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V tokratni številki so objavljeni prispevki v angleščini in španščini.
Za slovenske povzetke in ključne besede glej strani 185–198.

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Damiano Canale[*]
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Default reasoning and the law: A dialogue

Reasoning by default is a relevant aspect of everyday life that has traditionally attracted the attention of many fields of research, from psychology to the philosophy of logic, from economics to artificial intelligence. Also in the field of law, default reasoning is widely used by lawyers, judges and other legal decision-makers. In this paper, a philosopher of language (Carlo Penco) and a philosopher of law (Damiano Canale) attempt to explore some uses of default reasoning that are scarcely considered by legal theory. In particular, the dialogue dwells on the notion of literal meaning, witness testimony, and the problem of disagreement among experts in legal proceedings. The paper is intended as a sort of brain storming useful to identify new lines of research straddling philosophy of law, cognitive psychology and philosophy of language.

Keywords: default reasoning, context, experts, evidence, stereotypes, legal interpretation, literal meaning

A.1 PHILOSOPHER OF LANGUAGE

Since Marvin Minsky's 1974 seminal paper on concepts as stereotypes or frames, the debate on default reasoning spread across different fields of research, from philosophy to logic, to psychology, to economics (although in economics, the work of Herb Simon, antedated the basic idea with the concept of bounded rationality). According to Minsky, we mostly reason with stereotypes that have default values. A birthday party has default assignments of this kind: Sunday dress; wrapped presents; cake, ice cream, and sodas are served; games like hide and seek are played; and so on. The term "stereotype" may be misleading. It was widely used in the 1970s due to the relevance given to the term by Hilary Putnam in his "Meaning, Reference, and Stereotypes" (1972 and 1975). We will use the term here in a very broad sense, as Putnam did, in his attempt to generalise some of Wittgenstein's ideas. Minsky himself was offering his proposal as an explanation and a development of Wittgenstein's ideas. In the 1980s, philosophers and linguists widely discussed the role of default reasoning. Given that there is no limit to the number of irrelevant inferences we can make on any subject, the question arose: what helps us avoid time-consuming thoughts?

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This text is written as a dialogue between a philosopher of language (Carlo Penco, sections A.1–A.5) and a philosopher of law (Damiano Canale, sections B.1–B.4).

Kent Bach (1984: 46) suggested two rules, concerning, respectively, theoretical and practical reasoning:

(*a*) **TGR or *Take-for-granted rule*:** If it seems to me that *p*, then infer that *p*, provided that no reason to the contrary occurs to me.

(*b*) **NWC or *Not-worth-considering rule*:** If it occurs to me to do *A*, do *A* unless a thought occurs of a reason to the contrary or an alternative to *A*.

Default reasoning, which proceeds without doubt if there is nothing to the contrary, helps us quickly reach a conclusion, but at an increased risk of error. The tension between reliability and efficiency is partly resolved by the idea of "demons": the concept of a demon is a wonderful gift from the history of philosophy introduced in artificial intelligence by Oliver Selfridge in his "Pandemonium" system. The idea appears in the first pages of Milton's *Paradise Lost* (see Husbands 2008) and was later developed in a dissertation by Minsky's student, Eugene Charniak (1972: 36-42). What is the point? Socrates, in *Apology*, 31d, says:

> A sort of voice [] sometimes comes to me. It never tells me what to do, but only dissuades me from doing what I am proposing to do.

In computer science, the 'demon' setting is a backup process for detecting when there are some infringements of the rule that compels us or suggests we *not* follow the default rules. From a psychological viewpoint, the contrast between default reasoning and demons is a forethought of Daniel Kahnemann (2011): when everything seems "normal" we think fast, by stereotypes or by default. However, when something unexpected happens, we need to reason about what is going on or about what to do or not to do. This difference works both in reasoning (TGR: rule (*a*)) and in decision making (NWC: rule (*b*)). I don't normally think while I am driving, but if I have to put the car into a difficult parking space, I need to reason on how to move the wheel. When I open a door to take something from my room, I don't even think about taking a few steps inside the room: by default, I assume I will walk the few steps to get what I need… unless something relevant happens. During the Second World War, my aunt opened the door of her room to take a copy of her dissertation, which she was in the process of completing and which she had placed in a drawer. However, after opening the door, she realized there were no walls. A bomb had split the house in two. An unexpected demon – the floor no longer being there – gave her a strong reason *not to do A,* that is, not to enter the room. She changed her decision to enter the room (she did eventually graduate in History, but she had to rewrite her thesis).

The distinction between defaults as reasons for belief and reasons for action defined by the two different rules presented above is consolidated in the literature, and we may take these two rules as an intuitive rendering of these two aspects of default reasoning (see also Benzi & Penco 2018). My first question

is: when (and how) the topic of default reasoning entered the discussion in the field of Law?

B.1 LEGAL PHILOSOPHER

In recent years, legal philosophers have also extensively focused their attention on default reasoning, even though this subject usually appears under the heading of "defeasibility" in the jurisprudential debate. The general idea is that legal rules, standards, and principles may admit implicit exceptions, and thus do not *per se* provide conclusive, all-things-considered reasons for action. This idea has been elaborated on in several areas of research in legal philosophy, such as deontic logic, legal reasoning, the theory of legal rules and legal systems, etc.[1] Yet, default reasoning seems to be involved in further theoretical controversies that are apparently unrelated to those just mentioned. Among them, it is worth mentioning the notion of literal meaning and the principle of non-discrimination. The philosophical inquiry into default reasoning could shed new light on these subjects and highlight some aspects of them that have traditionally been overlooked by legal scholars. But why can literal meaning and unequal treatment be looked at as instances of default reasoning? Let's try to provide an introductory answer to this question.

When interpreting statutory or constitutional law, courts often claim that literal or conventional meaning is the starting point of their interpretive work. If the letter of the law is plain - so it is frequently stated - no interpretive effort is needed. The law speaks for itself, providing an answer to the legal issue brought to court. However, it is highly disputed whether that is all true. According to some scholars, the literal meaning of legal texts is always under- or over-determined and courts must carry out interpretive work in all cases, even though judges are unaware of this. Other scholars claim that literal meaning corresponds to the minimal semantic content of the law, which in most cases is sufficient to reach a decision (cf. Soames 2009). Only in hard cases does this minimal content need to be enriched or modulated, and interpretation is necessary for this purpose. As it may be, one could argue that literal meaning is usually considered by courts as the default linguistic content of legal texts.[2] Following the TGR rule, courts' reasoning proceeds more or less as follows: It is generally assumed that legal text (LT) has content C, so LT has content C provided that no reason to the contrary comes up in the courtroom.

