

2.1 Introduction

In the first half of the nineteenth century, the historical school usefully and also abusively derived legal difference from differences in national culture and national history. Towards the end of the century, it was common to understand systems as flowing in their details from a large conceptual characteristic (for example, codified versus common law; place on the evolutionary spectrum running from status to contract; formal rationality versus *qadi* justice). In the next period, the dominant mode was to understand systems as having adopted varied solutions to common functional problems.

These methodologies of comparison are related to the juristic methodologies of their times. Weber's typology of modes of legal rationality, with German pandectism at the top, was a manifestation of the classical legal thought that was declining as he wrote.¹ The functionalist method is patently consonant with the emergence of social legal thought, whose slogan was that law is a means to social ends and whose juristic method was teleological.²

In contemporary legal thought, 'balancing' or 'proportionality' is a prevalent legal methodology. Is there an equivalent comparative methodology? A preliminary answer would be that one way to understand any particular difference between two contemporary legal systems is as the product of different balances between conflicting considerations, be they principles or policies, rights, powers, or whatever.

Traditionally, common lawyers have understood legislative law-making as reflecting the situational balance of political power, and sharply contrasted it with judicial and scholarly legal interpretation, understood as scientific, as technical, or, at the very least, as non-political. Civilians have had much the

¹ Max Weber, *Max Weber on Law in Economy and Society*, ed. M. Rheinstein, trans. E. Shils (Cambridge, MA: Harvard University Press, 1954).

² K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, trans. T. Weir, 2nd rev. edn (Oxford: Clarendon, 1987).

same notion, once exception is made for the epochal legislative moments of codification, heavily influenced by the scholars. Over the course of the twentieth century, critiques of the varieties of 'formalism', meaning juridical techniques that isolated legal interpretation from 'extra-juristic' considerations, brought gaps, conflicts, and ambiguities to the centre of legal consciousness. Balancing conflicting considerations is the standard contemporary method for choosing an interpretation when traditional methods – precedential, conceptual, or teleological – are, for some reason, not operative.

The rise of balancing as a juristic method, rather than a method restricted to legislation, threatens the sharp distinction between legislation and legal interpretation across the whole domain of Western-influenced legal systems. Ideal typical balancing firmly rejects ideological considerations, requiring that factors be 'universalizable'. This is supposed to guarantee the non-political character of the technique. Nonetheless, the relatively low level of constraint imposed on the jurist by this methodology makes inevitable a 'hermeneutic of suspicion' that outcomes either follow from particular ideologies or represent compromises of conflicting ideologies rather than of conflicting universal principles and values.³

This might not be so bad if it were possible to understand balancing as nothing more than a disfavoured method of last resort. But it is also common to see rules justified in precedential or conceptual or teleological terms as the product of *covert* balancing, disguised by the abuse of deduction, or of teleology, or of precedent. Systems that present themselves as flowing coherently from values or principles may 'actually' be compromises or hotch-potches of *conflicting* values and principles. If the norm is the product of covert balancing, it is, even more than in the case of overt balancing, subject to the suspicion that it is politically rather than 'technically' determined.

In other words, a first operation critiques legal solutions that present themselves as precedentially or conceptually or teleologically required, showing that the solution represents in fact a balance of conflicting considerations. The second operation indicates the ideological orientation or orientations that plausibly motivated a solution that was formally presented as a balance of universalizable considerations.

³ D. Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge, MA: Harvard University Press, 1997).

In the contemporary period it would seem that a plausible account of legal differences would have to take into account the influence of ideological conflict in the production of law, including legal interpretation. This is true because ‘we’ practise the double hermeneutic of suspicion described above, wanting first to understand the purportedly legally necessary as the product of balancing, and then to understand balancing as involving conflicting ideologies.

It is striking that this approach is sufficiently unfamiliar that we have no canonical list of ideologies at play, and no list of domains of legal comparison where the ideological interpretation of difference is already well established. But there are also plenty of promising starting points, as I shall try to show.

To avoid any misunderstanding, ideological differences, producing varying legal compromises behind the screen of overt or covert balancing, will not explain anything like the total range of legal difference. Each of the earlier approaches retains its usefulness. It is still useful to attend to national and international history (for example, colonial and post-colonial history) and to systemic/conceptual differences, such as common versus civil law or logically formal method versus teleology, and to identify typical functional problems of modern social organization to which legal systems offer a variety of solutions. What is open to criticism is the categorical exclusion of the ideological factor in constructing explanatory schemas.

Further, this exclusion seems to me open to the same kind of ideology critique that we now habitually direct at the law itself, that is, open to an ideological critique of the academic discipline of comparative law. The categorical exclusion of ideological analysis (with the interesting exception of the category ‘socialist law’ in René David’s families typology) is a residue of that very self-conception of the non-political jurist that balancing has called into question.

2.2 The analytic scheme

2.2.1 What is balancing/proportionality?

The rise since 1945 of balancing/proportionality (hereinafter simply ‘balancing’) is a striking aspect of law as practised around the world. It has attracted a great deal of attention from comparative lawyers, legal theorists, and

sociologists of law. This section briefly lays out what I take to be its various characteristics in both private and public law.

