PART V

Legal Normativity beyond the State

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What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law

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I. Introduction

Despite opposing voices[1] it is a shared view among legal and political philosophers that the Rule of Law is the most effective mechanism for controlling the coercion of the State and the arbitrary will that human beings can exercise upon one another. Different characterisations have been advanced to disentangle the nature of the Rule of Law, but two main conceptions can be identified: first, a thin perspective of the Rule of Law that establishes formal conditions for law-making and the exercise of government. These conditions, it is argued, are detached from human rights ideals, justice, freedom and other substantive values.[2] Second, a thicker conception

[1] See RM Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (New York, Free Press, 1976) and D Kennedy '"The Rule of Law", Political Choices, and Development Common Sense' in D Trubeck and A Santos (eds), *The New Law and Economic Development* (Cambridge, Cambridge University Press, 2006) and 'Toward a Critical Phenomenology of Judging' in AC Hutchinson and P Monahan (eds), *Law's Rule – The Rule of Law: Ideal or Ideology* (Toronto, Carswell, 1987). They are sceptical of rules in general and therefore of the Rule of Law. For them there are no rules or principles of law because judges decide according to their biases, prejudices, social and historical perceptions and political ideology. Law is reduced to relations of power and therefore this scepticism also affects the Rule of Law, but mainly the Rule of Law conceived in a 'thin' or formalistic manner. See also M Horwitz, 'The Rule of Law: An Unqualified Human Good' (1976–77) 86 *Yale Law Journal* 561. Other criticisms come from communitarian fronts. For example, Michael Sandel considers the Rule of Law individualistic. However, this critique of Sandel arguably affects the thin conception of the Rule of Law only: see M Sandel, 'The Political Theory of the Procedural Republic' in AC Hutchinson and P Monahan (eds), *Law's Rule – The Rule of Law: Ideal or Ideology* (Toronto, Carswell, 1987).

[2] See Montesquieu, *The Spirit of the Laws*, A Cohler, B Miller, and H Stone trs (Cambridge, Cambridge University Press, 1989); AV Dicey, *Introduction to the Study of the Law of the Constitution* (Elibron Classics, 2005, originally published in 1889); F Hayek, *The Road to Serfdom* (London, Routledge, 2001); J Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law* (Oxford, Oxford University Press, 1979)

of the Rule of Law that construes it as aspiring to moral ideals.[3] In the former conception the Rule of Law guides acts of government through managerial mechanisms, whilst in the latter view guidance though the Rule of Law is not the final end, but a by-product of the final end formulated as a moral aspiration.[4] Within this account the Rule of Law establishes right standards of conduct to be followed that enable legal practice to become closer to a moral ideal of conduct. According to common thought within the transnational perspective, if we correctly delineate the most appropriate conception of the Rule of Law then we are able to transpose the Rule of Law that is defended at the national level to the transnational level. But the appropriate solution at the transnational level is more subtle and complicated, and defenders of either conception overlook the most important premise of any sound argument that defends the Rule of Law and the Transnational Rule of Law, ie we need a correct understanding of human action and human compliance with rules, standards, regulations and principles (from now on RSRPs). This bottom-up approach is not alien in legal and political philosophy and has an established pedigree in Aristotle and Oakeshott, but is absent in much established thinking of transnational law.[5]

The emergence of transnational laws puts pressure on our most cherished legal and political concepts such as the State, legal authority and the normativity of law because these concepts have traditionally been shaped and theorised around the idea of State law and within the confinements of single jurisdictions. Furthermore, transnational laws, arguably, make superfluous the debate on the appropriate model of the Rule of Law because there is no State to control and therefore no coercion or arbitrary power to be liberated from. Actors in transnational contexts willingly accept and comply with rules, regulations, and principles

at 210–29; RS Summers, 'A Formal Theory of the Rule of Law' (1993) *Ratio Juris* 12; A Scalia, 'The Rule of Law as Law of Rules' (1989) *University of Chicago Law Review* 1175; R Posner, *Economic Analysis of Law*, 6th edn (Aspen Law, 2003) at 266–68, 541–42.

[3] See L Fuller, The Morality of Law (New Haven, Yale University Press, 1964); R Dworkin, A Matter of Principle (Cambridge MA, Harvard University Press, 1986) 12–13; J Finnis, *Natural Law and Natural Rights* (Oxford, Clarendon Press, 1980) at 270–81; N Simmonds, Law as a Moral Idea (Oxford, Oxford University Press, 2008); B Tamanaha, 'The Rule of Law For Everyone?' (2002) 55(1) *Current Legal Problems* 97; T Endicott, 'The Impossibility of the Rule of Law' (1999) 1 *Oxford Journal of Legal Studies* 1.

[4] For defenders of the thick conception of the Rule of Law the key argument is the need to make law intelligible. See EJ Weinrib, 'The Intelligibility of the Rule of Law' in AC Hutchinson and P Monahan (eds), *Law's Rule – The Rule of Law: Ideal or Ideology* (Toronto, Carswell, 1987).

[5] In transnational law the methodology is either socio-systemic, eg G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in *Global Law Without State* (Aldershot, Ashgate, 1996) and *Constitutional Fragment: Societal Constitutionalism and Globalization* (Oxford, Oxford University Press, 2012); R Cotterrell, 'What is Transnational Law?' (2012) 37(2) *Law and Social Inquiry* 500; W Twinning, *General Jurisprudence: Understanding Law From a Global Perspective* (Cambridge, Cambridge University Press, 2009); N Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford, Oxford University Press, 2010) or neo-Kantian, eg see cosmopolitan claims in C Corradetti, 'Judicial Cosmopolitan Authority' (2016) 7(1) *Transnational Legal Theory* 29; S Benhabib, *Another Cosmopolitanism: Hospitality, Sovereignty and Democratic Iterations* (Oxford, Oxford University Press, 2006).

and, arguably, the 'coercion question' is therefore dissolved, making the inquiry for the most adequate account of the Rule of Law unnecessary. Why do we need, it might be argued, a transnational rule of law if there is nothing to control? Lex mercatoria[6] – which operates under conditions of 'raw agency' – illustrates the difficulties of the 'coercion question' and the Rule of Law. This means that agents or actors comply with regulations, customs and decisions because they are engaged with the ends of these regulations, customs and decisions, which they see as having good-making characteristics or values for them, or so I will argue. They willingly and freely comply with the set of rules, principles and regulations contained in lex mercatoria and since they do so, the idea of standards of conduct, such as the Rule of Law, does not add much to their already free action. However, contrary to appearances and to this common understanding of the matter, I will argue that the 'coercion question' is also relevant in the context of transnational law.

