ABHANDLUNGEN / ARTICLES

Judges, Judicial Opinions, and Culture from a Comparative Perspective. An Introduction

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Legal taxonomies have been central in comparative law.[1] Since its emergence as an autonomous discipline, represented symbolically by the First International Conference of Comparative Law in 1900,[2] one of its key objectives was the ordering of the legal world in categories analogous to those of the natural sciences. These classifications would allow describing the different types of legal systems that exist around the world, as well as their similarities and differences. It is therefore not surprising that a good part of 20th century comparative law revolved around the idea of legal families or traditions.[3] Nor is it surprising that an important part of 20th century comparative law revolved around the articulation and application of the criteria that would distinguish the law families of the world, style[4] or ideology,[5] for example. This academic enterprise would allow creating maps of the global legal field. These maps could help to understand it and to make legal and political decisions of great importance, such as what legal systems should exchange legal products and how

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1 *Mariana Pargendler*, The Rise and Decline of Legal Families, American Journal of Comparative Law 60 (2012), p. 1043, and *Mathias Reimann*, The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century, American Journal of Comparative Law 50 (2002), pp. 671, 673.

2 See, for example, *Diego López-Medina*, El nacimiento del derecho comparado moderno como espacio geográfico y como disciplina: instrucciones básicas para su comprensión y uso desde América Latina, International Law - Revista Colombiana de Derecho Internacional 26 (2015), pp. 117-159; and *H. C. Gutteridge*, Comparative Law, Cambridge 1946, p. 18.

3 See, for example, *H. Patrick Glenn*, Legal Traditions of the World, Oxford 2010; *Konrad Zweigert & Hein Kötz*, An Introduction to Comparative Law, Oxford 1987; *René David & John E. C. Brierley*, Major Legal Systems in the World Today, London 1985; *John H. Merryman*, The Civil Law Tradition, Stanford 1969. Also see new versions of the taxonomies in *Mirjan R. Damaska*, The Faces of Justice and State Authority, New Haven 1986; *Ugo Mattei*, Three Patterns of Law: Taxonomy and Change in the World's Legal Systems, American Journal of Comparative Law 45 (1997), p. 5 ff. Taxonomies, reinterpreted and updated, continue to be used in the new century. See, for example, *Vernon Valentine Palmer*, Introduction to the Mixed Jurisdictions, in: Vernon Valentine Palmer (ed.), Mixed Jurisdictions Worldwide: The Third Legal Family, Cambridge 2001; and *James A. Whitman*, Consumerism versus Producerism: A Study in Comparative Law, Yale Law Journal 117 (2007), pp. 340, 353.

4 *Zweigert & Kötz*, note 3, pp. 63-73.

5 *David & Brierley*, note 3, pp. 20-21.

the processes of regional or global unification, that are also a key part of the agenda of 20th century comparative law, should move forward.[6]

The criteria for identifying legal families or traditions,[7] as well as the use of these criteria, are always presented as neutral by dominant comparative law.[8] The separation between law and politics constitutes one of the pillars of this approach to comparative law, which is represented paradigmatically by René David,[9] and Konrad Zweigert and Hein Kötz.[10] The descriptions offered by these authors are presented as a scientific ordering, not politically contaminated, of the contemporary legal world.[11] Nevertheless, these classifications were far from neutral: both the selection of the criteria for grouping legal systems and the ranking they led to were determined by the political commitments of the academics that promoted them.[12] Two of these political commitments were particularly important: the concept of law that constitutes the basic structure of these taxonomies[13] and the one-way relationship between culture and law.[14] On one hand, then, the classification orders and describes the legal systems by using a Western law concept. Law is presented as an autonomous social field that is formed by a particular set of institutions.[15] As a consequence, it is not strange that these taxonomies typically privilege the common law and civil families in the maps they construct and in the evaluations they offer.[16] Both fit precisely into the theoretical premises that frame and guide the inquiry. Other families, such as Muslim or Hindu law, do not fit with these epistemological assumptions so precisely. The concepts of law that structure non-Western legal systems are different from the concept of law that comparativists use as a premise. The intersection between law and religion that characterize these non-Western legal orders, for example, does not allow them to be clearly encased by the identification criteria that guide the comparative law scholar's analysis.

6 *Pier Giuseppe Monateri*, "Everybody's Talking": The Future of Comparative Law, Hastings International and Comparative Law Journal 21 (1997-1998).

7 In this introduction I understand both the concepts of families and legal traditions as central components of the taxonomies created by comparative law. However, it is important to note that these categories are not identical. While legal families emphasize on criteria like the style or ideology of legal systems, legal traditions emphasize on their common past. *Jaakko Husa*, Legal Families, in: Jan Smits (ed.), Elgar Encyclopedia of Comparative Law, Cheltenham 2006, p. 384; and *H. Patrick Glenn*, note 3. p. 5.

8 *Pargendler*, note 1, p. 1068.

9 See *David & Brierley*, note 3.

10 See *Zweigert & Kötz*, note 3.

11 *Pargendler*, note 1, pp. 1068-1069.

12 *Günter Frankenberg*, Critical Comparisons: Re-thinking Comparative Law, Harvard International Law Journal 26 (1985), pp. 421-426.

13 *Zweigert & Kötz*, note 3, pp. 1-10.

14 *Monateri*, note 6, pp. 826-835.

15 *Frankenberg*, note 12, p. 432.

16 *J. Barton, J. Gibbs, V. H. Li & J. Merryman*, Law in Radically Different Cultures, St Paul 1983, p. xiv; and *Frankenberg*, note 12, p. 422.

On the other hand, these classifications start from the premise that law and culture are two distinct social fields, although they are closely linked.[17] More precisely, they start from the premise that law is an epiphenomenon of culture.[18] Culture synthesizes the *ethos* of a nation or the *ethos* shared by a set of nations, although with local nuances, such as those of continental Europe. Law is a consequence, a reflection of this shared horizon of perspectives. However, this thesis is not only descriptive. This approach within comparative law argues that law should be a reflection of national or supranational cultures.[19] Rights and obligations, institutions, procedures and substantive norms should reflect and reproduce culture. As a consequence, and continuing with the example, the historical importance and the influence that the common law and civil traditions have had on the rest of the world are a function of the richness of the Romano-Germanic and Anglo-Saxon cultures that produce them.[20]

The narratives created by dominant 20th century comparative law have had a profound influence on how we imagine legal systems and the subjects of law that create and apply them.[21] Despite the historically marginal character of comparative law in legal practice and academia,[22] the narrative offered by its taxonomies has become the standard description and evaluation of the contemporary legal world. This narrative has been naturalized and reified.[23] The legal world is identified with this narrative; a different world cannot be imagined. The ideal types that this narrative offers are also confused with reality itself. The homogenization and abstraction of the legal world they provide is no longer interpreted as a limited tool for organizing and understanding a heterogeneous reality. It is interpreted as reality itself.

We think that the legal field is constituted by a series of families that share a set of ideological or technical characteristics, a series of families that are constituted by mother legal orders and child legal orders.[24] Roman law and the French and German legal systems are the source of the civil law family. The law of the United Kingdom and the law of the United States are the origin of the Anglo-Saxon family. The legal orders of the rest of the world that belong to one tradition or the other are described in this narrative as mere reproductions

17 *Monateri*, note 6, pp. 826-827.

18 *Iibd*, pp. 829-835.

19 *Ibid*, pp. 835-839.

20 *P. G. Monateri and Geoffrey Samuel*, La invención del derecho privado*,* Bogotá 2006, p. 67.