In balancing, we understand ourselves to be choosing a norm (not choosing a winning party) among a number of permissible alternatives, on the ground that it best combines conflicting normative considerations. The considerations vary in strength or 'weight' across an imagined spectrum of fact situations. They include moral considerations often called 'principles', but also values, policies, precedents, rights, and powers. Considerations of administrability (or legal certainty) and of institutional competence (appropriate role for the judge, subsidiarity, etc.) are part of the calculus. It is common to balance a consideration from one category (say, a right) against a consideration from another category (say, the value of legal certainty).

Balancing is often called a technique of 'last resort'. This approach is unsophisticated, since it leaves out of account the legal 'work' by which lawyers often strive to turn a question that seems at first susceptible of a coherence-based solution into a question that requires balancing.⁴

It is a condition of legitimate balancing that the considerations must be derivable from the body of legal materials, either as enacted or as inferable (this is the survival of the classical 'method of construction' within the balancing enterprise). And they must also be 'universalizable', meaning that they must be at least formally in the interests of 'everyone', in contrast to interests understood to be 'ideological', or 'partisan', or 'sectarian'. It is worth noting that, in secular systems, religious reasons are not considered universalizable. In religiously based systems, those of the established faith are highly pertinent, and, moreover, can be balanced.

2.2.2 The shadow of ideology

The conflicting considerations model operates in 'the shadow of ideology'. Participants in the discourse know that there is always a possibility that a given balancing analysis will seem to be ad hoc in its definition of the situation to be dealt with, and merely post hoc in its deployment of conflicting considerations reduced to easily manipulable argument-bites.

The shadow of ideology is not a 'fact'. In characterizing contemporary legal consciousness, the point is not that all attempts at deduction or teleology must fail, so that the 'truth' is the ineluctability of balancing and

⁴ *Ibid.*

ideological contamination. The point is to convey the overall situation in which the reduction of doctrine to balancing, and of balancing to ideology, is an ever present possibility.

2.2.3 Commonplace ideological analysis

For the purpose of making sense of legal difference through a notion of ideology, we do not need a strict definition. What seems to me a plausible approach is to offer a list of 'isms' that seem to motivate legislative activity, but that also can be the ideological 'shadow' that those who practise the double hermeneutic of suspicion of juristic activity discern in juristic balancing.

In my own work, I have spent considerable effort on giving definitions of American conservatism and liberalism, understood as ideologies.⁵ In the kind of analysis we are discussing, nationalism, black nationalism, Arab nationalism, feminism, radical feminism, liberal feminism, libertarianism, anarchism, fascism, communism, and socialism can all play the same role. Neo-liberalism of the type propagated by the international financial institutions, and advocacy of the 'European social model' are ideological in a similar way. For these purposes, I would not characterize present-day Catholicism, or Christianity, or Islam, or Protestantism or Methodism or Hinduism as ideologies. But it seems to me that 'Islamism', American Christian conservatism, Social Catholicism, liberal and conservative Catholicism, and Hindu nationalism, do fit into the list.

To begin with a very simple example: it is common to analyse national legislation that regulates immigration from the global south to the global north as reflecting conflicts between 'nativism' and what? The alternative to nativism is likely to be called a 'liberal' orientation. Observers might link nativism loosely to nationalism (or in a denunciatory mode to fascism or racism) while linking liberalism to humanitarianism (or in a denunciatory mode to the capitalist interest in driving down wages and weakening organized labour).

Now, if we are interested in contrasting Italian and US immigration law, we might stop at the level of legislation. But it might well be the case that very important questions of law had been settled not by statute but by judicial interpretation, including, of course, constitutional interpretation imposing restraints on permissible legislative activity.

⁵ *Ibid.*

When analysing the case law interpreting immigration statutes, or assessing their constitutionality, or the legal academic literature that analyses and propounds alternative interpretations, it is intuitive to engage in the double hermeneutic of suspicion. This means that even though the judgment of the court claims that it is implementing the ‘plain meaning’ of the statute or constitution, we may well decide that there was no plain meaning, and that the court engaged in covert balancing.

In the second step, we might decide that the best way to make sense of any particular difference between the judicial decisions in the two legal systems would be to place the contrasting norms at different points along an ideological spectrum running from nativism to liberalism. Then we might, or might not, attempt the further step of accounting causally for the differences in outcome by reference to the relative strength of ‘nativist’ versus ‘liberal’ ideological tendencies in the views of the particular decision-makers, or, more ambitiously, in the views of what we took to be the relevant strata of Italian and American society.

I do not see what I have just written as very controversial. The difficulties arise when we try to establish the truth of some concrete instance of this kind of analysis, when we try to figure out the parameters of its appropriate application, and particularly to reason causally. For this purpose, it may be useful to try a loose but not completely vague definition of an ideology and of an ideological conflict, as these notions might come into play in interpreting a legal difference.

