JUSTIFICATION OF JUDICIAL DECISIONS FROM A NORMATIVIST AND INFERENTIALIST APPROACH

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The aim of this work is to analyse the notion of justification of judicial decisions. In a nutshell, the analysis is carried out in two directions: firstly, criticising the notion of justification of the deductive model –i.e. one of the most well-accepted theoretical models about judicial decisions; and secondly, proposing a new notion of justification, that has better theoretical performance. The main argument begins by making the deductive model explicit. The argument continues with Juan Carlos Bayón's objection to the deductive model. Bayón argues that this model is implicitly committed to a conception of rules and the application of rules that is afflicted by the rule-following paradox. The argument then shows that this paradox, in its most threatening version, contains two other problems that Bayón did not consider. The argument is further developed by specifying a conception of rules and the application of rules, that is in keeping with Wittgenstein-Brandom's normativist and inferentialist theoretical project, which in itself avoids these philosophical problems associated with this paradox. Finally, this article concludes by proposing a meta-theoretical criterion of justification, based on the avoidance of those problems, which is more rigorous and appropriate to be used in theories about judicial decision practices.

Keywords: Judicial Decisions, Justification, Juan Carlos Bayón, Ludwig Wittgenstein, Robert Brandom.

1. Introduction

The analysis offered in this article starts from the common assumption that underpins much of the investigations on judicial decisions. This point is premised on the assumption that in most modern legal systems there is a norm that requires judicial officials to provide reasons for their decisions. More precisely, in most modern legal systems there are some norms that broadly require: (a) that judicial officials ought to resolve the disputes that reach their courts; (b) that they ought to establish, in order to resolve them, particular decisions; (c) that each particular decision ought to have some reasons in support of it; (d) that judicial decisions, in a general sense, can be controlled and reviewed by other higher courts, except in the last step of the judicial hierarchy.

Having taken these practical demands into serious consideration, some legal philosophers have assumed the commitment to creating theoretical models of two different kinds. On the one hand, models that capture the nature of legal practices in which judicial officials take decisions –i.e. models that propose a descriptive explanation (i.e. a theoretical reconstruction), with a certain level of abstraction and generality, about the structure and functioning of judicial decisions. On the other hand, models that offer some normative or evaluative criteria to determine how judicial officials should substantiate their decisions and when judicial decisions are justified –i.e. models that propose some means to assess whether a particular decision is justified.

It is well known that the expression 'judicial decision', within practical and theoretical legal contexts, suffers from ambiguity. Among other senses, it can be used to refer (i) only to the particular conclusion of a judicial dispute or (ii) both to the particular conclusion and the reasons offered in its favour. This expression will be understood here in the second sense. The term 'justification', even when associated with this notion of judicial decision, also suffers from ambiguity. This term can be used to refer (i) to the reasons presented by judicial officials in favour of the particular conclusions –this notion of 'justification' is descriptive and similar to some meanings commonly associated with the term 'argumentation', 'foundation', 'rationale', 'motivation'– or (ii) to a criterion of correction that is established between the reasons and the particular conclusion –this notion of 'justification' is normative or evaluative and expresses a criterion that serves to determine whether or not judicial decisions are justified. The term 'justification' will be used here, unless it is specifically expressed otherwise, in line with its second sense[1].

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1 In this sense, the notion of justification of judicial decisions is defined in terms of its correctness, and the notion of *correctness* is defined in turn in terms of *rationality*.

Considering the practical demands and the theoretical commitment previously mentioned, the issue addressed in this article is precisely the criterion of justification for judicial decision practices. It is argued that the criterion of justification offered by the deductive model, which is the position that is criticized here, has a serious theoretical problem; basically, it suffers from the rule-following paradox[2].

However, in this article it is argued, moreover, that the rule-following paradox is not only composed of a single theoretical problem, as it is usually considered, but of three different and independent theoretical problems: (i) the infinite regress of interpretation, (ii) the gerrymandering, and (iii) the personal or subjective criterion of correction. For this reason, a new and adequate criterion of justification for judicial decisions is offered. This is the challenge faced in this work: to build a new and adequate criterion of justification for judicial decisions which is not committed to any of the problems of the rule-following paradox.

The main argument of this work has the following structure. In the first step, presented in the second section, the deductive model of justification of judicial decisions (that is considered one of the most well-accepted models by legal theorists of the analytical tradition) is made explicit. This model presents a simple and precise criterion of justification of judicial decisions which is based on deductive logic and thus on formal rationality.

In the second step, third section, Juan Carlos Bayón's objection to the deductive model is revisited. The objection suggests that the deductive model is committed to a conception of the nature of rules and the application of rules, through its criterion of justification, that is affected by the rule-following paradox that Wittgenstein outlined in his *Philosophical Investigations*.

In the third step, fourth section, it is shown that the rule-following paradox, in its most comprehensive version, in addition to the infinite regress of interpretation problem, it is composed of two other problems. The second problem has been presented more precisely by Kripke than Wittgenstein in Kripke (1982). This is a problem that is triggered by the "regularist" or "descriptivist" positions about the criteria of correction. The third problem has been presented more precisely by Brandom than Wittgenstein in Brandom (1994). This is a problem that is triggered by the "personal" or "subjective" positions about the criteria of correction.

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2 In this article I will not analyse in detail the particular positions committed to this or other models on judicial decisions, which have also been well-accepted; for the simple and only reason that I consider that this task cannot be adequately carried out in the extension of an article. Anyhow, I believe that many of the particular position of those other models also suffer from the rule-following paradox in the most threatening version, that will be presented in this article.

In the fourth step, fifth section, a manner in which these three thorny philosophical problems can be solved is presented. In short, a solution is offered –one that theories about judicial decisions could and should use– in response to what Bayón has discerningly pointed out as a substantial problem, the rule-following paradox. Specifically, the solution is composed of three parts. In the first place, the way in which it is possible, on one hand, to reject the "regulist" or "Platonist" position and, on the other hand, to block the infinite regress of interpretations. In the second place, the way in which it is possible, on one hand, to reject the "regularist" or "descriptivist" restrictions imposed by Kripkenstein's sceptical position and, on the other hand, to propose a technical normative vocabulary to explain the nature of norms. In the third place, the way in which it is possible, on one hand, to reject the "personal" or "subjective" positions and, on the other hand, to explain the social dimension of norms.

In the fifth step, in the sixth and last section, the proposal of this work is presented. A new criterion of justification is offered –i.e. a meta-theoretical notion of justification– that is more rigorous and less problematic, in conceptual and theoretical terms, than the notion with which the deductive model is committed. The idea on which this proposal is based consists of expanding the normativist and inferentialist philosophical project of (the second) Wittgenstein and Brandom –about the conceptual content of intentional actions and speech acts– to the content of the judgments expressed by the judicial official in their decisions. This theoretical project has developed a conception of rules and application of rules –basic elements in the explanation of the justification of a decision of any kind– which is not a victim of any of the three problems of the rule-following paradox. In this way, the hope is to build a new criterion of justification for judicial decisions, based on this conception of rules and applications of rules, which does not imply any of the problems of the rule-following paradox.

2. The Deductive Model

What I call in this article "the deductive model" is a theoretical proposal that offers a simple but precise logical criterion of deduction for assessing the correction of judicial decisions. The central claim of the deductive model expresses that a judicial decision is justified if, and only if, it can be reconstructed as a reasoning in which its conclusion is a necessary consequence of –or is logically implied by– a general legal norm, a description of the facts of the case, and at times certain definitions. One of the most emblematic formulations of the central thesis of this model is the following:

> The justification of a decision consists of reconstructing a logically valid infer-
> ence or reasoning, among whose premises there is a general norm and whose
> conclusion is the decision. The rationale of a decision is a general rule of which
> there is a case of application, i.e. the fact of the judicial case. Between the
> rationale (a general norm) and the decision there is a logical, not causal rela-
> tionship. A justified decision is one that follows logically from a general norm
> (in conjunction with other factual propositions and, sometimes, also analytical
> propositions) (Bulygin, 1966, p. 356)[3].

According to this model, a judicial decision is justified if, and only if, it can be recon-
structed as a deductive and normative reasoning structure composed of two prem-
ises and a conclusion. Firstly, a normative premise, called "premise of law", whose
content expresses a legal rule that the judge considers applicable to the particular
facts of a case. This premise is generally extracted from one or more legal sources.
Secondly, a descriptive premise, called "premise of facts", whose content expresses
a description of the facts of the case in question. This premise is generally extracted
from the evidence offered during the judicial process. The content of this premise
expresses a particular action, described by the judge, belonging to the general class
of actions provided by the rule. Finally, a normative conclusion, that resolves the
judicial controversy, whose content expresses the legal consequence provided by
the rule for the general class of actions with which the description of the fact is an
instantiation[4].

