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Determining and Reflective Judgments: Two Approaches to Understanding Legal Decisions

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Abstract: This article examines legal judgments in light of the two ways that, according to Kant, the Power of Judgment operates. After analyzing both uses of this faculty, it justifies that legal decisions can be considered as a type of reflective judgments, but not as exemplary as the ones treated in the *Critique of the Power of Judgment*—namely, the aesthetic and teleological.

Keywords: *determining judgments, legal decisions, Kant, reflective judgments*

This decade seems to be one seeing a re-emergence of board games. It is not strange that young adults gather every weekend to spend a couple of hours submerged in the ludic nature of games such as Catan and Monopoly. From the wide range of these, there are two that have caught our attention: Dixit and What Do You Meme? In Dixit, one of the players has to give a concept, and the rest must try to find an image that is suitable for that concept. The player who, according to the "concept giver", has found the most suitable image wins. What Do You Meme?, on the other hand, operates in inverse order. Here the first player must provide an image, while the rest of them must try to find an adequate concept from a limited number of "concept containing cards". The player who, according to the "image giver", has provided the most suitable concept for the image wins.

These games have caught our eye because in them it is possible to identify the two ways the power of judgment operates according to Kant. Indeed, we can relate, to some extent, Dixit with the determining judgment, where the universal (in this case, the concept) is given, and the particular (the image) must

be subsumed under it.[1] We can see that there is a similarity between the rules of What Do You Meme? and the way reflective judgment operates: the particular (the image) is given, and the universal (the concept) is to be found (Cf. CJ, FI, IV, 5:180). Although Kantians will immediately identify inconsistencies between these board games and the way judgment operates, they do provide an overall picture of the differences between them.

The good thing about the analysis of these games in light of determining and reflective judgment, especially in the case of the latter, is that it is possible to think that it would be acceptable for Kant. This is because, as Burnham has stated, he did not limit reflective judgment to the aesthetic and teleological. In fact, these judgments are only "exemplary of what Kant calls reflective judgments—judgments which proceed without a concept" (Burnham, 2000, p. 40). Therefore, it would not be necessarily incorrect to state that What Do You Meme? is exemplary of how reflective judgments operate as well (although not as radically exemplary as aesthetic judgments[2]).

The question that will be addressed in this work, however, is not that of the reflective nature of a board game (although it is directly related to it). The article will argue that it is conceivable to make a similar analysis of how legal understanding operates. In particular, it will justify that if we take the way these judgments operate, it is possible to identify two modes of understanding how legal decisions are made—a determining and a reflective.

An analysis of this nature makes it necessary to see if it is legitimate to extend what Kant says in his *Critique of the Power of Judgment* to legal thought. Therefore, in what follows, an attempt will be made to answer this question according to the following structure: first by providing an overall picture of what Kant means by the power of judgment and its different uses (I). Then, the article will review the legitimacy of extending determining (II) and reflective (III) judgments to legal understanding. Finally, some conclusions are drawn (IV).

1 Cf. *Critique of the Power of Judgment* (hereafter CJ), First Introduction (hereafter FI), IV, 5:180. The translation follows that in Kant, 2009a.

2 Burnham (2000, p. 40) says, "Aesthetic judgments are the most radical kind of reflective judgments".

I A brief review of Critique of the *Power of Judgment*

Kant starts his *Critique of Pure Reason* by stating that "there is no doubt whatever that all our cognition begins with experience".[3] In a similar sense, we may say that there is no doubt whatsoever that every legal decision starts with a particular case that needs a solution. Particular cases are a condition of possibility for legal decisions. The problem, however, is the following: how does a judge arrive at that solution? This is a long-standing problem in legal philosophy to what most thinkers have dedicated hundreds of pages. Immanuel Kant is no exception. It is a well-known fact that he addressed this problem in his *Metaphysik der Sitten*. However, this is not the only text where a legal thought can be identified in Kant's work. As Herrero has pointed out, "usually when it comes to talking about Kantian [legal] philosophy, commentators turn to the theory of natural law and [...] lose sight of the most interesting question: the philosophy of Kantian law of the faculty of judgment" (Herrero, 2012, p. xxxi). That is, according to Herrero, Kant's *Kritik der Urteilskraft* can be read in terms of legal philosophy.[4]

This statement, though interesting, poses a question that must be answered prior to any analysis of legal thought—namely, is it admissible to extend the distinction between determining and reflective judgments to legal decisions? Using the famous Kantian legal metaphor, as Burnham (2000, p. 21) has called it, we must ask ourselves why we should believe that this distinction has *jurisdiction* over legal understanding. Before addressing this matter, let us review the differences between these two types of judgments.