2.2.4 A tentative definition of ‘ideology’

Ideologies are the theory part of political projects, in the very broad sense of projects that aim to change or to preserve some controversial dimension of social life. We call the theory an ideology only if it combines claims of particular groups or interests with the universalizing claim that people who do not share the interest, or will be hurt by its success, should nonetheless agree to that success. The ‘nativist’ has a theory of who is entitled and who is not to enter the country, and understands his or her claim to be an appeal to the moral values and good sense of the person who will be excluded by his programme, even if s/he has no expectation that the prospective immigrant will in fact agree that s/he should be excluded.

In this conception, the ideology is operated by an ‘ideological intelligentsia’ that does the theory work. It has its own interests distinct from those of

the represented group, and is at least somewhat independent of that group, although not so independent as to be altogether distinct. In other words, an ideology is not 'just a superstructure'.

Ideological conflict often has a symmetrical character, but an ideology can confront something as vague as 'the status quo' or an entrenched interest with no universalizing apparatus to back it up. Ideology is a critical word. It is typically used by a critic charging that the universalizing of the advocate is mere window dressing for the selfish pursuit of an interest. In other words, that the fragile equilibrium between the 'selfish' dimension of group commitment and the universalizing dimension of 'principle' has tilted towards the interest.

There is a striking homology between the critique of an ideology and the critique of balancing. Ideologies make universalizing claims in favour of the outcomes they aim at; in balancing, the considerations to be balanced must be stated in universal terms. Their opponents criticize ideologues for manipulating a universalizing discourse for particularist ends, just as those suspicious of balancing criticize the balancer as a covert ideologist.

When the critic accuses the balancing judge of covertly importing his ideology rather than applying or interpreting the law, he takes it for granted that suspicion has already discredited the universalizing claims of the ideology whose presence he senses. It is just because it has been identified as particular rather than universal that it has been excluded from the set of legitimate considerations for legal balancing. It is therefore enough, in order to undermine the claim that the judge is acting as a judge (and not as an unelected legislator), to show that the ideology in question is plausibly the 'true' motive.

This definition of ideology is supposed to correspond to a common current usage, and it seems important to distinguish it quite sharply from an earlier usage. Contrary to the orthodox Marxist idea, but corresponding to the early Marx and the Gramscian mode, there are diverse ideological projects at work in a given society, rather than a single one corresponding to the 'mode of production'. An ideology, as noted already, is not a 'superstructure'. And there is no presumption that an ideology flows in a coherent way from a central premise – as, for example, the 'law of the commodity' in Pashukanis. Rather, my presumption is that ideologies are incoherent, ambiguous, full of gaps, just as is the body of legal materials. An ideologist will have to engage in the same kind of interpretive work as the jurist when trying to decide what 'his' ideology requires in a given circumstance.

2.3 Splendours and miseries of ideological analysis

Here I begin with examples that are supposed to be easy, and then move on to instances that illustrate what is problematic about this type of analysis.

2.3.1 Some easy(?) examples

Suppose that we are interested in comparing the rules that in different countries govern an employer's attempt to discharge a worker. We know from the outset that there is a spectrum running from the extreme of 'employment at will', with virtually no restrictions on discharge, to the highly protective regime of discharge only for 'good cause', with elaborate procedural protections. There is a familiar transnational debate between advocates of 'flexibility' and advocates of 'protection'. This debate seems to fit easily into the definition of ideological conflict I gave above. Observers of juristic activity interpret decisions interpreting national laws through the double hermeneutic of suspicion, discerning ideological orientations behind balancing decisions and also behind decisions that claim a more formal basis in precedent, concepts, or teleology.

In the current debate about the harmonization of European private law, there is an evident tension on the subject of duties of good faith between England, Scotland, and Ireland, and to some extent Spain, on the one hand, and the civil law countries of the Continent on the other. In a comparative study, Zimmermann insists that we understand the difference neither as intrinsic to common versus civil law, nor as an index of enlightenment, but as reflecting different balances between the interests in legal certainty and ethical content. This is not in any overt way a left/right debate, but rather one internal to law. Nonetheless, the participants often seem acutely aware that in the background is the general political question of the extent to which classical private law rules should be 'shanghaied', according to one side, or just developed, according to the other side, to protect weak parties against strong parties. It is therefore analogous to the flexibilization debate.

If we want to understand the legal regimes governing foreign exchange, foreign trade, parastatal organizations, banking, agricultural pricing, education, and health, of countries across the global south, it is obvious that they vary to the extent to which they have adopted the policies of openness to the world market, privatization, and deregulation advocated by the

World Bank since about 1980. These policies in turn are comprehensible only against the background of 'import substitution industrialization', with its host of legal institutions, that global southern countries adopted between 1945 and 1980. Differences here flow quite directly from the ideological battle, and from the intervention of the international financial institutions and the aid agencies of developed countries. The constitutional courts of countries in this category (for example Colombia, Egypt, Ghana, India, Mexico) are well understood as engaged in a complex mediation of the contending ideological camps.⁶

The criminal law rules governing crimes of honour in the countries of the Middle East have been interestingly arrayed on a spectrum according to the extent to which they embody classic crime of honour versus classic crime of passion rules. For example, in the honour paradigm male brothers and fathers are authorized to kill, immediacy is not an important requirement, and illegitimate pregnancy is a valid trigger. For passion, only the husband can kill, immediately, if he catches his wife in flagrante. Abu-Odeh argues that while we need this spectrum to understand what is at stake in defining the crime, variations are probably caused not by different ideological forces at the societal level, but by the accident of the codifier's preference. On the other hand, judicial interpretation, which moves along the same spectrum, generally in the honour direction, may be well interpreted as caused by shifts in the balance between traditionalist and modernist factions in the judiciary and in the society at large.⁷

These cases, to my mind, illustrate the plausibility of ideological analysis. Those that follow illustrate the ambiguities, not to speak of the sometimes severe difficulties, that arise as we try to test the outer limits of application of the general scheme.