21 *Daniel Bonilla*, Introduction, in: Daniel Bonilla (ed.), Constitutionalism of the Global South: The Three Activist Courts of India, South Africa and Colombia, Cambridge 2013, pp. 5-7.

22 *Frankenberg*, note 12, p. 418; *Zweigert & Kötz,* note 3, p. 3, and *Pierre Lepaulle*, The Function of Comparative Law, Harvard Law Review 35 (1922), p. 838.

23 *Frankenberg*, note 12, pp. 421-426, 432. See *David & Brierley*, note 3, p. 21 and *Zweigert & Kötz*, note 3, p. 66.

24 *Zweigert & Kötz*, note 3, pp. 41,64.

of the 'source' systems.[25] This is a conclusion that is applied with particular force to the Global South: the legal orders of the countries that form this imagined geography are described as iterations of mother systems.[26] The conquest and colonization of these countries allowed the Global North to impose their legal cultures locally.[27]

These narratives have led a good part of the political communities in the world to internalize and therefore firmly believe that the limits that distinguish the common law from the civil law families are clear and precise.[28] We tend to believe that these limits are structured around judges – along the different ways of conceiving them and thinking about the roles they should play in a legal order.[29] In the common-law family, judges have marked visibility and social importance; in the civil law family, judges have low visibility and little social importance.[30] In the Anglo-Saxon tradition, judges are cultural heroes recognized in the political community. Marshall, Holmes, Cardozo, Warren or Rehnquist are widely known and socially respected figures. In the civil law tradition, judges are understood as a component of the state bureaucracy.[31] Judges are among the many public officials aimed to realizing the state's functions, in this case, solving conflicts by applying preexisting legal norms. Judges that are part of high courts are clearly respected and admired. Nevertheless, this respect and admiration is what is granted to those who occupy the upper echelons of the state bureaucracy. In the civil law tradition, the cultural heroes that emerge from the legal field are legislators: Bonaparte, Bello, Vélez Sarsfield, and Texeira de Freitas are the paradigmatic figures admired and respected in the political community.[32]

This narrative also argues that the Anglo-Saxon legal family judge is usually an attorney coming from professional practice, and he or she is appointed through a socially rele-

25 See *Boaventura de Sousa Santos*, Three Metaphors for a New Conception of Law: The Frontier, the Baroque and the South, Law & Society Review 29 (1995), pp. 569, 579-582; and *Mark van Hoecke & Mark Warrington*, Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law, International and Comparative Law Quarterly 47 (1998), pp. 495, 498-499.

26 See *Daniel Bonilla*, note 21; specifically about the case of Latin America, See *Jorge L. Esquirol,* The Fictions of Latin American Law (Part I), Utah Law Review (1997), pp. 425, 427-428; *Jorge L. Esquirol*, Continuing Fictions of Latin American Law, Loyola of Los Angeles International and Comparative Law Review 55 (2003), pp. 41, 42; and *Jorge L. Esquirol*, The Failed Law of Latin America, American Journal of Comparative Law 56 (2008), pp. 75, 94-95.

27 *John R. Schmidhauser*, Legal Imperialism: Its Enduring Impact on Colonial and Post-Colonial Judicial Systems, International Political Science Review/Revue Internationale de Science Politique 13 (1992), p. 321 ff.; and *John R. Schmidhauser*, Power, Legal Imperialism, and Dependency**,** Law & Society Review 23, pp., 857-878**.**

28 *John Henry Merryman*, La tradición jurídica romano germánica, México 1980, pp. 13-21.

29 *John Henry Merryman & Rogelio Pérez Perdomo*, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, Stanford 2007, pp., 57, 60.

30 *Merryman*, note 28, pp. 66-72.

31 *James Apple & Robert Deyling*, A Primer on the Civil-Law System, The Federal Judicial Center, Washington 1995, p. 30.

32 *Merryman*, note 28, p. 70.

vant political process.[33] Members of high courts —the Supreme Court of Justice of the United States, for example— are understood as public figures chosen for both their technical skills and their political commitments. This political process is discussed broadly in society, law schools, and the media. In contrast, the judge of the Romano-Germanic family is part of the state bureaucracy; he or she is a public employee who is part of the judicial service and who enters this career path when graduating from law school.[34] His or her appointment and promotion are a consequence of bureaucratic processes that occur within the judiciary and that are not visible in society. For example, few people in Colombia or Mexico can name any of the justices on the Supreme Court or are familiar with its jurisprudence in general terms. Of course, these justices are usually respected and recognized in society, but these are attributes that are typically derived from their position, not from their visibility or individual characteristics.

The legal families' narrative also tells us that judges create law in the common law tradition.[35] Step by step, case by case, judges clarify and formalize the norms that already exist in the nations' practices. In this legal tradition, law is developed slowly by means of judicial opinions, which do not create general rules in the abstract but resolve particular cases. In the civil law tradition, judges are subordinated to the legislator and to the rules legislators create: statutes.[36] While in the Anglo-Saxon legal family judges are at the apex of the sources of law system, in the civil legal family judges are on its margins.

In the civil law family, case law also has relevance for the parties involved in the conflict only.[37] Judicial opinions do not have the force of precedent; the principle of *stare decisis* is inapplicable. In contrast, in the Anglo-Saxon legal family, the idea of legal precedent and the analogical application of judicial opinions is a key part of the legal system – it is a structural component of a persons' legal consciousness.[38] In this legal family, the principle of equality requires similar cases to be treated similarly. However, the principle of equality is also key in the civil law tradition. Nevertheless, it is realized by means of the general and abstract character of statutes.[39] Judges should apply law's mandates equally in all cases established previously by the legislator.

33 *J. G. Sauveplanne*, Codified and Judge Made Law: The Role of Courts and Courts in Civil Law and Common Law Systems, Amsterdam 1982, pp. 9-12, 25-26.

34 *Joseph Dainow*, The Civil Law and the Common Law: Some Points of Comparison, The American Journal of Comparative Law 15 (1966-1967), p. 431.

35 *Dainow,* note 34., pp. 424-425.

36 *Sauveplanne*, note 33, pp. 17-21.

37 *Michael Kleine & Clay Robinson*, The Dialogic Rhetoric of the Supreme Court: An Interdisciplinary Analysis, Rhetoric Review 27 (2008), p. 415 ff.

38 *Oona A. Hathaway*, Path Dependence in the Law: The Course and Pattern of Change in a Common Law Legal System, Iowa Law Reviews 86 (2001), p. 601 ff.

39 *Seon Bong Yu*, The Role of the Judge in the Common Law and Civil Law Systems: The Cases of the United States and European Countries, International Area Review 2 (1999), pp. 42-44.

Law and judicial opinions, the legislator and the judge, Congress and the courts are then presented as conceptual oppositions that characterize the primary families of the contemporary legal world. These conceptual oppositions form the central structures of both the common law and civil law traditions. However, these conceptual oppositions simultaneously illuminate and obscure legal reality. These categories certainly describe parts of the legal systems grouped into the Anglo-Saxon and civil law families. Historically, judges and judicial opinions have had relative importance and a distinct role in each legal tradition. Nevertheless, these categories offer a static, homogenizing, and superficial narrative of courts and the function and value of judicial opinions in these legal families. They obscure changes experienced by these traditions, conceptual and institutional intersections that both legal families have as a consequence of their continuous interactions, and the heterogeneity and nuances that characterize each legal tradition.[40]

The narrative offered by comparative law through these taxonomies is useful because it distinguishes clearly and precisely; because it orders simply and understandably; because it offers a clear-cut narrative that allows for controlling the legal world; because it presents serious and valuable albeit general information on complex phenomena that had not previously been the subject of much study. However, this narrative says very little about the meaning that these categories and distinctions have for political communities. It does not offer an account of the role these categories and distinctions play in the construction of the individual and collective subjects that constitute our political communities.