As we have already pointed out, Kant "describes two different ways in which judgment can operate: depending upon whether it is first furnished with a universal or a particular, judgment may be 'determinant' or 'reflective'" (Guyer, 1997, p. 35). The faculty of determining (or determinant, according to the translation used) is the capacity to apply already given pure concepts (*a priori*) to appropriate particulars (Guyer, 1997, p. 35). In other words, the whole purpose of this type of judgment is to bring intuitions under concepts to make the experience of phenomena possible. In Kant's words: "If the understanding in general is explained as the faculty of rules, then the power of judgment is the faculty of *subsuming* under rules, i.e., of determining whether something stands under a given rule (*casus datae legis*) or not" (CPR, A132/B171). Let us

[3] *Critique of Pure Reason* (hereafter CPR), B1. The translation follows that in Kant, 2009b.
[4] Rasch says something similar in Rasch, 2004.

explain this a bit. Human beings, Kant argues, are inevitably doomed to acquire knowledge of reality through our senses. We need something external, that is part of the "objective reality", to present itself to our senses in order to procure a representation of a phenomenon (through a process that he calls 'schematism'). Our perception of the world is not productive (by merely thinking something it becomes real), but sensitive (things are imposed on us). The intellect takes part in knowledge, but not in an intuitively creative way, but in a discursive one. In order to know the world, sensitivity must provide us with intuitions, that is, with "data" that comes from experience. Once this has happened, our understanding takes that data, "processes" it, and produces a concept (CPR, B59–B73). If nothing is presented to our senses, no knowledge is possible; and, if our understanding does not process the data supplied by our senses, the world is presented as amorphous chaos. In Kant's words, "thoughts without content are empty, intuitions without concepts are blind" (CPR, A51/B75).

According to Kant, in order to "process" the data supplied by sensible experience, we need a series of "rules", which he calls categories, that allow us, the recipients of the intuitions, to "order" what is presented to our senses. Categories can be thought of as mental concepts that contribute to the formation of phenomena.[5] Now, from where do we get these concepts? In his work, Kant does not inquire about the origin of the categories but rather is of the idea "that knowledge of sensible reality is only possible if the necessary concepts (such as substance) are already given" (Burnham, 2000, p. 5). In the same sense, Zuckert affirms that in the *Critique of Pure Reason* Kant establishes "that we have some necessary, universal knowledge of nature: the categorial principles are laws governing all of nature, necessarily, and are such because they are necessary conditions for our knowledge of nature and for the possibility of experience" (Zuckert, 2010, p. 11). Simply put, in determining judgment we already possess a series of concepts (categories), and the job that is left for the power of judgment is simply to apply those given concepts to the particulars provided by intuition.[6] The process, then, is merely mechanical: intuitions are subordinated under universal pre-given (*a priori*) categories (Makkreel, 1994, p. 54).[7]

[5] Concepts, in the case of understanding, are called 'categories', cf. Burnham, 2000, p. 14.

[6] The question of how these concepts are applied to intuitions is answered by Kant in his 'Deduction of the Pure Concepts of the Understanding'.

[7] It should be considered that the description made here is a simplification, since one of the great problems Kant faces is how the subject emerges from himself, from his subjectivity, and applies the categories to the intuitions provided by the sensitivity. This, in fact, led him to almost completely modify the 'Transcendental deduction' (CPR, A84–130, B116–169) in the second edition of his *Critique of Pure Reason*. It is still discussed today whether Kant managed to justify this matter properly.

In reflective judgments, on the other hand, what is given is a particular, and what must be found is the appropriate universal (Guyer, 1997, p. 35). As Burnham says, "Kant calls both the aesthetic and the teleological judgments 'reflective' to indicate that a determining concept (which accords with the principles of the understanding) never enters the equation" (Burnham, 2000, p. 28). In other words, reflective judgment does not supply any of the conditions for the possibility of experience but rather is confronted with an already conformed phenomenon from which it intends to find a universal (concept) from that which is left undetermined by the determining judgment. Kant assumes that nature is not a random chaos, but is organized according to a certain systematicity. In his words,