2.3.2 Conceptual difficulties

Here I briefly describe three sources of perplexity, ambiguity, and doubt in the enterprise of ascribing country differences to differences in the balance of ideological forces.

⁶ R. Hirsch, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004).

⁷ L. Abu-Odeh, 'Honor Killings and the Construction of Gender in Arab Societies', (2010) 58 *American Journal of Comparative Law* 911.

2.3.2.1 Mediation of ideological conflict versus mere law application

Current work in comparative constitutional law has paid surprisingly little attention to the ideological conflict between what we might loosely call authoritarian and republican orientations *within* a regime of constitutional democracy. In a system of separation of powers, an entrenched bill of rights, and judicial review, authoritarians tend to favour the presidency over parliament and the judiciary, plebiscites, emergency powers, domestic 'order', national security, patriotism, the armed forces, an official role for organized religion, and family values. On the other side, republicans favour the legislature over the president, interest group pluralism rather than corporatism, a secular state, civil liberties defended by a strong independent judiciary. This dimension of conflict is independent of that, say, between left and right on economic issues, populism versus elitism, and so forth.

The contrast may well be invisible to the reader of the constitutional text in isolation, but easy to discern in legal argumentation, including not only judicial decisions but also legal scholarship and the arguments of politicians. The analyst, however, will have to deal with the delicate question of how much of this juristic activity is 'just' derivation of outcomes from written constitutional norms according to non-political juristic methods, and how much should be interpreted as the mediation of ideological conflict. In other words, the analyst will have to engage in the double hermeneutic of suspicion, interrogating first the formal techniques adopted by the jurist and then searching for traces of the authoritarian or republican orientation where it appears that there was interpretive choice.

The plausibility of the first move, to establish that there was choice, is crucial to the whole project. Within a legal culture, some lawyers seem to be instinctive critics, quick to discern balancing behind a necessitarian screen, while others are notably legalist. Between legal cultures, the same distinction reproduces itself: in some the reduction of doctrine to balancing is commonplace, in others practically unknown.

In southern Europe and in Latin America today, it is quite common for a civilian lawyer to refer to more or less 'positivist' approaches, contrasting them with a reasoning style that resorts frequently to balancing or proportionality. Positivists in this sense are those who insist that the legal reasoning methods of literalism, originalism, induction/deduction ('construction'), and precedent, based on the presupposed coherence of the law as a whole,

will in all, or in most, or in many more cases than the balancers admit, produce legally 'true' answers, if only the interpreter takes them seriously.

It seems clear (at least to me) that depending on where one places oneself on the scale between positivism and critique, one is more or less likely to practise the first hermeneutic of suspicion. And this difference between positivists and critics is an ideological one, in the sense I developed above. It is a division internal to the legal profession, and the interests represented do not correspond to the left/right division of the broader society. It is striking that Latin positivists include a 'Jacobin' left strand, committed in the mode of the French Revolution to the empowerment of popular assemblies at the expense of judges. In the common law countries, 'positivism' is much more English than it is American, with Canadians and Australians situating themselves in between.

Ideological analysis of legal texts has the built-in controversial element that the analyst is necessarily ideologically embedded in one or another attitude on this spectrum. Before we can attribute a difference to juristic ideology, we shall have to convince the reader that the difference in question was not explained much more simply by differences in the legal texts, as opposed to the exercise of choice by the jurist.

2.3.2.2 Difference along a spectrum without ideological conflict

According to Abu-Odeh, we can analyse the family law rules of the classical Sunni schools using the contract/status dichotomy, but we shall not find the schools aligned along the spectrum: the rules of each school seem more or less randomly to incorporate elements from each paradigm. On the other hand, in analysing the modernization of Egyptian family law over the last century, it is clear to Abu-Odeh that elite male legislators and jurists develop the law by 'splitting the difference' (her phrase) between the models, mediating between feminists and religious traditionalists.⁸

My conclusion here is that it is a question for inquiry in each case whether what seem to the observer to be crucial distinctions along a gradient are part of the self-conscious and therefore plausibly ideological motivations for particular actors or groups. As in Abu-Odeh's example, a given spectrum can be present for observation without having any 'operative' importance. And it can change its role over time, as it apparently did here.

⁸ L. Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt', (2004) 37 *Vanderbilt Journal of Transnational Law* 1043.

2.3.2.3 What 'causes' a mediation of ideological conflict?

Suppose that we can array a set of possible rule-choices along a spectrum that runs from one ideological alternative to another, and that judges in different countries have chosen different points on the spectrum. Suppose that we can plausibly argue that the judges and their audience interpreted choice as having, as a matter of fact but not necessarily of motive, disposed of the ideological stakes in play. Have we 'explained' the difference between countries?

