out position here than it is a reaction against what it sees as parochial perspectives, which foster discrimination. As Crenshaw puts it, intersectionality "is a provisional conceptualization, a prism refracted to bring into view dynamics that were constitutive of power but obscured by certain discursive logics at play in that context."[16] Anti-essentialism feminist scholarship has played a similar role: it has a critiqued the idea that there are "essential" experiences of, for example, womanhood. The recognition of these differences is meant to empower marginalised subgroups, defined perhaps by race, colour, socio-economic position or sexual orientation, within the larger discourse of feminism. An example of this perspective comes from the work of Angela Harris. In looking at the work of white feminist scholars, Harris, who is herself a black woman, says:

> I argue that their work [viz., of white women scholars], though powerful and brilliant in many ways, relies on what I call gender essentialism—the notion that a unitary, "essential" women's experience can be isolated and described independently of race, class, sexual orientation, and other realities of experience.

Moreover:

> [a] second and less obvious reason for my criticism of gender essentialism is that, in my view, contemporary legal theory needs less abstraction and not simply a different sort of abstraction. To be fully subversive, the methodology of feminist legal theory should

14 *Ibid*. at 139–40.

15 *Ibid*.

16 Kimberlé Crenshaw, "Postscript" in Helma Lutz, Maria Maria Teresa Herrera Vivar, & Linda Supik, eds., *Framing Intersectionality: Debates on a Multi-Faceted Concept in Gender Studies* (London: Ashgate, 2011) at 231.

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> challenge not only law's content but its tendency to privilege the abstract and unitary voice, and this gender essentialism also fails to do.[17]

The subversive (and even destructive?) potential of anti-essentialism is noted also by Tariq Modood, who points out that:

> [i]t seems, then that anti-essentialism is inherently destructive. Each escape from its grasp (for example in the celebration of hybridities) proves to be illusory; while thoroughgoing embrace seems to leave us with no politics, no society, not even a coherent self…What promised to be an emancipatory, progressive movement seems to make, with its "deconstruction" of the units of collective agency (people, minorities, the oppressed and so on), all political mobilisation rest on mythic and dishonest unities.[18]

Harris resists these consequences, however, and is at pains to point out that she does not want her critique to result in a sort of "isolationary pluralism" from which nothing can be said about a larger group:

> I do not mean in this article to suggest that either feminism or legal theory should adopt the voice of Funes the Memorious, for whom every experience is unique and no categories or generalizations exist at all. Even a jurisprudence based on multiple consciousness must categorise; without categorisation each individual is as isolated as Funes, and there can be no moral responsibility or social change. My suggestion is only that we make our categories explicitly tentative, relational, and unstable, and that to do so is all the more important in a discipline like law, where abstraction and "frozen" categories are the norm. Avoiding gender essentialism need not mean that the Holocaust and a corncob are the same.[19]

Here I would like to re-invoke as a place-holder Cotterell's challenge of balance and how it may resonate with Harris viewpoint (as I think it does). I will return to this point more fully below.

Like Harris, Trina Grillo, another important feminist scholar, notes that essentialism may be useful in allowing us to speak about experiences which, while diverse, have commonality. Her caution is to remember the potential pitfalls that essentialist discourses entail. As she puts it: "[t]he question is whether essentialism, which is sometimes unavoidable, is explicit, is considered temporary and is contingent."[20] The point therefore is not to swear

17 Angela P. Harris, "Race and Essentialism in Feminist Legal Theory" (1989–1990) 42 Stan. L. Rev. 581, 585.

18 Tariq Modood, "Antiessentialism, Multiculturalism and Religious Groups" (1998) 6(4) The Journal of Political Philosophy 378, 381.

19 Harris (1989–1990), *supra* note 17 at 586.

20 Trina Grillo, "Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House" (1995) 10 Berkeley Women's L.J. 16, 21.

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off generalisation altogether but rather to use the insights of intersectionality and anti-essentialism to act as checks on how we formulate our generalisations.[21]

There is much more that could be cited to explain the perspectives of intersectionality and anti-essentialism and the recognition of the challenges that they pose to generalisation on the one hand, but also the potential value of generalisations that they acknowledge on the other. One might nonetheless find, as I do, that engaging as these perspectives are we are still left in conditions of malaise in that we are no clearer about how to find a point of balance between diversity and generalisation. Even if we are usefully informed and fully adopt the insight that any generalisation must be seen as temporary and contingent, when do those conditions become so corrosive of generalisations that what we have said becomes irrelevant at best or even harmful? Ultimately, therefore, if we are being intellectually rigorous and extending these perspectives to their logical conclusions are we not witness to an internal contradiction? That is, should we not admit that we really cannot say anything "general" (whether it be about women or the "Common Law tradition") and so we collapse into isolated silos?