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3 The translation has been made by the author of this article. One subsequent but equally emblematic formulation
says: "we fully agree with the general approach [of Neil MacCormick] and the main thesis of his article, such as: i)
the legal reasoning that aims to show that a decision or a claim are justified according to current law is essentially
deductive or, at least, can be reconstructed as a logical inference in which, based on two types of premises, normative
and factual, it reaches a conclusion that states that certain legal consequences are applicable to a particular case. This
inference shows that the decision to apply those consequences to this particular case is legally justified" (Alchourrón
& Bulygin, 1989, p. 303). This position has also been held in other works such as MacCormick (1978, p. 35); Alchourrón
& Bulygin (1991, p. 356, p. 303); Moreso, Navarro & Redondo (1992, p. 257); Redondo (1996, p. 251), (1999, pp. 150-151);
Rodriguez (2002, p. 252).

4 The problem behind this position is none other than determining whether deductive logic works only with descriptive
statements (truth-false apt) or also with normative statements (no truth-false apt). In other words, it is the so-called
Jörgensen dilemma (1937, pp. 288-296), which states that: either a logic of norms is not conceptually possible, because
the notion of inference and the propositional connectives are defined in terms of truth, and (as is generally assumed)
truth does not operate on norms; or a logic of norms is conceptually possible, but then the concepts of inference and
logical connectives cannot be defined in terms of truth. However, taking the second horn of the dilemma, considering
some general intuitions about the way we actually reason (Cf. Von Wright, 1957, preface; Alchourrón, 1995, pp. 63-
64), theoretical foundations for a characterization of logical inferences and their connectives for norms, through an
abstract notion of logical consequence, following the rules of introduction and elimination in contexts of deducibility
(Cf. Gentzen, 1934, pp. 176-210; Belnap, 1962, pp. 130-134), have been properly developed (Cf. Alchourrón & Martino,
1990; Alchourrón, 1995).

According to this position, for example, for this reasoning to function as a deductive inference, the premise of law should contain a universal normative statement of general classes, whose content expresses a universal and general class norm. The premise of the facts should contain a particular descriptive statement, whose content affirms that there is a particular object that has the property established in the general class. In this way, a normative conclusion that contains a particular normative statement can be inferred deductively, according to the predicate logic vocabulary, starting from a normative premise of law and from a descriptive premise of facts. This last statement prescribes the inclusion of a particular action in the general class of actions established in the universal norm. An example of this kind of reasoning could be the following: anyone who has committed a homicide ought to be sentenced to be in prison for 8 to 25 years; Gianfranco Ferrari has committed homicide; Gianfranco Ferrari ought to be sentenced to be in prison for 8 to 25 years[5].

Therefore, the deductive model offers an almost exclusively normative and evaluative position to assess judicial decisions, to determine whether or not they are justified, by means of a simple yet precise logical deductive criterion, which is committed to a formal conception of rationality[6]. However, for the purpose of the argument to be developed in this article, and according to Bayón's objection as well, the deductive model could be extended to a model that, in addition to a purely logical criterion of deduction, incorporates: (i) the distinction between internal and external justification, (ii) an explanatory reconstruction of some other intermediate decisions involved in judicial decisions, and (iii) a logical criterion of induction for assessing the internal justification of the decision of facts[7].

The well-known distinction between "internal justification" and "external justification" has been drawn by Jerzy Wróblewski, in the following way:

> Internal justification deals with the validity of inferences from given premises
> to legal decision taken as their conclusion. The decision in question is inter-

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[5] This is an example of the kind of deductive reasoning called "normative syllogism". However, the standard model position also accepted two other kinds of deductive reasonings, namely, "normative *modus ponens*" and "normative *modus tollens*". An example of the normative *modus ponens* structure could be: a) for all x, if x has committed homicide, x ought to be sentenced to be in prison for 8 to 25 years; b) x has committed homicide; c) then, x ought to be sentenced to be in prison for 8 to 25 years. An example of the normative *modus tollens* structure could be: a) for all x, if x ought to be sentenced to be in prison for 8 to 25 years, x has committed homicide; b) x has not committed homicide; c) then, x ought not to be sentenced to be in prison for 8 to 25 years.

[6] I say "almost exclusively" because this model presents a descriptive or explanatory reconstruction of the judicial decisions that is overly simplified and bears too little information about all the characteristic aspects of those practices.

[7] In Chiassoni (2007) and Canale (2013) there is an analysis in which the transition from the strict deductive model to the extended deductive model can be observed. In Canale (2013) there is also an analysis of other lines of investigation of non-analytical traditions regarding judicial decisions.

nally justified if the inferences are valid and the soundness of the premises is not tested. (…) External justification of legal decision tests not only the validity of inferences but also the soundness of premises. The wide scope of external justification is required especially by the paradigmatic judicial decision because of the highest standards imposed on it (Wróblewski, 1971, p. 412)[8].

In Wróblewski's view, the notions of internal and external justifications are related not only to the particular conclusion of the controversy but also with (at least) two other judicial decisions, namely, "the intermediate decision of law" and "the intermediate decision of facts" (Wróblewski, 1971, pp. 412-417). He understood judicial decisions as chains of reasoning, where each link has a series of premises and a conclusion, and where to determine whether a decision is justified, each link should be assessed internally –i.e. the inferential relationship that goes from the premises to the conclusion– and externally –i.e. the soundness of each of the premises that supports the conclusion[9].

Therefore, the central claim of this extended deductive model would be that a judicial decision is justified if, and only if, the following conditions are fulfilled: (i) the particular conclusion is internally justified (i.e. if the inferential relation that goes from the premises to the conclusion is *deductively valid*) and externally justified (i.e. if the premises are sound according to some criterion of correctness)[10]; (ii) the intermediate decision of law is internally justified (i.e. if the inferential relation that goes from the premises to the conclusion is *deductively valid*) and externally justified

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8 Before Wróblewski, some theorists of judicial decisions, such as Perelman 1958 and Toulmin 1958, had entirely rejected the deductive model and developed some other theories that they suggested accounted for other aspects of judicial decisions. In general, the reasons why they had rejected such a model were as follows: a) because they considered that it obscured a large number of other decision-making activities; b) because it obscured a wider variety of reasoning strategies that were involved; or c) because deductive logic does not apply to the inference between normative premises and conclusion as in this kind of reasoning. A detailed analysis of these positions is found in Atienza 1991. Instead Wróblewski (1974, p. 287 and 1975, pp. 119-120) maintains the position that establishes a criterion of logical deduction to assess the correctness of the internal justification of judicial decisions. However, Wróblewski (1986, p. 214) establishes a much less strict criterion, which is based on the requirement of internal coherence, between the premises and the particular conclusion.

9 Wróblewski's proposal stimulated the general interest of most analytical legal theorists vis-à-vis the identification of the relevant intermediate decisions that judicial officials generally adopt explicitly or implicitly; and regarding the incorporation of these decisions into the deductive model to create a model with greater explanatory capacity, and with an adequate criterion of justification regarding this broader picture of judicial decision practices. See, among others, MacCormick (1978); Alexy (1978); Atienza (1991).

10 The issue of the determination of the criteria of correctness for the premise of law and the premise of facts of judicial decisions has been extensively debated without peacefully accepted results. For example, criteria of correctness of very different kinds have been proposed regarding the premise of law, such as legal validity, equity, fairness, justice, etcetera (Comanducci, 1999, pp. 52-58); while criteria of correctness based on different notions of truth, understood in turn according to various conceptions or theories about truth, have been proposed regarding the premise of facts.

(i.e. if the premises are sound according to some criterion of correctness)[11]; and (iii) the intermediate decision of facts is internally justified (i.e. if the inferential relation that goes from the premises to the conclusion is *inductively probable*) and externally justified (i.e. if the premises are sound according to some criterion of correctness)[12].

Therefore, the extended deductive model is committed to a broader kind of rationality, that is, a logical rationality that works with both deductive and inductive reasonings, and not only with *formal validity*, as in the deductive reasoning, but also with *probability*, as in the inductive reasoning. However, for both deductive and inductive reasoning, there is no other rational way than to establish a criterion (or standard) –i.e. deductive validity, on the one hand, and inductive probability, on the other hand– according to which it can be properly argued that a certain case is an instance of that criterion. This is the point that will be analysed in the next section.