My aims in this paper are twofold. First, to demonstrate that, contrary to appearances, the 'coercion question' does in fact arise in transnational legal contexts once we properly understand the different features of coercion. Second, to defend a sound conception of the Rule of Law which will lead us to the heart of the correct question concerning the Rule of Law, ie what is the grounding that enables us to understand how participants of a legal practice comply with regulations, rules, directives, and principles (RRDPs)? Legal philosophers tend to defend one model of the Rule of Law over another assuming the truth of a certain view on human action and without much defence of this assumption. The method that I propose in this paper is the opposite. I propose to put the horse before the cart, ie to explain how human beings comply with RRDPs. This explanation will pave the way to understanding coercion at the transnational level. I will also argue in favour of a thick conception of the Transnational Rule of Law. The methodology that I defend establishes that a sound understanding of the Rule of Law entails posing the correct question about the Rule of Law, ie how participants comply with

[6] *Lex Mercatoria* is the set of principles and rules that guide the decisions of international commercial arbitration. The participants are non-State actors and State actors but not *qua* States, but *qua* parties to a commercial contract. States also are indirectly part of this *lex* via international treaties (see for example the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, 'The York Convention'). The contemporary *Lex Mercatoria* includes established customary commercial practices, rules, principles and standards of different States, international organisations and special commissions (UNCITRAL, UNIDROIT, Principles of European Contract Law). See B Goldman, 'La Lex Mercatoria dans les Contrats et L'Arbitrage International: Realités et Perspectives' in *Clunet* (1979) and 'Lex Mercatoria' in *Forum Internationale* (1983); and CM Schmitthoff, 'The Unification of the Law of International Trade'(1968) *Journal of Business Law* 105. International arbitration law is the best example of *lex mercatoria*. It emerges as a result of landmark conflicts due to the nationalisation of oil companies in developing countries. See *Texaco Overseas Petroleum Co v Libya*, Int'l Arbitral Award, 104 J. Droit Int'l 350 (1977). As shown by international arbitration rules and principles, transnational law regulates specific activities across borders. Thus, *lex mercatoria* regulates international commercial activities only, but there are many regulations that aim to govern other transnational activities, eg insurance (European Standards Alliance), health (Food Standard Agencies and World Health Organisation), forest (Programme for the Endorsement of Forest Certification), banking (Basel Committee on Banking Supervision), advertising (European Advertising Standards Alliance).

the RRDPs of transnational law, and how law created by human beings is able to bind other human beings and guide them in their conduct.[7] The thought is that if we understand this basic question, then we can understand how the Transnational Rule of Law operates and why it is necessary. Finally, I discuss some possible objections to this view.

II. Understanding Human Action: The Medusa of Coercion

Coercion is characterised by two key features. First, coercion is typically defined as the exercise of violence, psychological or physical, and/or oppression or threats.[8] Second, coercion is defined by arbitrariness. This latter feature is less standard in the literature on coercion[9] but is amply studied in the literature on freedom of the will and practical reason. Coercion as arbitrariness implies that the person who ought to be able to choose and perform an action cannot choose and be guided by any rational standards because the reasons or logos that ground the action are confused, muddled, unclear or contradictory. In order to understand the latter feature of coercion we need to understand how voluntary action is possible and how we voluntarily engage and comply with RRDPs.

Aristotle[10] and Aquinas[11] accept that the individual (I) can be blamed or praised only for what the individual does voluntarily. They also accept that there are two types of voluntary action. First an action is voluntary if it springs from the will of the agent (V1), if, in other words, the agent is the origin of the action. The agent is the arché or principle of the action.[12] Second, an action is voluntary if the agent wills the end which she sees under the intelligible form of the good and deliberates about the means to obtain the end (V2). In the latter case we can say that there is full voluntariness and in this case a voluntary action overlaps with

[7] The importance of the 'internal aspect' of the agent or actor in the context of the Rule of Law has been highlighted by M Oakeshott, 'The Rule of Law' in *On History and Other Essays* (Indianapolis, Liberty Fund, 1999). However, his explanation of human action differs from the one I defend in this paper. For a point of view that emphasises the role of the actor in global law see, for example, M Zamboni, 'Globalization and Law Making: Time to Shift a Legal Theory's Paradigm' (2007) 1 *Legisprudence* 125.

[8] For an outstanding contribution of the idea of coercion in this sense in the context of law, see F Schauer, *The Force of Law* (Harvard, Harvard University Press, 2015).

[9] Exceptions to this trend are G Lamond, 'The Coerciveness of Law' (2000) 20(1) *Oxford Journal of Legal Studies* 39 and 'Coercion and the Nature of Law' (2001) 7(1) *Legal Theory* 35 and M Fowler, 'Coercion and Practical Reason' (1982) 8 *Social Theory and Practice* 329. For the standard view on coercion see R Nozick, *Anarchy, State and Utopia* (New York, Basic Books, 1974). See also T Endicott, 'Arbitrariness' (2014) 27(1) *Canadian Journal of Law and Jurisprudence* 49, who distinguishes arbitrary government from arbitrariness per se.