The principle of non-discrimination is more clearly linked to default reasoning and stereotypes. We have seen that stereotypes are shortcuts in reasoning

1 See, e.g., Dworkin 1978; Schauer 1991; Ferrer & Ratti 2012; Duarte d'Almeida 2016; Prakken & Sartor 2004; Sartor 2018.

2 Hrafn Asgeirsson has called this standpoint the "pro tanto content view". See Asgeirsson 2020.

and decision-making that are based on generalizations. Based on the characteristics associated with some members of a class, we reach conclusions and make decisions about *all* the members of that class. So, if I believe that all knives are sharp, I do not need to test whether the knife in my kitchen is sharp to decide to handle it carefully - I do so by default. Similarly, if an employer believes that all women are unreliable, he will not allow Mary to be put forward for promotion based on the same kind of reasoning. In the latter case, however, the employer's conduct is discriminatory and, thus, against the law. It is so for two related reasons. First, the employer's belief is false because it is the outcome of a faulty generalization. What the employer believes is not justified by sufficient and unbiased evidence. Second, his action brings about a disadvantage to Mary that infringes upon the principle of equality. This is the reason why some scholars claim that stereotyping leads to various forms of cognitive and practical distortion. As William Blake once said, "to generalize is to be an idiot. To particularize is lone distinction of merit". On this point, justice is at odds with any form of default reasoning (cf. O'Neill 1992). Others instead maintain that one should draw a distinction between those stereotypical generalizations that have no statistical or factual basis and those that do (Schauer 2006). After all, if the percentage of reckless drivers among young men is noticeably higher than the percentage of bad drivers in some comparison group (young women, for instance), a higher premium for the car insurance of young men is not discriminatory. Therefore, stereotypes and default moral values do not necessarily lead to faulty practical conclusions. In several cases, they turn out to be an inevitable and often desirable dimension of decision-making.

All this being said, it seems that literal meaning and the principle of non-discrimination admits different kinds of "demons", doesn't it?

A.2 PHILOSOPHER OF LANGUAGE

Indeed. I like the idea of different kinds of "demons" that prevent us from making too easy and hasty generalizations in different fields. The two issues that you mention ((1) literal meaning and (2) the principle of discrimination) seem to be a source of big conflicts. On (1) there are defenders of the role of literal meaning as default linguistic contents against the claim the literal meaning is always under or overdetermined; on (2) some consider stereotypes as always leading to cognitive practical distortions, against the claim that there may be "good" stereotypes (with some statistical or factual basis) and, after all, we *need* stereotypes.[3] On both topics, there have been wide debates in the philosophy of language, and I propose we focus at least on (1): literal meaning.

3 See again the classical Putnam 1975 and the shorter Putnam 1973; on the difference between stereotypes and prototypes see Marconi 1997.

Since a seminal paper by Francois Recanati (2003) appeared on "literalism and contextualism", the battle began between two fields: defenders of minimal literal content and theorists of a radical context-dependence of meaning, (for a summary see Penco and Vignolo 2020). In the philosophy of language, the debate took the form of a question: what is "what is said"? what is the content of an assertoric sentence, or its truth conditions? The problem arose with the distinction proposed by Paul Grice between what is (literally) said and what is implicated. In the beginning, the distinction seemed clear and simple: what is said is dependent on literal meaning, and what is implicated is dependent on context and either (a) derived by literal meaning but not asserted (conventional implicature) or (b) derived by context and by the use of conversational maxims (conversational implicatures). This is well known and, I assume, probably also used in the philosophy of law.

There is, however, a problem: it is not clear what we *really* mean with "what is said". First of all, as Grice was also well aware, if somebody says

"He offended me yesterday"

we need to know to whom "he" refers, and to which day "yesterday" refers. As Perry (2019) would put it, to understand what is said, it is not enough to know that the sentence is true if some male individual offended the speaker the day before the speaker uttered the sentence. These are what Perry calls "reflexive truth conditions" and they are of no use to a judge in proceeding to fine the offender, given that, in this case, the judge has no idea of who the offender is. On the contrary, to know *what is said* is to know the *actual* or *subject matter truth conditions* of a sentence: we need to know the referents of indexical expressions.

Recanati calls the process of interpreting the referents of indexical expressions (pronouns, adverbs of time, demonstratives) "saturation". Is saturation enough to understand what is said? Recanati says it is not. We often need more, we need a "modulation" of the meaning of the expressions to interpret an assertoric sentence. Most words reveal themselves to be as context-dependent as indexicals are. Take "the ham sandwich left without paying". The literal meaning of "the ham sandwich" is not enough to understand the sentence. We need to make some pragmatic operation – in this case, a "transfer" from the sandwich to the person who ordered the sandwich, and we need to rely on a lot of default reasoning of what we know about restaurants, food, and money. We rely on general knowledge of our lexicon, where in order "to pay" you need to be a "person", and so on (using a general default ontology implicit in our lexicon, as Nicholas Asher (2011) insists). The lexicon is full of polysemy, and this implies that most words have different meanings depending on the context (and this is Recanati's (2019) point, although Devitt (2021) proposes an alternative view linked more to conventions). Apparently, the problem of polysemy, which has been widely analysed by linguists, could be framed inside a general view

of default reasoning: there are inferences that our lexicon almost compels us to perform. We may think that some of them are less compelling, but there is always some general stereotype that helps us to find the best interpretation. According to Recanati, we always need different kinds of "modulation" (transfer, free enrichment, loosening…) of the so-called "literal" meaning. How "free" the enrichment can be is debatable.

It seems to me that framing the problem of meaning in the form "what are the truth conditions of an assertion?" might be relevant for legal philosophy, given that in a trial we need evidence to ascertain the truth or falsity of a witness's claims. If we are not very clear on what the truth conditions are of what the witness says, then we cannot use her deposition as a source of evidence. But to understand the truth conditions of an assertion, to understand "what is said", literal meanings are insufficient. We need both saturation and modulation.

B.2 LEGAL PHILOSOPHER

I find Recanati's observations illuminating with regard to legal interpretation and judicial reasoning too. As I noted above, literal meaning is considered by most legal scholars and legal practitioners as the a-contextual meaning that is sufficient to fix the linguistic content of statutes, constitutional provisions, and administrative regulations in easy cases. In this sense, literal meaning corresponds to the full meaning conventionally encoded in these legal texts by default, which should be used to rule on a case as long as some "legal demon" does not provide reasons to the contrary (yes, I believe that there are specific demons that typically operate in the law).

