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Transnational Rule of Law, coercion, and human action

Some remarks on Rodriguez-Blanco's "What makes a Transnational Rule of Law?"

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Abstract

In "What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law", Veronica Rodriguez-Blanco explores the possibility—and opportunity—of the existence of a Rule of Law (from now on, RoL) on a transnational level. The aim of this paper is to briefly discuss some points related to various facets of Rodriguez-Blanco's proposal: the correct question about the RoL and her particular view of human action (section 2); the type of explanation about rules, standards, regulations and principles (section 3); the definitions of RoL, coercion, and freedom (section 4); the parties of the relevant relationship and the notion of transnational law (section 5); and the structure of relevant relationships in national and transnational contexts (section 6). I will try, on the one hand, to show how these points could appear quite problematic and thus seem to undermine the integrity of Rodriguez-Blanco's proposal, and on the other hand, to offer some suggestions as to how these problems could be solved to strengthen her proposal. With these comments, I will also try to indicate what I think are the most important points that should be considered in any sound discourse or proposal on these subjects. I will then conclude with some final remarks (section 7).

Index terms

Keywords: rule of law, translational law, coercion, agency, transnational rule of law

Full text

1 Introduction

1 In “What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law”,[1] Veronica Rodriguez-Blanco explores the possibility—and opportunity—of the existence of a Rule of Law (from now on, RoL) on a transnational level. Starting with the idea that the RoL can be the “most effective mechanism for controlling the coercion of the State and the arbitrary will that human beings can exercise upon each another”,[2] Rodriguez-Blanco tries to answer the following questions. Is a RoL necessary in transnational contexts? If so, what would be the most adequate conception of this transnational RoL? What would its constitutive elements be, and how would they achieve the goal of controlling coercion and the imposition of an arbitrary will upon human beings?

2 Rodriguez-Blanco’s answer to the first question is affirmative. On the one hand, she rejects the idea that discussing the RoL in international contexts is superfluous because in those contexts there is no state to control,[3] and thus no coercion or arbitrary power to be protected or freed from.[4] Rodriguez-Blanco points out that coercion is defined not only by an exercise of psychological or physical violence and/or oppression or threats, but also by arbitrariness.[5] Thus even if coercion as violence may not exist in a transnational context, coercion as arbitrariness is still definitely possible.[6]

3 Rodriguez-Blanco’s answer to the second question is twofold. First, she rejects those classical theorizations whose starting point is to search for an adequate conception of the RoL in a national context, which, once found, they propose to automatically transpose to a transnational context. The reason for this rejection is that, according to Rodriguez-Blanco, these classical theorizations overlook the fundamental premise of any argument in favour of the RoL in any context, i.e. the necessity of an adequate understanding of human action and human rule-following. The correct question about the RoL would thus be: how do agents comply with rules, standards, regulations and principles (from now on, RSRPs)?[7] And how can law created by human beings bind other human beings and guide them in their conduct?[8]

4 Secondly, Rodriguez-Blanco proposes a particular view of human action in order to answer this last question. She proposes to understand human beings as “eudaimonic creatures”: beings whose will yearns for and desires “good-making characteristics” or values. All human movements and activities are directed towards seeking and producing these “good-making characteristics” or values. Thus human lives and actions can only be understood by understanding their underlying grammar or logic (their *logos*).[9] Accordingly, only if legal reasons for action are formulated as genuine “good-making characteristics” or values by legislators and judges, could the legal addressees be considered to be bound to comply with RSRPs without being subjected to the arbitrary will of another human being. This is so because they would comply with—or follow—the RSRPs intentionally and voluntarily, because they share or endorse those RSRPs’ underlying “good-making characteristics” or values (be they either genuine or believed to be genuine).

5 If RSRPs are not created on the basis of “good-making characteristics” or values, or if these characteristics are not clear or apparent, then agents would suffer from coercion as arbitrariness: they would be subjected to the arbitrary will of another. The prevention of such a situation is precisely the main function of the RoL, especially of a transnational RoL: to demand that the “reasons or logos as values or good-making characteristics are embedded in the creation of transnational RSRPs, and this enables agents in the transnational context to choose RSRPs because they are grounded in such reasons or logos.”[10] This way the transnational RoL would be the best possible mechanism to guarantee the transparency of these reasons or *logos*, and their capacity to be known by agents.[11]

6 Here I propose to briefly discuss some points related to various facets of Rodriguez-Blanco’s proposal: the correct question about the RoL and her particular view of human action (section 2); the type of explanation about RSRPs (section 3); the definitions of RoL, coercion, and freedom (section 4); the parties of the relevant relationship and the notion of transnational law (section 5); and the structure of relevant relationships in national and transnational contexts (section 6). I will try, on the one hand, to show how these points could appear quite problematic and thus seem to undermine the integrity of Rodriguez-Blanco’s proposal, and on the other hand, to offer some suggestions as to how these problems could be solved to strengthen her proposal. With these comments, I will also try to indicate what I think are the most important points that should be considered in any sound discourse or proposal on these subjects. I will then conclude with some final remarks (section 7).

2 On the correct question about the Rule of Law and human action

2.1 On the correct question about the Rule of Law

7 One of the most suggestive points made in Rodriguez-Blanco's proposal is, indeed, that the correct question about the RoL—regardless of the context—is different from the question that those authors who defend formal or substantial conceptions of the RoL use as their starting point. This correct question is formulated by Rodriguez-Blanco as follows: how do agents comply with RSRPs, and how is law created by human beings able to bind other human beings and guide them in their conduct?[12]

8 Faced with this question, one may ask: is this truly a single question, or could it actually be two different and mutually independent ones? In other words: is it the same to ask how law created by human beings is able to bind other human beings, and to ask how can law guide them in their conduct? Rodriguez-Blanco seems to assume either that these are indeed the same question, or that they are two different but interdependent ones. However, it is possible —and desirable—to problematize this assumption.