In *Making the Case: The Art of Judicial Opinion*, Paul Kahn simultaneously appeals to the taxonomies produced by comparative law and distances himself from them. Kahn, like most members of contemporary legal communities, calls upon these narratives to learn about the legal "other" and to access a widely held description of the legal order to which he belongs. Nevertheless, Kahn also distances himself from these taxonomies; he knows their limits, he knowns their political and epistemological weaknesses. *Making the Case* therefore seeks to examine the symbolic structures that account for the place that judicial opinions and judges occupy in the US legal and political imagination. The basic descriptions offered by comparative law's taxonomies are not sufficient to account for the complexities of the legal world, not only of the US legal system. Nevertheless, Kahn uses in part the 'other' of US law, the civil law tradition, to better understand his legal and political community. The common law and civil law families are part of the Western legal tradition. However, each of these families emphasizes different aspects of the tradition; they have a common trunk but also important differences.

Making the Case is therefore simultaneously an exercise in cultural interpretation[41] and an exercise in comparative law. The latter is one of the means by which the former is mate-

40 *Vincy Fon & Francesco Parisi*, Judicial Precedents in Civil Law Systems: A Dynamic Analysis, International Review of Law and Economics 26 (2006), p. 519 ff.; *M. Cappelletti*, The Law Making Power of the judge and its Limits, Monash University Law Review 8 (1981), pp. 62-63; and *R. G. MacLean*, Judicial Discretion in the Civil Law, Louisiana Law Review 43 (1982), pp. 47-56.

41 *Paul W. Kahn*, The Cultural Study of Law, Chicago 1999.

rialized. The contrast with the "other" sharpens the descriptive and analytical gaze on oneself. In *Making the Case* there are not many references to the civil tradition, only a few to the law of continental Europe, but they appear at key moments in the book. These references allow Kahn to show the particularities of the US legal and political imagination with greater precision. In particular, they allow him to describe and analyze the role that judges and judicial decisions play in this form of imagining subject, time and space. The taxonomies offered by comparative law, which focus on judges and their products to differentiate the civil and Anglo-Saxon legal traditions, appear in the background of Kahn's analysis. The two legal traditions certainly have some differences with regard to judges and judicial opinions. These differences, though, have been fading or have disappeared completely due to the constant interaction of both legal families. Nevertheless, this does not mean that the two families are identical on matters related to judges and judicial opinions; nor does it mean that the conceptual architecture that constitutes these legal institutions is the same or that the role they play in the Western legal and political imagination is indistinguishable.

This introduction is divided into two parts in order to analyze critically the two components of *Making the Case*: in the first, I present the central components of the theoretical approach that constitutes the background of Kahn's interpretation of US judges and judicial opinions. In this section, I focus on three analytical and practically interlaced issues: the identity, aims, and method of the cultural analysis of law. In particular, I explore how this theoretical perspective conceives the relationship between culture and law, as well as the differences between the cultural analysis of law and traditional forms of legal academia and the social sciences. I likewise examine the idea that the cultural analysis of law aims to describe and analyze the symbolic structures that shape the legal and political imagination. Finally, I study the concepts of genealogy and architecture, which are the means, the methodological tools to achieve the aims pursued by the cultural analysis of law.

In the second section of this introduction, I examine *Making the Case* cultural interpretation of US judicial opinions and judges. In particular, I explore the analytical axes that structure *Making the Case* and the role that comparative law plays in this book. Finally, I reflect upon the usefulness of Kahn's book for the Global South.

A. Cultural Analysis of Law: Identity, Aims, and Method

I. Culture, Law, and Critique

Law is part of culture, not its consequence.[42] For the cultural analysis of law, the legal world is not an epiphenomenon of culture. Law is part of the horizon of perspectives human beings are immersed in. This horizon is a world of meaning that we simultaneously inherit

42 *Paul W. Kahn,* Comparative Constitutionalism in a New Key, Michigan Law Review 101 (2003), p. 2677.

and construct:[43] it already exists when we arrive in the world; it does not cease to exist when we disappear. In fact, when we are born, we are already constituted by this horizon of meanings: we describe ourselves and interact with the world by means of its categories. Our identities, the meaning we give to the world, the ways we relate to external reality do not exist outside of this horizon of meanings. The world exists as materiality independent of these categories, of course. However, it exists as an entity without meaning. Culture, and law, as one of its components, articulates the narratives we use to answer key questions for our lives like, Who are we? What do we do? What should we do? and What have we experienced?

The cultural analysis of law argues that law, like knowledge, faith, and morality, conditions our experience.[44] We experience the world by means of the categories that these webs of meaning offer us. Each proposes a different way of understanding the world. Each of these fields is totalizing; each seeks to account for all of the phenomena that occupy the conceptual and practical space it controls.[45] Human imagination is plural. Nevertheless, each of its components is all-encompassing. Kant proposes and examines knowledge, faith, and morality; the cultural analysis proposes and examines law. The cultural analysis of law is therefore a form of neo-Kantism;[46] it seeks to make the conditions of possibility of the world we inhabit explicit. In particular, it seeks to describe and examine how law constructs our imaginations, and therefore how law constructs the world we occupy.[47]

For Kant, there are three categories that determine how we represent the world: subject, time and space.[48] A representation of the world always emerges in the consciousness of an individual that is located in a determined space and time. However, for Kant, the subject that unifies the experience is a generic subject that inhabits an empty geography and an abstract history.[49] This is not the case for the cultural analysis of law. Its object of study is the different types of incarnated subjects that inhabit specific geographies and have particular histories.[50] The cultural analysis of law nourishes from Ernst Cassirer's expansion of Kant's work to include the various cultural formations that human beings effectively construct.[51] In this sense, cultural analysis is a critical enterprise that seeks to make explicit the conditions of possibility of the world we inhabit; it seeks to describe the structure and limits of

43 *Paul W. Kahn*, The Reign of Law: Marbury V. Madison and the Constitution of America, New Haven 1997, pp. 34-41.

44 *Kahn*, note 41, p. 34.

45 *Ibid*, pp. 123-127.

46 See *Paul W. Kahn*, Prólogo a la edición en español, in: Paul Kahn, El análisis cultural del derecho, Bogotá 2014, p. 11; and *Kahn*, note 41, pp. 34-35.

47 *Paul W. Kahn*, Freedom, Autonomy, and the Cultural Study of Law, Yale Journal of Law & the Humanities, 13 (2001), p.141.

48 *Kahn*, note 41, pp. 40-41.

49 *Ibid*, pp. 38, 66.

50 *Ibid*, pp. 55-86.

51 *Ernst Cassirer*, Philosopyhy of Symbolic Forms, vols. 1-3, New Haven 1953-1957.

the different forms of experiencing the world.[52] Nevertheless, cultural analysis is also a critical enterprise in a sense other than the Kantian: it seeks to make explicit the ideological horizons that make the existence of those worlds of meaning possible.