Along with Recanati, conversely, we might claim that literal meaning simply sets the "semantic potential" out of which the linguistic content must be constructed. The semantic potential is the output of an inductive inference (a generalization) through which the court abstracts the meaning of a word or a sentence "from the specific senses that it expresses, or seems to express, on the observed occasions of use" (Recanati 2004: 147). Starting from this generalization, however, the linguistic content needs to be modulated according to the context of use in which the law is applied, and this recontextualization takes place even though the court is not aware of it or claims that its ruling is only grounded on some sort of a-contextual meaning.

On this account, literal meaning is never *per se* sufficient to fix the linguistic content. It needs to be supplemented by other contextual information, which assumes the form of further interpretive arguments (the statutory structure, the intention of the lawmaker, the purpose of the law, the consequences of the regulation, etc.). In my view, all this has some interesting implications with regards

to our subject. Literal meaning is an example of default reasoning, not in the sense that it corresponds to the default linguistic content of a legal text. Literal meaning is rather an abstract generalization that constitutes a possible (and, in most legal systems, desirable) starting point of the interpretive process. This process, however, necessarily includes a number of "demons" - under the form of further legal reasons - which help to modulate linguistic content with regard to the case being decided. Is this picture plausible in your opinion?

A famous and largely discussed example of this can be found in the case *Smith v. United States*.[4] Here, the U.S. Supreme Court was called upon to decide whether exchanging a firearm for cocaine is "using a firearm".[5] The starting argument against the defendant was that the expression "use of a firearm" literally encompasses *any* use that facilitates the commission of a drug offence, including the use of a firearm as an item of barter. Against this literal argument, the defence and the dissenting opinion of Justice Scalia pointed out that, in this specific context, when we refer to the use of an artifact, we refer to the standard or intended use of it (the use the artifact was created for). Therefore, the relevant use of a firearm would be the use of it as a weapon, i.e., to threaten or offend other people. But the defendant didn't use his automatic gun in this way, for he tried to employ it as a means of payment. The Supreme Court held that literal meaning was sufficient to reach a conclusion and Smith's conviction was confirmed. As a matter of fact, however, the Court did not only stick to literal meaning in its reasoning. The judges put forward an alternative recontextualization or modulation of the semantic potential of 'using a firearm'. Against the defendant, it was pointed out that the purpose of the regulation was to minimize the risk that the presence of drugs and firearms imposes on individuals and society. Drugs and guns are a dangerous combination and, so the argument went, any use of a firearm during and in relation to a drug-trafficking crime should be sanctioned to minimize that risk. Furthermore, according to the Court, the reading of the other sections of the regulation confirmed this statutory construction. Consequently, *Smith v. United States* cannot be seen as a battle between literal meaning as default linguistic content, on the one hand, and contextual meaning, on the other. Instead, two alternative modulations of literal meaning that were justified by different "legal demons", confronted each other in the courtroom. To put it another way, this was a case of competing "default" interpretations of the same legal text, one of which was prioritized over the other on the basis of further reasons.

4 Smith v. United States, 508 U.S. 223 (1993). For a discussion of this decision from the point of view of the philosophy of language see Neale 2007, Soames 2009: 251-393.

5 Title 18 U.S.C. 924(c)(1) required the imposition of specified penalties if the defendant, "during and in relation to" a drug trafficking crime, "uses a firearm".

A.3 PHILOSOPHER OF LANGUAGE

You asked me whether I agree with intending literal meaning as a starting point of an interpretative process. This would be in favour of the work done by the US Supreme Court in the case *Smith v. United States*, that – as you say – applied "a modulation of the semantic potential of '*using a firearm*'". Although in general I like the idea of meaning as inferential potential, invented by Frege and developed by Robert Brandom, I may be less "contextualist" than it may appear from my previous intervention. I still see a contrast between *literal meaning as default* and *contextual meaning as modulation* of literal meaning. Default meaning is a robust background we should stand on. You claim that we have two modulations of the same literal meaning of "use of a firearm". I disagree. I agree with Justice Scalia's view that the literal meaning of "using a firearm" is the "intended" use, the use the artifact was built for: "use of a firearm" is the use of the weapon for "shooting" or "threatening", not for *any* use of a weapon. On the contrary, the U.S. Supreme Court's decision seems to be a starting point of an endless list of possible interpretations. The "expansion" interpretation according to which *any* use of a firearm is condemnable seems ridiculous: somebody might use a firearm as a vase for flowers (as happened with peaceful demonstrators who put flowers in the police's firearms: they have never been condemned for illegal "use of firearms"). Using a firearm as means of payment is not a good "interpretation" of the "literal" meaning of "use of a firearm".

You say we may accept exceptions. Indeed, this is the essence of default reasoning. However, can we accept *any* use as a *proper* application of the notion of "use of a firearm"? There are abnormal uses like using a firearm to hit somebody on the head, and this is an offensive use, and it may count as just as offensive as shooting. But not *everything* is acceptable. In its defence the Court suggested that scratching the head with a gun would *not* constitute a criminal offense because it would have been unrelated to the crime. But they refused to consider "uses of a firearm" as if it were tantamount to "uses of a weapon" (where "weapon" is a concept under which the concept of "firearm" stands). The Court justifies its awkward decision in this way:

> We are not persuaded that our construction of the phrase 'uses . . . a firearm' will produce anomalous applications . . . § 924 (c) (1) requires not only that the defendant 'use' the firearm but also that he use it 'during and in relation to' the drug trafficking crime.

This move is very "inventive". In saying "during and in relation to", they restrict the literal meaning of "to use" to make it apt to condemn the defendant. But the ploy does not work, because the defendant might have been using a computer for exchange. And, apparently, the "use of a computer" in this context does not count as a stereotypical meaning of "using a computer". The Supreme Court insists that this hypothetical case (use of a computer in exchange for drugs) would not constitute a criminal offence. But what is the difference be-

tween selling a computer or selling a weapon (empty and without bullets)? The defendant did not use a firearm, he sold it.

A firearm *is* a weapon. Giving a firearm instead of money is equivalent to selling. The defendant did not "use" a firearm as a weapon, he "sold" a firearm for its market value. The Court is implying that "buying" is a kind of "use", but this inference reveals where the ploy is. If you are defining different kinds of uses, you should distinguish "uses for": a weapon can be used for different purposes, some that are coherent with the offensive purpose, some that are not. The use of a firearm for buying something (as means of exchange) seems to be a category quite distant from the default meaning of "use of a firearm", which is intended as an offensive use as is a firearm's proper function. Justice Scalia was unknowingly using the notion of "proper function" of an artifact and his interpretation was coherent with the contemporary debate on the ontology of artifacts. The U.S. Supreme Court, against Scalia's suggestions, seems to overstate the case with an interpretation that sounds artificial and beyond the most common (and default) language use. It might seem to some to be an excuse to condemn the defendant in absence of stronger evidence. Fascinated by the sirens of interpretations, the Court put on a forced "ad hoc" interpretation. The problem emerging from this discussion is the weak status of "literal meaning" or "literal interpretation".