9 How the law can guide human behaviour can be understood as a descriptive question focused on the elements that cause or originate an agent's action. In other words, this is a question about an agent's motives or motivational reasons for action.[13] On the other hand, which type of question the second one is—i.e. that of how law created by human beings is able to bind other human beings—heavily depends on the meaning ascribed to "bind". If its meaning is assimilable to "cause", then this second question could be considered a mere specification of the first one. If, however, its meaning is instead assimilable to "obligate", in the sense of creating (genuine) duties, we would then be dealing with the so-called problem of (legal) normativity.[14]

10 In my view, there are at least four questions or queries that are present in—or that can be reconstructed from—Rodriguez-Blanco's "correct question":

11 (Question 1) What explains human action?

12 (Question 2) What should be done, or what would be the (most) adequate means, to produce human action?[15]

13 (Question 3) What binds human beings, in the sense of creating (genuine) duties for them?

14 (Question 4) What justifies considering someone to be bound to act (and thus justifies both requiring the act to be performed and criticizing its non-performance)?

15 These are queries that focus their attention on different aspects of human action: its explanation, justification, and critique. In this sense, question 1 aims at the explanation—in a causal or non-causal sense—of human action. This would thus be an eminently descriptive question, related to those elements—motives or motivational reasons—which in any way produce the agent's action.[16]

16 On the other hand, question 2 aims to identify an adequate means to achieve a specific goal: to cause human action. This is an eminently teleological question: it aims to postulate a means that, with specific characteristics and under certain conditions, can cause human action in a specific way. In this sense, question 2 is intimately related to the first one: what means could cause the action (the second question) is something that can only be understood once we understand which elements explain human action and how (the first question).

17 Now, the third and fourth questions do not seem to belong to the same level of discourse as the first two, nor do they seem to have any necessary relation to them. Question 3 can be understood as a version of the well-known problem of (legal) normativity: how is it that the law, being posited by human beings, can generate (genuine) duties? In other words, is it possible for a human creation to generate (genuine) duties for third parties? Any in-depth analysis of this problem and its possible answers far exceeds the aim of the present essay. Here it will suffice to point out that the problem of normativity has usually been understood not as a descriptive problem, but as a normative or prescriptive one.[17]

18 Question 4 is, in a sense, related to all of the others: the link is the notion of coercion as arbitrariness—and responsibility for one's own actions, and autonomy—which Rodriguez-Blanco is especially interested in. If human action is caused in a certain way by a certain means (the first question), and if that way or means has not been produced (the second question), then it would be arbitrary or otherwise unjustified to consider an agent to be bound

(the third question), and thus unjustified to require an agent to act in a certain way (the fourth question). It would also be arbitrary to criticize an agent for not acting in a certain way if that agent has not been able to—or has not discovered how to—cause their action, and it would also be unjustified to consider the agent to be bound to act in that way (especially, to comply with a certain rule).

19 Thus, the correct question identified by Rodriguez-Blanco in relation to the RoL could be any one of these four questions, all of them, or just two or three of them. In this sense, it is quite unclear which of these questions—if any—are those which Rodriguez-Blanco considers part of her correct question, or considers to be otherwise linked to it. Be that as it may, it is very important for us to take this ambiguity of Rodriguez-Blanco's correct question into account, because this will allow us to analyse other points of her proposal (especially those which seem to presuppose that, if an agent's action can be produced or caused—questions 1 and 2—then it is possible to consider that agent to be bound and to require them to act—questions 3 and 4).[18]

2.2 On the type of action and the explanation of motivation

20 Let's assume here that the correct question regarding the RoL is Rodriguez-Blanco's proposed one; and that, in order to answer it, an understanding of human action is needed to identify what type of action is performed when an agent complies with RSRPs. This understanding would also allow us to identify the cases where an agent suffers from coercion as arbitrariness when complying with a RSRP, and the cases where they do not.

21 In her paper, Rodriguez-Blanco proposes to analyse human action using two possibly independent properties:[19] voluntariness and intention.[20] Thus three basic types of human action can be identified: voluntary and intentional action, or "actions of men and women"[21] (from now on, *Type 1* actions); voluntary and non-intentional action, or "human actions"[22] (*Type 2* actions); and non-voluntary and non-intentional action (*Type 3* actions).[23] Following this schema, Rodriguez-Blanco seems to hold that agents' actions regarding rules (or RSRPs in a wide sense)—that is, the relevant actions for her defence of further claims about the transnational RoL and the notion of coercion as arbitrariness—are Type 1 actions.

22 Adopting Rodriguez-Blanco's proposed notions of intention and intentional action without further discussion,[24] I think two critical observations can be made. The first is consequentialist in nature and relates to the consequences that these notions—as adopted by Rodriguez-Blanco—have for the purposes set out in her essay. The second is methodological in nature, and relates to the central case of human action to which Rodríguez-Blanco is committed.

23 As for the first observation, the intentionality of Type 1 actions,[25] as assumed by Rodríguez-Blanco, seems to depend either on an *ex post* justification by an actor who is asked—in the context of an intersubjective justificatory practice—why he did what he did;[26] or on an external ascription—justified or not[27]—made by an observer. In the first case, as Rodríguez-Blanco points out, there are obvious problems regarding the truthfulness or authenticity of the agent's testimony: He may not know or understand why he did it and admit so; he may not know or understand why he did it and invent a reason; or, even though he knows or understands, he may respond with another question.[28] In the second case, even if this were an ascription justified by the institutional or social context, as Rodríguez-Blanco suggests, it is still ultimately that: an external ascription.