For cultural analysis, the law is, therefore, an autonomous normative field. It is a field that has the capacity to endogenously create the units that constitute it, as well as transform and eliminate these units. The legal field interacts with other social fields, of course. Nevertheless, the changes created by these interactions are explained and put into practice by means of the categories offered by the legal system. Understanding these units and their relationships involves understanding the world they make possible. The law constitutes a field by which we create and experience the world. The law constructs particular forms of subjects that inhabit determined geographies and histories. Precedents, which constitute a key aspect of the analysis offered in *Making the Case*, thus materialize particular ways of understanding time and the relationship with legal and political authority. Statutes, understood as a product of a-temporal reason, as it was understood by the creators of the French Civil Code of 1804, also presuppose and reproduce a form of understanding the time and space that human beings, not only the French of the early 19th century, inhabit.[53]

For the cultural analysis of law, the categories that constitute the legal world are conceptual networks that shape the narratives that we use to construct our individual and collective identities.[54] These identities do not exist prior to the categories and the networks they interweave; nor do these categories exist as monads in a world of abstract and universal ideas. They do not exist as isolated units: they construct and give meaning to the reality that human beings inhabit by means of their intersection; by means of the construction of narratives that seek to persuade others, and ourselves, of the value of the legal world of meanings we are immersed in. As a consequence, the cultural study of law describes and analyzes not only the most general categories constructed by law —subject, time and space —: it also describes and examines legal categories, like persuasion and interpretation, that cut across legal institutions, principles and rules.[55] It is likewise concerned with the relationships between categories, with a greater or lesser degree of generality, that form the legal world of meaning.[56]

However, examining law as culture also requires studying the 'other' of law.[57] The law and its 'other' are inescapably interlaced. The law is not only what it is; it is also what it is

52 *Kahn*, note 41, pp. 34-35.

53 *Julien Bonnecase*, La escuela de la exégesis en el derecho civil, México 1944. Also see *M. C. Mirow*, Borrowing Private Law in Latin America: Andres Bello's Use of the "Code Napoleon", in Drafting the Chilean Civil Code, Louisiana Law Review 61 (2001), p. 291 and *M.C. Mirow*, The Code Napoleon: Buried but Ruling in Latin America, Denver Journal of International Law and Policy 53 (2005), pp. 179-194.

54 *Kahn*, note 41, pp. 102-106.

55 *Ibid*, p. 125.

56 *Ibid*, p. 125.

57 *Ibid*, pp. 119-123.

not. Understanding law involves understanding that which is outside of its domain: love, revolution, nature, for example.[58] In this sense, the cultural analysis of law is an academic enterprise that is based on the comparative examination of the legal and political imagination. Why, for example, are law and filial love in contradiction for Antigone, a paradigmatic character in Western culture?[59] What makes love different from law? Why, in the contractualist tradition, key for understanding the basis of the modern state, are law and politics differentiated from nature?[60] What distinguishes the state of nature from law? How do these notions and distinctions construct a particular type of subject?

However, the comparative dimension of the cultural analysis of law is not only concerned with the "other" of law: it is also concerned with the similarities and differences of different legal cultures.[61] *Making the Case*, for example, is partly an exercise in comparative law: it seeks in part to understand the meaning that judges and jurisprudence have in US culture by distinguishing it from the meaning that judges and jurisprudence have in the civil law tradition. Law is a substantive part of our social imagination. Legal cultures can be notably distinct or can have important similarities. Nevertheless, understanding the content of who we are as individual and collective subjects must include understanding how we differentiate ourselves from other individual and collective subjects.[62]

II. Law, Reason and Reform: The Differences Between Cultural Analysis and Other Forms of Doing Legal Academia

Legal academia usually moves in a cycle of critique and reform: it questions the existing law and proposes its transformation.[63] The law that 'is' has to become the law that should be. The scholar uses reason to show the reason of law. The reforms proposed by the legal scholar do not originate in alternative normative systems, among others, morality or politics. It is the law that shows how law should be.[64] The scholar does not present her proposal as based on her particular form of understanding justice; she presents it as the best possible interpretation of existing law. The usually critical and normative character of legal academia is not motivated only by the political commitments of law professors. This type of legal scholarship is a form of practicing law. In this sense, it is not different from judicial practice. Both law professors and judges are always seeking the law that should be. The law itself is always understood as approaching what it should be.

58 See, for example, *Paul W. Kahn*, Law and Love: The Trials of King Lear, New Haven 2000 and *Paul W. Kahn*, Sacred Violence: Torture, Terror and Sovereignty, Ann Arbor 2008.

59 *Sófocles*, Antígona, 2011.

60 *Thomas Hobbes*, Leviatán, Buenos Aires 2003, pp. 127-132 and *John Locke*, Dos ensayos sobre el gobierno civil, Buenos Aires 1991, pp. 205-213.

61 *Kahn*, note 42.

62 *Ibid*, p. 2679.

63 *Ibid*, p. 2678, and *Kahn*, note 41, pp. 7-30.

64 *Kahn*, note 41, pp. 18-30.

Legal scholarship is therefore usually committed to its object of study;[65] it is a means of materializing law's internal logic. There is no distance between the scholar and the legal reality she examines. By means of writings and teaching practice, the law professor reproduces the dynamics that shape the legal system; she reproduces the practice of justification and continuous questioning that is part of a political community formed by free and equal citizens – a political community in which all of its members are subject to the law.[66]

Cultural analysis does not seek to replace reformist scholarship. It recognizes its value and the contributions it makes to the political community. Nevertheless, the cultural analysis of law seeks to propose a different form of approaching the law academically, one that coexists with other possible ways of thinking about legal scholarship. This approach is also understood as part of a philosophical tradition. In this case, the legacy taken up is no longer Kantian but Socratic.[67] Cultural analysis is understood as a form of self-examination, as a form of describing and analyzing our practices and beliefs. The aim of this exercise is not evaluating these practices and beliefs; nor is the exercise proposing to replace them. The aim is to understand who we are as subjects immersed in a particular horizon of perspectives.[68]

As Socrates interrupted the daily dynamics of the Athenian Agora to reflect on the political, aesthetic, or moral commitments of Athenians, for example, the cultural analysis of law seeks to suspend the practice of law to understand the conditions of possibility of the different forms of legal imagination.[69] At the same time, it seeks to understand the subjects they construct, the geographies these subjects inhabit, and the types of history they experience. When the examination of our beliefs and practices ends, there is no conclusion that shows us the truth of the matter.[70] If it is successful, this critical exercise can help us understand who we are as particular individual and collective subjects. The exercise that promotes the cultural analysis of law is therefore an exercise with no end.[71] The dialogue on our individual and collective identities is always in process: it is enriched with new interpretations, with innovative forms of understanding our practices and beliefs. There will always be the possibility of interpreting and connecting these practices and beliefs differently. New narratives about ourselves will never cease to arise.

Cultural analysis thus seeks to distance itself from the practice of law. Distance allows for a free scholarship.[72] This does not mean that cultural analysis is neutral.[73] Certainly, it is

65 *Ibid*, p. 7.
66 *Ibid*, pp. 7-18.
67 *Ibid*, pp. 31-34.
68 *Ibid*, pp. 32-33.
69 *Kahn*, note 41, pp. 31-33.
70 *Ibid*, pp. 33.
71 *Ibid*, pp. 33-34.
72 *Paul W. Kahn*, Prólogo, note 47, pp. 165-171.
73 *Kahn*, note 46, pp. 9-10, 12-21.

a situated form of scholarship, one with normative commitments on how the law must be academically examined. Nor does this mean that the descriptions and analyses that it offers are free of evaluations. Both are always perspectival and partial. However, cultural analysis does not offer any proposal on how the law should be, on how a rule, principle or institution should be interpreted or transformed.[74] Cultural analysis does not want to be trapped by its object of study; it does not seek to show the internal reason of law that is always seeking what law should be. Suspending our commitments to the law is always a momentary and never complete exercise, though. Once the examination has ended, the practice of law reappears without agitation. The life of law remains unmoved, as happens with the commercial, political, and aesthetic practices of the Agora after the Socratic dialogue.