This is the real danger of what we may call "free literal interpretation without constraints". Any literal interpretation needs to have some constraints. Stephen Neale (2007), discussing the Supreme Court's sentence, presents three ways of considering the problem of interpreting the concept of "use of a firearm": (1) in analogy with attributive uses of definite descriptions intended as an ellipsis. I interpret this as meaning that "the use of firearms" may be elliptical for "the use of firearms to offend", (2) in terms of "meaning underdetermination", following Relevance Theory, and (3) in terms of unarticulated constituents, following Perry's critical pragmatics. In particular, he reminds us of Perry's stance:

> It can't just rain, Perry might say; raining has to take place somewhere, somewhen. Similarly, you can't just *use* something; and you can't just use that something to do *something*, or just use it as something; you have to use it to do *something in particular* or use it as *something in particular*. The proposition we express by stating a regulation governing the use of firearms contains an unarticulated constituent [...] (Neale 2007: 8)

Speaking of an unarticulated constituent is not too dissimilar from treating the problem in terms of a "default meaning" given by the stereotypical use of the expression. It corresponds to a dictionary definition: a firearm is "a lethal barrelled weapon of any description from which any shot, bullet or other missile can be discharged". It is, therefore, *by definition*, a weapon. Frame semantics, at the slot "use" in connection with the meaning of "weapon", reads: "The type of

activity that the weapon is generally involved in".[6] The type of activity that the weapon is *generally* involved in is not using it in exchange for goods. Buying or selling concerns *everything* and it cannot be defined as the use that a weapon is supposed to perform. The U.S. Supreme Court pretended to apply the "literal meaning" of "use", in its widest sense. In doing so, they avoided making explicit the specific category that was relevant: used for economic exchange. And you cannot consider a piece used for economic exchange as a "use of a weapon" that could figure under the category of the type of offence attributed to the use of a weapon. Literal meaning here has been a device for an incongruous interpretation and modulating of a "free enrichment" beyond any reasonable interpretation. This tendency may lead to interpreting any term in any way you want.

Language is a social affair, and the uses of expressions are given by shared habits. We may invent new uses and find different ways of interpreting a word in context, but there are strong conventional restrictions we should accept. The U.S. Supreme Court went too far in its interpretation. It forgot the strength of conventions.

That is why the well-known case of Bill Clinton and his claim that "I didn't have sex" is different. Clinton's impeachment trial in December 1998 was partly a consequence of his testimony about an improper relation he had with a White House intern. The testimony was defined as perjury by Counsel, Ken Starr. Clinton said: "I did things that were…inappropriate and wrong. But …they did not include any activity that was within the *definition* of sexual relations"[7] (my emphasis). In his testimony we are faced with contrasting stereotypes. On the one hand, mainly in the South, "having sex" has the "default" meaning of having "proper" intercourse. On the other hand, for a puritan evangelical, the default meaning is probably intended as "having any kind of connection with sex". Therefore, there is a possibility of differing interpretations here, given the different stereotypes on the market. From the point of view of the first kind of stereotype of "having sex", it can be claimed that Clinton did not properly or intentionally "lie", but that he did lie from the point of view of the second. There is no similar socially recognized pair of standard definitions of "use of a firearm".

I realize now that we have discussed the problem of the meaning of terms in the interpretation of the law, and just hinted at the topic of the content of a deposition. Certainly, as epistemological contextualists insist, the context of a deposition has a different epistemological criteria of correctness than the context of everyday discourse (as shown in how Clinton used the term "having

6 See Berkeley FrameNet II database at https://framenet2.icsi.berkeley.edu/fnReports/data/frameIndex.xml?frame=Weapon

7 Federal News Service (1998, September 21) *From the Starr Referral: Clinton's Grand Jury Testimony, Part 7*. Washington Post. https://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/bctest092198_7.htm

sex"). How do we interpret the defendant's assertions or testimony? And how is this connected with the meaning of legal terms?

B.3 LEGAL PHILOSOPHER

You just have touched upon a very interesting subject. It is well known that witness testimony is an important form of evidence in law. In many cases, it is the main evidence upon which the decision of judges or jurors is based. However, witness testimony may be unreliable and prone to error. This is because the witness might be insincere, or what the witness intends to say does not correspond to what is communicated through her testimony, or that the content of the testimony is false even though the witness believes it to be true, or a combination of these factors. This is why the acquisition and evaluation of witness testimony can be accounted for as a form of default reasoning (Walton 2007). Recasting the TGR rule formulated at the outset, in legal proceedings it holds true that "if the witness claims '*p*', judges or jurors are justified in believing *p* unless no reason to the contrary occurs to them". Given the adversarial structure of the trial, in current legal systems many relevant defeaters of witness testimony are provided by the law, which also sets the procedure to be followed to test the reliability of testimony.

Testimony defeaters are mainly of two sorts: subjective and objective. Subjective testimony defeaters are related to the credibility of the speaker. What matters here is the witness's personality, her relationship with the defendant and the case to be decided, as well as the "moral character" of the speaker, for instance, the fact that the witness was convicted of a criminal offence.[8] Objective testimony defeaters concern the way in which witness testimony is acquired and evaluated within the trial. So, for instance, oral and documental testimony recorded before the trial is not conclusive and shall be re-examined to be considered as evidence. Furthermore, so-called "leading questions" are not permitted during the witness examination stage: the party on behalf of which the witness testifies is not permitted to suggest to the witness the answer wanted, nor shall the witness be subjected to any form of psychological pressure in rendering testimony. Witness testimony is then the subject of cross-examination. This stage of the trial makes it possible to complete and correct the story told by the witness during the first examination, to test her accuracy and honesty, and allows the witness to bring out information that is favourable to the case of the party on whose behalf the cross-examination is being conducted. The acquisition and evaluation of witness testimony then depends on further factors: the burden of proof, the standard of proof adopted by the legislature, and how well

8 Note here that the credibility of a testimony has two dimensions: it is related to both what the witness and what the judge or the jury thinks of him.

the testimony hangs together as part of a plausible account of what supposedly happened. All these considerations and procedural steps can be seen as potential defeaters of witness testimony. They may justify a judge or a juror in not believing that *p* even though the witness claims that *p* is the case, or to consider the information provided by the witness as irrelevant in determining the truth value of *p*.

Returning to our questions, it seems to me that the problem of contrasting stereotypes that characterizes Clinton's testimony case can be easily solved in the context of legal adjudication. In particular, cross examination makes it possible to address the problems of vagueness, ambiguity, contextual indeterminacy, and meaning shifting that may affect witness testimony. Within the legal context, testimony is not a one-shot communicative event. It is rather the result of an exchange of reasons governed by the law on the basis of a set of background assumptions regarding the content, the credibility, and reliability of witnesses' conveyed information.