> under the government of reason our cognitions cannot at all constitute a rhapsody but must constitute a system, in which alone they can support and advance its essential ends. I understand by a system, however, the unity of the manifold cognitions under one idea. […] The unity of the end, to which all parts are related and in the idea of which they are also related to each other, allows the absence of any part to be noticed in our knowledge, *and there can be no contingent addition or undetermined magnitude of perfection that does not have its boundaries a priori*. (CPR, A832–833/B860–861)

Determining judgments explain a certain aspect of phenomena (the conditions of possibility of experience) but fail to explain other features, such as their beauty. These aspects are left undetermined, and what reflective judgment intends to do is to provide the concepts (universals) that "govern" these aspect of existence.[8] However, as we learned from the *Critique of Pure Reason*, human knowledge has boundaries, and these concepts (the ones that the reflective use of the power of judgment pursues) are located beyond them. Therefore, we cannot fully grasp them, and must merely assume that *if* they exist, they were given by a supersensible understanding (God). Therefore, when talking about the concepts (universals) that the reflective use of the power of judgment intends to grasp, we are locating our object of study in the field of the supersensible, field where no knowledge is possible for human beings. Thus, as Kant says, "it is a field that we

[8] In this sense, in the 'First Introduction' of the *Critique of the Power of Judgment*, Kant states that "particular experience, thoroughly interconnected in accordance with constant principles, also requires this systematic interconnection of empirical laws, whereby it becomes possible for the power of judgment to subsume the particular under the general, however empirical it may be, and so on, right up to the highest empirical laws and the forms of nature corresponding to them, and thus regard the *aggregate* of the particular experiences as a *system* of them; for without this presupposition no thoroughly lawlike interconnection, i.e., empirical unity of this experiences can [be] (sic) obtained" (CJ, FI, II, 20:203).

must certainly occupy with *ideas* […] [and] our theoretical cognition is not in the least extended to the supersensible" (CJ, *Introduction*, 5:175). As Kant says in the *Prologue* to the second edition of the *Critique of Pure Reason,* "I had to deny *knowledge* in order to make room for *faith*" (CPR, xxx).

It must be noted, however, that the distinction between determining and reflective judgments does not mean that one excludes the other. On the contrary, "determinant judgment seems to set the agenda for reflective judgment" (Makkreel, 1994, p. 170). In the same sense, Guyer affirms "the categories alone do not fully determine the individual laws of nature discovered by natural science. […] The categories need to be supplemented only by the strictly empirical method of induction" (Guyer, 1997, p. 37). Zuckert says something similar when stating that Kant argues that categories

> are not sufficient conditions for either: they do not provide knowledge of the given, particular character of objects, nor do they guide us as to how we ought to discern some order in nature with respect to those characteristics. Yet, unless we have some way of ordering the diversity in nature, we will have no knowledge of nature beyond that the categorical principles apply to it. Indeed we might be incapable of having any coherent experience at all, for we would be overwhelmed by natural diversity. (Zuckert, 2010, p. 12)

In other words, the determining use of the power of judgment allows us to order the chaos presented by the intuition through the schematization of the data provided through sensible experience so that we are able to make sense of the world and acquire knowledge of it. If we were not able to distinguish one phenomenon from another, or make sense of the data provided by sensitivity under basic conditions which allow the possibility of knowing an object (such as quantity and quality), we also would not be capable of considering certain phenomena as beautiful or as part of a teleologically ordered whole (which, as we will explain in Section III of this work, is a matter of the reflective use of the power of judgment).

In sum, the determining use of the power of judgment, on the one hand, provides the *a priori* concepts for the understanding (the categories), but on the other, set the limits for our knowledge and defines what is left undetermined in sensible experience for us to investigate with the reflective use of the power of judgment.

II Determining judgment and legal understanding

Having provided an overall picture of how the determining and reflective uses of the power of judgment operate, let us return to our apparently forgotten question: is it admissible to extend the distinction between determining and reflective judgments to legal understanding? To answer this question, it is necessary to analyze the legitimacy of extending each of these uses of the power of judgment to legal judgments separately. We will start with determining judgments.

As we have already seen, the determining use of the power of judgment allows us to have sensible experience. In every act of knowledge, two poles are confronted: one that is real, through which our senses are presented with a manifold of representations, and another that is ideal, through which that manifold is ordered according to concepts (categories) that are located in our understanding. The role of determining judgments is to apply the concepts that are located in the ideal pole to the manifold that is presented by the senses. That is, to subsume that which is provided by the real pole under the categories of understanding for us to experience things as phenomena. Kant says that this subsumption takes the name of synthesis (CPR, B130–131).