Exposing the ideological context is likely to make the difference between countries a good deal more intelligible than it would be if we had nothing but a 'merely legal' explanation of what happened. But from a sociological or historical point of view, we are still far from a full account. Most obviously, we need to be able to affirm that there was enough in the way of a gap, conflict, or ambiguity in the pre-existing law so that we can deploy the double hermeneutic of suspicion, and interpret what the judges did as choice along the spectrum, rather than as a 'merely legal' act of interpretation or of balancing.

Supposing choice, and that we think ideological conflict was a factor, we would like to know what caused the difference between the ideological mediations in the two countries. The ideological preference that influenced the outcome might be located in an individual judge or judges, or in the judiciary at large, or in the stratum of society from which the judiciary is drawn, or in the society as a whole. As soon as we start down this road, we shall have to ask to what extent ideological differences at the societal level are consequences as well as causes of juristic choice. In other words, judicial choices may have decisively influenced the ideological tendencies that they seem merely to reflect. Ideological analysis of the type I have been describing is nothing more than a starting point.

2.4 The conundrum of the varieties of capitalism

In recent years a fascinating literature largely outside the academic discipline of comparative law has grown up, contrasting, in a general way, two modes of capitalism in highly developed Western countries (Japan is sometimes included and sometimes not). The axes of comparison are corporate law, labour law, social welfare law, and civil procedure. As far as I know, there is as yet no attempt to synthesize the work in these four areas, and I have no intention of trying anything so ambitious here.

2.4.1 The varieties

2.4.1.1 Corporate law

The central contrast in the varieties literature is between two regimes defined in economic terms with only minimal reference to law. 'Competitive capitalism' operates through companies with diffuse stock ownership that is heavily traded, with short-term financing and a vigorous market for corporate control. The 'co-operative capitalist' economies are dominated by (equally large and powerful) companies controlled by a small number of large-blockholding long-term stockholders, operating through the board of directors, with long-term financing.

There are nonetheless a number of clear legal correlatives for the competitive model: derivative suits, regulation of insider trading, antitrust prohibitions on inter-firm co-operation, limited disclosure and good faith duties to creditors and workers, permissive rules on hostile takeovers, and government regulation through bright-line rules administered by courts. On the other side: the opposite regulatory strategy, designed to force good faith co-operation among stakeholders, all under the supervision of administrative agencies using broad standards, with limited small shareholder protection and considerable restrictions on hostile takeovers.⁹

2.4.1.2 Labour law

In labour law, on one side: collective bargaining based on exclusive, compulsory union representation of a bargaining unit, which may be a fraction of the workforce of a firm or a whole firm, with the union chosen in an election with one option being no union at all, leading to a party-specific collective bargaining agreement, against the background of limited government regulation of individual employment contracts. On the other side: many unions operating in a given unit, sectoral rather than unit-specific bargaining, with result imposed by government on all employers and employees in the sector, combined with some form of compulsory worker representation at the plant level and sometimes worker representation on the enterprise board of directors.

⁹ P. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001).

2.4.1.3 Welfare law

The liberal regime here involves as key traits time-limited unemployment benefits, along with means-tested and time-limited welfare benefits, uniform but set at a sub-poverty level, stigma for recipients, and benefits directed to single mothers more easily than to two-parent families. The principal alternative 'corporatist' regime involves universal, not means-tested, state provision of benefits to those unable to work, with variable benefit levels depending on prior employment experience, from ample to modest, without stigma, with incentives designed to keep families together rather than breaking them up.¹⁰

2.4.1.4 Civil procedure

Ugo Mattei has sharply contrasted the US regime, which he sees as government by strong judges, with the European regime characterized by strong legislative and administrative institutions. The US regime is powered by privately initiated litigation, through which judges engage in continuous economic and social regulatory rule-making (Mattei is far along towards the 'critical' end of the positivism spectrum). Some key characteristics of the US model are class actions, extensive discovery, no shifting of lawyers' fees to losing parties, contingency fees for plaintiff's lawyers, punitive damages, and long-arm jurisdiction. All these are absent or weak or merely emergent in Europe.¹¹

2.4.2 A puzzle: 'organic' versus 'semiotic'

In interpreting these differences, we mix and match what I shall call an 'organicist' and a 'semiotic' approach.¹² As organicists, we account for the multitude of legal details by explaining how they are derived from or 'fit with' or are 'syntonic with' the 'natures' of the 'varieties' in question. We account for the difference between the systems taken as wholes in terms of their autonomous internal development, perhaps calling it 'evolution', or in other words, historically. On this account, the varieties are 'wholes'.

¹⁰ G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990).

¹¹ U. Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance', (2003) 10 *Indiana Journal of Global Legal Studies* 383.

¹² D. Kennedy, 'Thoughts on Coherence, Social Values and National Tradition in Private Law', in M. Hesselink (ed.), *The Politics of a European Civil Code* (Amsterdam: Kluwer Law International, 2006), 9.