[10] Aristotle, *The Nicomachean Ethics*, 1109b30–34.

[11] Aquinas, *Summa Theologiae,* I–II, q.21, art. 2.

[12] Aristotle, *The Nicomachean Ethics*, 1110a16–20 and Aquinas, *Summa Theologiae*, I–II, q.6, art. 1 and art. 3.

an intentional action.[13] But is it the case that, on some occasions, V1 will be independent from V2? How can there be two types of voluntariness? The idea that the agent is the origin of the action (V1) is possible because the agent is able to grasp the end of the action in the form of good-making characteristics or values, and deliberates about the series of actions in terms of a series of reasons that lead to the planned end seen in the form of a good (V2). Let me explain. Aristotle insists that the starting point of any intentional action is the state of affairs or thing that the agent wants and that is wanted because it is presented to the agent as having good-making characteristics or as being valuable. For example, the man wants to have vitamin X because it is healthy. Furthermore, the practical syllogism is not limited to two premises and a conclusion, there can be many intermediate instances that are part of the syllogism. Unlike theoretical syllogism, practical syllogism is not a proof or demonstration of a true proposition, nor is it a proof or demonstration of what ought to be done or what we ought to do. It is a form of how and why we are bringing something about when we are actually bringing it about.

Anscombe presents us with an alternative analysis to practical syllogism and a different way to understand practical reasoning. Thus, the series of responses to the question 'Why?' manifests or reveals the practical reasoning of the agent and enables us to identify whether the action the agent is performing is intentional or not. However, she warns us, the why-question methodology is as 'artificial' as the Aristotelian methodology of practical syllogism.[14] When we act intentionally we exercise a kind of reasoning which is not theoretical and which is grounded on a desire for that which seems to the agent to be have good-making characteristics. You know the thing or state of affairs you are bringing about because you desire the thing or state of affairs you are bringing about, and you are able to desire the thing or state of affairs you are bringing about because you know practically the state of affairs. Your desire arises because you represent the thing or the state of affairs to be brought about as valuable or good. Volition and knowledge do not fall apart.[15] For example, if you are a painter you know how and why the shapes and colours on the canvas are what they are; it is because you desire and value the painting you will produce that it should be such and such a colour and shape. But it is also true that because you desire and value this and not that arrangement of colours and shapes, you are able to know it practically. Consequently, moral approbation is irrelevant for practical reasoning and for our practical engagement with the world.[16] This does not mean that there are no instances of objectively

[13] For a full development of this conception, see my book V Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (Oxford, Hart Publishing, 2014, paperback edition 2016). For a summary of the conception see V Rodriguez-Blanco, 'Practical Reason in the Context of Law' in D George and RP George (eds), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge, Cambridge University Press, 2017).

[14] E Anscombe, *Intention* (Oxford, Blackwell, 1957/2000) §41–42.

[15] ibid § 36.

[16] ibid § 37–38.

justified reasons for actions. On the contrary, we aim at getting it right and finding the genuine good-making characteristics or values that will provide meaning and intelligibility to the movement of our bodies. Therefore, the possibility of hitting the target of genuine good-making characteristics or values resides in our good characters and capacities. But to understand the basic structure of practical reason and the different scopes of agency, we do not need to begin from fully justified and objective values. Our choosing and deliberative activities are better understood in the progressive form. Therefore, I am the origin of an intentional and voluntary action because I can grasp the end and deliberate about the means as a series of actions that are intelligible because they are connected by underlying reasons (for actions).

One possible way of understanding that V1 and V2 might take separate paths, ie that there can be voluntary actions that are not intentional, is as follows. It can be argued that when an action is successful and the agent produces the end she intends, ie a state of affairs, object, artefact, or activity, then V1 and V2 coincide. However, if the end is not achieved we can say that V1 and V2 have become dislocated. The intended end is not achieved but another end is achieved *per* accidens and not per se. In this latter case, V1 results from V2, but V1 takes an independent form. In paradigmatic examples, the agent is forced by circumstances to change her plans to achieve an end that is not what she planned, but she is in some sense the origin (arché *or principle) of the action because the action is conceived and seen as a unity that is caused by her.*[17]

Let me put the following example to illustrate the point.[18] A captain might deliberate about the best route to take her ship and its cargo from Southampton to Venezuela, where the cargo needs to be delivered. She hires the best sailors, provides favourable wages, finds the best possible ship, and plans the best route that will take the ship, its cargo and the crew to the planned destination. The captain engages in this activity because she aims to earn money, and she aims to earn money in order to enjoy a month's holiday with her family. Let us recall, this is her first person deliberative stance. She sees this month of holiday as the end of her actions and as having good-making characteristics. When the ship sails close to Bermuda, however, there is a storm that endangers the life of the crew and the captain has no option but to throw the cargo overboard. The captain takes the decision to get rid of the cargo to save her life and the lives of the sailors. This is not what she had planned to do and it is not the end per se when she deliberated and acted upon her deliberations. The circumstances, however, lead her to this other end which in some sense is per accidens. She acts voluntarily because the action of hiring the sailors, agreeing to take the cargo to Venezuela and beginning the

[17] Here I assume the truth of agent-causation, which I do not have space to defend in this paper.

[18] See Aquinas, *Summa Theologiae*, SI IaIIae, Q6, where he says that this kind of action would be 'a mixed of voluntary and involuntary, but more voluntary'. See also Aristotle on mixed actions, *The Nicomachean Ethics*, Book III.

journey etc have an origin in her through her deliberations and the execution of her powers, but in one significant sense she did not deliberate about throwing the cargo from the ship. This action is voluntary because 'it springs from her will' but she did not plan or deliberate about it.