Having said that, it seems unlikely to extend the determining use of the power of judgment to legal judgments. Why? Because every legal decision, the main concern of this branch of knowledge, supposes an already synthesized world. In other words, if the world were presented to us as a chaos of un-synthesized sensible representations, no knowledge (and therefore no positive law) would be possible. In that sense, the determining use of the power of judgment is a condition of possibility of law and legal decisions (and consequently of legal philosophy). Must we, therefore, abandon our aspiration of reading legal judgments in light of determining judgment? Not necessarily, because we can still use a fundamental aspect of these types of judgments to analyze legal decisions, namely, the way they operate.

As we have already stated, when talking about the determining use of the power of judgment, we are referring to a situation where we have a given concept, and it must be applied to a particular case. In Kant's words, it is "a faculty for *determining* an underlying concept through a given *empirical* representation" (CJ, FI, 20:211). In that sense, this faculty operates in a logical/mechanical way. The process consists of merely *fitting* the given particulars under the generality of the concepts for obtaining a product: phenomenons. The equation, so to

speak, is already given, and the "job" left for the power of judgment consists merely in replacing the variables. Furthermore, these "given concepts", to be considered properly as scientifically obtained knowledge, must constitute, according to Kant, a self-sufficient and self-contained system which "can at the same time yield a touchstone of the correctness and genuineness of all the pieces of cognition fitting into it" (CPR A65/B90).

In short, determining judgments operate under the logic of what may be identified as the "classic scientific paradigm", a model of understanding for which, as Alvesson and Sköldberg (2009, p. 16) have pointed out, "science is ultimately intended to systematize data of our experience" and according to which

> something is put, set, placed or laid; this something is given facts or data, and the one they lie in front of is the researcher. Data are consequently something that exists, is *(already) there,* and the task of the researcher thus becomes to gather and systematize them. (Alvesson and Sköldberg, 2009, p. 17)

Now, even though operating under the logic of the scientific paradigm is necessary in order to acquire more knowledge of the sensible world (aspects of existence that can be perceived by one or more senses), it is important to recognize that other aspects of life, such as beauty, justice, the meaning of life, among others, cannot be explained through science. There is, however, a line of thought that is usually referred to as scientism, which affirms the universal applicability of the scientific method and approach. That is, for scientism, reality is constituted by a manifold of raw data that must be systematized into all-encompassing categories that thereupon allow us to explain that same reality by subsuming what is given under those omni-comprehensive concepts. In other words, scientism takes the way Kantian determining judgments operate and affirm that our whole reality operates and can be explained under that logic.

Having this in mind lets us explain how the determining use of the power of judgment may be extended to law and legal judgments. Though it cannot be denied that these branches of knowledge suppose that we are confronted with an already synthesized world (which is done, according to Kant, by determining judgments), there are legal thinkers that have stated that legal decisions operate in a similar, if not identical, way as the Kantian determining judgment. In other words, we believe that the logic behind the determining use of the power of judgment may be (and actually already has been) extended analogically to legal thought. We are thinking specifically in the line of thought that is commonly known as positivism.

Though many different thinkers and theories, each with their specificity, may be identified or subsumed under the concept 'positivism' (and many may feel uncomfortable or unjustly judged by this categorization), the concept 'positivism' generally refers to a line of thought that may be described as "any interpretation of science (and of theoretical knowledge in general), which applies an assumption equivalent to the statement by the well-known positivist Hempel, 'Science is ultimately intended to systematize data of our experience'" (Feyerabend, 1981, p. 16 seen in Alvesson & Sköldberg, 2009, p. 16). Put differently, positivism takes as the cornerstone of its methodology the Kantian assert made in his *Critique of Pure Reason* that, in order to be considered successful, every branch of knowledge must follow the secure course of a science (cf. CRP, BVII).

Now, how does positivist thought manifest itself in law? To give us an idea of legal positivism, let us review how Hans Kelsen, one of the great positivists in legal though, starts his famous *Pure Theory of Law*:

> The Pure Theory of Law is a theory of positive law. It is a theory of positive law in general, not of a specific order. [...] As a theory, its exclusive purpose is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is science of law (jurisprudence), not legal politics.
>
> It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory. (Kelsen, 2005, p. 1)

In other words, legal positivism limits its object of study to legal categories (or norms) and eradicates anything alien to it, such as ethics or politics. Even though Kelsen says that his approach to law is merely descriptive, his theory is actually prescriptive. He provides a theory of legal interpretation, as well as a way of understanding the legal phenomenon. Now, even though we do not intend to delve into Kelsen's thought, we will use some aspects of his theory as exemplary for explaining the logic behind legal positivism.