Nevertheless, the aspiration of the cultural analysis of the law is that after the process of free self-examination that requires the temporary suspension of our commitments to law, we will be better able to understand who we are:[75] what type of individuals and collectivities we have constructed; what type of subjects we have made of ourselves. As a consequence, cultural analysis seeks to contribute to the understanding of our legal imagination, which, like the moral or epistemological imagination, constitutes the conditions of possibility of the ways we experience the world.[76] The world is always for someone; there is no world with meaning without a subject that interprets it. In addition, this subject is always a subject incarnate, even if the subject is thought of as an abstract subject characterized by her capabilities and not by the effective consequences that the exercise of these capabilities creates. The cultural analysis of law does not therefore intend to contribute to the solution of hard cases, does not intend to contribute to making our law a coherent or more just system. These are all valuable objectives. Nevertheless, they are aims that imply a commitment to the object of study, to its value and to the need for its reproduction. The cultural analysis of law appraises the distance between subject and object of knowledge not because this allows scholars to arrive at absolute truth or to annul their perspectival nature but because it gives scholars freedom to examine their practices and beliefs.

Freedom is not the only normative commitment of the cultural analysis of law. It is also committed to sympathy and respect for its object of study.[77] Culture is an achievement of the imagination: it gives meaning to the subject, constructs and constitutes the subject. The disembodied subject is not a particular subject; the subject without culture ceases to be a subject. As a consequence, the dignity of the individual is closely linked to its culture.[78] Of course, some cultures can be globally questionable from a moral point of view, and all cultures have aspects that can be evaluated negatively from one ethical perspective or another. Nevertheless, to understand a culture, even a morally questionable one, it is necessary to

74 *Kahn*, note 47, pp. 141-142.
75 *Kahn*, note 41, p. 6.
76 *Ibid*, p. 53.
77 *Kahn*, Prólogo, note 46, pp. 16-17.
78 *Ibid*, p. 17.

understand the point of view of those immersed in it. To be able to recognize a subject as a moral agent, it is necessary to understand the subject's culture. It is necessary to see the world through the cultural lenses used by the subject, to see the world that these lenses construct.[79]

This does not mean that we cannot disagree with these cultural perspectives, the cultural analysis of law argues.[80] Describing and analyzing the internal point of view of the member of a practice, in this case a culture, does not mean that we should accept it. Respect and disagreement are two different categories and are always difficult to balance. We can disagree with a form of legal culture; we can think that it is morally unacceptable. Nevertheless, to understand this culture we must see it as a subject that is committed to it does. Culture gives meaning to the experience that this subject has with the world. As a consequence, to understand legal culture, the scholar cannot start from a particular concept of law. If this were the case, she would do nothing other than try to see herself in the 'other', try to find that the 'other' is like her. The scholar would not be able to understand how the 'other' understands itself as a legal subject and the meaning that the subject gives to the legal world she inhabits. The cultural analysis of law therefore distances itself from implicit but powerful forms that determine comparative law's description of non-Western cultures; it distances itself from the implicit premises that guide the taxonomies created by comparative law.

III. Culture, Explanations and Social Sciences

The cultural analysis of law does not believe that a culture, in particular, the culture of law, can be accounted for by pointing to something outside of it.[81] Cultures are understood by going within their conceptual networks. Accounting for a culture, and understanding it, is therefore an interpretative practice.[82] Cultural analysis seeks to understand this set of beliefs and practices on its own terms; it seeks to make a dense description of the webs of meaning that these beliefs and practices construct.[83] The cultural analysis of law consequently does not pursue the aims that the social sciences seek to achieve when they have culture as their object of study; it does not seek, as sociology and anthropology usually do, for example, to offer a set of explanations that would allow for understanding how a culture came to be what it is; it does not seek to make explicit cause and effect relationships. These kinds of explanations are useful for illuminating the external phenomena that determine the construction of a culture. Nevertheless, they do not allow for understanding cultures' substantive contents.

79 *Kahn*, note 41, p. 35.

80 *Daniel Bonilla*, El análisis cultural del derecho. Entrevista a Paul Kahn, Revista Isonomía 46 (2017) (see in particular, answer to question eight).

81 *Ibid* (see, in particular, answer to question three).

82 *Ibid* (see, en particular, answer to question eleven).

83 *Clifford Geertz*, The Interpretation of Cultures, New York 1973.

As a consequence, cultural analysis is not a discipline that uses empirical research methods to specify why a culture has some characteristics and not others.[84] It does not use statistics, surveys, or structured interviews to show the external variables that account for the internal elements or the dynamics that constitute a culture. It does not revolve around the collection and interpretation of quantitative information. It is a humanist interpretative practice that examines how the culture of law constructs a world of meaning.[85]

Cultural analysis also understands that the micro and the macro intersect.[86] In this sense, when it analyzes a particular legal product, cultural analysis considers that it can find some of the key general elements of a legal culture. The cultural analysis of law therefore tends to focus on the analysis of a few legal products. The macrocosm of the legal appears in the particular legal object. This interpretative project of legal cultures is no different from other philosophical projects that interpret, that seek to understand, for example, the modern age, postmodernity, the Mexican Revolution, or the Regeneration period in Colombia. These projects do not examine all the possible products that are associated with each of these moments in intellectual or political history. Nor do they make use of quantitative research methods to characterize them. The meaning of postmodernity, for example, does not emerge from a survey done with a representative sample of philosophers recognized as postmodern or from the use of statistics to specify which concepts appear repeatedly in the texts that declare to be committed to this school of thought.

The cultural analysis of law tends to interpret some products of a legal culture – some central or paradigmatic, some common – to try to understand both the particularities of the world of meaning they construct and the most general matters of the conceptual and practical network they intersect with.[87] Thus, when a paradigmatic judicial opinion is analyzed, as happens in *Making the Case*, for example, it is possible to analyze the role that judges and jurisprudence have in a particular legal culture. Nevertheless, it can also show how the courts and the legal norms they produce are connected to structural aspects of this culture; it can clarify the forms in which these concepts interweave with more general notions of a liberal democracy, like the principle of separation of powers, self-government, and popular sovereignty.

In this way, an academic committed to the cultural analysis of law will not be able to answer the question that asks for the reasons that explain the existence of a culture.[88] The only answer the scholar can offer is that this is a question that cultural analysis does not consider, that it does not pose; it is a question that starts from premises other than those that support this theory. Perhaps an analogy would be useful for illustrating this point: the interpretation of the meaning of postimpressionism can be achieved by means of the interpreta-

84 *Kahn*, Prólogo, note 46, p. 11.

85 *Bonilla*, note 81 (see, in particular, answer to question twelve).

86 *Ibid* (see, in particular, answer to question thirteen).

87 *Kahn*, note 47, p. 151.

88 *Kahn*, note 43, pp. 39-40.

tion of the works of Van Gogh, Gauguin, and Cézanne. Achieving this objective involves examining, for example, the composition of their paintings, how they use color, or the issues they reflect on with the images they create. In contrast, the explanation of works such as *The Starry Night*, *Where do we come from? Who are we? Where are we going?* and *The Card Players*, i.e., specifying the causes that allowed for their emergence, can be reached by means of a social history of art[89] – a type of historical work that emphasizes the material conditions that allowed for the emergence of the artistic vanguards of the second half of the 19th century in Western Europe. In sum, interpreting our culture is interpreting our history. The interpretation made by the cultural analysis of law is not based on quantitative empirical arguments; it is an interpretation that seeks to apprehend the possible meanings of the conceptual network that constitutes a culture, that gives an account of the culture by examining its discursive and practical components.