Let us suppose an alternative scenario where, in contrast to the former scenario where the plan is thwarted, there is no storm and the captain succeeds in her plan to take the cargo to Venezuela. In this case we can say that the captain had 'enhanced' control of her actions since she knew what she was doing and why, and there were no impediments to the intended direction of her actions and the production of the planned state of affairs, ie the delivery of the cargo. In the first scenario where the ship encountered a storm, the captain was in a position of reduced control because she could not deliberate, and circumstances obliged her to take a different route in her performance, ie to get rid of the cargo.

At the other extreme of the range of actions where V1 and V2 are located, we have actions that are neither intentional nor voluntary (V1) or (V2). This happens when we have been denied access to the reasons or logos of the action that is requested from us. Let us go back to our example of the storm. I am your captain and I do not tell you that there is a storm up ahead. When I tell you to throw the cargo overboard I do not provide any justification for this, I simply demand you throw the cargo overboard. This is a clear case of coercion as arbitrariness where I do not present you with the reasons or logos of the action, but merely demand that you act. Naturally, you do not understand why you are doing what you are doing and you do it purely because I said so. You have been deprived of your capacity as a chooser or deliberator and some authors might say that your dignity has been violated.[19]

How does this all apply to the 'coercion question' in the context of the Rule of Law and transnational law? In the context of national law, judges and legislators provide the necessary justification when the State exercises coercion and demands that citizens obey the decisions of courts and judges. Judges and legislators give reasons for action that justify why the law demands citizens to perform certain actions in specific circumstances. I have argued that citizens can be bound because legal reasons are formulated as genuine or as having believed good-making characteristics or values. In this way, the grounding of RRDPs are underlying reasons as good-making characteristics or values.[20]

[19] See Kant, who considers that dignity is grounded on our humanity and therefore capacity to choose our lives: I Kant, *The Metaphysics of Morals*, Mary Gregor trs (Cambridge, Cambridge University Press, 1996) 6:387, 6:392, 6:420, 6:462; *Groundwork for the Metaphysics of Morals*, A Zweig trs (Oxford, Oxford University Press, 2002) 4:435, 4:436; *The Critique of Practical Reason*, Mary Gregor trs (Cambridge, Cambridge University Press, 1997) 5:71, 5:87, 5:88. The dignity of humanity is the first step towards the most complete idea of dignity which is the 'dignity of personality'. See also my forthcoming article V Rodriguez-Blanco, 'Dworkin's Dignity Under the Lens of the Magician of Könisgberg' in S Khurshid, L Malik and V Rodriguez-Blanco (eds), *Dignity in the Legal and Political Philosophy of Ronald Dworkin* (Oxford, Oxford University Press, 2018).

[20] See Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (n 13).

In the transnational context there is no apparent coercion, legitimate or illegitimate, of the State since there is no State at the transnational level. I argue, however, that whilst there is no coercion as violence or repression, there can be coercion as arbitrariness. For example, if the arbitrators in an international arbitration case do not provide coherent and adequate legal reasons grounded on values or genuine or believed good-making characteristics for their awards and decisions, or they demand certain conduct or an action to be performed by the parties grounded on muddled, incoherent or confused reasons, then we can say there is coercion as arbitrariness.

If this notion is sound, a transnational rule of law would serve as the quintessential mechanism to ensure that agents in the transnational legal context are not subject to the arbitrary will of another, because the transnational rule of law demands that reasons or logos as values or good-making characteristics are embedded in the creation of transnational RRDPs, and this enables agents in the transnational context to choose RRDPs because they are grounded in such reasons or logos.

But now the question that arises is 'What are the key features of a Rule of Law and Transnational Rule of Law that guarantee agent choice and liberate agents from arbitrariness?' This is the direction in which I now turn.

III. The Rule of Law and the Thick Conception of the Transnational Rule of Law

There are two contemporary theoretical views on the nature of the rule of law. First, a thin conception that establishes the set of conditions that are part of the doctrine of the Rule of Law and according to which the rules of law should be: clear; consistent with action; coherent; possible; public; non-retroactive; and constant. This set of conditions does not necessarily generate a legal system whose key feature is substantive justice.[21] According to the thin view this set of conditions is contingent upon the moral landscape of the specific legal system. In other words, these conditions can be equally present in either evil or benevolent regimes. Second, there is the view that the conditions are not only contingent upon and neutral to a just legal system, but that they embed a moral ideal that provides the conditions of possibility for any legal system to be just.[22] According to the latter, the conditions, albeit refined and conceptualised in more appropriate ways, give shape to and make possible a fundamental moral idea that is intrinsic to our understanding of what law is, ie the independence of one person from the will of another. Thus, legal rules and principles that are clear, consistent with action,

[21] Raz *The Authority of Law* (n 2) and M Kramer, 'The Big Bad Wolf: Legal Positivism and its Detractors' (2004) 49(1) *American Journal of Jurisprudence* 1.

[22] See Weinrib, 'The Intelligibility of the Rule of Law'(n 4) and Simmonds, *Law as a Moral Idea* (n 3).

coherent, possible, knowable, non-retroactive and constant enable citizens to guide their actions according to them under the warrant that these rules and principles are not the manifestation of the arbitrary will of officials, judges and legislators, but that they manifest a will possessing a certain logos as good-making characteristics or values. This is a crucial point, but difficult to understand. How can mere formal conditions generate the power of liberating us from an arbitrary will? Simmonds and Fuller carve out the idea of law as being purposive and Simmonds adds that it is purposive towards an aspiring moral archetype where the conditions above are fully fulfilled. (Note that the conditions are fulfilled only by degrees in defective legal systems.)