24 This has, in my opinion, some consequences which are undesirable for the aim pursued by Rodríguez-Blanco. First, it seems that in all cases where the agent describes her action (except perhaps in the last one), the involved actions are not Type 1, but Type 2 ones. Only by *ex post* rationalization could they be transformed—reconstructed or considered—as Type 1 actions. If so, then it seems that the meaning and purpose that characterize these Type 1 (voluntary and intentional) actions cannot be used to answer the question of what explains human action in a particular way; for what would explain it in any case are the practices of justifying human action. This, in turn, would also affect the answer to the question of the (most) appropriate means of bringing about human action in a particular way, and it is here that Rodríguez-Blanco proposes to focus the discussion on the RoL (question 2).

On the other hand, the case for ascribing intentionality possibly poses a problem for the answer to question 2. On the one hand, it does not seem able to ensure that it is not a reconstruction—in terms of Type 1 actions—of Type 2 actions. Thus, what would be gained in

the intelligibility of actions would be lost in potential effectiveness in the way one brings them about. On the other hand, and even if they were Type 1 actions, this would not serve as a basis for a decisive answer to question 2. Thus, the degree of justification for the ascription could, at best, ensure a high probability regarding the effectiveness of a particular means in bringing about human action in a particular way, i.e. intentionally and without coercion (questions 2 and 4). As a result, the proposed means cannot be regarded as practically or conceptually necessary, but only as a means whose necessity or effectiveness would be contingent or falsifiable.

26 The second remark is methodological and has to do with the choice of the central case or focal meaning of human action that seems to underlie Rodríguez-Blanco's proposal.[29] If Type 1 actions seem to be largely the product of *ex post* reconstructions or external ascriptions, then what good reason is there to use Type 1 actions as the central case of human action, rather than Type 2 actions? Using Type 1 actions as the core case means that Type 2 actions should be considered marginal or non-core cases of human action. If it is true that Type 2 actions account for a proportionally larger share of human actions,[30] then this methodological choice would contribute to a distorted theoretical description or reconstruction of the phenomenon of human action. This affects the answers to both question 1 and question 2.

27 One possible way out of this methodological difficulty would be to say that Type 1 actions are the type of action that *should be* brought about, and therefore have to be taken as the central case of human action. However, this seems to be a prescriptive claim, and thus would not function as an adequate premise from which to infer some of the conclusions that are drawn at the end of the paper; especially those related to the RoL as the (most) adequate means to achieve the goal of guiding human behaviour that is free from coercion. The force of a proposal such as Rodriguez-Blanco's rests precisely on stating the truth of a means-to-an-end proposition (the answer to question 2) and, for that purpose, it does not seem enough to assert that the agent's actions *should be* Type 1 actions, nor that they can be reconstructed *ex post* as such. On the contrary, it is necessary to assert that *it is the case* that the agent's actions are Type 1 actions.

28 So far, we have analysed some key methodological and conceptual points for the beginning of the analysis. On the one hand, we have seen that what Rodriguez-Blanco calls the "right question regarding the RoL" may in fact be a multitude of questions, and that it is not entirely clear which, if any, of those questions are the ones that Rodriguez-Blanco considers to be part of her correct question, or how would they be related (point 2.1). On the other hand, we have seen that there may be difficulties in relation to the kind of human action that Rodriguez-Blanco takes to be central to answering the "correct question": on the one hand, difficulties arising from some undesirable consequences of her chosen notion of "intentionality" and how this intentionality is to be recognized or attributed to agents and actions; and on the other hand, difficulties arising from her choice of "voluntary and intentional action" as the central case or focal meaning of "human action" (point 2.2).

29 It is now appropriate to focus on the content of the "correct question", and how Rodriguez-Blanco formulates her answer to it. So, we will begin by analysing her answer to what we have reconstructed as question 1: "What explains human action?"

3 On the type of explanation about rules and *logos*

30 Regarding question 1, Rodriguez-Blanco argues that a person can only be guided and motivated by a rule if they avow the *logos* of the rule (or of RSRPs in general).[31] In this sense, she defines the paradigmatic case of legal normativity as "the case of the agent who complies with the law because, from the deliberative or first-person perspective, she avows the values or good-making characteristics of the law".[32] It is precisely these values or good-making characteristics that constitute the *logos* of law.

31 Some questions arise in relation to this *logos*, on whose existence Rodriguez-Blanco's proposal is based. I will briefly point at them here.

3.1 What *logos*? The *logos* of the Rule, of Law, and of norm production

32 When the *logos* of RSRPs is mentioned and discussed in Rodriguez-Blanco's paper, it seems that several different situations are being treated indistinctively, even though they could—and indeed should—be differentiated.

33 For example, it is possible to differentiate between the *logos* of law as an institutional system and the *logos* of every RSRP considered individually. As well as this, it is possible to differentiate between the *logos* of the activities of the lawmakers and the *logos* of the RSRPs in themselves as products of those activities. Moreover, it is possible to differentiate between the *logos* of a particular RSRP, the *logos* of the lawmakers in relation to norm production in general, the *logos* of the lawmakers in relation to the production of that particular RSRP, the *logos* of an agent in relation to compliance with RSRPs in general, the *logos* of an agent in relation to compliance with a particular RSRP, and so on.

34 These distinctions are paramount to resolving a central query whose answer could determine or undermine the strength of Rodriguez-Blanco's proposal. That is, what would be the *logos* that should be made available to agents in a clear, non-muddled, non-confusing, non-contradictory way in order for the law to (adequately) guide their conducts? (Question 2 and, relatedly, questions 3 and 4.) To give an example: the *logos* of any particular RSRP—which is, by definition, intrinsically related to its specific content—may not be the same as the *logos* of the activity of lawmaking in general, or the general fact of having rules, independently of their specific contents.