Within the organic approach, we may attribute more or less importance to law. At one extreme, Hall and Soskice, in their (brilliant) initial elaboration, grant it none at all as a causal factor in the constitution of their varieties. They describe corporate institutions and market configurations as though they arose and now perpetuate themselves without any need for a legal structure. They seem to have adopted, implicitly, something like the model of Eugen Ehrlich (derived from Savigny). A given economic formation has a set of norms of behaviour that emerge over time from the practical experiences of life, and they 'fit' the life form in which they arise. These social norms are sometimes then turned into positive law and systematized by some combination of scholars and judges and legislators. In this model, the legal systems that seem to 'govern' liberal and co-operative capitalisms are in actuality simply reflections of the strong underlying norms of proper behaviour peculiar to each socio-economic system, and their role is the marginal one of sanctioning cheaters and backsliders.¹³

The main alternative is the 'mutually constitutive' theory: the legal 'rules of the game' are formative of economic practices rather than merely reflective, but always in a dialectical, synergistic relation to those same practices and to social norms that are not legalized. The rules function 'externally' to the economy, in the sense that actors often, although not always, take them as given, and pursue their interests within the system they provide. When those with legal power change the legal regime, they may (depending on the circumstances) induce quite basic changes in the actors' strategies and even in their conceptions of their interests.

At the same time, economic actors are constantly trying to change legal rules to suit their projects, and they often succeed. They generally aim at short-term opportunistic modifications that will increase their profits, rather than at systemic change. But these can have large cumulative effects, when they are not opposed by opposite opportunistic pressures. For example, in the United States the procedural rules (concerning derivative actions, insider trading, class actions, punitive damages, contingency fees, and no-penalty-for-losing) create large incentives for the kinds of shareholder behaviour that Hall and Soskice identify with competitive capitalism. For years, the quite different European rules have seemed to be drifting slowly

¹³ E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. Moll (Cambridge, MA: Harvard University Press, 1936).

in the US direction. It is hard to avoid the thought that there may be significant consequences for the 'co-operative' model.

We understand the differences 'semiotically' when we treat each of the multitude of legal details as a distinct policy choice between alternatives available in all systems. The choice is intelligible not as flowing from a larger systemic whole, but as choice along a spectrum, motivated by arguments or interests or conditions that are similar, but vary in force across systems. In the semiotic account, the overall difference between systems is simply the sum of the individual differences, with no attribution of unity or coherence or wholeness to either system, or to its sub-domains.

In practice, we use both modes of explanation. On the one hand, it seems clear that there is something 'coherent' about combining high levels of small-shareholder protection with tight control of insider trading and vigorous antitrust enforcement and, more broadly, with the pro-plaintiff procedural regime. Indeed, there are many plausible connections between corporate, labour, welfare, and procedural law. Mark Roe argues that a strong labour movement incentivizes a closely held, bank-dominated corporate structure. The insiders will be capable of adopting long-term strategies in business downturns, when workers cannot be fired, unlike diffuse shareholders with a short-term orientation to stock values.¹⁴

Esping-Andersen attributes the more generous, less stigmatizing European corporatist welfare regime partly to the strength of the labour movement. Within the organicist approach, there is circular or mutual causation among elements: it seems plausible that the relatively pro-union regime of the European model is in part the consequence of the corporate and welfare and procedural regimes, as well as vice versa.

In the examples of ideological analysis I have given so far, particular rules are presented as compromises of conflicting transnational ideological forces, in other words according to what I am calling the semiotic approach. A strong argument for this way of proceeding is that, in comparing, for example, the competitive with the co-operative corporate law model, we can put protection of small shareholders on a spectrum from less to more; neither model requires a particular point on that spectrum; and there is a great deal of variation in fact. It is striking that the supposedly purer US regime is more open to good-faith requirements, supposedly emblematic of the continental

¹⁴ M. Roe, 'Political Preconditions to Separating Ownership from Corporate Control', (2000) 53 *Stanford Law Review* 539.

and civilian European co-operative model (Teubner), than the supposedly somewhat less competitive British regime. Moreover, while the polar models correspond quite closely to the German and US systems, most developed industrial countries fall in between, tilting one way or another on different legal dimensions.

But there is no necessity to bring ideology to bear only through the semiotic approach. Organicist ideological analysis could, for example, treat the polar types as instantiating coherent polar ideologies, and the intermediate forms as compromises between them. In that case, we should explain the differences between the polar regimes organically, as all flowing from the choice of an overarching ideology. For the intermediate compromise regimes, we would return to the semiotic approach, mapping the way the particular rules of intermediate regimes respond to the conflicting ideological forces. Something like this seems to be happening in the current 'varieties' debate.