Both conceptions of the Rule of Law presuppose law created by the State. The emergence of transnational regulations, which go beyond the borders of State law, pose important questions about their legitimacy and normativity, ie about their capacity to create reasons for citizens at the transnational level. Transnational regulations seem to go – it is claimed – beyond the legitimacy that is provided by the Rule of Law. I would like to argue in favour of the possibility of a Transnational Rule of Law that meets the conditions adumbrated by the thick conception of the Rule of Law and explore the idea that the logos as values that underlie the rule of law enables us to be free from the arbitrary will of another person. In a similar way, in the case of a Transnational Rule of Law, the *logos as values* that shapes transnational interactions enables citizens in different States to be free from the arbitrary will of another person. My explanation differs from the one advanced by Fuller, Simmonds and Weinrib.[23] My proposal goes deeper into the nature of the logos as values of the Rule of Law and the distinction between arbitrary will and non-arbitrary will as being key to a conception of liberty. My proposal fully explains why the logos as values provides a warrant that the will of the arbitrator in the case of lex mercatoria and transnational law, and the will of officials, judges or legislators, in the national context, is not arbitrary.

Fuller points out that law is a practical craft and proposes that legislation and judging involve developing the skills for a practical craft. This idea should not be taken lightly. It invites us to reflect on the kind of creatures we are and how we produce things in the world and, more specifically, how the will can create something that is not arbitrary, but rather has a certain logos that is compatible with and appropriate to the kind of creatures we are. In previous work[24] I have argued that we are 'eudaimonic creatures' and that the authorship of the law and its key features, ie normativity and authority, are rooted in this condition. This means, following the Aristotelian and Thomistic traditions,[25] that in our condition of lacking we reach, interact the world and transform it following our visions, conceptions and imaginings of what good-making characteristics or values consist in.

[23] Weinrib formulates a similar thick conception, though he focuses on intelligibility, see n 4.
[24] See Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (n 13).
[25] See especially J Lear, *Radical Hope* (Cambridge MA, Harvard University Press, 2008).

We yearn and long for and desire certain things, sometimes apprehending what is correct, right and good, but sometimes catastrophically failing to grasp what is correct, right and good, though we still believe that what we desire and long for does possess good-making features. We do this not only individually but also collectively.[26] This condition is pervasive and makes the world intelligible beyond its pure materiality. Thus, a piece of music becomes more than noise, a speech becomes more than the vocal chords making sounds, a hammer is more than steel and wood assembled in a specific form, a cathedral is more than stone, mortar and glass, and a choreographed dance is more than a group of people moving their bodies. In a similar way the set of legal rules, directives and principles are not the sole expressions of the raw will of judges and legislators, nor mere social facts that become fully intelligible through examination of the beliefs and desires as mental states of judges and legislators. Judges and legislators create legal rules, directives and principles with the aim of bringing about a state of affairs, ie compliance with the rules, directives and principles that will either serve or produce good-making characteristics, albeit that they might be mistaken or merely believed.

RRDPs need to be intelligible to the addressee in order for him or her to follow and be guided by them and this intelligibility is only possible when the good-making characteristics or values appear in the scene of our longings, yearnings and desires. In other words, when they are present or knowable by us. Judges and legislators do not escape the 'eudaimonic condition' of humankind. What differentiates human actions from the actions of man and women? The latter actions possess an intrinsic aim formulated as a value or good-making characteristic. Other actions such as sneezing, itching your head or yawning are all human actions but not the actions of men and women. This suggests that when men and women transform the world they do it according to an order of reasons or logos that they understand and they do it under the rubric of 'actions of men and women'. This order of reasons or logos is not merely theoretical but is practical in the sense that it is directed to a future action, to something that will happen. The order of reasons or *logos* is known by the executor or agent of the action and he or she understands why one action ought to follow another until the good-making characteristics or specific value is achieved. The latter makes intelligible the order of reasons and its execution in the world. Thus, to make a cappuccino I follow certain procedures and/or possess the know-how to make a cappuccino. I switch on the cappuccino machine, put the coffee beans in the appropriate container, press the 'On' button, place the cup in the correct position, open the milk carton, pour the milk into the milk container to be frothed and finally add the milk to the coffee. There is a 'practical craft' in the process because the order of my actions cannot change

[26] See my forthcoming article V Rodriguez-Blanco and P Zambrano, 'One Myth of the Classical Natural Law Theory: Reflecting On the "Thin" View of Legal Positivism' (2018) 31 *Ratio Juris* 1, 9–32, for an explanation on how social practices define the particularities of the good or values. I rely on the idea of 'institutional transparency' advanced by GEM Anscombe in her article 'On Brute Facts' (1958) 18(3) *Analysis* 69.

if I wish to produce a good cappuccino. It has a natural practical character. The performance of any intentional action is parallel to a process of deliberation that involves the exercise of practical reason. This account of intentional action has been misunderstood or confused by contemporary understandings of intentional action which focus on intentional action as a mental state.[27]

It is arguable that the creation of the rule of law is also a 'practical craft', albeit one with a logos that can be the subject of discussion and re-conceptualisation. It requires that legal rules and principles are non-retroactive, knowable, clear, consistent in action, coherent, possible, public, and constant. Advocates of the thin view of the Rule of Law have argued that the formal conditions of the Rule of Law do not ensure a just legal system in any substantive way, and that the *logos* consists merely of rules of management that can lead to evil acts such as extra-legal violence. The notion of law as purposive gives us a hint towards a response to the thin view but does not seem sufficient and for a more fulfilling insight we need to go deeper into the nature of this *logos*. My proposal is as follows. What is missing from Fuller's account is the idea that this logos has a specific subject matter which are values or good-making characteristics and that our will yearns and desires good-making characteristics or values. This is the result of our 'eudaimonic nature'. Thus, if legal rules and principles are grounded on good-making characteristics or values then the consistency is not mere consistency of the will of legislators and judges, but consistency of good-making characteristics or values. If we look in further depth at the thin set of conditions that are part of the doctrine of the Rule of Law we can say that knowability concerns the knowability of values that are the basis for legal rules and principles; this does not only mean that the citizens of a state know the texts and words of court legal decisions and statutes, it must also entail that legal rules and principles are grounded on shareable values or good-making characteristics and are therefore knowable by the community. The non-retroactivity of law should also entail that the embedded values or good-making characteristics that ground the rules are non-retroactive. Clarity in the language of the legal rule, directive or principle entails that we correctly grasp the value or good-making characteristics that grounds the legal rule or principle since only in this way will it be possible to formulate in a clear manner RRDPs. The condition of possibility entails that the values are possible to realise and perform under specific social, psychological, cultural and economic circumstances. The condition of coherence requires that there is coherence in the values that ground the legal rules and principles, and the condition of constancy demands that grounding or underlying values and good-making characteristics of rules and directives, to the extent that this is possible, remain constant over time. Consistency in action requires that there is no discrepancy in terms of the values that are pursued by the law and the actions that guide officials.