IV. Genealogy and Architecture

The method of the cultural analysis of law is also connected to a particular philosophical tradition. Genealogy and architecture are nurtured on a tradition that has Nietzsche and Foucault as two of its primary representatives.[90] From this perspective, history is not understood as a succession of points, a line that has a specific origin and an end that can be envisioned.[91] Nor is history interpreted as a succession of points that can be explained causally. It is not a process that can be grasped through cause/effect studies. For cultural analysis, law is both a legacy that we receive and construct. We always find ourselves immersed in a culture that precedes and survives us.

In this sense, legal cultures are analogous to language.[92] Understanding or using a language does not pass for explaining how it emerged; rather, it passes for understanding the web of meanings that constitute this language. Nor is learning a language equivalent to learning the meaning of each of its words; learning a language involves being able to use its terms to construct sentences, i.e., involves knowing how to construct meaning by weaving voices and using its grammar; learning it also involves the capacity to use these sentences to create narratives that can answer complex questions like: Who are we? What do we want to be? And what are the means we consider adequate for materializing these normative projects? The phrase ‘my heart jumped for joy’, which is expressed when you see a loved one you haven't seen for a long time, for example, has no meaning if we only sum up the meaning usually given to each of the words that form it. Hearts do not have a life of their own, cannot jump, and do not have feelings. The meaning of the sentence emerges from the intersection of the five words, of the simple network they create in a particular context. The

89 See, for example, *Arnold Hauser*, Historia social del arte and la literatura, vol. 3, Madrid 1957.

90 *Michel Foucault*, Nietzsche, la genealogía and la historia, Valencia 1992.

91 *Kahn*, note 41, pp. 41-43, 46, 48, 75, 80, 80-81, 88-89, 91, 98.

92 *Kahn*, note 43, pp. 35-38.

combination of the elements that constitute a language, like that of a culture, is also infinite. The elements that constitute both can be connected in multiple ways; the meanings that can be generated in diverse contexts are inexhaustible.

Genealogy does not consider that phenomena or practices happen in linear fashion, either.[93] New phenomena do not replace past phenomena completely; they are not watertight compartments that can replace each other and that the historian connects by causally. The past forms of the phenomena always leave traces in the new, mutated forms. The present of the phenomenon always includes its past.[94] Understanding contemporary legal practice is, in part, understanding the tracks that its previous forms left in the elements and dynamics that currently constitute it. In legal culture, this relationship between the past and the present is described in a particularly sharp manner. Legal categories are much more stable than their meanings.[95] Categories are maintained for long periods, but not necessarily with the same meaning: today's concept may express something different from what it expressed previously. Nevertheless, the meaning it has in the present partly reflects the marks that past uses have left on its conceptual body.

This happens with the category ‘constitution’, for example, which is part of the grammar of modern constitutionalism and has always been present in the narratives constructed by this type of legal discourse. The meaning of the concept has not been univocal; it has had multiple meanings, and each has varied with the passage of time. Two of the most important are as follows: synthesis of the normative political project of a community that does not have direct legal application and the supreme norm of a legal order that has immediate and direct application.[96] This second meaning, however, common in contemporary legal systems, is marked by the first meaning. A constitution continues to be understood as a summary of the political morality that this community is committed to, only it is now understood that this set of institutions, principles, and rules have direct and immediate legal effects. The legislator does not need to intervene to materialize the constitution’s mandates through statutes. The constitution is an instrument that creates rights and obligations that citizens can demand without the mediation of third parties.

Genealogy is also closely linked to architecture.[97] The former focuses on the emergence and transformation of phenomena and practices. The latter focuses on the structures of current beliefs and practices.[98] Architecture has the objective of describing and studying how subjects experience the rule of law today. It tries to account for and examine the characteristics of the web of meanings that constitute the different legal cultures at present. This dimension of the method that cultural analysis is committed to seeks to specify how the legal

93 *Kahn*, note 41, p. 42.

94 *Kahn,* note 41., p. 41.

95 *Kahn*, note 43, p. 40.

96 See *Manuel García Pelayo*, Derecho constitucional comparado, Madrid 1961, pp. 33-53.

97 *Kahn*, note 41, pp. 41-43, 63-65, 73-74, 78-82, 93 and 98.

98 *Kahn*, note 43, p. 35.

culture is different from other beliefs and practices of the political community. However, this map of the structure of today's legal and political imagination cannot be construed without calling upon the past. As a partial expression of the character of an individual, the face is a consequence of its past; it is a consequence of the scars, wrinkles, stains, deformations that are created during the life of the subject. The face of today is, in part, the face of the past.

B. The Conceptual Architecture of Judicial Opinions

I. Popular Sovereignty and the Voice of the Judicial Opinion

Making the Case examines the role that judicial opinions and judges play in the US legal and political imagination. More precisely, it examines the conceptual architecture that sustains US legal practice. The book seeks to describe and analyze how the subject of the US rule of law imagines jurisprudence at present. The book is an interpretation of a key element of US legal culture. The central argument it defends is that, in the United States, jurisprudence is a rhetorical device that aims to maintain the belief in self-government through law. Popular sovereignty and judicial decisions are strongly connected in the US legal and political imagination. In the United States, the microcosm of the ruling synthesizes the macrocosm of the rule of law.

Kahn argues that jurisprudence is a literary genre. Judicial opinions announce the meaning of the law by using a series of rhetorical tools that aim to persuade citizens. Judicial decisions specify the meaning of legal mandates, but they also offer justifications for this meaning. Orders and motives go hand in hand within judicial opinions. The authority of judges and the products they create resides in their capacity to persuade the political community. For Kahn, law in general and judicial opinions in particular are a form of seeing and maintaining life in common. As a consequence, understanding who 'Americans' are as particular legal subjects necessarily means understanding how the rhetorical resources that judicial opinions call upon operate. It also means understanding the relationship that people in the US have with other elements of their legal culture.

Kahn states that there is music in law. Nevertheless, the different legal norms that form a legal order produce different types of notes, rhythms, and melodies. Not all of the sounds produced by a legal order are the same. The sounds produced by judicial opinions are particular and cannot usually be heard by any individual. People need to learn how to hear the music produced by judicial opinions. *Making the Case* is therefore directed at both students and professors of various disciplines, although its primary audience is law students and professors. In the tradition of *The Concept of Law* by H. L. A Hart,[99] and of *Bramble Bush* by Karl Llewellyn,[100] Kahn wants to examine a central legal issue in a way that appeals to both a specialized audience, like legal scholars, and one in training: law students. He wants to

99 *H. L. A. Hart,* El concepto de derecho, Buenos Aires, 1998.

100 *Karl Llewellyn*, Bramble Bush, New Orleans 2012.

study one of the main components of US legal culture with simplicity but also with philosophical depth.

For Kahn, learning to read judicial opinions involves learning to argue legally. The rhetorical tools that are considered to be persuasive in a legal community are put into practice in judicial decisions. Judges want to convince parties, their peers, attorneys, and citizens in general that their decisions are correct. Kahn wants to show students, wants to examine with students, the rhetorical instruments used in judicial decisions and how these instruments operate. Nevertheless, he does not approach his object of study as a technician that only seeks for its disciples to learn to use these tools effectively. Kahn distances himself from the idea that law schools must be spaces for the training of new generations of technicians that the legal practice needs. Of course, he wants students to have the instruments necessary to act competently in legal practice. However, he also wants new lawyers to understand that law is a form of culture, as well as the precise role that judicial opinions play in that culture. Lawyers should have the technical capacities to represent their clients competently and ethically. Nevertheless, lawyers should also be humanists who understand how their work is connected to a particular form of imagining the world. Lawyers in particular and citizens in general are who they are, in part, due to the web of legal meanings they are immersed in.