35 In this sense, assuming that these *logos* exist and that they have to be made available in a certain way to the agents, it would be essential in my opinion to clearly define which *logos* are involved. Likewise, it would be equally essential to theorize about the possible existence of general and particular *logos*, and about what the relations between the different *logos* applicable to a certain particular situation would be—for example, relations of accumulation, of hierarchy, etc. This would allow for, in the first place, establishing clear criteria for determining if in fact the RoL is being observed or not; and, secondly, establishing different degrees of seriousness of any eventual violation of the RoL, on the basis of what *logos* is or is not made available to the agents, and in what way.

3.2 On (epistemic) access to the *logos*

36 Let's assume here that the ideal situation for achieving the guidance of agents' behaviour by RSRPs obtains, i.e. it is known exactly what the relevant *logos* are; these *logos* have been made available to the agents; and these available *logos* are clear, non-confusing, non-muddled, and non-contradictory. This is the situation that, according to Rodriguez-Blanco, the RoL should guarantee as a means to achieve the goal of guiding their conducts in an adequate, non-coercive way.

37 The question that arises here is how agents access or would access these *logos*. We can think of two kinds of situations: one in which this access is achieved with some kind of mediation by other agents, and another in which it is achieved without any such mediation.[33] Let us consider both of these in more detail.

38 In the first case, the mediation coming from other agents may be complete or partial,[34] and may come from the creators of the RSRPs or from interpreters of the RSRPs who are understood to be competent. Thus, it may be that the creator of the RSRP states (e.g. in the preamble to a law or in its preparatory works) that the RSRP's *logos* is *Y*; or that a competent interpreter of the RSRP (who is taken to be an epistemic authority on the matter) states that the RSRP's *logos* is *Y*. Now, this situation raises two types of questions. On the one hand, one might wonder whether this would suffice for assuming that agents have access to those *logos* and therefore could (or would) be motivated by them. Would this count as "knowledge" of the *logos*? And if so, would this knowledge of the *logos* be *ipso facto* sufficient, or would something else be required? And perhaps the most pressing question: is there an intrinsic connection between knowledge of these *logos* and their being recognized or adhered to? On the other hand, this situation can also be seen as a mere multiplication of instances. If the agent follows the RSRP not because it was issued by *Z*, but because he adheres to the *logos* underlying the RSRP, then why should he accept that the *logos* of the RSRP are *Y* just because *Z* (or someone else) claims so?[35]

39 In the second case, the hypothesis would be a situation in which agents reconstruct or apprehend the *logos* of RSRPs without any mediation by other agents. In this case, the central question would be how the agents could effectively access this *logos*, especially in contexts

where the RSRPs are the product of decisional processes (or even deliberative ones) with respect to which the agents have not had any type of participation, and do not have any possibility of participating in their eventual modification. Likewise, it is unclear how uniformity in the apprehension of the *logos* could be achieved, especially in contexts of heavily plural communities; and this uniformity seems to be fundamental to achieving the goal, in turn, of guiding their behaviour on the basis of a single *logos*. Such queries assume particular relevance when contexts with both of these characteristics are considered—i.e. no participation in decisional processes, and heavily plural communities—contexts such as, precisely, the transnational one.

40 In sum, the notion of the *logos* of a rule or RSRP is fundamental to Rodriguez-Blanco's view, since an agent can only be truly guided and motivated by them through recognizing and accepting or adhering to them. In this sense, it seems equally fundamental to distinguish between the different *logos* associated with the existence of these rules or RSRPs, and to precisely determine which is the *logos* that should be made available to individuals in a clear, unclouded, non-confused and non-contradictory manner, so that the law can (adequately) guide their behaviour. On the other hand, once this has been determined, it would be equally important to clearly define how an agent can access these *logos*, and whether this access would be through intermediaries.

41 Defining both of these points is, in turn, essential for examining and analysing one of the central points of Rodriguez-Blanco's proposal: the notion of coercion as arbitrariness and the notion of the RoL as a means to control it.

4 On the definitions of the Rule of Law, coercion, and freedom

42 Assuming that the RoL can indeed be the "most effective mechanism for controlling the coercion of the state and the arbitrary will that human beings can exercise upon each another",[36] in this section I would like to discuss the notion of coercion advanced and defended by Rodriguez-Blanco, in particular the notion of coercion as arbitrariness.

43 "Coercion" is characterized, says Rodriguez-Blanco, by two key features: (1) the exercise of psychological or physical violence, oppression or threats; and (2) arbitrariness. In particular, coercion as arbitrariness implies that the agent, who should be able to choose and act, can neither choose nor be guided by any rational standard, because the reasons or *logos* "that ground the action are confused, muddled, unclear or contradictory".[37] In a negative sense, this would mean that an agent is free from coercion as arbitrariness if they can access the reasons or *logos* grounding the existent rational standards and, subsequently, they can choose and be guided in their action by those standards.

44 This definition of coercion as arbitrariness (and its correspondingly opposed definition of freedom) is then used by Rodriguez-Blanco to assert the following: (1) coercion (understood as coercion as arbitrariness) exists not only in the national context but also in the transnational one; thus the concern about protecting agents from coercion is also present in the transnational context; and (2) the RoL—understood as thick RoL—is an adequate solution for protecting agents from coercion, not only in the national context but also in non-national contexts (international, transnational, global).[38]

45 Some aspects of this definition of coercion as arbitrariness may be disputed. First, "arbitrariness" can be used to designate at least three different situations that, in my opinion, not only can be differentiated but should also be considered independently. In this sense, it seems a clear distinction can be drawn between arbitrariness as "not having reasons for *X*", as "having bad/wrong/invalid/insufficient reasons for *X*", and as "not making (sufficiently, adequately) available the reasons for *X*".

46 In the first case, the problem stems from a complete absence of reasons—either motivational or justificatory—for *X*. In the second case, in contrast, the problem is not the absence of reasons, but instead the type or quality of the existent ones for *X*. Finally, in the third case, the problem is not the absence or the quality of the reasons for *X*—these could very well be perfectly existent and valid reasons—but instead the fact that these reasons are not being made available to the relevant agents, the RSRPs' addressees, either completely—i.e. a complete lack of communication of them—or partially—i.e. they are unclear or contradictory.