Academics and others who work with intersectionality and anti-essentialism literature are aware of these theoretical limitations and post-intersectionality discourse has tried to figure out how difference and diversity might be overcome so as to allow meaningful statements to be made about groups. Let me therefore turn, briefly, to explore some of these perspectives to see what insights they may offer.

One perspective that has been posited is to adopt a frame of "multidimensionality" that would recognise "the inherent complexity of systems of oppression … and the social identity categories around which social power and disempowerment are distributed."[22] Multidimensionality posits that various forms of identity and oppression are inextricably linked and intertwined. Another perspective, coming out of literature addressing sexual orientation, is of "cosynthesis," which:

> insists that identity categories are sometimes themselves constructed or synthesized out of and rely upon other categorical notions. Therefore, this mutually defining, synergistic, and complicit relationship between identity categories is a dynamic model of multiple subordinating gestures. It denies the priority of the deconstructive

21 See *ibid*. at 30.

22 See Darren Lenard Hutchinson, "Identity Crisis: 'Intersectionality', 'Multidimensionality' and the Development of an Adequate Theory of Subordination" (2000–2001) 6 Mich. J. Race & Law 285.

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> concerns of class over race, of race over gender, or of gender over sexual orientation, of anything over anything else.[23]

While initially tantalising, both multidimensionality and cosynthesis are perspectives that seek to address cross-cutting and interlinked dimensions of (depending on how one wants to describe it) oppression or subordination. Thus, like intersectionality, they focus on the interplay of marginalisation that may arise by virtue of race/colour and sexual orientation, say, or gender and socio-economic position. In other words, they seem to reemphasise the basic insights of intersectionality and the warnings of anti-essentialism, while providing a better basis for political solidarity and mobilisation. That may be an important advance in practice but we are not, I think, conceptually closer to locating our balance point. Peter Kwan puts it well when he notes that:

> [i]ntersectionality tells us, for example, that the condition and subjectivity of and hence the legal treatment of Black women is not simply the sum of Blackness and femaleness, but it does not shed much light on what it is nevertheless. Narratives are often used to fill this gap. But narratives provide only the empirical data on which the theoretical work remains to be done.[24]

IV. Southeast Asia: the work of M.B. Hooker

I suggested that there may be some common intellectual ground in the literature on intersectionality and the pioneering scholarship of M.B. Hooker in illuminating what were previously blind spots in our understanding. The different bodies of work have highlighted that there is much more complexity and richness in the subjects of their study (the conditions of women, for example, or the legal system of Southeast Asia) and have therefore challenged what had been the conventional understanding of scholarship before their insights. Furthermore, both bodies of literature force us to confront the theoretical challenge (with which it seems we are still struggling) of making sense of all the richness they have exposed.

Hooker noted that: "When we ask ourselves what it is to be compared, we very quickly find ourselves asking what we mean by the term 'law' in its comparative context. Its meaning cannot be limited to the lawyer's highly specialized use of the term[.]"[25] Additionally, in the introduction to his study

23 Peter Kwan, "Complicity and Complexity: Cosynthesis and Praxis" (1999) 49 DePaul L. Rev. 673, 688.

24 *Ibid*. at 686.

25 M.B. Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Oxford: OUP, 1975) at 456.

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of Southeast Asia, Hooker notes the several points of analysis of legal systems in the region, namely written law, oral law, law in social institutions and indigenous adaptations.[26] He ends the introduction with the key insight of his study that is built on this framework of analysis: "The striking feature of modern South-East Asian law is legal pluralism...Like most processes of change or development [the expression of this pluralism] is untidy and occasionally inconsistent with itself."[27] It hardly needs to be said that the development of the concept of legal pluralism and the understanding of its manifestations, which comparative law now takes for granted, is deeply indebted to Hooker's careful, detailed studies and reflection.