Kahn thinks that the conceptual architecture of US jurisprudence is formed by four categories that intersect analytically and practically: voice,[101] doctrine,[102] facts[103], and narrative.[104] Voice answers the question of who is speaking through judicial decisions. Public authorities act through a combination of voice and vote. Vote emphasizes the political dimension of public actions. Examining vote allows for understanding the balance of power that led to one decision or another. In the judicial context, this perspective focuses on the political and moral commitments of judges and how they construct alliances to make their political views triumph. This approach focuses on counting the votes that determine who wins and how the scarce resources at play are distributed in a case.

However, voice is much more important than vote: it explains what the law is to those who have decided to live under its domain. In a liberal democracy, citizens have agreed to subject themselves to the law that they themselves create as part of the sovereign people. Judicial opinions are based on narratives that weave law and facts to persuade the members of the political community. Every narrative creates a voice. The question then, is who is heard when the opinion is read. The central problem of the voice of judicial opinions is therefore authorship. Who is speaking through the judicial opinion? For Kahn, the person speaking is neither the clerk who effectively drafts the opinion, nor the justice who signs the decision, nor the court the justice represents. Successful opinions persuade the

101 See Chapter 3.
102 See Chapter 4.
103 See Chapter 5.
104 See Chapter 2.

sovereign people that they are their author. The opinions that triumph are those that eliminate the difference between the authoritative text and its interpretation; they manage to make the text they are based on transparent. In these opinions, the creations of the sovereign people, the Constitution or statutes, are not perceived as different from the creations of the judge.

Kahn argues that the law is a creation of the sovereign people, not because they have drafted it but because they are responsible for it. At the base of judicial opinions lies the difference between who is writing and who answers for the text, i.e., who is responsible for it. Ultimately, the people must see judicial decisions as their responsibility, Kahn argues. Judges produce opinions. Nevertheless, in a liberal democracy like the United States, it is the people who create the law. This is the true meaning of the idea that sovereignty resides in the people; this is the true meaning of the fact that the United States is an autonomous community, not a heteronomous one, that governs itself through law. The US legal culture therefore presupposes the existence of a transtemporal collective agent: the people.[105]

The people create law, but the people are not the set of citizens that form it currently. The people are a collective subject that emerges when the revolution triumphs and is crystallized into a constitution. It is a subject that continues giving life to the rule of law. This creation of the imagination, the people, is what allows contemporary citizens to feel responsible for the law created in the past by individuals who have already disappeared. The collective subject is interlaced with the individual subjects that give it life. However, they are not the same; they do not equate with each other.

The judicial voice therefore does not speak the language of abstract reason. Of course, reason is an instrument that judges use to articulate their opinions. Nevertheless, the legitimacy of judges' legal products is derived from the links these products have with the transcendent authority of the people, who understand the law as a social practice in development; it is derived from the charismatic character of the courts, i.e., from the connection they have with the sovereign source of law, from the capacity they have to express the voice of the sovereign people, to make the voice of those who concentrate the power to create law in a liberal democracy heard.

The structure of judicial opinions is therefore not that of syllogism. This is a poor description of how a judicial decision is constructed. Judicial opinions, Kahn argues, is not a product of the deductive reasoning that is effectively put into practice by a technician of the law. When a case is constructed, all of its components are at play at the same time, and all are related amongst each other. We do not learn the law, the facts, or their connection before the decision. Judicial doctrine, factual issues, and its links are constructed by means of an interpretative process that aims at persuasion. In this process, the applicable legal norm is defined in dialogue with the facts that are being constructed. The way the former must be applied to the latter is not discovered by the interpreter; it does not exist before the interpretation: it is articulated by means of situating the legally-relevant facts in a particular context

105 *Kahn*, note 41, pp. 112-117.

that serves as a basis for formulating a narrative that seeks to show its readers, citizens, that the decision made could be no other.

This form of imagining judicial opinions is different from how it is usually imagined in other legal cultures, like that of Latin America.[106] As a part of the Romano-Germanic tradition, the region's legal culture constructs the judge in a different way. In this culture, the judge is typically imagined as a bureaucrat that controls an expert knowledge and whose main attribute is her capacity to resolve conflicts peacefully through reason. The judge, who is part of the judicial career, and who therefore does not have the same political responsibilities as a US judge, is understood as an expert in a type of rational argument: the test of proportionality. In this tradition, judges are experts in the science of law.[107]

Jurisprudence is thus not usually understood as an art, but as part of a scientific discipline. This interpretation of the judge has varied in the last few decades with the creation of constitutional courts in the region. In Colombia, for example, the historical interpretation of the Supreme Court of Justice is very close to the traditional interpretation of judges offered by the Romano-Germanic family. Nevertheless, the way the Constitutional Court is interpreted is different: in its twenty-six years of existence, the form of understanding the role of this court and its jurisprudence has gotten very close to the interpretations of judges offered by the Anglo-Saxon tradition. The influence that US law and legal theory have had on Latin America in general and Colombia in particular in the last few decades is well known.[108]

II. Jurisprudential Doctrine and Factual Issues

The issues of law and fact related to judicial opinions in the US legal and political imagination are related to a second question that Kahn tries to answer in *Making the Case*: What do judicial opinions say? If the first question, *who is speaking through judicial opinions* is related to legitimacy, this second question is related to justice. To make the case, i.e., to construct the law and the legally-relevant facts, the judge — Kahn argues—, borrows from various genres and disciplines: journalism (reporting), history (narration of the past), hermeneutics (tools of interpretation), logic (deductive arguments) and rhetoric (persuasion). In this book, Kahn explores the ways in which judicial opinions nourish from each of these tools and disciplines.

However, the description and analysis of judicial opinions revolve around how judges interact with preexisting doctrine. Every decision is situated in the face of a body of legal doctrine that is usually presented as a combination of case law, constitutional law, and statutes. Every decision can be located at some of the points created by the intersection between a horizontal axis, precedents, and a vertical axis, the authoritative text that the prece-

106 See, for example, *Diego López Medina*, El derecho de los jueces, Bogotá 2006.

107 See, for example, *Carlos Bernal Pulido*, El derecho de los derechos, Bogotá 2005.

108 See *Daniel Bonilla*, La economía política del conocimiento jurídico, Revista de Estudos Empíricos em Direito/Brazilian Journal of Empirical Legal Studies 2 (Jan. 2015), p. 43.

dents interpret. Decisions can interact with this doctrinal body in three ways. First, they can aim to create a new start for the law. Borrowing a term from Hannah Arendt, this is what Kahn calls *natal decisions*. These rulings usually offer a combination of horizontal and vertical arguments. Natal decisions appear as a flare in the law; they mark the moment when the law appears out of nowhere, when the law seems to emerge spontaneously.

Second, new rulings can aim to take a step, to partially increase the existing doctrinal body. This type of decision can involve revoking some of the existing decisions. These opinions commonly present horizontal arguments. These are erudite opinions - opinions that call upon erudition to support their rulings. These decisions show a detailed legal knowledge of preexisting opinions; they organize them in coherent legal reasoning lines that are presented as inescapably connected to the new decisions. Finally, the judge may aim at the destruction of a doctrinal line. It is common for this type of decision to present vertical arguments to justify its conclusions. In contrast to the erudition of incremental opinions, destructive opinions move away from the existing judicial decisions and cling to the authoritative text that is their original source; in this sense, they are fundamentalist opinions.