However, your last reply points at a further issue that is worth considering in more detail. How is witness testimony connected to the meaning of legal terms? It seems to me that this question is particularly relevant if we look at the role of expert opinions and testimony in the law.

As current society increasingly depends on science and technology, more scientists, engineers, and physicians are called upon to testify in court on technical matters in their field of expertise. Think of all those cases dealing with disputed issues in DNA testing, toxicology, epidemiology, engineering, finance, and other technically complex subjects. It is commonly assumed that expert witnesses merely contribute to fact-finding. Imagine, for the sake of argument, that XYZ is a chemical formula used in the specialized language of chemistry, and that the legislature has enacted a legal provision declaring: "the marketing of XYZ is prohibited". Now, imagine that a judge is asked to decide whether the marketing of a certain chemical product *x* is prohibited. Thanks to the information provided by expert witnesses, the judge will ascertain whether *x* is XYZ, and thus if the marketing of *x* is prohibited. In a case like this, it is commonly stated, expert witnesses contribute to ascertaining the facts of the case (*x* is XYZ), but they do not determine the content of the legal provision in question. But are things really like that? As I have argued elsewhere (Canale 2021), there are cases in which expert opinions and testimony may determine the meaning of legal texts. In the example just mentioned, the experts actually *first* fix the semantic content of XYZ, which is unknown to the judge, and *then* use this content to determine whether *x* is XYZ, i.e., the truth value of a factual statement. In other words, deference to expert witnesses contributes here to determine the linguistic content of the law, to such an extent that the judge is not able to grasp the law that she applies, nor to evaluate its impact on other legal contents and

reasons that may justify a different judicial outcome.[9] When all this occurs, it seems that legal defeaters take a step back, and expert testimony fixes the semantic content of legal texts by default, as long as the expert's opinion is considered reliable by the judge.

Does all this seem plausible to you?

A.4 PHILOSOPHER OF LANGUAGE

Indeed. Testimony is a perfect example of default proof: a testimony is accepted *unless* some other testimony may falsify it. The more the testimony is certified, the more reliable it is. Reliability in scientific evidence requires a "ranking" in the authority of scientific testimonies (cf. Prakken & Sartor 2004; Bex 2011; Haack 2014). Given that, it sounds good that scientific experts might, or even should, determine the meaning or semantic content of something that is at stake, fixing the truth-conditional content of the sentences in which the term appears.

However, the problem of experts fixing the meaning is linked to the problem of deciding *which* expert has to be relied upon. I enjoyed reading Susan Haack's papers collected in *Evidence Matters*, where she discusses the definition of "scientific experts" since the case of *Daubert v. Merrell Dow Pharmaceuticals* (in short "Daubert").[10] In this case, the criterion for defining scientific experts was a bit contradictory, as Haack insists, given that they say that "the criterion of the scientific status of a theory is its falsifiability, or refutability, or testability" (falsifiability is Popper's view and testability is Carnap's & Hempel's view, against which Popper was fighting). But, leaving aside this philosophical debate (on which I suggest Dalla Pozza and Negro's 2017 book), the lawmaker's point was to distinguish between science and pseudo-science. As a consequence, after Daubert, the rejection of experts in a trial (when experts were "Dauberted out") resulted in terrible damage to their image as scientists (see Lakoff 2005). After many debates, in 2000 and 2011 the Daubert Standard was reshaped in a more liberal way to evaluate experts, following the idea that there are experts in different fields and not only in science, apparently returning to the previous definition (according to the 1923 case of *Frye vs. the United States* evidence of

9 Put another way, one could claim that in the case just outlined, the judge, thanks to expert testimony, is able to fix the reference of 'XYZ' even though she does not have the inferential competence to use 'XYZ'. On the distinction between inferential competence and referential competence, see Marconi 1997: 74.

10 According to the Daubert standard, the factors to be considered by the court in evaluating a scientific methodology are: (1) whether the theory or technique in question has been tested; (2) whether it has been subjected to peer review and publication; (3) whether its potential error rate is known; (4) the existence and maintenance of standards controlling its operation; and (5) whether it maintains widespread acceptance within the relevant scientific community. Cf. Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993).

testimony based on "general acceptance in the particular field in which it belongs"). The Federal Rule of Evidence (FRE) 702, restated in 2011, says:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) The testimony is based on sufficient facts or data;(c) The testimony is the product of reliable principles and methods; and (d) The expert has *reliably* applied the principles and methods to the facts of the case. (My emphasis.)

There are at least two features that make this definition interesting. On the one hand, while open to the acceptance of "specialized knowledge", the definition may induce people to think that science is no more important than any other expertise. On the other hand, it provides relevant space to the topic of *reliability* ("reliable principles and methods"), which opens a fundamental problem. Reliability comes in degrees, and in a trial we should check different levels of reliability. On this issue, we may rely on the checks and balances of different testimonies in the adversarial system that governs law: testimony is checked by two sides that try to find not only the flaws in the testimony, but also which testimonies are more reliable according to scientific standards. And the most reliable should also fix the meaning of some legal terminology. But who are the most reliable scientists?

Looking at the adversarial system of law, I was shocked to realize the difference between the search for truth in the system of science and the search for truth (= compromise) in adversarial systems. In adversarial systems, the *main* aim is not the truth but a practical matter, reaching a verdict of liability or guilt in a reasonable amount of time. FRE 702 says: "Scientific conclusions are subject to perpetual revision. Law, on the other hand, must resolve disputes finally and quickly." In principle, I am fascinated by the scientific aspects of advocacy. From an abstract point of view, it sounds not so different from a scientific discussion: the plaintiff presents the evidence and the defendant tries to present a piece of counterevidence, and both try to find flaws in the reasoning of the other side until a verdict is reached. Therefore, in principle, the idea of checking the reliability of testimonies and relying on scientific standards should help. But, assuming judges are honest, a basic problem remains: how to choose "the right" definition when experts don't agree. I see at least four great concerns about the role of scientific experts in trials that I think might also result in problems in using scientific experts to define legal terms.

(1) The adversarial system runs the risk of comparing two very different scientific testimonies with respect to their shared scientific agreement as though they were on the same level. The typical examples are the trials for or against the role of tobacco in causing cancer. Most, if not all scientists, were persuaded of the risk of tobacco, but a few "experts", paid by tobacco companies, were able

to defend the "scientific doubts" of the causal connection (see the well-written *Merchants of Doubt*). The question of scientific assessment of the risk of tobacco smoke is now history, but we still have contrasts between theories held by very few scientists against the consolidated "standard" scientific view: theories of human-driven global warming are still presented in a supposedly "fair" comparison with theories that deny that climate change depends on human actions or the use of fossil fuels. There is still a resurgence of comparison between creationism (or intelligent design) and evolutionism, notwithstanding the famous 1982 verdict in *McLean vs. Arkansas Board of Education* that includes a detailed discussion and definition of "science", according to which creation science simply is not science. Facing these uncertainties, how can a judge decide when the time is ripe to reject some experts as "fake"?