3. Juan Carlos Bayón's Objection

Juan Carlos Bayón has carried out an analysis of inestimable importance for the theoretical scenario of the justification of judicial decisions in a brief but powerful article entitled "*Bulygin and The Justification of Judicial Decisions: The Surprising Part*" (2007)[13]. In this work he presents a profound analysis of the conception of rules and the application of rules with which the deductive model is implicitly committed through its criterion of justification. I believe that this work represents one of the best-directed advances in the search for a more rigorous and appropriate criterion of justification for theories about judicial decisions.

According to Bayón, the idea of justification that the deductive model uses in its theoretical proposal can be seen as the corollary of the principle of universality, which

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11 It is often held that the intermediate decision of law should be reconstructed as deductive normative reasoning. However, the determination of the criteria of correctness for the premises of this decision has also been extensively debated without peacefully accepted results. For example, Wróblewski has proposed a broad criterion that considers the adequacy of the premises with positive legal norms, fragment of the sources' discourse, interpretative directives, fragments of ideology of the judicial function, ethical-political positions of the judicial officials, etc. (Wróblewski, 1971, p. 132, pp. 413-417; 1975, p. 121; 1989, pp. 240-253; Cf. Perelman, 1978, pp. 425-426); and Alexy has proposed a criterion of adequacy of these premises with the rules of rational practical discourse specifically adapted to the legal field (Alexy, 1978, p. 149 ff.).

12 It is also often held that the intermediate decision of facts should be reconstructed as probative reasoning that is carried out in two conceptually diverse phases. In the first phase, as an abductive reasoning. This is an inductive inference in which premises are composed of particular facts and in which the conclusion is composed of another particular fact that is presented as an explanatory hypothesis, with a certain degree of probability, about the proven facts (Cf. Tuzet, 2006). In the second phase, as a descriptive syllogism or modus ponens. This is a deductive inference. So, according to the extended deductive model, the intermediate decision of facts depends on a deductive inference as well.

13 The original title is: "*Bulygin y la justificación de las decisiones judiciales: la parte sorprendente*". The following quotes of Bayón's article have been translated by the author of this paper.

in turn is assumed to be a basic condition or requirement of a general conception of rationality. This principle plays a central role regarding the possibility of discerning between correct and incorrect judgments in any given field or context.

> Because to justify a judgment requires indicating the rationale of it, giving reasons; and since it is a matter of mere rationality to judge in the same way any other assumption with similar relevant aspects, giving reasons would always imply the need to transcend the particularity of a case: it would imply a commitment to a general rule, to a norm (only in light of which it would make sense to say that the concurrence of a certain property constitutes a reason). From all this, it would finally follow that the idea of a reason as something intrinsically and irreducibly particular would constitute a nonsense (Bayón, 2007, p. 147).

Bayón holds, as the deductive model presupposes, that the justification of a judgment cannot be anything other than the correct application of a general norm to a specific case. However, he argues that the deductive model also incorporates a conception of rational justification (a criterion of correction) that goes well beyond the latter thesis that he called "minimum universalism". This model goes further, he said, in the sense that implies a certain image of the "normative competence" –i.e. a certain image of the nature of norms and the correct application of norms– that should be made explicit and analysed in detail.

> However, the substantive conception of rational justification, which incorporates the deductive model, goes well beyond that minimal universalism that is summed up in the assertion that the justification of every judgment depends on norms: what seems to me that also implies –and it is here, not before, where I think it is not plausible any more– a certain image of the norms, of what it is to "follow them" and, consequently, of the way in which it is necessary to proceed to justify a judgment –i.e. to argue that something is or is not a correct application of a norm. According to this image or conception –which Wittgenstein called "platonic", "intellectualist" or "rules as rails"– the normative competence would go through the representation of a propositional content that can be expressed in a formulation and that specifies which applications are correct by articulating a sufficient criterion of application; and to determine what the rule requires –and, therefore, to justify to oneself or to others that something is or is not a correct application of a rule– would involve to use inferentially such a formulation as a major premise of a subsumptive reasoning (Bayón, 2007, p. 148).

So, Bayón does not agree specifically with this conception of the normative competence and his argument is composed of an excellent reconstruction and extrapolation of the infinite regress of interpretations problem that Wittgenstein described in *Philosophical Investigations.*

> To make a judgment, in any context, is nothing more than to classify a particular object, that is, to subsume it into a concept; but it is not possible to articulate and make explicit ("codify") a set of rules that determines exhaustively when the particular is an instance of the universal, because that would be as much as articulating meta-rules for the application of rules, with the consequent reproduction of the problem regarding the application of meta-rules. In short, the judgment is irreducible to an algorithm because it is not possible, without an infinite regress, the complete formulation of explicit criteria for the judgment (Bayón, 2007, p. 148).

Subsequently, Bayón offers a way to avoid the infinite regress problem, in terms that Wittgenstein offered before, and to begin an explanation of our normative competence –upon which an adequate explanation of the justification of judgments of any kind depends on.

> However, from the fact that norms are not exhaustively codifiable, it does not follow that we do not apply norms in our judgments, that we do not have competence to distinguish correct applications of norms from incorrect ones, and that there is no *argumentative way* to justify the correction of our judgments. It follows, simply, that applying norms is not applying *representations* of norms; that normative competence cannot be understood in *computational* terms, but as a practical skill, such as the "mastery of a technique"; and that although a judgment is correct when a rule is applied (and there is no other intelligible sense in which one can say that it is correct), *to show* that it is correct, to justify its correction, consists essentially of giving reasons regarding the relevance or irrelevance of features or properties of the particular object in view of analogies and differences with paradigmatic cases, where recognition of those as significant and of these as paradigmatic is immanent to the "mastery of the technique" that normative competence implies (Bayón, 2007, p. 149).

Bayón's objection affects the conception of normative competence that is found, precisely, at the meta-theoretical explanatory level regarding the theoretical positions of the deductive model about the justification of judicial decisions. This theoretical model implicitly incorporates, through its criterion of justification, this conception

of normative competence that falls into the rule-following paradox. In this sense, the objection is placed precisely at the meta-theoretical explanatory level because it challenges the general conception with which such a criterion of justification – which is a central element of its theoretical normative and evaluative positions– is implicitly committed. In this way, Bayón's objection functions as the touchstone for the construction of a new criterion of justification for theories of judicial decisions. Firstly, it gives us the possibility of clearly identifying a problematic philosophical complexity (i.e. the rule-following paradox). Secondly, it shows the first problem of the following-rule paradox. Thirdly, it shows the solution for this problem. By performing these tasks, it paves the way for successive steps in this explanatory line of thought –as it offers a conceptually more rigorous way to explain the normative competence from which an adequate notion of justification of judicial decisions can be offered.

4. Three Different Problems

In this section, the most powerful version of the rule-following paradox, which includes two other problems, will be exposed. The second problem is the gerrymandering, in Brandom's terminology, and it is triggered by the "regularist" positions. The third problem is the individual or personal criterion and it is triggered by some kind of "subjectivist" positions.

The first problem has already been exposed here, according to Bayón's formulation. In other words, the infinite regress of rules (or interpretations) problem, affects the notion of rules and consequently the application of rules, when they are understood as sufficient criteria of correctness based only on the explicit formulation of a rule. This is "the regulist position".

The problem for this position lies specifically in the case in which it is understood, correctly, that rules are criteria of correctness to particular judgments but, incorrectly, that they are nothing more than explicit linguistic formulations of those criteria. Because to determine the content of a rule (and to identify the rule), we ought to interpret the rule (i.e. its explicit linguistic formulation); but once this is done, the content of the rule that has been determined (i.e. which is another explicit linguistic formulation) can be interpreted again offering a new interpretation or content (and a new explicit linguistic formulation) for the same rule. For this reason, if we understand that a rule is nothing other than a sufficient criterion of correctness based only on an explicit linguistic formulation (or even mental intellection) of a judgment, then this criterion inevitably falls into an infinite regress of the interpretations of linguistic expressions (Wittgenstein, 1953, §191, §198, §201c, §218).

The second problem has been firstly identified by Wittgenstein (1953) and secondly explained more carefully by Kripke (1982). However, while Wittgenstein offered a correct solution to this problem, Kripke did not.