From a methodological point of view, positivism considers that nothing is left undetermined by legal norms. This is because the undetermined elements are not relevant for scientific knowledge. In Kelsen's words:

> uncritically the science of law has been mixed with elements of psychology, sociology, ethics, and political theory. [...] The Pure Theory of Law undertakes

> to delimit the cognition of law against these disciplines, not because it ignores the connection, but because it wishes to avoid the uncritical mixture of methodologically different disciplines (methodological syncretism) which obscures the essence of law and obliterates the limits imposed upon it by the nature of its subject matter. (Kelsen, 2005, p. 1)

In other words, legal positivism does not deny that there are extra-normative elements in the legal phenomenon, such as ethics or politics, but it does not consider them relevant for approaching law in a scientific manner.

From a hermeneutical perspective, legal positivism affirms that the procedure judges must follow when applying law is of a logical nature and functions mechanically. The judge must limit his labor to verifying if what happens in the factual or empirical world correlates with what is described in the legal norm. "That means, […] [if] the contents of actual happenings agree with a norm accepted as valid" (Kelsen, 2005, p. 4). The judge is seen merely as a "machine" entrusted with the responsibility of determining if the cases put before him are adequate or not with what is established in the legal categories (a procedure that sounds awfully similar to how determining judgments operate).

In conclusion, although legal philosophy supposes that there is an already synthesized world, synthesis which is made by the determining use of the power of judgment, it is possible to see that some legal theories, such as positivism,[9] have adopted the way the determining use of the power of judgment operates and stated that legal decisions work the same way. That is, they have limited the legal phenomenon to legal categories (norms) and declared that the application of law consists of a procedure of subsuming cases under the given legal categories—all of this in the name of the goddess of knowledge: science.

[9] We say "some legal theories", because, as Bobbio (2015, p. 88) explains, naturalist theories of law may also be considered as positive in their method if they affirm that, to apply law, judges must subsume the given cases under the ethical content of natural law.

III Reflective judgments and legal understanding

As we saw in the previous section, legal theories that adopt the way determining judgments operate as the sole paradigm for legal understanding dispose of everything alien to legal norms. This means getting rid of everything that belongs to the real pole of existence that cannot be determined/subsumed by the legal categories (exceptional cases, political circumstances, moral values, etc.). All this under the premise that these undetermined elements are not relevant for scientific legal knowledge (what we already identified as scientism).

This approach, however, seems to leave out a fundamental aspect of Kantian philosophy, namely, that we must assume that what is left undetermined by the determining use of the power of judgment is not merely chaotic, but must be governed by a certain unity (even if we, as limited human beings, are not able to grasp it). In Kant's words:

> since universal laws of nature have their ground in our understanding, which prescribes them to nature […], the particular empirical laws, in regard to that which is left undetermined in them by the forms, must be considered in terms of the sort of unity they would have if an understanding (even if not ours) had likewise given them for the sake of our faculty of cognition, in order to make possible a system of experience in accordance with particular laws of nature (CJ, 5:180).

In other words, if we are faithful to Kantian philosophy considered as a whole, we must acknowledge his quest in the *Critique of the Power of Judgment* for finding unity in what is left undetermined by determining judgment.

Before attending this topic, there is a need, nevertheless, to undertake another quest, namely, that of determining the legitimacy of extending the reflective use of the power of judgment to law. As already mentioned at the beginning of this work, in his *Critique of the Power of Judgment* Kant analyzes aesthetic and teleological judgments not because they are the only reflective judgments that can be found in existence, but because they are exemplary of how this type of judgment operates (Burnham, 2000, p. 40). The power of judgment operates in a reflective manner when the particular is given, and the universal is to be found. Let me explain this a bit with an example. Imagine you are presented with a landscape. After some contemplation, you arrive at the conclusion that it is the most beautiful landscape that you have ever seen. How did you arrive at that

conclusion? One way of looking at it is to argue that we have in our mind the concept of beauty and that the procedure followed by the viewer is one where he or she simply must check whether the landscape corresponds to that concept. That is, the viewer must verify if the particular case that is presented to him by the senses can be subsumed under the pre-given concept of beauty. The problem, however, is that, as human beings, we are unable to specify the conditions under which a phenomenon is beautiful or not. In other words, we do not have an already formed concept of beauty. The beauty of a phenomenon is presented to us as a feeling of complacency that appears almost spontaneously, and not as the conclusion of an intellectual procedure. In simple words, we do not know what makes a phenomenon beautiful, but when we are faced with beauty, we know it. The example given illustrates how reflective judgments operate. What is presented to us is an aspect of a phenomenon, its beauty (particular), for which we do not have a concept (universal).[10]