[27] In Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (n 13) I extensively criticise this view and will, therefore, in this paper focus only on the account of intentional action under the model of the guise of the good only.

Let me provide a metaphor to better explain my point. A good cappuccino is not just the result of the movements of my body, the switching on of the machine, and the pouring in of coffee beans and milk and so on. To assert in an intelligible way that I am making a cappuccino is to understand; ie know practically why I am switching on the machine, filling the machine with coffee beans and milk and so on. Finally it is to understand that a cappuccino is a warming drink that will pep me up – emotionally and physically – during the day, ie the ends of the complex diachronic action provide the complete form or logos of my bodily movements. To understand what I am making entails understanding why I am making it. These two understandings are not independent when we reflect on them from the deliberative point of view or the point of view of the performer. Similarly, the legislator or judge creates RRDPs in the national context, and arbitrators, actors and regulatory bodies at the transnational level create RRDPs, following coherence in values, knowability of values, non-retroactivity of values, consistency in action being guided by the values, clarity in values, and constancy in values, to the extent that this is feasible, and the value is possible to realise. In other words, to understand that we are the authors of something called 'law' entails understanding why we create it. Judges and legislators at the national level, and arbitrators, actors and regulatory bodies at the transnational level, create RRDPs because we all yearn and long for values. But to achieve these values successfully in the world we need to ensure that an arbitrary will is not the creator or author of the law, but rather a will or intention that attains the *logos* as values. The thick conception of the Rule of Law and the Transnational Rule of Law hinders the intervention of a will that does not follow the underlying logos of RRDPs. It is the 'structure of values' or logos as values that ensures that I, as a citizen, will not be subject to the arbitrary will of another. Of course, as I have argued in previous works, the believed values or good-making characteristics might be mistaken, in error, badly characterised, or even evil.[28]

The power of the proposal lies in the idea that the logos of the Rule of Law and Transnational Law is able to direct us to the problem of the matter: the values to be pursued and subsequently we are able to choose whether or not to adopt the set of RRDPs. In other words, the logos enables us to see what the genuine or believed value truly is and it will be apparent to us what the genuine or believed value that grounds the RRDPs is. In the case of believed values that are not genuine values, the transparency of the logos enables citizens to make criticisms of RRDPs grounded on specific values.

The idea advanced in this paper is that the order of reasons or principles of creation lie with legislators and judges at the national level, and with arbitrators, actors or regulatory bodies at the transnational level, but the Rule of Law or Transnational Rule of Law make apparent the logos as values that reveal the order of reasons guiding the creation of RRDPs. Thus, to be more precise, the

[28] See Rodriguez-Blanco, *Law and Authority Under the Guise of the Good* (n 13).

idea is not that there is a moral ideal that we participate in and that by degrees we fulfil.[29] Rather, the approach is that legislators and judges at the national level, and arbitrators, actors and regulatory bodies at the transnational level, already have a set of values that they aim to foster and realise in their respective legal frameworks because we are 'eudaimonic creatures'. Consequently, the Rule of Law and a Transnational Rule of Law provide the best possible mechanism to guarantee the transparency and knowability of these genuine or believed values. When the conditions of the Rule of Law and Transnational Rule of Law fail then it is the transparency and knowability of the values that fail. Therefore, the Rule of Law and the Transnational Rule of Law can be substituted by any arbitrary value imposed by an arbitrary will. In other words, when the conditions of the Rule of Law and Transnational Rule of Law fail, the legislator or judge, arbitrator, actor or regulatory body is guided by his or her own arbitrary order of reasons, even a chaos of reasons, or for no reasons. The result is that the citizen or actor cannot guide his or her behaviour rationally and only illegitimate violence or coercion as arbitrariness force the citizen or actors to act and comply with the RRDPs.

When the conditions of the Rule of Law and Transnational Rule of Law are fulfilled, we still need to think hard about the kind of values that ought to ground RRDPs. The values that ground RRDPs and the logos of the Rule of Law and Transnational Law are not two different phenomena. On the contrary, the logos takes as its subject matter values and then brings the form of law to completeness. Analogously a piece of choreography is not only the bodily movements that follow a certain order, it is also the harmony, agility, grace and expression of the dance; we can still study the bodily movements but should not forget their subject matter, which is the harmony, agility, grace and expression of the choreographed piece. This thick conception of Rule of Law and Transnational Law opens the path for a new conception of Transnational Private Law and provides a framework of unity and intelligibility in the context of transnational law.[30]

I will further illustrate my core thesis with one key legal example, which is located at the intersection of Comparative European Private Law and a new European Contract law order. The German Federal Constitutional Court (*Bundesverfassungsgericht*) reached an interesting decision in the case of *Bürgschaft*.[31] In this case, a Bank offered a businessman a loan of DM 100,000 (€50,000) with the condition that his daughter would sign the contract as his guarantor. The daughter had no lawyer or financial advisor to assist her in understanding the duties that arose from the loan. Furthermore, she was asked to sign the contract and was given no explanation about her future obligations. She was told that the signed document was 'only part of the files'. The daughter, who was 21 and worked as an employee in a fish factory, accepted to act as surety for her father's debts. After few months, the father's business suffers financial difficulties and as a

[29] See Simmonds, *Law as a Moral Idea* (n 3).
[30] This is something I aim to explore further in future papers.
[31] BVerfG 19 October 1993, BVerfGE 89, 214 (Bürgschaft).

result he was unable to pay the loan to the Bank. The Bank claimed the total loan of DM 100,000 with interest from the daughter. The Federal Supreme Court reached the decision that anyone who has reached the age of majority knows that by signing the contract, she has bound herself to the duties expressed in the contract, in this case a surety contract. She appealed to the Supreme Court and argued that her constitutional right of autonomy had been violated. The Court decided that in cases where there is an imbalance in the bargaining power of the contracting parties, the Courts have the right to intervene on the basis of the general clauses of the Civil Code (*Bürgerlisches Gesetzbuch*, §138(1) and 242) concerning good morals and good faith.