Kripkenstein –as Kripke's sceptical interpretation of Wittgenstein's reflections is often called– has presented the rule-following paradox in a more comprehensive manner than Wittgenstein. In Kripkenstein version, it is possible to see clearly that the theoretical explanation of normativity not only faces the previous problem but also the following one.

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here (Wittgenstein, 1953, §201a).

Kripkenstein develops his argument from this paragraph through the use of an imaginary example related to the mathematical function "plus" or, in technical terms, "addition". The example shows that there are no past facts that determine whether when we use the word "plus" or the symbol "+", we are applying the rule of addition or another rule. For example,

> In the past I gave myself only a finite number of examples instantiating this function [plus or addition]. All, we have supposed, involved numbers smaller than 57. So perhaps in the past I used 'plus' or '+' to denote a function which I will call 'quus' and symbolize by 'Å'. It is defined by: $x Å y = x + y$, if $x, y < 57$; and $Å = 5$ otherwise. Who is to say that is not the function I previously meant by '+'? The sceptic claims (or feigns to claim) that I am now misinterpreting my own previous usage. By 'plus', he says, I always meant quus. (Kripke, 1982, pp. 8-9).

Kripkenstein's argument demonstrates that there is no past application or use of the alleged rule that really determine a rule, because any past application or use can be made compatible with another rule, as the example of addition shows (Kripke, 1982, pp. 12-21). In other words, the problem that Kripkenstein evidences consists of the predicament that there will always be many different ways of extending the previous behaviour to present or future judgments, or to use Wittgenstein's expression, many different ways of "following in the same way", because any finite number of cases are similar to each other in an infinite number of aspects (and different from each other in infinite aspects).

I consider this argument, together with other authors (Wilson, 1998; Weir, 2007; Brandom, 1994), to be both independent and complementary to the argument of infinite regress of interpretations. It is independent because one might not be committed to the explanation of rules as the explicit formulation of a sufficient criterion of correctness but might be committed to the explanation that what determines the rules is only the past behaviour of the participants of that practice, and vice versa. It is also complementary because even if we try to determine the rule without any explicit formulation, we have to appeal, according to this argument, to some previous application of the supposed rule based on a set of judgments –grouped together in a pattern– which supposedly would determine the relevant behaviour. Nevertheless, any past judgment that is proposed as an instantiation of the relevant behaviour (i.e. the pattern that relates previous judgments with a new one) can be made compatible with other behaviours.

The criteria of correctness adopted by Kripkenstein has two elements. The first consists of appealing to the previous behaviour of participants of a certain community manifested in social practice; therefore, avoiding the infinite regress of interpretation problem. The second consists of appealing to the previous and regular or irregular behaviour of the participants of the social practice to assess a judgment as correct or incorrect; therefore, trying to incorporate an adequate criterion of correctness. In this way, the distinction between correct and incorrect judgment is drawn with regard to a parallel distinction between regular and irregular behaviour, according to some pattern of regularity. This is "the regularist position".

The problem for this position arises specifically in the identification of the pattern of regularity, because in the task of identifying the criterion of regularity a problem known as the "gerrymandering problem" appears. According to this problem, in order to establish any criteria of correctness based on the relevant previous behaviour of a community, we ought to individualise the relevant previous behaviour or, better still, the aspects that comprised the relevant prior behaviour. However, this can only be done by manipulating in some way, arbitrarily, the different aspects that would possibly comprise the relevant previous behaviour[14]. In other words, any behaviour has a large number of different aspects, and to establish the aspects that comprise the relevant one there is no other option than to crop reality in some way, which can

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14 The expression ̈gerrymandering ̈ originally comes from the political practice of the United States of America and is currently widely used in the contexts of science and political philosophy. This term was coined to refer to the action of a North American politician who had manipulated the electoral constituencies of one of the states in order to improve the chances of his party in an election. In the mentioned contexts, this term is generally used to express the disapproval of a manoeuvre that manipulates reality – uniting, separating, dividing, etcetera – with the purpose of producing some desired effect.

then mean it has the potential to be made compatible with aspects of other behaviour. Therefore, the regularist position fails to offer an adequate, non-circular, criterion of correctness (Brandom, 1994, pp. 26-30; McDowell, 1984, p. 341 ff.).

Kripkenstein did not consider the answer that Wittgenstein himself offered to this problem and inferred from the gerrymandering problem some sceptical consequences, that Wittgenstein himself blocked (Wittgenstein, 1953, §201b). According to Kripkenstein, it follows from the gerrymandering that language and communication become unintelligible (Kripke, 1982, p. 62), and that the attributions of meaning themselves become meaningless (Kripke, 1982, p. 83). Kripkenstein came to these consequences, because after identifying and explaining correctly this problem, he did not offer a correct solution to it, because he limited the explanation of normativity to a vocabulary of causal or empirical notions, that allow us to only explain the factual dimension of norms. This is an unnecessary restriction for an indispensable theoretical vocabulary to explain general normativity. Thus, Kripkenstein analysis failed because he did not consider, as Wittgenstein did, the possibility of explaining general normativity through a vocabulary of genuine normative notions, that allows us to explain not only the factual dimension, but also the normative dimension of norms (McGinn, 1984; McDowell, 1984; Boghossian, 1989; Wilson, 1994; Brandom, 1994).

The third problem has been presented also by Wittgenstein. This problem arises when the criterion of correctness for judgments depends only on what one person, individually, considers correct or incorrect. The criterion of correctness cannot appeal only to the personal consideration of someone for assessing a particular judgment as correct or incorrect. This would make the idea of mistake unintelligible. Because what one person considers a mistake ends up being a mistake (Wittgenstein, 1953, §206).

This problem is also independent and complementary of the other two problems. It is independent because it arises even when the problem of the regress of infinite of interpretation is avoided, appealing to its implicit manifestation in social practice; and even when the problem of gerrymandering is avoided, drawing on genuine and non-circular normative notions for the criterion of correctness. This problem arises, even in that case, if the criterion of correctness is not independent of one's own consideration (or assessment) about what is correct or incorrect (Brandom, 1994, p. 37). Therefore, this subjective position –i.e. which reduces rules to individual or personal considerations or assessments– fails to offer an adequate, or intelligible, criterion of correctness.

5. Three Different Solutions

In this section, a way in which every one of these three thorny philosophical problems can be solved is presented. This is Wittgenstein-Brandom's theoretical proposal, which has been developed firstly by Wittgenstein mainly in (1953), and secondly by Brandom mainly in (1994) but also in many other books and articles.

Wittgenstein-Brandom's theory offers, after rejecting the unnecessary restriction implicitly imposed by Kripkenstein to the normative explanatory vocabulary, three conditions of adequacy to explain the nature of social norms and the application of social norms, each of which provides a distinction to deal with one of the problems presented under analysis. Specifically, the theory offers an alternative criterion of correctness (non-intellectualist or non-Platonist, non-circular, non-subjectivist) based on genuine normative notions, namely, *practical attitudes*, *normative statuses* and *social norms* (Brandom, 1994, pp. 18-66)[15].

The first condition establishes a non-circular means to distinguish between correct and incorrect judgments. This condition is constructed from the gerrymandering problem. This problem suggests that we should not be committed to regularistic position, but rather to a normative position, based on a vocabulary of genuine normative notions that allow us to determine, without circularity, whether a judgment has been made correctly or incorrectly. This is the "condition of normativity".

The distinction that is proposed in order to overcome this problem is one that lies between *judgments* – i.e. performed speech acts – and *normative statuses* of the participants towards those judgments – i.e. expressed commitments and entitlements. This allows us to make a distinction between what is done in practice – i.e. the *performance* of a judgment – and what ought to be done in practice – i.e. the *correct* performance of a judgment (Cf. Brandom, 1994, p. 27).

Brandom defines the normative statuses based on the Kantian principle of practical autonomy, which states that the authority of norms over participants is derived from their *attitudes* of *recognition* (or *acknowledgment*) toward the norms that compel them. This means that the binding character of norms comes just from the norms that they recognize or acknowledge.

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15 Brandom's theory systematizes Wittgenstein's philosophical project. Brandom produces an innovative and radical theory of intentional content (conceptual content, in a broad sense) that begins with a characterization of social practices, in the terms of linguistic and discursive (or argumentative) practices. Then continues with (in contrast to other semantic theories) an explanation of the pragmatic dimension of content (i.e. pragmatic significance) in terms of normative, social and historical interrelations among participants (in contrast to the pragmatic theories which explain it in terms of speaker's intentions). The theory then follows with an explanation of the semantic dimension of content (i.e. semantic content), in terms of inferential relations among pragmatic significances (in contrast to the semantic theories which explain it in terms of representations).