2.4.3 Varieties of ideological analysis

The 'legal origins' school accounts for many corporate and labour law systemic differences organically. The competitive model of corporate law and the contractarian labour bargaining model are characteristic of the common law universe that includes Britain, Canada, Australia, New Zealand, and the United States. The co-operative corporate regime and the more state-regulated labour regime are typical of civil law countries around the world (ignoring the fact that the co-operative model characterizes the core continental European countries, not Scandinavia or southern Europe or Latin America, which are mixed). 'Legal origins' ties many aspects of each complex to these common law versus civil law origins. It then argues that the data shows unequivocally that growth is better in the Anglo countries.¹⁵

The 'legal origins' thesis was congruent with the US legal academic theory that Anglo corporate law was destined to become universal because of its greater efficiency in a globalized world economy. Many of the characteristics that legal origins attributed to the common law corresponded to what law and economics scholars had identified as efficient arrangements.¹⁶

¹⁵ E. Glaeser and A. Schleifer, 'Legal Origins', (2002) 117 *Quarterly Journal of Economics* 1193.

¹⁶ H. Hansman and R. Kraakman, 'The End of History for Corporate Law', in J. Gordon and M. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004), 33.

It is interesting that the place of ideology in an organicist explanation can vary over time. The 'legal origins' theory was introduced fifteen years ago in a context where the common law versus civil law distinction had come to seem, first, not very great, and, second, not tied to any significant larger ideological interests. In this respect the situation was quite different in 1900, when many jurists believed in a profound organic difference between the systems, and the world was divided between a dominant British common law empire and rival French, Dutch, and nascent German civil law empires. The consuls of the imperial rivals did classic ideological battle in Ottoman, Persian, Japanese, and Chinese courts.

The attribution of economic growth and efficiency to the common law has retriggered the antique common law versus civil law conflict, and added a centre-left/centre-right dimension. At a first level of critique, it is implausible, to say the least, that common law origins explain high growth rates, or that there is an efficiency-driven tendency for developed systems to converge on the Anglo system.¹⁷

According to the hermeneutic of suspicion, we move towards understanding juristic elaboration of the various statutory, administrative, and constitutional rules that compose the corporate, labour, welfare, and procedural regimes as reflections of the battle between neoliberal-common-law and European-social-model-civil-law approaches. According to matching negative stereotypes, the cultural individualism of the first generates skewed income distribution and rule by business lobbies, while the other trumpets solidarity and co-operation in the covert interest of the self-dealing large corporate institutions of a stagnant European status quo.

It might be better to treat the polar types not as instantiating coherent polar ideologies, but as themselves contradictory amalgams of competing elements. To call the Anglo model 'free market' (Teubner) or the European model 'social' ignores the 'ordo-liberal' character of both. The Anglo model is based on very elaborate regulation through antitrust and small-shareholder protective legal rules, and the European social model leaves wide scope for private ordering by dominant corporate interests. Within both the German and the US systems, the combination of the long boom and the global financial crisis has produced numerous proposals on each side to move it

¹⁷ M. Roe, 'Legal Origins, Politics and Modern Stock Markets', (2006) 120 *Harvard Law Review* 460; L. Bebchuk and M. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance', in J. Gordon and M. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004), 69.

towards the other. In this perspective, the ideological battle is within the poles as much as between them, and the semiotic trumps the organic.

2.5 Tentative ideology critique of the discipline of comparative law

The examples above suggest (no more than that) a large potentially fertile field of inquiry into the functioning of ideology as a cause of non-legislative legal differences, that is, of differences in case law and in legal academic writing. The mainstream of comparative law has not been particularly focused in this direction. Indeed, it seems to me that it is likely that such a focus would be painful or awkward. Why?

The distinction between the legal and the political, understood as between science and ethics, fact and norm, logical judgment and value judgment, is what Rodolfo Sacco might call a 'cryptotype' in comparative law: a distinction from the past which continues to influence analysis without being theorized as orienting the activity in question.

A comparative lawyer is likely to take as the model of inquiry the comparison of civil codes, or of common law private law systems, or of a code with a common law system. Beyond that, it seems easy enough to compare civil or criminal procedural rules, or the institutional structure of administrative agencies and courts. The types of comparison that I proposed above seem to belong to a somewhat different domain, because judges and academics seem to be operating as lawmakers motivated in the way legislators are motivated, in the way we commonly designate as 'political'.

Balancing as a juristic technique puts the jurist in the position of the legislator. In the contemporary period, the legislator is understood as representative of the people, legitimated procedurally, that is, by election, rather than substantively – not by the ethical correctness of his choices but by his status as representative of the views of his constituents, who have the power to dismiss him if he fails in that mission. Comparative law in the age of balancing has to be about the various different ways in which balancing, and the problematic of juristic activity in its presence, play out across the world's legal systems, and that means that it has to be about, at least in part, ideological conflict as it translates into the activities of jurists.

At that point the comparative lawyer is likely to ask a question along the lines, 'What do I have to contribute, as a legally trained researcher, to an

inquiry that is really about comparative politics?’¹⁸ The comparative lawyer’s understanding extends beyond the complex discursive particularities of juristic activity to the sociology of law, to the investigation of effects of legal difference. He is equally at home with causal statements in the organicist mode about national cultural or functional characteristics that help to explain the content of national legal regimes.

But here we are speaking of the cause of legal difference when that difference cannot be understood as generated ‘intra-juristically’ or in terms of a larger national particularity. When we understand judicial or doctrinal writing as ideologically driven, we are, precisely, *not* understanding it as legally or culturally or functionally driven.