47 Rodriguez-Blanco's notion of coercion as arbitrariness, in my opinion, does not allow these three cases to be clearly differentiated. Therefore it remains unclear which of these three possible meanings—if not all of them—Rodriguez-Blanco's considerations about the RoL would apply to. Moreover, this (potential) ambiguity of "coercion as arbitrariness" also makes it unclear what it would mean for an agent to be free from coercion as arbitrariness.

48 Regarding this last point, if I understood it correctly, an agent is free from coercion as arbitrariness if they can access the reasons or *logos* of the existent rational standards; only then being able to choose and be guided by them. This definition would reduce "arbitrariness" to the first and third cases (reasons must exist, and they must be adequately made available to the relevant agents); and there would be no room or relevance for the second case (the fact that the reasons are correct, sufficient, valid or in some other way adequate).

49 In which sense could we deem free from coercion an agent who does not endorse the *logos* that is made available to them, but nevertheless cannot choose not to perform what is required from them? This is a particularly important question because it takes into consideration the cases in which an agent finds themself in such a situation where—even though no violence or threats are involved, and regardless of the fact that the relevant *logos* is perfectly made available to them—there is nevertheless no real choice for the agent to make.[39]

50 In such cases, agents find themselves in a situation similar to those cases where there are no reasons to ground the standards, or where these reasons are not made available to them. In all such cases, the agents cannot choose or be guided by rational standards: either because there are no rational standards at all (the first case), or because the *logos* of these standards is not available to them (the third case), or because they don't endorse the available *logos* but they simply cannot choose not to do what it is required from them (the fourth case).

51 Of course, it is possible to argue that in this last case the agents would not be *complying* with the standard but just *conforming* to it for prudential reasons; and that Rodriguez-Blanco's proposal is precisely based on the notion of *complying* with the standards.[40] However, it is difficult to see why these cases should be left out of consideration, if the main concern of her proposal is to find an adequate way to guarantee free-from-coercion guidance of human action in every context where such action could be performed. It seems to me that the avoidance of such cases might be something that the RoL should also aim for.

52 These reflections on Rodriguez-Blanco's notion of coercion by arbitrariness, and on the cases in which the RoL would act as the most effective mechanism to control such coercion, are particularly important in order to move on to the next step of my analysis. That is, to apply them, along with all the considerations elaborated in the previous sections, to the context of "transnational law".

5 On the parties in the relevant relationship and the notion of transnationality

53 So far, four assumptions have been accepted here without further discussion: (1) the subject who merits protection—the agent, participant, person—is a human being; (2) the identity and particular characteristics of this subject are indifferent for the analysis; (3) the identity and particular characteristics of this subject, who would be subject to "transnational RoL" are also indifferent for the analysis; and (4) a general discourse about the RoL can be constructed independently of the context (national, international, transnational, or global).

54 However, when trying to apply Rodriguez-Blanco's arguments about human action and RoL to the context of transnational law, some questions arise that threaten to undermine the integrity of her proposal.

55 (5.1) The first question is: who exactly are the subjects who take part in the relevant relationship under analysis once the context of transnational law is taken into consideration? While it seems to follow from Rodriguez-Blanco's remarks that the relevant subjects are always natural persons—for example, from the enormous importance that she assigns to the understanding of *human* action, as well as her subscription to the statement that the RoL is most effective mechanism for controlling *the arbitrary will that human beings can exercise upon each another*[41]—the multiplicity of actors, institutions, and normative systems in the context of transnational law invites us to consider whether this may not be too superficial or too narrow an assumption.[42]

56 This first question also raises the further question of what the relevant relationship is, i.e. the relationship within which Rodriguez-Blanco states that the RoL—the thick version of it—fulfils the function of protecting the relevant subjects from coercion, especially coercion as arbitrariness. In the case of national law, the relevant relationships seem to be clear: state/person and person/person. However, in the case of transnational law there seem to be a multiplicity of possible relationships, and not all of them would directly involve a natural person as one of their parties. To give some examples: state/natural person; international organization/natural person; transnational agency/person; person/person; state/state; state/international organization; state/transnational agency; state/supranational organism; supranational organism/person; and so on.[43]

57 Despite the common denominator that would seem to unify them all—i.e. the presence of a context where (presumably) there is a standard whose compliance is somehow required or enforceable—it is quite unclear whether Rodriguez-Blanco's conclusions about rule-following (especially RSRPs), and the particular notion of RoL that she bases on them, are equally and globally applicable to all these possible relationships. On the one hand, these conclusions seem to be based on the idea that one party in the relevant relationship—in particular, the one to be protected—is necessarily a natural person. However, this does not always seem to be the case in the transnational context; and even if Rodriguez-Blanco could argue that both sides of the relationship always ultimately involve natural persons, even if only indirectly, the mediation of institutions would only add more complexity and difficulties to the topics discussed above in sections 1, 2 and 3.

58 On the other hand, Rodriguez-Blanco's conclusions also seem to be based on the idea that one party in the relevant relationship is the one that has created the relevant standard and requires its compliance. But again, some of the possible relationships in the transnational context seem to be based merely on a relationship of requiring standards either created by a third party or created by no party at all (for example, customary RSRPs). Moreover, some of these possible relationships could also feature a combination of multiple parties in several different roles. Let's imagine a case where *A* (a citizen of *M*) requires *B* (a citizen of *J*) to comply with an RSRP issued by *C*. In this example, we could identify between three and five different parties: a party who is required to comply with an RSRP (*A*); a party who requires that compliance (*B*); a party who has issued the RSRP (*C*); a party who has the means (or the capacity) to enforce compliance with that RSRP (by hypothesis, *J*); and a party who is in charge of protecting the required party (by hypothesis, *M*).