However, US legal culture requires the three types of opinions to assume a double argumentative load. They must simultaneously be coherent with the doctrinal background they are situated in and offer a coherent application of that background to the particular case. This background may be constituted by text (constitution or statutes) or case law (the relevant precedents). The sovereign people could not simultaneously understand itself as the creator of a judicial opinion and its opposite, Kahn argues. The transtemporal collective subject is one and only one; the transtemporal collective subject must not contradict itself. This sovereign people that expresses itself through the judge also uses analogy to take on this argumentative load. The new judicial opinion must show that it is similar or different from preexisting opinions. The judicial interpreter's primary tool for interacting with existing judicial doctrine is the construction of distinctions and similarities with past law.

The construction of law in a case is not articulated separately from the construction of facts. The judge puts both in dialogue. The legally relevant facts are formulated through the interaction with the law that seems to control the case. The law is specified through its interaction with the relevant factual circumstances. The facts of a case are not natural phenomena that can be captured neutrally by the judge. The facts do not appear in the world labeled as ‘legally relevant’. These are a function of both legal procedures and the substantial rules and principles that seem to control the case; they are also a function of the contexts they are located in to make them intelligible. Contexts are what determine what type of case is being discussed; they are what allow for situating the cases in relation to one line of reasoning and not another.

Contexts determine, for example, if a case involving adoption by same-sex partners is a case on the rights of minors or if it is a case on equality between same-sex partners and heterosexual partners. Situating the facts in one context or another will determine not only which cases are analogous, but which constitutional, statutes or case law would be relevant

for solving it. Facts and law appear to go hand in hand again in the analogical interpretation articulated by the judge. The solution to the case seems obvious once the facts have been constructed and located in a particular context. The articulation of the facts in one way and not another already suggests how the conflict must be solved.

III. Cultural Analysis and Comparative Law in Making the Case

Kahn's interpretation of US judicial opinions is partly an exercise in comparative law. However, it is not a functionalist exercise that has a practical objective:[109] the solution of a particular problem by means of the importation and exportation of legal products. Rather, it is an expressivist exercise that seeks to understand one's own culture by means of comparison with another legal culture.[110] The objective of *Making the Case* is to understand who 'Americans' are as subjects constructed by the law; the objective is to understand the political community they are members of in as much as it is a collectivity that is understood as subject to law. The issue is that to achieve this objective, Kahn contrasts his legal tradition with the Romano-Germanic legal family. There are few references to continental European law, more precisely to how it imagines judges and judicial opinions, and they are not broadly developed; nevertheless, they play an important role in the book. References to the *other* of Anglo-Saxon law allows for sharpening the gaze on Anglo-Saxon law. The *other* is a mirror of oneself. The *other* allows self to recognize, by means of contrast and difference, what constitutes it.

Kahn's interpretation of the legal culture he belongs to can therefore be useful for legal academics that belong to other legal cultures in three ways: first, it serves as an invitation for non-US legal academics to describe and analyze the meaning that our legal cultures give to judges and judicial opinions. In the case of Latin America, for example, there will likely be similarities between national legal cultures. Each country's legal history has a common trunk and has been constructed by means of profound and continuous exchanges of legal knowledge with other States in the region.[111] Nevertheless, it is likely that there are nuances and differences between these legal cultures. Knowing them would allow for enriching the knowledge on who we are and questioning the idea that Latin America is a monolithic legal entity; it would allow for questioning the idea, so common in US and Latin American legal academia, that describing and analyzing one country of the region is describing and analyzing the entire region.

109 See *Alan Watson*, Society and Legal Change, Philadelphia 2001; *Mark Tushnet*, The Possibilities of Comparative Constitutional Law, Yale Law Journal 108 (1999), pp. 1225, 1225-1239, and *Alan Watson*, Legal Transplants and European Private Law, Electronic Journal of Comparative Law 4 (2000).

110 See *Pierre Legrand*, The Impossibility of 'Legal Transplants', Maastricht Journal of European and Comparative Law 4 (1997), p. 111.

111 *David Clark*, The Idea of the Civil Law Tradition, in: David Clark (ed.), Comparative and Private International Law, Duncker & Humboldt, Berlin 1990, pp. 11-23.

Second, in a reverse expressivist comparative law exercise, non-US readers of *Making the Case* can sharpen their interpretations of the legal cultures they belong to. The contrast with how the US legal and political imagination constructs judges and jurisprudence will allow them to better understand the particularities of the worlds of meaning that create the horizons of legal perspectives they are immersed in. It will allow for understanding the specifics of how the cultures of non-US readers imagine courts and the products they create with greater richness.

Finally, reading *Making the Case* outside of the United States can also contribute to reflecting on the similarities between the US legal culture and other legal cultures. The profound exchanges of legal knowledge between the United States and the rest of the world in the last few decades have meant that many of the legal systems of Europe, Asia, Latin America, and Africa have incorporated beliefs and practices that are common in US law.[112] Contemporary legal systems are mostly cultural hybrids; they are a mixture of multiple legal traditions. Thus, understanding the culture of US law is, in part, understanding some of the facets of other contemporary legal cultures.

Within this theoretical framework, this special issue has three objectives: first, to examine critically *Making the Case* from both a Global North and Global South perspectives; second, to discuss from a comparative law standpoint the various ways of imagining judges and judicial opinions in the civil law and common law traditions; and third, to explore critically the cultural study of law – a form of legal scholarship that seeks not to reform or explain but to understand its object of study. To achieve these aims, the special issue includes articles by both Global North and Global South legal scholars. In the first article, Daniel Bonilla explores the connections and tensions between a monist and a pluralist approach to culture and the cultural analysis of law. More precisely, Bonilla examines the substantive and methodological limits that a monist cultural study of law, which he identifies with Kahn's work, has for the understanding of legal culture. In the second article, Amnon Lev examines the concept of self-authorship that is at the core of *Making the Case*. Lev argues that Kahn's understanding of judicial opinions as rhetorical devices that allow for maintaining the belief in self-government through law radically changes Kahn's relationship with liberalism and puts into question the links between freedom and the cultural study of law. Marco Goldoni, in the third article of this special issue, analyzes the charismatic function of courts and uses this analysis to explore the tensions and connections between central banks

112 See *James A. Gardner*, Legal Imperialism: American Lawyers and Foreign Aid in Latin America, Madison 1980, p. 43, and *Laura Kalman,* The Strange Career of Legal Liberalism*,* New Haven 1996. See also *John Henry Merryman & Rogelio Pérez-Perdomo*, The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America, Stanford 2007, pp. 57, 60; *R. Daniel Kelemen & Eric C. Sibbitt*, The Globalization of American Law, International Organization 58 (1984), pp. 103, 103-136; *John Henry Merryman*, Comparative Law and Social Change: On the Origins, Style, Decline, and Revival of the Law and Development Movement, American Journal of Comparative Law 25 (1977), pp. 457, 484-489; *Kerry Rittich*, The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social, in: D. Trubek & A. Santos (eds.), The New Law and Economic Development, Cambridge 2006, pp. 203-252.

and charismatic legitimacy. In the fourth article, Amalia Amaya argues that judicial opinions should be interpreted through the lens of judicial virtues. Amaya, therefore, examines the virtues that an exemplary judge should have and the connections between these virtues, legal culture, judicial subjectivities, and judicial authority. In the fifth article, Magdalena Holguín problematizes the way in which the cultural analysis of law uses Kant, questions the vagueness of Kahn's concepts of rule of law and culture, and criticizes Kahn's concept of law as narrative. Finally, in the last piece of this special issue, Paul Kahn responds to his commentators and explores the comparative law dimensions of the cultural study of law.