> As natural beings, we act according to rules. As rational beings, we act according to *conceptions* of rules. (…) The rules do not immediately compel us, as natural ones do. Their compulsion is rather mediated by our *attitude* toward those rules. What makes us act as we do is not the rule or norm itself but our *acknowledgment* of it. It is the possibility of this intervening attitude that is missing in the relation between merely natural objects and the rules that govern them (Brandom 1994, 30-31). It must be possible to distinguish the attitude of acknowledging *implicitly* or *in practice* the correctness of some class of performances from merely exhibiting regularities of performance (Brandom, 1994, p. 32).

In fact, the *attitudes* of *recognition* (or *acknowledgment*) of the participants are not only towards the norms that they recognize or acknowledge, but also towards the other participants, who they recognize or acknowledge, as members of the community. According to this view, each participant has the autonomy to be bound by norms in two different ways. On the one hand, each participant *is responsible* or *committed* to the other participants for their performances. On the other hand, when a participant makes a performance, she is granting *authority* to the other participants, because they are the ones who decide whether or not to grant an *entitlement* for that commitment to the participant (Brandom 1994, pp. 159-160)[16].

The second condition establishes an adequate means to discern between correct and incorrect judgements which is not committed to the infinite regress of interpretations problem. This condition is constructed from that problem (Wittgenstein, 1953, §191, §198, §201c, §218). Wittgenstein has taught us, and Bayón has reminded us, that the notion of norms should be characterised as some sort of practical matter which is concretised or manifested in the social practice. It should not be committed to the regulist position about norms, but to a pragmatist position. This is the "pragmatist condition".

> This was our paradox: no course of action could be determined by a rule, because every course of action can be made out to accord with the rule. The

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16 Brandom (2000) explains this point by linking it with the rationalist and expressivist principles of his pragmatist project: "It is a *rationalist* pragmatism, in giving pride of place to practices of giving and asking for reasons, understanding them as conferring conceptual content on performances, expressions, and states suitably caught up in those practices. (…) And it is a rationalist expressivism in that it understands *expressing* something, making it *explicit*, as putting it in a form in which it can both serve as and stand in need of *reasons*: a form in which it can serve as both premise and conclusion in *inferences*. Saying or thinking *that* things are thus-and-so is undertaking a distinctive kind of *inferentially* articulated commitment: putting it forward as a fit premise for further inferences, that is, *authorizing* its use as such a premise, and undertaking *responsibility* to entitle oneself to that commitment, to vindicate one's authority, under suitable circumstances, paradigmatically by exhibiting it as the conclusion of an inference from other such commitments to which one is or can become entitled" (Brandom, 2000, p. 11).

answer was: if everything can be made out to accord with the rule, then it can also be made out to conflict with it. And so there would be neither accord nor conflict here (Wittgenstein, 1953, §201a). It can be seen that there is a misunderstanding here from the mere fact that in the course of our argument we give one interpretation after another; as if each one contented us for at least a moment, until we thought of yet another standing behind it. What this shows is that there is a way of grasping a rule which is not an interpretation, *but which is exhibited in what we call "obeying the rule" and "going against it" in actual cases* (Wittgenstein, 1953, §201b)[17].

The distinction that is proposed as a means of overcoming this problem is that between *normative statuses* –i.e. commitments and entitlements– and *normative attitudes* –i.e. undertakings and attributions.

> Kant's principle that we are the ones who act not only according to rules but according to a conception of them is the claim that we are not merely *subject* to norms but *sensitive* to them. This principle has been taken over here by saying that we are characterized not only by *normative statuses,* but *normative attitudes* –which is to say not only that our performances are correct or incorrect according to various rules but also that we can in our practice treat them as correct or incorrect according to various rules. Using 'assessment' to mean an assignment of normative significance –in the most basic case taking as correct or incorrect– the point may be put by saying that Kant's principle focuses demarcational interest on the normative *attitudes* exhibited by the activity of *assessing*, rather than just on the normative *statuses* being *assessed* (Brandom, 1994, p. 33).

Normative attitudes are presented in two different ways: as *acknowledging* (*or undertaking*) of normative statuses –for example, an explicit undertaking of one's

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17 Italics have been introduced by the author of this article. See also Wittgenstein 1953, §199, §202. Brandom said: "The conclusion of the regress argument is that there is a need for a *pragmatist* conception of norms –a notion of primitive correctness of performance implicit in *practice* that precede and are presupposed by their explicit formulation in *rules* and *principles*" (Brandom, 1994, p. 21). "That form is intelligible only against a background that includes norms that are *implicit* in what is *done*, rather than *explicit* in what is *said*. At least the norms involved in properly understanding what is said by rules, or indeed in properly understanding any explicit saying or thinking, must be construed as norms of practice, on pain of vicious regress" (Brandom, 1994, p. 30). The regulist position presupposed the idea that the institution (or constitution) of norms and the application of norms are distinct and sequential phases in a process requiring both. First one fixes the content of the norm, and then one looks to see which applications of them are correct, given that content. The pragmatist position, however, hold that the institution and application of norms should be understood as two simultaneous aspects of the same phenomenon rather than two diverse and consecutive phases. Institution and application of norms are, indeed, two aspects of the same phenomenon, rather than two different phenomena.

own commitment– and as *attribution* of normative statuses (those can be done explicitly or implicitly) –for example, an attribution of an entitlement to one of the other participants[18].

Brandom sometimes uses the adjective "normative" to characterize also these *attitudes*, but rather they are *practical* attitudes – i.e., they belong to social practice, to the participant's activities – which allows to relate a participant's *judgment* with the *normative statuses* that she recognizes to herself and the other participants recognize to her in the course of practice. Practical attitudes are manifested in practice in the way in which participants modify (guide and criticize) their behaviour or they respond differently to a judgment. In other words, practical attitudes are manifested in the way in which the participant who made the judgment treats herself as committed to or in the ways that the other participants treat the participant who made the judgment, explicitly or implicitly, as entitled to the commitment that she signed when she made the judgment[19].

Practical attitudes, unlike normative statuses, belong to the factual and causal order: practical attitudes are both caused and causative. Practical attitudes are manifested in the behaviour of the participants during the course of the social practice, but normative statuses are not manifested in the world or, better said, they are not manifested *independently* of the practical attitudes of the participants.

> Deontic status of the sort to be considered here are creatures of practical attitudes […]; they are not part of the natural furniture of the world. Rather they are social statuses, instituted by individuals attributing such statuses to each other, recognizing or acknowledging those statuses (Brandom, 1994, p. 161).

The institution (or constitution) of norms and the determination of the content of norms is grounded in the factual and causal character of practical attitudes (Brandom, 1994, p. 47, p. 292). There is nothing other than practical attitudes in the course of the social practices of recognizing (or undertaking) and acknowledging commitments and entitlements. As Brandom said: "all the facts concerning normative *attitudes* settles all the facts concerning normative *statuses*" (Brandom, 1994, p. 47).

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18 As Brandom said: "The normative house has many mansions. The particular norms of concern in this work are *discursive* normative statuses, the sort of commitments and entitlement that the use of concepts involves. These norms, it will be claimed, are instituted by *social* practices. These are practices that incorporate the distinction of social perspective between two kinds of practical attitudes one can adopt toward a commitment: *acknowledging* it (one-self) and *attributing* it (to another)" (Brandom, 1994, p. 55; pp. 157-166).

19 Practical attitudes of the participants are attitudes of assessment and treatment judgments, that are not necessarily made explicit in the form of linguistic expressions. They are exhibited by the way of assessing and treating judgments as correct or incorrect, according to a norm; however, it is not necessary for a participant to represent the norm in any way (Brandom, 1994, p. 63).

But, although normative statuses are grounded in practical attitudes, the former are not reduced to the latter, because any practical attitude "is itself something that can be done correctly or incorrectly" (Brandom, 1994, p. 52)[20].