59 This case also shows an underlying but fundamental uncertainty in Rodriguez-Blanco's proposal: the identity of the subject of any eventual transnational RoL. In other words: even if it were clear who the parties to be protected are, and who they are to be protected from, who would be the holder or bearer of the protection duty? What would be the criterion for associating a certain duty-bearer with a certain party—either to protect them, or to protect others from them—in that relevant relationship? A clear answer to this uncertainty appears to be paramount for the success of Rodriguez-Blanco's proposal.

60 (5.2) It is possible that this first query and its complexities derive in turn from a second query, related to the notion of transnational law that is used—but not explicitly stated—by Rodriguez-Blanco in her paper.[44] The lack of an explicit definition of this core notion may be problematic in two ways. On the one hand, it precludes us from having a clear idea about what elements "transitional law" would encompass; resulting in a high degree of indeterminacy not only about the identity of the parties in the relevant relationship, but also about the types of standards—especially, concerning their source—that would potentially be considered. On the other hand, it makes it difficult to understand whether there would always be an element of voluntariness within the relevant relationship between the relevant parties—that is, whether the RSRPs under consideration have been voluntarily accepted, or whether the relationship has been freely undertaken by the parties; or whether, on the contrary, this would not be a necessary element of it.[45]

61 As is well known, the content of the notion of transnational law is far from uncontroversial and determined. Moreover, the very possibility of the existence of a transnational law as a kind of *tertium datur* between national law and international law is controversial. Any analysis of this topic and debate far exceeds the aim of the present comment.[46] However, the abovementioned difficulties can already be appreciated in Jessup's now classic definition of transnational law. Jessup argued that transnational law includes all law which regulates actions or events that transcend national frontiers; including both private and public international law, as well as "other rules which do not wholly fit into such standard

categories".[47] National legal rules whose effects (accidentally or purposely) transcend their state's frontiers would be an example of such other rules.[48]

62 Faced with such a wide range of possibilities, it seems paramount for Rodriguez-Blanco's proposal to have a clear, explicit, and delimited working definition of "transnational law", as well as an explicit argument in favour of its status as an autonomous category, and a clear understanding of who the relevant actors in transnational law would be. This would allow us, on the one hand, to understand exactly in which context the proposal is applicable, and differentiate between different contexts with particular characteristics that would require additional considerations. On the other hand, once these contexts have been delimited, it would allow us to better understand Rodriguez-Blanco's argument about coercion as arbitrariness possibly being the central case of coercion in the context of transnational law.

63 Thus it will be possible to distinguish between non-national contexts where there are no actors who could exercise coercion understood as the exercise of violence, oppression or threats—and thus, either there is no possible coercion whatsoever, or the only possible type of coercion would be coercion as arbitrariness—and non-national contexts where there are indeed actors who can exercise some type of coercion in this first sense. Furthermore, it will be possible to distinguish between transnational contexts where the participation of the relevant actors in the relevant relationship is voluntary—i.e. where the standards and their effects apply to the actors on the basis of their consent—and transnational contexts where the actors' participation is involuntary.

64 Finally, it will be possible to establish differences—for the purposes of analysis—between, at least, the actions of agents considered individually, especially agents who do not have any institutional role, the actions of agents considered from the perspective of their institutional roles, and the actions of institutions in themselves (states, organisms, agencies, companies, and juridical persons in a broad sense). This in turn would allow us to better define who or what would be the relevant subjects to whom Rodriguez-Blanco's considerations are directed —e.g. natural persons without institutional roles; public officials of national legal systems; states in their status as subjects of international law, etc.—and also to evaluate whether her conclusions apply in the same way independently of who or what the subject whose action and behaviour are intended to be guided by standards might be.

6 On the structure of relationship in national and transnational contexts

65 Lastly, I would like to add a final consideration to the analysis, this time related to Rodriguez-Blanco's idea that the RoL has always been theorized in the national context and afterwards, in any case, projected to international and transnational contexts. As I pointed out in section 1, Rodriguez-Blanco's paper is precisely an attempt to invert this theorization's logic and to replace it with one that is generic enough to be useful in any context in which enforceable standards of behaviour exist, through which the guidance of the relevant actors' conducts is intended. The RoL is always necessary because coercion can exist in any of these contexts, she argues, even if only in the form of arbitrariness.

66 My consideration is the following: maybe the main point of the classic theorization about the RoL—departing from the national context—is not the idea that, in the relationship that is relevant for the RoL, there is always a party who possesses an monopoly of force strong enough to impose their will on the other party (the first meaning of coercion). If this were the case, it could be accepted that the *ipso facto* transfer of this relationship structure to those who can be found outside a state's frontiers is not without difficulty.[49] On the contrary, it is possible that the main intuition underlying the classical theorization is another one: the idea that at least one of the parties—the one who is required to comply with a certain RSRP—has no (realistic) alternative of choosing not to comply with RSRP, as is required by the other party.

67 This lack of alternatives can be understood in multiple ways, which can also be combined. To give some examples: if the subject has voluntarily entered the relevant relationship or not; if their capacity to choose—between complying and not complying—is real or not; if the subject can voluntarily leave or renounce the relationship or not; and so on. When considering national law, it may be understood that the agents are in a relationship with the state that, usually,[50] they have not voluntarily entered, and cannot voluntarily renounce or exit; and that there is no realistic alternative to complying with the required RSRPs. The only relevant sense

in which one would be able to talk about voluntariness would be in relation to some parts of the legal system, which apply to agents if and only if they decide so; for example, contract law, trade law, some parts of family law, some parts of criminal law, and so on. In this case, at any rate, once the relationship has been voluntarily undertaken, usually the parties cannot withdraw from it with the same voluntariness; and even if the relevant relationship is one between private subjects, at any rate the state is the ultimate source behind the relevant RSRPs.