The "plurality consciousness"[28] that legal pluralism encourages in the comparative scholar helps us to see the remarkable variety beneath the formal unity of legal systems. In turn, and recalling the metaphor of the cake mix, this enables us to realise the capacity for similar "ingredients" to be combined in multitudinous ways. I suggest that the legal pluralism perspective has been able to do for our understanding of legal systems what anti-essentialism and, even more, intersectionality have done for their subjects of study – be it the experience of women or other groups. That is to say, legal pluralism has debunked straight-forward narratives of legal development and demonstrated that analysis must proceed along multiple vectors which will almost certainly be differentially important in different systems. The reality of a legal system in Southeast Asia will not be defined by its "Southeast Asianness"[29] (nor would that in Africa or Europe be defined by its Africanness or Europeanness etc.) but rather by how written law, oral law, law in social institutions and indigenous adaptations are manifested. So, too, the experiences of Black or Muslim women will not be definable by "Blackness" or "Muslimness" or "Femaleness" only but by and in the intersection of these aspects of their identity with class, race, socio-economic position and, one might add, their location in time and space. The challenge, therefore, is to how to find and express similarity in this intersectional diversity.

26 M.B. Hooker, *A Concise Legal History of South-East Asia*, *ibid*. at 1–6.

27 *Ibid*. at 14.

28 I draw this phrase from Werner Menski's, *Comparative Law in a Global World*: *The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: CUP, 2006).

29 Of course, Southeast Asia is itself a contentious category but this is like other geographical groupings (South Asia, West Asia, the Indian Ocean *etc*.). See on this "Introduction" in Victor T. King, ed., *The Sociology of Southeast Asia: Transformations in a Developing Region* (Copenhagen: NIAS Press, 2008).

V. Conclusion

In preparing to write this piece, I had hoped to square a circle. I wondered to what extent feminist theory's struggle with the challenge of plurality as a result of the perspectives of intersectionality and anti-essentialism might help to address comparative law's analogous challenge as a result of the understanding of legal pluralism. My first conclusion is that in neither context has the circle been squared. One might simply conclude with this and take some solace in that oft-quoted observation of Immanuel Kant: "Out of the crooked timber of humanity, no straight thing was ever made."[30] Surely, in saying this, Kant was cautioning us that to seek clear, straight order out of human experiences (whether in legal or social contexts) is impossible. I would, however, go a bit further and propose two other potential lessons that this examination might have revealed. These still do not bring us close to squaring the circle, but they might help us in taking a step toward a point of balance along the lines Cotterrell suggests.

Anti-essentialism and intersectionality emphasise the plurality of women's experience. The studies of M.B. Hooker likewise point to the plurality within the legal systems of Southeast Asia. Just as women's experiences may be formed by the intersection of diverse identities, so too legal systems may develop out of the intersections of a variety of legal and social forces. Context matters and so does the impact of the context that, for want of a better term, we might call the "culture" within which the subject (the women; the legal system) exists. And so, while identities are formed by their cultures, cultures are not just endogenous, self-contained units. Rather, they draw in other imports. Hence, the impact of legal norms, procedures, categories or ideas developed in different contexts or from external religious, social or economic sources, will be relevant. For example, Muslim American women may have their experience defined by the fact that they are women, Muslims and Americans even if their Muslim identity relates primarily to contexts outside of the U.S. (though of course over time the primacy of the external context might change as communities become more settled so that "Muslim American" identity will be different and distinct from the identity of Muslims in the "home" countries). Equally, the intersections will keep the identities fluid. Culture is not static and its effects on the shaping of a legal system or on identities of a social group will constantly generate new combinations.

Secondly, within these processes, the narrative that we tell ourselves is important. In the case of the legal systems I mentioned at the beginning of

30 Immanuel Kant, *Idea for a General History with a Cosmopolitan Purpose* (1784), Proposition 6.

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this paper, we can now relate their diversity to their varied cultural contexts. At the same time, however, there is what I call a "narrative of affinity" that is expressed – even if implicitly – in telling the "stories" of snails in ginger beer and the like. Kwan, recall, thought that narratives were the empirical basis for theorising. I would like to suggest that narratives that express affinity might bring us as close as we might hope to developing the balance between similarity and difference that Cotterrell mentioned. The narratives constitute a common set of references, normative concepts and analytical structures which are shared, *mutatis mutandis*, within a context, such as, for instance the "Common law jurisdictions." On this understanding, the concept of a "narrative of affinity" resonates with sets of ideas that have been used to explain the construction of common references. One of these is the idea of interpretive communities developed originally in Stanley Fish's literary theory. Fish's key insight is that interpretation is shaped by cultural assumptions developed with communities about what a text means. Within comparative law scholarship, John Gillespie has employed Fish's idea in the context of understanding legal transfers in different parts of East and Southeast Asia. Gillespie says that "deep beliefs of an interpretive tradition or community form 'a lattice or web whose component parts are mutually constitutive' and determine what ideas, arguments and facts members find compelling."[31] Thus he claims that legal transfers may appear logical and desirable for those embedded in one interpretive community, but inappropriate and alien to members of a different interpretive community.[32]