The third condition establishes an interpersonal (social or public) means to discern between correct and incorrect judgments. This condition is constructed from the subjectivist (or personal) criterion of correctness problem. This problem shows that there is a risk that normative statuses of the participants –by means of which the participants individually assess the correctness of judgments– are directly assimilated to norms –by means of which the correctness of judgments is finally determined– and, in this way, whatever a participant considers to be correct ends up being correct. For this reason, a means of being able to avoid that situation wherein the correctness or incorrectness of the judgment depends only on what is individually considered correct or incorrect should be established. The first condition established a distinction that allows us to declare correctness or incorrectness about *judgments*, but the third condition establishes a distinction that allows us to declare correctness or incorrectness about the individual (or personal) *criterion of correctness*. This is the "condition of objectivity".

The distinction that is proposed as a means of overcoming this problem is one that lies between *normative statuses* –i.e. as seen before, commitments and entitlements– and *social norms* –i.e. social criteria of correctness. The claim is that norms are instituted (or constituted) and their content determined at the same time of their application, both from the interpersonal relationships of the participants of the social practice and from the inferential relations between the normative statuses recognized by the participants. From this point of view, the institution of norms and the determination of the content of norms arise from the intersection of the perspectives of the different participants and the interrelation of their normative statuses within this structure that he calls "the structure of reciprocal recognition".

> Focusing on the distinction of social perspective between *acknowledging* (and thereby undertaking) a commitment oneself and *attributing* a commitment to another makes it possible to understand the objectivity of conceptual norms that consists in maintaining the distinction between the normative *statuses* they incorporate and the normative *attitudes* even of the whole community –while nonetheless understanding those statuses as instituted by the practical normative attitudes and assessments of community members. Far from precluding the possibility of conceptual objectivity, understanding the essentially social

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20 For the notion of grounding see, among others, Schaffer (2009); Rosen (2010); Wilson (2014).

character of the discursive practice in which conceptual norms are implicit is just what makes such objectivity intelligible (Brandom 1994, pp. 54-55).

In relation to this point, Brandom draws a distinction between the *force* of norms and the *content* of norms. The force of norms depends only on each individual participant, while the content of norms depends on the other plurality of participants as well. The content of norms is socially determined. The participant who makes a judgment has authority over the force of the norm to which it is binding, but she is not the only one who has authority over the content of this norm; instead, she is responsible for the judgment she made, according to the norm socially determined by all participants. In other words, the status of being bound or not by a norm depends on the participant who recognize some normative statuses through a practical attitude. However, the content of the norm –i.e. what the norm specifically requires– does not depend only on the participant who recognize some normative statuses, but on the social interaction among the participants of the practice, who finally determine the content of the norm. In this way, when a participant performs a judgment, she implicitly authorises the other participants to assess the correctness of the judgment she performed and, thus, she authorises the other participants to administer the content of the norm (Brandom, 1994, pp. 52-53)[21].

The social interaction between participants, the structure of reciprocal recognition, which allows the objective determination of the content of norms, works in the following way. Firstly, a judgment is performed. Secondly, the judgment performed is linked to normative statuses through the manifestation of practical attitudes by the participants. So, when a participant performs a judgment, she explicitly undertakes a commitment for that judgment and, at the same time, she is implicitly authorizing the other participants to attribute to her (explicitly or implicitly) an entitlement for the commitment or to challenge the commitment (and

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21 For example, if a participant uses the term 'tellurium', she has committed herself to the concept of tellurium, the subscription of this commitment depends only on her, but the specific content of the concept tellurium does not depend only on her, but also on the other participants. As Brandom (2000) says: "Understanding or grasping a propositional content is here presented (...) as practical mastery of a certain kind of inferentially articulated doing: responding differentially according to the circumstances of proper application of a concept and distinguishing the proper inferential consequences of such application. This is not an all-or-none affair; the metallurgist understands the concept *tellurium* better than I do, for training has made her master of the inferential intricacies of its employment in a way that I can only crudely approximate. Thinking clearly is on this inferentialist rendering a matter of knowing what one is committing oneself to by a certain claim, and what would entitle one to that commitment. Writing clearly is providing enough clues for a reader to infer what one intends to be committed to by each claim, and what one takes it would entitle one to that commitment. Failure to grasp either of these components is failure to grasp the inferential commitment that use of the concept involves, and so failure to grasp its conceptual content" (Brandom 2000, pp. 62-63).

not attribute the entitlement), recognising in this way their *authority* regarding the administration of the content of that norm[22].

Thirdly, the content of the norm is *socially* determined through the normative statuses recognized by the participant (i.e. the commitment), the normative statuses attributed to her by the other participants (i.e. the entitlements), and other collateral normative statuses recognized and attributed by her and the other participants (i.e. other collateral commitments and entitlements) (Brandom, 1994, p. 139)[23].

Fourthly, the norm is not only socially but also *historically* determined. The process of determining the content of norms is always open to the continuous development of social practice. The content of the norm is determined through a selected trajectory of past practical attitudes of the participants of the social practice and through the actual practical attitude regarding to the present judgment. The community is not a closed group, it is open to the incorporation and consideration of new participants. In this way, the community allows a continuous evolution of the content of norms, because any practical attitude is, in itself, susceptible to a further practical assessment. In this way, it is possible to make sense of the idea that the practical attitude of the participants towards their normative statuses might be erroneous, because practical attitudes are acts of assessment and treatment that might be susceptible to a later assessment that determines their correctness or incorrectness. The essential practical opening of the social and historical determination of the content of norms implies that "there is never any final answer to what is correct; everything, including our assessment of such correctness, is itself a subject for conversation and further assessment, challenge, defence, and correction" (Brandom, 1994, p. 647).

Fifthly, the norm is not only socially and historically but also inferentially determined. The performance made is linked to normative statuses and they are inferentially articulated. The kind of inference whose correctness determines the content of norms is called, following Sellars, *material* inference.

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22 The commitment of a participant can be challenged by another participant, for example, explicitly, asking for more reasons to grant an entitlement. In this case, the participant will have to produce those reasons, or he can also delegate those reasons to another participant or to another time of the practice. The other participants assess and treat that judgment, through their practical attitudes, to decide whether or not to attribute an entitlement regarding the judgment made according to that norm. When the other participants attribute an entitlement for the commitment or challenge the commitment undertaken by the participant, they are administering the content of that norm (Brandom, 1994, p. 37).

23 Brandom conceives the structure of reciprocal recognition as a social game in which every participant keeps track of her own and each other's commitments and entitlements. They are (we are) deontic scorekeepers. In the scorekeeping practices, i.e. the linguistic practice of asking and giving for reasons, each participant follows the deontic score of the other participants. Each participant keeps the deontic score of the normative statuses of each one of the participants (including themselves) according to each one of their judgments. The content of the norm is determined by the perspective of each one of the participants of the social practice.

As examples, consider the inference from "Pittsburgh is to the west of Princeton" to "Princeton is to the east of Pittsburgh", and that from "Lightning is seen now" to "Thunder will be heard soon". It is the contents of the concepts *west* and *east* that make the first a good inference, and the contents of the concepts *lightning* and *thunder,* as well as the temporal concepts, that make the second appropriate. Endorsing these inferences is part of grasping or mastering those concepts, quite apart from any specifically *logical* competence (Brandom 2000, p. 52; Cf. 1994, pp. 97-98)[24].

Every judgment performed into the structure of reciprocal recognition is involved in a set of normative statuses (at the beginning just commitment and then maybe entitlements) which are inferentially articulated regarding what follows from it (i.e. inferential commitment consequent), what is incompatible with it (i.e. incompatibility commitment consequent), and what it follows from (i.e. inferential commitment antecedent). Thus, normative statuses are inferentially connected, on the one hand, by antecedent circumstances for an appropriate judgment and, on the other hand, by appropriate consequences of that judgment (Brandom, 1994, p. 117). However, more precisely, the antecedent and consequent relations that encode the content of the norms are of two different sorts: inferential and empirical (i.e. perceptual and practical) relations.

The consequences of application are always themselves inferentially related to the concept in question (…). The circumstances of application need not themselves be linguistic. (…) The circumstances of appropriate application of a claim can include not only other claims (from which the one in question could be inferred) but also perceptual circumstances (to which one has been trained to respond non-inferentially by endorsing the target claim). The appropriate consequences of application of a claim can include not only the inferential acquisition of further beliefs whose contents follow from the contents of the belief in question but also, in the context of further contentful intentional states, the non-inferential responsive performance of actions, under the descriptions by which they can be exhibited as the conclusions of practical inferences (Brandom, 1994, pp. 119-120).