68 One may ask: how much of the transnational law really breaks away from this structure? Rodriguez-Blanco brings up the example of *lex mercatoria*, which would suggest a relationship between parties with a voluntary entrance and, under certain parameters, an equally voluntary withdrawal. However, and taking into account what was said in section 5, taking a case such as *lex mercatoria* to exemplify a possible central case of transnational law may be misleading. For, unless it is defined very restrictively, it seems possible to find numerous situations within "transnational law" that can easily be represented using the same structure as relationships within national law.

69 Furthermore, to think that coercion in any sense other than coercion as arbitrariness does not exist in *lex mercatoria* (merely because usually there is no party with a strong enough monopoly of force to impose their will on the other) seems to be—as I pointed out in section 4—a very narrow way to think about coercion. Coercion also encompasses the possibility of one party generating a state of affairs which heavily restricts—sometimes, to the point of nullifying altogether—the other party's capacity to freely carry on with their life plan.[51] To do so, no monopoly of force or threat or violence is needed: it suffices, for example, for there to be a generic non-enforceable sanction, or a public notice of non-compliance which could very well signify a loss in reputation—a highly important matter in some contexts like that of *lex mercatoria*—or the withdrawal of some type of membership, or any type of act that in any way prevents the agent from belonging to a certain normative system or group: such membership or subjecthood being necessary for that particular agent to carry on with their life plan, even if for other agents this result could be absolutely innocuous.

7 Conclusion

70 In "What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law", Rodriguez-Blanco proposes to pay particular attention to several ideas that, in my opinion, are of great relevance to legal theory and legal philosophy. One of these ideas concerns how the transnational context strains our understanding of legal concepts that are usually taken for granted, and the possibility of their application. Another concerns the great attention devoted to coercion as a ubiquitous problem in legal contexts, regardless of whether these contexts are national, international, transnational or global; and to coercion as something more than mere violence: something that is often forgotten or neglected when theorizing about power relationships in legal contexts.[52] Finally, the attention paid to the RoL as (presumably) the most adequate means to prevent the coercion of agents in all contexts in which they may find themselves, which nowadays are decreasingly national, is always essential.

71 With this in mind, my intention with this essay has been to highlight some questions and doubts about some issues that could be key to strengthening Rodriguez-Blanco's proposal. It is my understanding that clarifying these questions about human action and the type and identification of the *logos* of RSRPs, as well as the adoption of a somewhat broader notion of coercion, and an explicit and detailed stance about what "transnational law" is, would be extremely helpful for achieving that goal. Finally, I also hope that these comments may be useful to anyone else who is concerned with these ideas and points, which, as I said at the beginning, I think are of great importance to (at least) the theory and philosophy of law.

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Notes

1 Rodriguez-Blanco 2018.

2 Rodriguez-Blanco 2018: 209.

3 Or, in any case, any type of agent or organization with a similar coercive capacity.

4 Rodriguez-Blanco 2018: 210.

5 Rodriguez-Blanco 2018: 212.

6 Rodriguez-Blanco 2018: 216.

7 Rodriguez-Blanco 2018: 210.

8 Rodriguez-Blanco 2018: 211–212.

9 Rodriguez-Blanco 2018: 214, 223–224. Two clarifications apply here. The first is that “good-making characteristics” could be defined like this: (i) the property *P* is a *good-making characteristic* if it follows from *X* having *P* that *X* is intrinsically good; (ii) *P* is a *good-making characteristic* if an act results in the production of good in virtue of having *P*. The second clarification is that Rodríguez-Blanco adheres to a theory of intentional action (following Anscombe) according to which understanding (the meaning) of a human action implies or presupposes understanding the “point” (the meaning and purpose) of that action, since any intentional action is a sequence of actions directed towards its ultimate goal (cf. Anscombe 2000). On this view, then, these “good-making characteristics” are not only what each agent pursues with his or her actions, but also what makes the successive steps of any intentional action intelligible as a whole (both to the agent and to the observer). I will return to this in section 2. For further development of Rodríguez-Blanco’s perspective, see e.g. Rodriguez-Blanco 2014: ch. 2; 2021a: 702–703; 2021b: 49–50. In the Spanish version of her 2021a (i.e. 2021b), Rodriguez-Blanco adds two ulterior facts that “require accounting for” in order to fully understand the *why-question methodology* (not present in the English version).

10 Rodriguez-Blanco 2018: 216.

11 Rodriguez-Blanco 2018: 221.

12 Rodriguez-Blanco 2018: 211–212.

13 See e.g. Redondo Natella 1996; Alvarez 2017.

14 Cf. footnote 17.

15 I use “produce” here so as not to take sides on whether the explanation is causal or non-causal, although it seems to me indisputable that the format of the question (means-ends) presupposes that the medium is somehow at least considered a necessary condition for producing or achieving that end.

16 Against identifying motivational reasons with explanatory reasons, see e.g. Alvarez 2017.

17 For an great introductory essay, see Muffato 2015. For an in-depth analysis, see e.g. Redondo Natella 1999 and 2018.

18 It is very important to take this kind of ambiguity into account when analysing approaches or discourses. My intention here is not only to distinguish the point analytically in order to analyse the work that is the subject of this commentary, but also to propose a clear and explicit scheme that may be useful for future analyses of problems related to human action and law (for example, but not limited to, those related to the authority of law).

19 Rodriguez-Blanco analyses whether they are indeed independent or not, and she opts for considering them to be “possibly independent”. Cf. Rodriguez-Blanco 2018: 212ff. I will not discuss this assumption here.