The obvious answer would appear to be that legally trained scholars are uniquely qualified to disentangle the elements that propel the law-making or law-influencing activities that jurists virtually always represent as non-political. In other words, legal scholars, by contrast with political scientists and sociologists, are the masters of the double hermeneutic of suspicion. By contrast, ‘straight’ social scientists tend either to reify law in what contemporary jurists see as a formalist mode, or to dereify it in a cynical mode. Each mode denies the important ways in which politics pursued through law differs from politics pursued through diplomatic or military or electoral or legislative or administrative agency activity.

Which brings me to the suspicion that what is at stake in keeping ideology out of comparative law analysis is not the appropriate division of academic labour, but the preservation of the jurist’s sense that s/he is operating at a remove from politics. In short, the comparatist who unhesitatingly claims to be far beyond any simple-minded law/politics dichotomy, to have lived the double hermeneutic of suspicion to the maximum, reinstates that dichotomy by his choice of topics to address. And it is hard not to suspect in the comparatist’s choice of topic a residual attachment to the prestige, or at least to the security, that the jurist has derived from his firm placement on the scientific side of the dichotomy.

¹⁸ M. Tushnet, ‘Comparative Constitutional Law’, in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1225.

Further reading

- L. Abu-Odeh, 'Honor Killings and the Construction of Gender in Arab Societies', (2010) 58 *American Journal of Comparative Law* 911
 'Modernizing Muslim Family Law: The Case of Egypt', (2004) 37 *Vanderbilt Journal of Transnational Law* 1043
- R. Alexy, *A Theory of Constitutional Rights*, trans. J. Rivers (Oxford University Press, 1984)
- L. Althusser, 'Ideology and Ideological State Apparatuses', in Althusser, *Lenin and Philosophy and Other Essays* (New York: Monthly Review Press, 1971)
- L. Bebchuk and M. Roe, 'A Theory of Path Dependence in Corporate Ownership and Governance', in J. Gordon and M. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004), 69
- E. Ehrlich, *Fundamental Principles of the Sociology of Law*, trans. W. Moll (Cambridge, MA: Harvard University Press, 1936)
- G. Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge: Polity Press, 1990)
- E. Glaeser and A. Schleifer, 'Legal Origins', (2002) 117 *Quarterly Journal of Economics* 1193
- A. Gramsci, *Selections from the Prison Notebooks*, trans. Q. Hoare and G. Nowell Smith (New York: International Publishers, 1971)
- J. Habermas, *The Theory of Communicative Action: Reason and the Rationalization of Society* (Boston, MA: Beacon Press, 1985)
- P. Hall and D. Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage* (Oxford University Press, 2001)
- H. Hansman and R. Kraakman, 'The End of History for Corporate Law', in J. Gordon and M. Roe (eds.), *Convergence and Persistence in Corporate Governance* (Cambridge University Press, 2004), 33
- R. Hirchl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2004)
- O. W. Holmes, 'Privilege, Malice and Intent', (1894) 8 *Harvard Law Review* 1
- D. Kennedy, *A Critique of Adjudication: fin de siècle* (Cambridge, MA: Harvard University Press, 1997)
 'Thoughts on Coherence, Social Values and National Tradition in Private Law', in M. Hesselink (ed.), *The Politics of a European Civil Code* (Amsterdam: Kluwer Law International, 2006), 9
- H. S. Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (London: John Murray, 1861)
- K. Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge*, trans. L. Wirth and E. Shils (New York: Harcourt, Brace and World, 1936)
- K. Marx, 'Essay on the Jewish Question', in Marx, *Writings of the Young Marx on Philosophy and Society*, ed. and trans. L. Easton and K. Guddat (Garden City, NY: Anchor, 1967)

- U. Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance', (2003) 10 *Indiana Journal of Global Legal Studies* 383
- E. Pashukanis, *Law and Marxism: A General Theory*, trans. B. Einhorn (London: Pluto, 1989)
- M. Roe, 'Legal Origins, Politics and Modern Stock Markets', (2006) 120 *Harvard Law Review* 460
- 'Political Preconditions to Separating Ownership from Corporate Control', (2000) 53 *Stanford Law Review* 539
- A. Santos, 'Labor Flexibility, Legal Reform and Economic Development', (2009) 50 *Virginia Journal of International Law* 1
- A. Stone Sweet and J. Mathews, 'Proportionality, Balancing and Global Constitutionalism', (2008) 47 *Columbia Journal of Transnational Law* 73
- G. Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Differences*, (1998) 61 *Modern Law Review* 11
- M. Tushnet, 'Comparative Constitutional Law', in M. Reimann and R. Zimmermann (eds.), *The Oxford Handbook of Comparative Law* (Oxford University Press, 2006), 1225
- M. Weber, *Max Weber on Law in Economy and Society*, ed. M. Rheinstein, trans. E. Shils (Cambridge, MA: Harvard University Press, 1954)
- R. Zimmermann and S. Whittaker, *Good Faith in European Contract Law* (Cambridge University Press, 2000)
- K. Zweigert and H. Kötz, *An Introduction to Comparative Law*, trans. T. Weir, 2nd rev. edn (Oxford: Clarendon, 1987)