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[24] "Inferring is a kind of doing. Acknowledgment of inferential proprieties need not be explicit in the endorsement of rules or principles of inference but may remain implicit in the capacity to take or treat inferential transitions as correct or incorrect in practice. Inferential relations among concepts are implicit in the practice of giving and asking for reasons" (Brandom 1994, 91).

Therefore, according to this theory, the conceptual content of social norms is characterized as a function that pairs two sets of normative statuses: on the one hand, those that constitute antecedent circumstances (inferential and maybe perceptual as well) under which a judgment is correctly performed and, on the other hand, those that constitute appropriate consequences (inferential and maybe practical as well) of performing that judgment. The content of a social norm is in each moment of the practice partially determined by the trajectory of its past applications and its current determination is complemented and completed –although only synchronically– in the actual application by the perspective of the different participants of the practice and the inferential relations among normative statuses undertaken and attributed through their practical attitudes (Brandom, 1994, pp. 182-183).

6. A New and Adequate Notion of Justification

In the previous section it has been presented a complete proposal of how the three different problems of the rule-following paradox can be solved. This proposal also offers a plausible way of explaining, essentially, how social norms are instituted (or constituted) –an ontological position– and how their content of meaning is determined –an epistemological position. More generally, this proposal contains an image of the normative competence that is diverse with respect to the one with which the deductive model is implicitly committed to.

In this section, firstly, the notion of justification that is proposed to be used in the theories about judicial decisions, based on the normative competence explained in the last section, will be made explicit. Secondly, some particular aspects of the image of this normative competence, to which this notion of justification is committed, will be emphasized. This will allow us to distinguish it, clearly, from the image with which the standard model is committed to. Thirdly, the way in which the process of justification of judicial decisions works, according to this notion of justification, will be shown.

In this way, if all the steps of this argument are convincing, a proposal to solve the challenge established at the beginning of this work will have been offered at the end of this section. The challenge established was to build a new and adequate criterion of justification for judicial decisions which does not imply any of the problems of the rule-following paradox[25].

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[25] Some extensions of Brandom's proposal to the legal theory has been developed before. For example, Canale (2005) offers an extension to some aspects of the legal reasoning. Klatt (2008) offers an extension to some aspects of legal adjudication. Canale (2017) offers an extension to some aspects of the indeterminacy of legal norms. However, none of these proposals follows exactly the argumentative route that has been presented here nor extends the specific conclusions that will be presented here.

The steps of the central argument of this article have initially been developed in the introductory section; others have been presented and substantiated in the previous sections; and the last ones will be explained and defended in this section.

In the introductory section, it has been said that the notion of 'judicial decision' is understood as the conjunction of the particular conclusion (of judicial controversies) and the premises (or reasons) adduced in favour of that conclusion. That is mainly because, as a matter of fact, in judicial contexts, the particular conclusions established by the judicial officials regarding the cases are supported by explicit reasons (or premises), that is, the particular conclusions are presented within the framework of an argumentation. If judicial decisions are reconstructed only as particular conclusions, without considering the premises, this would basically be a false reconstruction or, at best, incomplete with respect to one of its essential parts.

On the other hand, it has also been said that the technical notion of 'justification' should not be understood as the premise (or the set of premises) presented by judicial officials in favour of the particular conclusions. This should not be done this way because the technical notion of 'justification' should not be descriptive (or even explanatory), but rather normative and evaluative. Nothing is justified by asserting, as a matter of fact, that certain reasons have been adduced in support of a certain conclusion. The reasons can, as a matter of fact, have been formulated with the *intention* (or pretension) to justify the particular conclusion; however, this does not imply that the given reasons *justify* the conclusion –in a normative sense.

For this reason, it has been said that a judicial decision, in order to be justified, ought to conform to a criterion of correctness –i.e. a normative and evaluative criterion. Therefore, the technical notion of 'justification' of judicial decisions is understood as a criterion (or set of criteria) that serves to assess the correctness of the particular conclusion with respect to the premises presented –i.e. the essential elements of judicial decisions– and to determine whether or not a judicial decision is justified.

In the third section, following Bayón, two other relevant claims to the central argument have been argued. On the one hand, the justification of a judgment –as the conclusion of a judicial decision, or as one of the premises of this decision that also plays the role of a conclusion with respect to another reasoning connected with the first one– should be understood as a normative and evaluative criterion based on a *general* norm. Because there is no other intelligible way of understanding the justification of a judgment, but through the *normative* consideration that this judgment is an instance of a general norm[26].

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26 Cf. Alexy (1978, pp. 177, 239).

On the other hand, it has been argued that the technical notion of 'general norm' should not be understood, in the first place, only as the linguistic formulation that represents the norm. Because this notion would fall in the infinitive regress of interpretations[27].

In section four, two other ways have been shown in which the technical notion of 'general norm' should not be understood. In the second place, the notion of 'general norm' should not be understood as a factual consideration, with respect only to facts. Because this notion would fall into the problem of gerrymandering. In the third place, the notion of 'general norm' should not be understood as personal consideration of correctness of judgment. Because this notion would fall into the subjectivist criterion of correctness.

In the fifth section, a plausible way of understanding the institution (or constitution) of social norms and the determination of their content has been shown. Through the same explanatory path, a plausible way of understanding the *normative competence* of the participants in a community has been presented. The first result of that section –an ontological one– is that we should understand norms as contents of meaning: norms are socio-linguistic entities which are composed of contents of meaning. Rules are, then, normative socio-linguistic entities that, abbreviating the explanation, are grounded in the personal practical attitudes of the participants of the community. The second result –an epistemological one– is that we should understand the determination of the content of social norms in an inferential way, that is, through the inferential relationships between normative statuses that are grounded in the practical attitudes of the participants of the community. In a nutshell, normative statuses are grounded in practical attitudes, and normative statuses determine, inferentially, the content of social norms.

The last two steps are essential for the argument that is being presented, because now the claim that the justification of judicial decisions depends on criteria based on general and social norms can be based on a precise theory that adequately explains: (i) that general and social norms are composed of meaning contents, and (ii) that meaning contents are identified and determined in a normative (social and historical) and inferential manner.

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[27] In the third section, it has been argued, following Bayón, that the technical notion of 'justification' should not be understood only in deductive terms, as the strict version of the deductive model claims. This is so because the internal justification of the premise of facts cannot be satisfied taking into consideration only a deductive logical criterion, but it also needs an inductive logical criterion, as shown in the second section. There is another reason to reject the strict version of the deductive model, which is not in Bayón's article, but which is based on the idea that deductive logical reasonings are monotonic, while legal reasoning, like many other kinds of reasoning that we develop in our daily life, are non-monotonic. Cf. Brandom (2014, pp. 50-51).

So, for these reasons, the technical notion of 'justification' for judicial decisions proposed here is understood as a criterion (or set of criteria) based on general and social norms, which allows us to assess the correctness of the particular conclusion regarding the reasons or premises presented. This criterion establishes that the assessment of the correctness of the judicial decision should be carried out with respect to a social norm, the content of which has been instituted and determined through the image of the normative competence that has been reconstructed in the previous section. According to this image, the criterion of justification (or correctness) of judicial decisions is based on general and social norms which are instituted and determined through a unique (or momentary) process of a normative (social, historical, discursive or argumentative) and inferential nature.

This notion of justification is committed to a radically different image of the normative competence than the image of normative competence with which the standard model is implicitly committed to. This new image, which we could call normative and inferential, contains a radical and novel change in the way of understanding the correctness of inferences in reasonings such as judicial ones. The fundamental change contains two central movements.

The first movement consists of the claim that the correctness of judicial reasoning not only depends on the deductive validity and the inductive probability of the inferences of the reasoning, but also on the *material correctness* of the inferential relationship with which the reasoner is committed to. According to Sellars and Brandom, the material inference is a kind of inference whose correctness essentially involves the conceptual contents of its premises and conclusions. For examples, consider the inference from "Mexico City is to the South of Guadalajara" to "Guadalajara is to the North of Mexico City", the inference from "Today is Friday" to "Tomorrow will be Saturday" and that from "Sunset is seen now" to "The night will have arrived soon". It is the contents of the concepts *South* and *North* that make the first a good inference, the contents of the concepts *Friday*, *Saturday*, *today*, and *tomorrow* that make the second inference correct, and the contents of the concepts *sunset* and *night,* as well as the temporal concepts, that underwrite the third. See Brandom (1994, pp. 97-98; 2000, p. 52) and Sellars (1953)[28].