As we already explained, Kant uses the aesthetic judgments as an example of how reflective judgments operate. Therefore, it is not absurd to think that other types of judgments may also be considered as reflective. This leads us to our next question: Is it admissible to consider legal judgments as reflective? In what follows, the article will try to justify that legal judgments can also be considered as exemplary of how the reflective use of the power of judgment operates. It must be noted, however, that the analysis here is different from the one made of legal decisions and the determining use of the power of judgment. This is because, as already explained, positive law supposes that the determining use of the power of judgment has synthesized the world we are perceiving, so the study was limited to demonstrating that some legal theories have taken the way determining judgments operate and stated that law, and legal decisions, operate exclusively according to the same logic. Regarding the reflective use of the power of judgment, on the other hand, the article will justify that legal decisions are a kind of reflective judgment.

As mentioned at the beginning of this work, every legal decision starts with a particular case that needs a solution. For legal theories that follow the paradigm of the determining use of the power of judgment, what judges must do to solve cases is to apply the legal categories available in the respective legal system to

[10] Moreover, the concept of beauty, if it exists, is located beyond the limits of our knowledge. This has, at least, two consequences: (1) We are unable to grasp such a concept (and any attempt to specify the conditions under which a phenomenon is beautiful would be fruitless); and (2) we can merely assume subjectively that if such a concept exists, it shared by all of humanity (what Kant calls the *sensus communis*, CJ 5:180).

the given cases. Judges then, must "fit" the cases under the general and abstract description contained in positive laws. The problem of this statement, however, is that it does not seem satisfactory for explaining neither legal phenomenon nor the task that judges must undertake when making a legal decision. One of the main reasons for this is the following: as Gerhart Husserl has explained, not only man is thrown into time and history, but also law (Husserl, 1955, p. 21 in Larenz, 2001, pp. 137–138). In a similar sense, Emilio Betti explains in his *General Theory of Interpretation* that far from being situated outside of time and history, law is "connected with the living and thinking spirit in such a knot and way that conscience addresses itself to the values by an intimate necessity, developing according to its own law of autonomy" (Betti, 2015, p. 35). Even though a law is promulgated in a given historical time with the purpose of solving a concrete problem or regulating a certain aspect of life in a community, its existence endures through history. In other words, its lifetime does not end when the problems that gave birth to the law is solved.

This situation presents a difficulty to the judge: that of solving the tension between a general and abstract text that responds to a former historical and legal situation, on the one hand, and a new particular case that presents a current problem that needs solving, on the other. As Derrida puts it,

> [h]ow are we to reconcile the act of justice that must always concern singularity, individuals, irreplaceable groups and lives, the other or myself *as* other, in a unique situation, with [the] rule, norm, value or the imperative of justice which necessarily have a general form, even if this generality prescribes a singular application in each case? (Derrida, 1992, p. 17)

The solution that "determining legal theories"[11] provide to this problem (cases must be subsumed under legal categories) seems insufficient mainly because of two reasons: first because it turns a blind eye to the historical character of law and human existence by pointing out that particular cases have no influence on legal categories whatsoever. Second, because it assumes a narcissist attitude by believing that a legal category is self-sufficient in the sense that it provides a normative framework that is able to encompass each and every singularity of future cases. That is, it does not contemplate the possibility of an exceptional situation.[12]

[11] By this we mean a legal theory that states that law operates in a similar way to determining judgments.

[12] Bobbio (2015, p. 96) points out that these are the reasons why nobody still believes that the operations carried out by the judge to interpret the law are exclusively logical, that is, operations that aim to deduce certain conclusions using predetermined premises.