Similar cases have emerged in England,[32] culminating in the decision of *Royal Bank Scotland v Etridge*.[33] The cases give origin to the doctrine of undue influence, which is a ground of relief from a contract on the basis of equity and the objective is that the influence of one person over another is not abused. The courts will investigate the manner in which the intention to contract was secured ensuring that unacceptable means, for example exercise of improper or undue influence, were not used by one party over another. Most of these cases arise from loans and mortgages given by banks or financial institutions acting as creditors and establishing relationships with wives or partners, who act as sureties, when the husbands or partners-debtors manipulate or exercise undue influence on them so that they enter into the transaction. Like in the *Bürgschaft* case, where the daughter's autonomy or self-determination has been violated, in the English cases the partners' or wives' autonomy or self-determination has been violated. In England, the bank will be put on inquiry if the transaction 'calls for an explanation' and the bank must take reasonable steps to ensure that the consent of the partner or wife has properly been obtained. It will be sufficient to show that the partner or wife has received advice from a solicitor. However, strong criticism has been advanced concerning this shift of responsibility from the bank to solicitors, since the only actions that partners and wives might eventually have is a claim on negligence for misstatements against the solicitor.

In the context of our discussion, the question that arises is how a European Private Law can be constructed if we are faced with these, at first glance, two very different approaches. The German approach is to argue in terms of self-determination and autonomy. The emphasis is to achieve substantive justice by invoking the protection of fundamental rights and good faith. The focus of English contract law is to rely on procedural justice, ie reasonable steps to ensure that the partner or wife has received advice. If we were to argue that a European Contract Law can be constructed on the basis of a Transnational Rule of Law where actors, as it has been shown in this study, will engage with the underlying *reasons as value*

[32] *Allcard v Skinner* (1887) 36 Ch D 145; *Lloyds Bank v Bundy* [1975] QB 326; *National Westminster Bank v Morgan* [1985] 1 AC 686; *Credit Lyonnaise Bank Nederland v Burch* [1997] 1 All ER 144; *Barclays Bank v O'Brien* [1993] QB 109.

[33] [2001] 3 WLR 1021.

or logos of the rules, then it would seem that the German and English contract law have separate and irreconcilable reasons as values or *logos*, ie substantive justice versus procedural justice. However, let us imagine the need to create legislation on undue influence at the European level. This new legislation would need to respect a European Transnational Rule of Law and preserve the publicity, knowability, clarity, non-retroactivity and consistency of the reasons as values or *logos* of both the German and English legal rules. The new legislation will need to look at the best ways to preserve *both* forms of justice, ie substantive fairness and procedural fairness, as the grounds to intervene in cases of undue influence and limit the sanctity of freedom of contract. In both jurisdictions, Germany and England, freedom of contract is limited by boundaries defined by ethical and moral considerations and the new legislation would require an act of imagination to reconcile two values and decide in a consistent manner accordingly. A European Transnational Rule of Law could not play its key function if it is about formal conditions independently of the underlying values as *logos* of the rules. The creation of legislation at the European Transnational level needs to both engage with the values as *logos* that underlies the different rules across Member States and be bound by a European Transnational Rule of Law that demands publicity of values, knowability of values, clarity of values, non-retroactivity in the application of the underlying *logos* of the rules, and consistency in the application of the underlying values or logos of rules across jurisdictions. In this way, agents or actors, including judges, will comply with the new created legislation because they are engaged with the ends or values of this new legislation.

IV. Possible Objections

A. The Conception Adumbrated in this Paper Contradicts the Quintessential Nature of the Rule of Law, ie the Pursuit of Different Ends and Values

It might be argued that the conception defended in this paper contradicts the reasons why we pursue any ends or goals. The Rule of Law, the objector might continue, is at the heart of the liberal project. But if legislators and judges, or arbitrators, actors and regulatory bodies create RRDPs following certain ends as good-making characteristics and values, and the citizen or legal participant follows these ends, then the citizen or legal participant is not really choosing her own ends.

However, the conception I have defended presupposes the view that ends are already given due to the kind of creatures we are and by virtue of the fact that we take part in certain social practices. Since we have a specific form of life, for example we eat, walk, love, play, have friends, write, think, mourn and so on, this form of life can only be understood if we understand the underlying grammar or logic

of our activities (logos). By contrast, empirical investigations such as biological, chemical and physical research aim to discover their object of study. The inner logic of such investigations is not given to us in the ordinary practice of actions; we need to discover it. The case of human activities is at variance with this since the internal logic or grammar of our activities is given to us and defines the limits of what we can make intelligible. However, this view does not contradict the liberal idea that there is a plurality of ends that can be chosen and pursued according to our own life plan; it only proposes that there are limits to our choosing of ends and life plans. These limits are the limits imposed by our social practices and the underlying logos that demarcates rational from irrational action. It is a pledge of humility that recognises our human nature with its richness and limits. This entails that there is plenty of room for imaginative ways of living and participating in the plurality of ends as good-making characteristics or values. Individual purposes can flourish without this being a threat to human practical imagination.[34] The richness of a planned life is in the determination and creative combination of our joined values.