(2) It is not always clear (a) what is more reliable within a scientific field and even (b) what counts as a "scientific field". Subtleties of the peer review system make it difficult to decide a scale or a ranking of experts. Having published in a peer-review journal is more than having submitted to a peer-review journal, but other problems are at stake: the difference among journals, the links between the writer and the editors, the number of quotations in other relevant journals, the different values of the h-index in different fields, general acceptance, standard applications, and so on (I admit, in retrospect, I am mimicking the Daubert criteria!). A judge seldom knows what kinds of journals are ranked higher in these fields, nor which kinds of scientific fields are considered mainstream science. How can judges be aware of different scientific fields and their relevance to the matter in question? Should they rely more on psychiatrists or on neurologists in cases where the inability to understand and have free will are to be determined?

(3) The checks and balances of different testimonies are effective if the two sides have the same level of capability, but the winner is more often the side who is better at finding (possibly biased) expert testimony. Big companies are better suited to find experts to help them win a trial. In these cases, we have a problem of knowledge asymmetry, which makes a trial unfair for a party that has no access to relevant information.

(4) This last problem takes us to a dark side in the increasingly frequent cases where scientific testimony is presented through artificial intelligence systems based on huge databases. These systems give "expert" definitions that depend on previous basic choices that are often "blind" to the judge and the other party. A typical case is the definition of risk assessment, which often raises objections of unfairness given that algorithms are "hidden", and a judge has no way of checking its reliability. As Quattrocolo (2020: 91) says: "digital data risks being considered unflappably reliable, due to a quite common and misplaced sense of innate reliability: this will impact on the admission of it, facilitating the party presenting this piece of evidence." But there is almost no way to challenge their

accuracy and actual reliability. The background definitions of the algorithms and their implementations hide choices that may distort the social reality, as abundantly shown by the challenging book *Weapons of Math Destruction*.

These four features may enforce the judgment given by Charles S. Peirce on scientific advocacy while contrasting it with scientific inquiry: "it is no longer the reasoning which determines what the conclusion shall be, but the conclusion which determines what the reasoning shall be" (quoted by Haack 2014: 33). It seems to me that the case of the U.S. Supreme Court we discussed in the previous section reflects this attitude. The Court wanted a landmark conviction of the drug dealer and used the "literal meaning" of "use of a firearm" in a very "inventive" and non-standard way: having decided on a conclusion, they found reasoning that could support it.

Is it possible to overcome these four worries linked to the definition of a scientific testimony? Besides the general problem of knowledge asymmetry, all these points are common both to logic, philosophy, and law: what is *relevance* and what is *reliability*. We cannot ask judges to understand the subtleties of sciences, but they do need to have a basic understanding of the notion of relevance and reliability in science. Both Susan Haack and Serena Quattrocolo offer some suggestions, albeit in different ways. But I have already gone beyond the space agreed on for our short discussion and I leave some final comments to you.

B.4 LEGAL PHILOSOPHER

The reliability of expert testimony is definitely a knotty issue that is becoming increasingly crucial in judicial decision-making. Legal scholars have mulled over this topic at length, but the questions you mention have not yet found a convincing answer.

From the philosophical point of view, an even more interesting problem is that of expert disagreement. How are jurors or judges, depending on the legal system, to evaluate expert opinion and testimony when experts are in an equally good epistemic position with respect to a certain proposition *p*, but they disagree on the truth value of *p*? Suppose, for instance, that expert E1 testifies that a person contracted mesothelioma as a consequence of exposure to asbestos in the workplace, whereas expert E2 testifies that this is not the case: the mesothelioma was first triggered by other pathogenic factors. And suppose, for the sake of argument, that E1 and E2 are equally reliable according to the Daubert rule. When confronted with a situation like this, which conclusion should the judge or the jurors draw with regards to the facts of the case? Which one of the two experts should the forensic factfinder trust most? We could translate all this into the vocabulary of default reasoning. According to the *Take-for-granted rule*, if

E1 tells me that *p*, then it is reasonable to infer that *p* unless a relevant reason to the contrary occurs to me. But if, at the same time, E2 tells me that not *p*, what should I infer? There seems to be no demon that could help me make a choice.

It is well known that the problem just outlined allows for different solutions. According to some, expert opinions and testimony are never equally reliable (cf. van Inwagen 1996; Dogramici & Horowitz 2016). As a matter of fact, experts have different cognitive abilities, background knowledge, past experiences, attentiveness to the case in question, and actual or potential biases. So, a genuine peer disagreement never takes place in a courtroom, as the expertise of one expert is always different from that of another. Jurors and judges should be put in a position where they can weigh experts' competences, experiences, and biases, to determine whether E1's testimony is more reliable than E2's, or vice versa. Conversely, others believe that a genuine peer disagreement in expert testimony is not only possible but also quite frequent. After all, the Daubert rule allows factfinders to base a defendant's conviction on defeasible forensic testimony, i.e., on testimony that is not fully supported by scientific consensus. In this way, scientific disagreement may easily enter the courtroom, as indeed happens when the facts to be proved require, for instance, expertise in psychiatry, epidemiology, or statistics. In cases like these, the reasons to believe in E1 may be as strong as the reasons to believe in E2, even though they conflict. It follows that the reason to discount one expert's opinion must be independent of their characteristics and the disagreement itself, but judges and jurors do not have the epistemic resources needed to make a choice of this kind. Therefore, so the argument goes, they should suspend their judgment with regard to *p* (cf. Feldman 2006). In other words, in the event of disagreement between E1 and E2, it is neither proved that *p* nor that not *p*.

Which of these two approaches[11] to peer disagreement has to be preferred in the law? I think that one should distinguish between different kinds of disagreement in legal proceedings, which admit different demons. As a matter of fact, experts disagree on different things, which should be considered in more detail.