As a result, we have that the logic of the determining judgment, where the universal is given, and the particular must be subsumed under it, is not useful for explaining legal judgments. So, what if we proceeded the other way around? That is, what if we start from the particular case, with all its singularities, and then ascend to the universal? What if, as Rasch says, we "propose […] that we look at the emergence of norms as a supplement of legal decisions that retroactively legitimate these decisions by posing as presuppositions" (Rasch, 2004, pp. 96–97)? In that case, the singularities from the particular cases would not be considered merely as aspects that must be subsumed under legal categories, but rather as elements that contribute to the configuration of the meaning and scope of the law. In other words, the legal text does not remain untouched in the act of its application but is rather re-configured according to the singularities of the given case. As Gadamer puts it,

> A law does not exist in order to be understood historically, but to be concretized in its legal validity by being interpreted […]. This implies that the text, whether law or gospel, if it is to be understood properly—i.e., according to the claim it makes—must be understood at every moment, in every concrete situation, in a new and different way. Understanding here is always application. (Gadamer, 2013, pp. 319–320)

With this in mind, we can begin to understand why it is possible to support the idea that legal judgment operates in a reflective way.

The question that arises, however, is the following: if legal judgments operate reflectively, that is, they begin with the particular and then ascend to the universal, what is the universal towards which they are "heading"? One possible answer is to say that the end of the road is positive law, which then would be considered as the "universal" that is grasped in this reflective operation. The problem is that this solution would lead us directly to what we criticized of legal theories based exclusively on the way the determining use of the power of judgment operates, namely, that we would be stating that legal categories are all-encompassing, and allows us, through a reflective procedure, to explain the legal phenomenon completely. So, if the universal that is pursued in legal decisions are not the legal categories, what are we left with? To answer this question, let us go back a minute and review Kant's theory of reflective judgment. As Burnham explains, in Kant's pursuit of the universal for what is left undetermined by nature

> [i]t has to be assumed that nature—insofar as it is governed by a set of empirical laws—exists *as if* it were made for the human understanding.

> Nature is assumed to be purposive by our judgment, in the sense of being on the way toward something. This, then, is an *a priori* principle of judgment. Of course, we are talking about a principle of judgment here, not the understanding. So this principle does not provide *knowledge* about nature: thus the 'as if' above. (Burnham, 2000, p. 31)

Put differently, the universal that is sought by the reflective use of the power of judgment is one that our limited human minds cannot grasp and therefore constitutes no knowledge whatsoever. That is why we can only assume that, if such a universal exists, it is provided by a being of supersensible nature.

Let us now return to our analysis of the legal decision in light of reflective judgments and ask ourselves, do legal categories correspond to the universal that Kant argues is pursued by this use of the power of judgment? Clearly no, because legal categories, which are contained in legal texts, are entities of sensible nature that can be grasped by our human understanding. Moreover, a line of thought that has absolute faith in positive law assumes that judges are faced with a stable reality, where the unexpected is not a variable to be considered. The problem, however, is that reality is not how positivism assumes it to be. On the contrary, though it is true that there is a certain level of "normality" or "stability" in concrete life, it is also accurate to state that it is normal for the "abnormal", the "exceptional", to emerge and break the scheme of normality. So, what is the universal sought by legal judgment? If we follow Derrida's deconstruction, we must affirm that it is justice. Derrida states that

> [d]econstruction is justice. It is perhaps because law (*droit*) (which I will consistently try to distinguish from justice) is constructible […] The deconstructibility of law (*droit*), of legality, legitimacy or legitimation (for example) makes deconstruction possible. The undeconstructibility of justice also makes deconstruction possible, indeed is inseparable from it. The result: deconstruction takes place in the interval that separates the undeconstructibility of justice from the deconstructibility of *droit*. (Derrida, 1992, p. 15)

According to Derrida, law can be decomposed (deconstructed in Derrida's words), while the concept of justice cannot. Moreover, Derrida says that justice is an experience of the impossible, while law is an element that seeks to calculate, within its limited possibilities, the incalculability of justice (cf. Derrida, 1992, p. 16). In other words, law is an instrument that intends to constitute itself as a channel through which the unfathomability of justice can

emerge. Positive law does not pretend to tame justice, but rather is at the service of it. Therefore, given the fact that the concepts of law and justice cannot be considered as synonyms[13], applying a law through the operation of subsuming the cases under the legal description may lead to a decision that is "legal", but not necessarily just (Cf. Derrida, 1992, p. 16). In sum, Derrida's thought provides us with two important elements for our analysis: that law is commensurable, while justice is incommensurable. That is, positive law is prepared only to face a stable and calculable situation (that which the text describes), while justice is a more comprehensive concept that allows it to give a just solution even to the exceptional case which is not contemplated by positive law.