20 As I understand it. On my understanding, the considerations of intention and intentionality in Rodriguez-Blanco’s work concern the intentionality of an individual agent. There remains the question of whether these considerations and their consequences can also be extended to the case of collective agents. In this case, one might ask not only what notion of collective intentionality could be used (see note 24), but also how these agents or subjects of the relevant relationship should be conceptualized (see sections 4 and 5). Entering into these points would far exceed the aim of this paper. I thank an anonymous reviewer for insisting on the clear relevance of making this point and leaving these questions open.

21 Rodriguez-Blanco 2018: 218.

22 Rodriguez-Blanco 2018: 218.

23 The apparent *Type 4* (non-voluntary and intentional action) is not taken into account here, as it seems to be a logical impossibility given Rodriguez-Blanco’s definition of intentionality.

24 To discuss them is far beyond the scope of this article, and it would be take a long separate work to deal adequately with the subject. This is so because what "intention" and "intentional action" mean has been—and continues to be—the subject of vigorous debate. For an introduction, see e.g. Mele 2009; Setiya 2018; Wilson & Shpall 2016. I thank the anonymous reviewer who prompted me to clarify and substantially improve my ideas on this point.

25 I speak here only about actions (action in a positive sense) and not also about omissions (action in a negative sense) for the sake of brevity, and also to avoid taking a stand in the debate over whether actions and omissions have the same status or not. All the considerations I develop here are equally applicable to actions and omissions.

26 Here Rodriguez-Blanco follows the *why-question methodology* developed by G. E. M. Anscombe (2000).

27 See Rodriguez-Blanco 2021a, where she defends the possible irrelevance of the agent's description of her choices in contexts where there is an institutional background that makes these choices intelligible (p. 706).

28 See e.g. Rodriguez-Blanco 2021a: 709ff.

29 For an in-depth analysis of the particular methodology of this central case, see e.g. Rodriguez-Blanco 2007.

30 See e.g. Haidt 2001.

31 See e.g. Rodriguez-Blanco 2014 and 2016.

32 Rodriguez-Blanco 2016: 15 (quoting Rodriguez-Blanco 2014: 199).

33 An alternative, more complete and detailed classification might be the following: (i) situations with mediation; (i.a) situations mediated by other elements or entities that are not agents; (i.b) situations mediated by other agents; (i.b.1) situations with complete mediation by other agents; (i.b.2) situations with partial mediation by other agents; and (ii) situations with no mediation. The problem with this alternative classification lies in the very possibility of (i.a) (what kind of mediation would we be talking about?); and, in any case, whether there would be any real difference between (i.a) and (ii). An example might be "the reason". Could a person access the *logos* without doing so in some way through her reason? This leads us to the serious question of in what sense we might speak of mediators other than as other agents. I cannot give a definite answer to this question here, which would require a much broader and deeper investigation. For this reason, I have decided to simplify the classification for the purposes of discussing the issues in this paper.

34 What I call here a complete mediation would be, to use Raz's terminology, one in which what the mediator produced is taken by the agent to be an exclusionary reason. A partial mediation would be one in which what the mediator has produced is taken to be a first-order reason, perhaps with some specific weight due to the mediator's particular role or status, which by no means necessarily supersedes or excludes the other reasons. See Raz 1999.

35 A similar question arises in the face of discourses on authority where a complete mediation is proposed, exactly as Raz's discourse can be understood. See e.g. Maniaci 2018 and 2019.

36 Rodriguez-Blanco 2018: 209.

37 Rodriguez-Blanco 2018: 212.

38 I thank M. Victoria Kristan for suggesting that I also include the "global" context within the possible relevant contexts.

39 These are situations where, for contextual reasons, not doing what is required has such negative consequences for the agent that it seems as if there is no real choice between doing and not doing it. If someone "has no choice but" to do what is required of them because, for example, their membership in a group on whose membership a large part of their life plan depends, then it seems that there has been no real choice on their part. This is a situation where the *logos* of a RRDP are made available to agents, and at the same time a context exists or is created in which the consequences of non-compliance are such that non-compliance would destroy or severely affect the agent's life plans (or force him to change them).

40 On the difference between conforming and compliance, see Raz 1999: 178–182.

41 Rodriguez-Blanco 2018: 209. The emphasis is mine.

42 It may well be argued that this multiplicity of actors, institutions, and normative systems can also be found in other contexts, especially in national law. However, it is usually accepted that in national contexts institutions and other normative systems ultimately depend—for their existence and operation—on the national legal system. Here I just want to point out that, in transnational and international contexts, this kind of dependence can be disputed. Furthermore, in regard to public international contexts, the relevant actors are definitely not natural persons but juridical ones—usually states, but also some international organizations.

43 For simplicity, I have chosen not to add examples of relationships in which states act as intermediaries—be this as appliers or bearers of duties and rights—between other actors—other states, international organizations, supranational organizations, transnational agencies, etc.—and certain agents bonded to those states by a legal bond, e.g. of citizenship.

44 This problem was also pointed out during the discussion of the paper in the conference "En teoría hay mujeres (en teoría)", by Jordi Ferrer Beltrán and M. Victoria Kristan.

45 I will develop this point further in section 6.

46 See e.g. Cotterrell 2012; Scott 2009.

47 Jessup 1956: 1.

48 This is of great relevance since, depending on the context of the analysis, it could be said that the rules that belong to each context are addressed to different actors: for example, in public international law, states (and organizations created by treaties between states); in private international law, states and (natural and juridical) persons; in national law, natural and juridical persons within the boundaries of a certain territory; and so on.

49 Although it may actually be easy if a broader conception of coercion is considered, at least broader than the one that—as we have seen in section 4—Rodriguez-Blanco seems to assume.

50 For simplicity, here I leave aside cases such as adoption of citizenship, naturalization, statelessness, etc.

51 See e.g. Celano 2013; Anderson 2017.

52 For example, in the debate on the central case of law and the central case of authority. See Schauer 2015; Celano 2014.

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