B. The Redundancy of Publicity

If values are embedded in the fabric of society, an objector might argue, then there is no need to make them explicit through the Rule of Law or Transnational Rule of Law; they are already public in our practices. We do not need the publicity of rules and their underlying values.

My response to this objection is as follows. There is a plurality of values and disvalues. All practices involve certain core values, but there is room for different interpretations of the core values of a practice. There is also room for divergence or distortions of the core values of a practice. The publicity of rules and their underlying values enable us to better understand – not only through practice but also reflection – the point of RRDPs. It also invites the participation of multiple and different cultural perspectives in the practice of compliance with RRDPs due to the pursuit of values. Consequently, it encourages diversity within unity.

C. The Transnational Rule of Law is Too Vague to Guide Behaviour

An objector might argue that the thick conception of a Transnational Rule of Law is too vague and therefore undermines its purpose, i.e. it does not enable us to predict behaviour and protect reasonable expectations in transnational law and, more specifically, in the private sphere.

[34] *cf* Hayek, *The Road to Serfdom* (n 2) 79.

This objection relies on an empirical conception of agency which presupposes that our intentions are mental events and that we can enact or recreate others' intentions to predict their behaviour. Elsewhere I have argued at length that this conception is parasitic on another model of human actions that relies on values and the good-making characteristics of our actions. I cannot fully engage with this objection here due to constraints of space, but I would emphasise that the position does not aim to eliminate agency construed on an empirical, economic or social basis. On the contrary, the idea is that the potential power of these explanations is parasitic on a more naïve and intelligible conception of human action that is not based on prediction and theoretical conceptions.

Legal actors who comply with transnational regulations need to recognise others. I have argued that in order to act and comply with RRDPs legal actors need to make intelligible the actions of others and this is only possible under the model of action that I have defended. For example, in the context of transnational arbitration, arbitrators are selected on the basis of their trustworthiness and credibility, and this is not dissimilar from the selection of judges. The arbitrator's capacities to follow lex mercatoria[35] and to advance the best possible interpretation of the underlying values of the different RRDPs embedded in lex mercatoria depend on his character as a trustworthy person. In this context, trustworthiness may be understood as a commitment to the underlying values of the fabric of RRDPs. Of course, as theorists we can create economic or social models that will enable us to predict the arbitrator's behaviour, but as legal actors in a practice we need to engage with the underlying values of the legal practice and the way that the arbitrator engages with such values.

D. The Thick Conception of the Transnational Rule of Law Undermines the Plurality of Goods Across Pluralistic Societies

This objection entails the view that in pluralistic societies, there is disagreement about values and therefore the thick conception of the Transnational Rule of Law presupposes that these disagreements can be dissolved.

The pluralism that I advocate is concerned with values as opposed to technical plurality,[36] and this brings about the danger that we can never reach consensus on matters of value. However, the model of human action that I defend as the basis of the Transnational Rule of Law takes the deliberative point of view as the privileged

[35] The correct function of a Transnational Rule of Law would need an ample use of the publicity requirement. In the context of international arbitration, for example, it would require the publication of arbitral awards.

[36] P Zumbassen and G-P Calliess in their book *Rough Consensus and Running Code: A Theory of Transnational Law* (Oxford, Hart Publishing, 2010) seem to advocate plurality in terms of technical standards. The model of conduct I defend relies on anti-hierarchical structures that emerge and grow from values.

position of human action and presupposes constant engagement and effort to make intelligible the position of the other as chooser. Genuine disagreements over values involves taking the matter at hand seriously[37] and earnest attempts to understand how different values can be manifested in legal and social practices. There is no ex ante solution that can guide us, and the process is one of constant construction.[38] To abandon our efforts to reach agreement and intelligibility is to abandon our rational capacities.

V. Conclusion

This paper began with a puzzle about the Rule of Law. If the objective of the Rule of Law is to protect citizens from the coercion of the State then a Transnational Rule of Law is unnecessary because at the transnational level there is no State and therefore there is no State to exercise coercion. I have shown that this puzzle is misleading, however, and relies on a misconception of coercion. Coercion is exercised not only through violence, oppression or threats, but occurs when legal actors are deprived of the opportunity to be choosers and – therefore – their access to reason is hindered. Consequently, I have argued, a Transnational Rule of Law that has as its subject matter values or good-making characteristics and ensures coherence, knowability, clarity and so on of values or good making-characteristics also ensures the availability of legal reasons to legal actors and shields actors from coercion as arbitrariness. Since we inherited via legal positivism a standard conception of the nature of law which is necessarily attached to State law, then any debilitated conception of the State as the source of law generates, it is argued, a soft conception of law. I have tried to show that this is a non sequitur. Law, soft or strong, is not only texts or words that are promulgated by the State and enforced by its organs; promulgated law also entails an underlying logos, which is translated as the reasons as values or good-making characteristics that ground RRDPs. This understanding of the law opens new avenues for the understanding of transnational and international law. I have shown that the former involves a logos as values that underlies RRDPs and has the form of an intelligible unity when legal actors adhere to the Transnational Rule of Law that ensures a framework of intelligibility and freedom as 'independence from the arbitrary will of another human being'. I have defended the thick conception of the Rule of Law and, a fortiori, of the Transnational Rule of Law because it is the only view that understands how we act in the context of the law and serves the key features of the human condition and human actions, ie our 'eudaimonic nature'.

[37] For a defence of this point, see my articles: V Rodriguez-Blanco, 'Genuine Disagreements: A Realist Reinterpretation of Dworkin' (2001) 21(4) *Oxford Journal of Legal Studies* 649 and 'Objectivity in Law' (2010) 5 *Philosophy Compass* 240.

[38] At the theoretical level a helpful metaphor is provided in 'Neurath's boat'. This metaphor also works at the practical level when we engage in actions and social practices.