From this point of view, our logical reasoning ability –i.e. our ability to draw correct inferences– should not be understood only as a formal capacity –i.e. as a ca-

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28 As Brandom said: "Endorsing these inferences is part of grasping or mastering those concepts, quite apart from any specifically logical competence. (...) Since neither the premises nor the conclusions of such inferences employ logical concepts, it seems appropriate to distinguish them from inferences whose correctness depends only on logical form" (Brandom, 1994, p. 98).

pacity that comes from a formal (Platonic or idealist) conception of rationality–, but also as a material capacity –i.e. as a capacity that comes from an implicit conception in our social activities of developing inferences (socially considered) correct. This conception of logically correct inferences is also derived from the solutions offered to avoid the rule-following paradox[29].

The second movement consists of the claim that the deductive logical validity, which depends on the form (or structure) of the reasonings, should be explained in terms of (or as an explanatory consequence of) the material correctness of the reasonings, which depends on the content of the concepts with which the reasoner is committed to. So, the formal goodness of inferences derives from, and is explained in terms of, the material goodness of inferences.

> Should inferentialist explanations begin with inferences pertaining to proposi-tional form, or those pertaining to propositional content? One important con-sideration is that the notion of formally valid inferences is definable in a natural way from that of materially correct ones, while there is no converse route. For given a subset of vocabulary that is privileged or distinguished somehow, an inference can be treated as good in virtue of its form, with respect to that vocab-ulary, just in case it is a materially good inference and cannot be turned into a materially bad one by substituting nonprivileged for nonprivileged vocabulary, in its premises and conclusions (Brandom, 1994, pp. 104-105)[30].

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29 In Brandom's words: "Often, however, *inferential* articulation is identified with *logical* articulation. Material inferences are then treated as a derivative category. The idea is that being *rational* –mastering proprieties of inference and so being subject to the force of the better reason– can be understood as a purely *logical* capacity. (...) Mistakes ensue, however, if the concept *logical* is employed with these circumstances of application conjoined with consequences of application that restrict the notion of the logical force of reasons to *formally* valid inferences. The substantial commitment that is fundamental to this sort of approach is what Sellars calls "the received dogma ... that the inference which finds its expression in 'It is raining, therefore the streets will be wet' is an enthymeme". According to this line of thought, wherever an inference is endorsed, it is because of belief in a conditional. Then the instanced inference is understood as implicitly involving the conditional "If it is raining, then the streets will be wet". With that "suppressed" premise supplied, the inference is an instance of the formally valid scheme of conditional detachment. The "dogma" expresses a commitment to an order of explanation that treats all inferences as good or bad solely in virtue of their form, with the contents of the claims they involve mattering only for the truth of the (implicit) premises. According to this way of setting things out, there is no such thing as material inference. This view –which understands "good inference" to mean "formally valid inference", postulating implicit premises as needed– might be called a *formalist* approach to inference. It trades primitive goodnesses of inference for the truth of conditionals. (...) The grasp of logic that is attributed must be an *implicit* grasp, since it need be manifested only in distinguishing material inferences as good and bad, not in any further capacity to manipulate logical vocabulary or endorse tautologies involving them" (Brandom, 1994, pp. 98-99).

30 Atienza (1997, 2006, 2013) has conceptually reconstructed three different conceptions that have been preciously used in legal theory to explain legal argumentation: formal, material and pragmatic. Atienza's explanatory hypothesis is that these three conceptions should be complemented among themselves to provide an *adequate* explanation of the legal argumentation. Atienza mentions only recently (Atienza, 2013, pp. 288-289) Brandom's theory. However, Atienza classifies Brandom's theory as a contemporary example of a theory committed to "material conception" of

To conclude, I would like to offer an example, albeit a general one, to illustrate the mechanism of justification of judicial decisions. According to what has been said so far, judicial decisions should be justified with regard to a general and social legal norm.

Legal norms are criteria of correctness grounded in the legal practice of a community where they have been manifested by the participants through a selected set of previous practical attitudes regarding previous judgments and a current practical attitude regarding a present judgment. Legal norms are constituted, and their content determined, by the social and historical interrelations among participants of the legal practice (from personal practical attitudes to personal normative statuses) and by the inferential interrelations among the personal normative statuses of each participant (from personal normative statuses to social norms) within the structure of reciprocal recognition –now understood as the legal practice of a community.

On the one hand, legal norms are found in the legal decisions developed until that moment as made by the lawmakers and judicial officials of the legal practice of the community where these norms have been manifested through their creation and application to specific past judgments. However, on the other hand, they are not only found in the legal creation practices and previous judicial application cases of the legal practice, but rather also in the current judicial practice that is being developed, that is, to the present controversy over a certain legal case. Therefore, it is in the context of a particular judicial case that the content of a particular norm is specifically determined by the implicit manifestation of the participants regarding a selected trajectory of past practical attitudes and to the current practical attitude of the judicial official regarding the present case. According to this, the legal norm is determined by the judicial official within the framework of the structure of reciprocal recognition in which normative statuses of the perspectives of all the participants of that particular case are socially and inferentially related.

When the judicial official recognises previous applications of the norm as authorised precedents of the application of that norm, she selects the trajectory of the previous applications and, therefore, of the authorised applications of its content. In a similar vein, when a practical attitude is considered a case of correct application of the norm, it is included in the history of its correct applications. In this way, normative force is given to these applications of the norm. The judicial official exercises her authority over the practical attitudes of the community's previous members,

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argumentation, a label that Brandom himself uses. Beyond the fact that Atienza's definition of 'material conception' is too broad, with fuzzy contours (Atienza, 2013, p. 275); Brandom's theory is incorrectly understood as an example of a theory of the material conception of argumentation, because it is rather a rigorous theory that combines systematically the formal, material and pragmatic conception of social argumentation. It is exactly what Atienza is looking for.

considering that a series of applications of the norm is correct; in this way, she also assumes responsibility for future participants for the consideration of that series of applications as correct. In this process, a trajectory of past applications is selected for the purpose of determining the content of the norm that can be considered correct in the present case and projected towards future cases, because past applications of the norm together with the present application of that norm also partially determine future applications of the same norm in future cases (Brandom, 2014, pp. 74-75).

Given that there is not a single possible trajectory, "only one way to follow the rule", the judicial official should select the antecedent practical attitudes that she considers as correct and, doing that, take a decision in the present dispute, in which she claims that the present case is or is not an instance of the same general norm applied in certain previous judicial cases. She should integrate the selection of cases chosen in such a way that they can be synthesized into a norm that might be applicable to the present case that she ought to resolve. In this way, she would propose the current case as another precedent, an instance of correct application of the norm. In doing so, she would determine the content of the norm by selecting the previous legal cases that she treats as precedents, the legal sources, the legal statements, and the factual characteristics of these cases that she takes as outstanding. Thus, the content of the norm is delimited, that is, the contours and limits that explicitly or implicitly have been governed by the entire sequence are specified (Brandom 2014, pp. 76-77).

The structure of reciprocal recognition allows that the content of the legal norm determined by the judicial official is not only dependent on her personal commitment, but dependent on the normative statuses of the other participants as well. The content of the norms does not only depend on the judicial official who recognizes and accepts the force of the norm, but also on the social communicative interaction among all the participants of that legal practice and the inferential relation between the normative statuses of all of them[31].

Finally, the content of a norm is only synchronically determined, because the norm socio-historically and inferentially determined in a time T1 might be erroneous in a time T2. The reason is that the normative statuses are grounded in the practical attitudes of assessment and treatment that are susceptible to a later assessment and treatment to determine their correctness or incorrectness. The selection that the judicial official makes in the present case is an implicit practical attitude. The claim that she makes in the present case saying that it is or is not an instance of the

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[31] Canale (2017) has carried out a detailed analysis of how inferential relationships between deontic statuses work in the context of judicial disputes.

same norm applied in a certain set of previous judicial cases is an explicit practical attitude. Both normative positions –the retrospective selection and the projective demand– are practical attitudes; and any practical attitude "is itself something that can be done correctly or incorrectly" (Brandom, 1994, p. 52)[32].

In this way, the determination of the norm referring to that particular case continues if the judicial case continues in other more advanced instances of the judicial hierarchy. On the other hand, the determination of the norm –in general, not only referring to that particular case, but to the whole sequence of cases that should be applied– continues when a new judicial case appears to which the norm might or should be applied.

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32 Cf. Brandom (2009, pp. 86-87) and Brandom (2002, p. 230).

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