Explicative disagreements. — First, forensic experts may disagree on whether a certain event took place, or on the causal chain that explains such an event, or on the effects that it is likely to bring about in the future. This typically occurs in the case of disagreement between the experts appointed by the opposing parties, who are supposed to uphold the conflicting standpoints of the prosecutor and the defendant in adversarial legal proceedings. This kind of disagreement, which we might call *explicative*, is physiological in adversarial legal proceedings and beneficial from an epistemic point of view (Lougheed 2020). The conflicting expert opinions contribute to proving that *p*, or not *p*, since they allow the

11 See also the traditional contrast between credulous vs. skeptical arguments in solving conflicts in argumentation theory, as discussed for instance by Doutre-Mengin 2004.

judicial factfinders to confirm their hypothesis about the facts of the case, to falsify their hypothesis in the light of new evidence, or to revise their hypothesis altogether. In the case of explicative disagreement, therefore, it is up to the factfinder to determine, through cross-examination and in the light of the sum of the evidence, which expert's testimony is more reliable. Here the demon is given by the characteristics of the experts, their cross-examination, and the further available evidence brought to the attention of the court.

Theoretical disagreements. — Second, forensic experts may disagree with regards to the generalization, or "covering laws", that are employed by forensic factfinders to test a hypothesis about the facts of the case. This kind of disagreement does not concern what the experts claim, but rather the scientific theories on which their testimony is based, which are usually elaborated by other experts. Theoretical disagreements may occur because the same event, for instance, the fact that Tom contracted mesothelioma, can be theorized in different ways that are equally accepted by the scientific community.[12] In cases like these, each generalization can be regarded as a default scientific standpoint that sheds light on a *different* aspect of the *same* phenomenon. But which scientific theory should be preferred in the courtroom? My idea is that theoretical disagreements are less problematic than we usually assume. If concurring scientific theories are equally accepted, alternative expert opinions based on them are *prima facie* equally correct. It will be up to the jurors or the judge to choose the generalization that explains the aspects of the phenomenon that are relevant to the individual case, and salient with regards to its legal qualification. A choice like this depends on legal reasons, not on scientific ones.

Epistemological disagreements. — A third kind of disagreement, that might be called *epistemological*, is related to the epistemic standards adopted by forensic experts to identify the sources and methods of knowledge that justify their beliefs. These epistemic standards typically include the rules of logic plus the procedural rules that govern the scientific method: 1) the formulation of a conjecture regarding the explanation of a phenomenon; 2) the prediction of the consequences that would result if this conjecture were true; 3) the degree of confirmation of that prediction guaranteed by the sum of the evidence (Hempel 1966). Now, it is well known that epistemic standards are general principles that may be specified in different ways depending on the research field and the purpose of scientific research (Haack 2005). Therefore, it is not surprising that experts may disagree on them. Yet, when disagreement occurs, expert testimony should lose any probative value in legal proceedings. If E1's testimony is based

12 By "equally accepted" I mean that two competing scientific theories satisfy the epistemic criteria conventionally applied by the scientific community, not that such theories are adopted by the same number of research groups or are vindicated in scientific publications that have received approximately the same number of citations. This expression is to be interpreted in a qualitative rather than a quantitative sense.

on epistemic standards that are accepted by the scientific community, whereas E2's is not, E1's testimony must be clearly preferred to E2's. What E2 claims turns out to be junk science. If, rather, both E1 and E2 ground their testimony on epistemic standards that are equally recognized by their epistemic peers, but these standards are incompatible with each other, then neither E1's nor E2's testimony should be given probative value in legal proceedings. In the latter case, what we can infer from the experts' disagreement is that science is groping in the dark with regards to the issue under scrutiny, and the experts' testimonies are of no help in deciding a legal case. When an epistemological disagreement takes place, our demon is eventually given by what we think that knowledge and scientific enterprise amount to.

So, once again, default reasoning is crucial even in expert forensic testimony. The important thing is to identify the appropriate demon that tells us when an exception is needed in what we believe or do by default.

A.5 PHILOSOPHER OF LANGUAGE

I find the distinction of different kinds of disagreement very interesting. We have seen epistemological and theoretical disagreements emerging after the second impeachment of the former U.S. President. Was his invitation to his followers to "fight like hell" an incitement of insurrection against the government or was it an expression of free speech? The answer depends on the theory used. The lawyers defending the former president presented a series of videos in which the phrase "fight like hell" was also used by many democrats in their speeches. Therefore, the conclusion was that the phrase was to be taken as an innocent metaphor that many politicians use. The other side remarked that the different kinds of contexts gave that phrase different roles, and that in the context of the speech inviting his followers to go to the Palace of Congress, it was an incitement to insurrection. We have here two different theories: (a) a "literalist" theory according to which a sentence's meaning is its literal or metaphorical meaning *by itself*, independent of the context, and therefore its utterance constitutes freedom of expression, and (b) a "contextualist" theory according to which the meaning of a sentence depends *on the context* in which it is uttered, and therefore is to be evaluated on the consequences it has. This contrast also reveals an epistemological disagreement. We have different conjectures regarding the explanation of the phenomenon (the attack on the Capitol) with different epistemic standards. According to Trump's supporters, the attack was explained by the free will of the attackers who occupied the palace of their own initiative. For the other side – although not explicitly – the explanation of the phenomenon required a counterfactual causal theory: if the former president *had not said* those words, there *would have not been* any attack on the U.S. Congress.

Assuming the truth of the counterfactual, we should conclude that there is a causal relationship between the speech and the attack.

But what to do now? Shall we (Carlo and Damiano) continue our discussion? We decided to arrive at an end at some point, and now seems a good one. We started with the idea of default reasoning and the problem it may pose to different aspects of legal reasoning and decision making. Default reasoning lies at the core of legal decision making. We didn't speak of the idea of "beyond any reasonable doubt", which seems to be another expression of a default argument: you have to reach a decision in a limited amount of time, often without complete information. You may have some "demons" or objections that cast doubt on a previously reached conclusion, but you cannot advance doubts without a "reason" (or without a reasonable demon). The need to reach a decision helps in understanding how to solve controversies, and the idea of distinguishing different disagreements is a good step towards a clarification of the issue of how to reach a decision. For the debate about the impeachment, we had Peirce's already quoted sceptical view on the law ("it is no longer the reasoning which determines what the conclusion shall be, but the conclusion which determines what the reasoning shall be"): the majority of Republicans wanted a certain conclusion and they found an argument to that effect. But we hope that the law will not always work in this way.

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Yohan Molina*

Norms, rationality, and relevance under the "guise of the good"

In several works, Veronica Rodríguez-Blanco has proposed an approach to the normativity of legal rules and intentional rule-following in the frame of the "guise of the good" model of intentional action. She argues that, on this approach, Raz's conception of legal authority implies that legal rules cannot be rational guides for intentional actions. I will argue that Rodríguez-Blanco's proposal does not succeed in addressing the practical relevance of legal rules. However, I shall argue that a weak version of her criticism of Raz still holds. Thus, this discussion provides a suitable framework from which I will propose a reflection on the normativity of legal rules. This reflection aims to show how legal norms can count as rational guides for intentional agents without being irrelevant in practical reasoning.