Let us say we express "narratives of affinity" among a group (women) or in a legal tradition (say, the Common Law) but resist essentialising by acknowledging that these narratives do not eliminate variety since these broad groupings will continue to intersect with other aspects of identity shaped by their culture(s). We would be in a situation where there is, lurking within the consciousnesses of Common law trained lawyers, a sense that despite our different substantive rules of law, varied contexts and national histories there is something familiar and even similar that we share. And the same may be true for what feminists see in women's experience: something shared despite – indeed, in spite of – diversity. Ugo Mattei has asserted that "[t]he pluralism of legal

31 John Gillespie, "Developing a Decentred Analysis of Legal Transfers" in Penelope Nicholson & Sarah Biddulph, eds., *Examining Practice, Interrogating Theory: Comparative Legal Studies in Asia* (Leiden: Martinus Nijhoff Publishers, 2008) at 42. The internal quotation used by Gillespie comes from Stanley Fish, *The Trouble with Principle* (Cambridge: Harvard University Press, 1999) at 280. I thank Sumithra G. Dhanarajan for bringing this material to my attention.
32 *Ibid*.

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patterns should not become an excuse to avoid classification."[33] I am not suggesting full-blown classification here but rather a more modest endeavour at a narrative, one that still finds pattern, organisation and meaning. Shared meaning between the narratives of common law systems can be as simple as the fact that the bulk of their imagined history is shared. The story of the first courts set up by the Normans rulers in Anglo-Saxon England is as much a part of the narrative of American law as it is of Indian law. These stories of ancient history may not be vitally important to comparative law in our contemporary world, but the idea of narratives nevertheless allows their presence to be felt in the grander scheme of things.

The idea of the Common Law as having a narrative of affinity suggests both that there are common sources which are taken as standard as well as a way of "reading" these sources – an interpretive matrix. Thus a paradigm of Common Law thinking is constructed by an interpretive community which cuts across geographical distances. Just like in science or literature, however, a narrative of affinity does not imply total uniformity: rather its main import is the common set of references (snails in ginger beer, the delights of village cricket, carbolic smoke balls *etc*.) and techniques of understanding.

Does this give us enough? Narratives are not closed off. In fact, the very idea of narrative suggests a certain flexibility and openness to change and to (re) interpretation. At the same time, a narrative provides a certain type of conception in which we might locate ourselves. Tariq Modood has said that "we do not have to be browbeaten by a dogmatic antiessentialism into believing that historical continuities, cultural groups coherent selves do or do not exist. Nothing is closed *a prioiri*; whether there is sameness/newness in the world."[34] So, if we do find that these narratives of affinity help us to explore normative or procedural or experiential commonality in the legal systems of Southeast Asia, or in the "Common law" world, or in other contexts then I believe we have found both something as a basis to balance sameness and difference. This point of balance will always be fluid and unstable but it is not meaningless.

In fact, because it is not meaningless it enables us to engage in what we might call "contingent categorisation of legal systems." This categorisation is contingent in two respects. First, membership in one group does not exclude simultaneous membership in other groups (Common Law and Islamic law; Adat law and Civil law, for instance). This provides for the intersectionality of legal

33 Ugo Mattei, "Three Patterns of Law: Taxonomy and Change in the World's Legal System" (1997) 45 Am. J. Comp. L. 5, 15.

34 Modood (1998), *supra* note 18 at 382.

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systems. Second, the border surrounding any one legal system is always in flux and subject to revision so that we get beyond a fixed identity for any one legal system. This incorporates an anti-essentialist understanding. Contingent categorisation gives us a way forward because it allows us to make sense of commonalties as well as differences, which we can perceive even without looking too deeply. At the same time, contingent categorisation speaks to the purpose of classification. That is to say, we seek to classify to know things about once case and to understand it relative to another case, to intelligently compare and contrast. Contingent categorisation allows us to realise these ends while always keeping us alert to the dynamics of the exercise in which we are engaged.

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