This analysis allows us to postulate, under firm ground, that justice is the supersensible concept towards legal decisions, considered as a type of reflective judgment, aim. This is because the given description of justice is consistent with Kant's account of the *purposiveness* towards which teleological and aesthetic judgments, the most radically exemplary types of reflective judgments, aim. Indeed, Kant states that through the reflective use of the power of judgment, we do not obtain knowledge of the purposiveness of nature. On the contrary, what we get constitutes a subjective judgment that is merely regulative in the sense that, as Guyer explains, "it does not furnish actual concepts of objects, but only certain goals for our system of concepts; and it prescribes these goals without any definite specification of what constitutes their fulfillment" (Guyer, 1997, p. 46). Put in simple terms, if we sustain that what is sought by legal judgment is the universal concept of justice, which due to its fathomless cannot be determined by our limited human mind and therefore constitutes a subjective principle that merely guides the activity of the judge, we are defending that legal judgments are of a reflective nature. Moreover, if we consider that legal judgments must take into consideration not only legal categories, but also all that is left undetermined by them (the singularities of particular cases), and seek a concept (universal) that unifies all of these elements (the manifold of experience), it seems reasonable to claim that they operate reflectively.

In conclusion, we believe that these characteristics allow us to argue that legal judgments are a type of reflective judgment, not only because of the way they operate, but also for how they tend (subjectively) towards the supersensible concept of justice.

[13] In a similar sense, see Bobbio, 2002.

IV Some conclusions

We began this journey by analyzing the rules of two games and stating that they were, in quite a limited sense, exemplary of how the determining and reflective use of the power of judgment operate. Then we made a turn and asked ourselves if it was possible to make a similar, though more extensive, analysis of legal judgments. The conclusions to which we arrived may be summarized the following way:

For legal judgments to be possible, it is necessary for us to be faced with an already coherent and synthesized world. That is, it is indispensable that the determining use of the power of judgment is already operating. That leads us to the conclusion that the readout that can be done of legal judgments in light of determining judgment is merely comparative or analogous. In that sense, we arrived at the conclusion that a particular line of legal thought, that is, legal positivism, takes the way in which determining judgments operate and affirm, on the one hand, that legal categories (or norms) exhaust legal reality, and that the task of the judges when applying law is merely that of subsuming cases under the given legal categories, on the other. We also criticized that this line of thought is not sufficient because, though it recognizes that there are some aspects of legal reality that are left out of the description of legal norms, it disposes of them in the name of science. In simple words, we criticized the scientism, as Herrera puts it[14], that is implicit in this line of thought.

Regarding the reflective use of the power of judgment and its relation to law, we justified that legal decisions could be considered as a type of reflective judgment. Therefore, in this case our analysis was not of a comparative or analogous character. We rather justified, based on the necessary consideration that judges must have of what is left undetermined by the legal norms and the pursuit of the unity of the legally-manifold through the supersensible concept of justice, that legal judgments can be considered as exemplary for how reflective judgments operate (we must insist, however, that they are not as exemplary as aesthetic or teleological judgments).

A question that this investigation leaves unanswered, however, is the following: If legal norms are insufficient for explaining and exhausting legal reality, should we not rather follow realist legal thought, eliminate laws, and banish the illusion

[14] See Herrera, 2011.

of legal certainty?[15]. Our answer is negative. This is because, as Derrida explains, though law is an element of calculation that is faced towards an incalculable demand (justice), it is preferable to have some stability in law than to be immersed in total chaos (Derrida, 1992, p. 16). To put it another way, it is better to have rules that aim towards legal certainty, even though this will never truly be accomplished, than to leave law and legal decisions in the hands of an unrestricted decisionism. Therefore, we can conclude that a "determining legal logic", so to speak, is necessary for law, but it does not exhaust the complexity that is involved in legal judgments.

Finally, we have only to point out that the problem with which legal judgments are faced, namely, that of the tension between a general and abstract rule and several particular cases each with their own singularity, is the same as that of understanding in general. Indeed, as Tarello points out, legal norms are nothing but a set of concepts, and concepts always have a degree of indetermination (Cf. Tarello, 2017, pp. 97–98) that is solved at the moment of their application to a particular case. Therefore, given the fact that we inevitably understand through language (on this see Gadamer, 2013, pp. 401–423), all understanding is presented to us as a tension between a rule (a concept) and a case to which it is to be applied.

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[15] Bobbio explains realist legal thought quite clearly in his *General Theory of Law* (see Bobbio, 2002, pp. 33–38).

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