Keywords: authority, legal normativity, relevance, rationality, guise of the good

1 INTRODUCTION

The core issue in the problem of the "normativity of law" is to explain how legal norms provide reasons capable of influencing the justification of our actions.[1] It seems clear that the law plays a normative role in our decision-making and in our actions; in our practical reasoning, we often take the norms of a legal system as considerations counting in favor of doing something. In this sense, we could say that legal norms, although they are products of social facts, have a "practical nature". However, how do legal rules give us practical reasons able to justify our decisions and actions? In what sense do they have a practical nature? Joseph Raz's well-known account attempts to explain the normative influence of legal rules in practical reasoning by drawing fundamentally on the concept of an "exclusionary reason." This approach has received a large number of comments and criticism over the years.[2] Especially provoking among them are Veronica Rodríguez-Blanco's. Rodríguez-Blanco objects that the Razian conception of exclusionary reasons implies that the law cannot serve as a rational guide for intentional actions, that is to say: we cannot intentionally fol-

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1 Postema 1987.

2 See Alexander 1990; Clarke 1977; Darwall 2010; Edmundson 1993; Essert 2012; Flathman 1980; Gans 1986; Gur 2007; Hurd 1991; Mian 2002; Moore 1989; Perry 1989; Regan 1989; Schauer 1991; Shiner 1992; Whiting 2017.

low legal rules if they are understood as exclusionary reasons.[3] Her conception of intentional rule-following and legal normativity draws on the "guise of the good" model of intentional action. As an explicative conception of action, this model basically contends that intentional action is a rational activity guided by the agent's conception of some value according to reasons. This would be a conception of practical intentionality that Raz himself advocates in his later work for actions in general, although he does not explicitly apply it in analyzing intentional rule-following in the legal case.[4] Such an analysis is something that Rodríguez-Blanco tries to do. On Rodríguez-Blanco's conception, legal rules provide normative reasons for us, and can be intentionally followed, as long as we evaluate their contents as *good* in the light of our rational appreciation of valuable ends or grounding reasons. This approach would imply that the account of rules as exclusionary reasons deprives the agent of the rational conception of value that is needed to intentionally obey legal rules. In this way, despite the fact that we normally accept that legal rules can be intentionally followed by rational agents, Raz's conception of exclusionary reasons would involve the peculiar consequence that they cannot be intentionally followed after all.

Although I accept that a weak version of this criticism is correct, I consider that Rodríguez-Blanco's own contribution on legal normativity and rule-following fails to give a proper and consistent justification of the practical relevance of legal rules in decision-making. In this way, I will contend that, on the one hand, Raz's conception has irrational consequences which prevent it from accounting for intentional rule-following according to the guise-of-the-good model, but on the other, Rodríguez-Blanco does not give a proper and consistent account of the practical relevance of legal rules. In the light of that, I will make a case for a view in which the existence of legal rules constitutes facts that, in certain situations, can be understood as fully rational guides for intentional action without being irrelevant in practical reasoning.

This article is divided into five parts. Firstly, I will briefly reconstruct the central aspects of Raz's conception of exclusionary reasons within his general project of justifying the idea of legitimate authority. Secondly, I will sketch Rodríguez-Blanco's conception of the normativity of law and intentional rule-following in order to show how this approach, according to her, implies that legal rules as exclusionary reasons cannot be intentionally followed. In the third part, I will argue that Rodríguez-Blanco's conception fails to give a proper account of the practical relevance of law, because her answer to the distinctive influence of law in our practical reasoning is at odds with her own approach to intentional rule-following. Nonetheless, I will advocate, in the fourth part, that a weak version of her criticism of Raz still holds, because under certain conditions, and not neces-

3 Rodríguez-Blanco 2014: ch. 8; Rodríguez-Blanco 2015.

4 Raz 2011: 59–84.

sarily as Rodríguez-Blanco suggests, the understanding of rules as exclusionary reasons seems to root out the rational perspective of value that intentional rule-following requires. Considering all of the above, in the final part I will try to show that the guise-of-the-good model of intentional actions can overcome the problem of irrelevance affecting Rodríguez-Blanco's view, without embracing the irrational implications of Raz's approach. I will argue that legal rules constitute facts that in some contexts, and under a qualified critical supervision, stand for normative guides that are relevant for practical reasoning without implying irrational consequences affecting intentional rule-following.

2 PRACTICAL REASONING AND EXCLUSIONARY REASONS

Joseph Raz calls his conception of authority the "service conception," because the fundamental role and primary normal function of legitimate authority is to serve relevant reasons of the governed.[5] Broadly speaking, the benefit of authority on this conception lies in the idea that we can better conform with our relevant reasons by obeying authority than by acting on a direct assessment of such reasons. There are three closely connected theses that shape Raz's general view.[6] First, the "dependence thesis" states that authoritative directives should be based on "dependent reasons" – later called "underlying reasons"[7] – that already apply to the agent subjected to authority and are relevant to his action in the circumstances covered by them. According to this thesis, authoritative directives in general should manifest or reflect the exigencies of relevant reasons that the agent subject to the authority already has and that apply to the situation governed by the directive. Second, the "normal justification thesis" claims that the authoritative relation stands to the extent that the addressee has a better chance to conform with dependent or underlying reasons when he follows the directive than when he acts guided directly by his own judgment on them.[8] These two theses emphasize the role of legitimate authority as a service for the governed.[9] Finally, the "preemptive thesis," which would be followed from the previous ones,[10] states that an authority's directive constitutes a *reason* for performing an action "*which is not to be added to all other relevant reasons when*

5 Raz 1986: 56.

6 Raz 1986: 42–62.

7 Raz 1990: 193.

8 In his later work, Raz does not mention the "dependent thesis"; rather, he introduces the "independence condition." This condition is satisfied when, regarding the matters covered by the normal justification thesis, it is more important to conform with reasons guided by authority than to decide for oneself (Raz 2009: 137).

9 Raz 1986: 55–56.

10 Raz 1986: 57–59.

assessing what to do, but should exclude and take the place of some of them."[11] In this view, when a subject is unable to establish, in his own judgment, what is required by his underlying reasons in a better way than authority,[12] then it is rationally justified to follow the authoritative directive and not to act based on one's own judgment on those underlying reasons on which authority is better positioned to decide. In this sense, the directive is not an ordinary reason that is to be added to all the other underlying reasons in practical weighting, but one that would reflect the action that the balance of some of them requires[13] and excludes our judgment on those specific reasons as direct guides of action.[14]

In this frame, the constitution of authoritative commands as practical reasons relies distinctively on the concept of an "exclusionary reason."[15] This depends on the important distinction between first- and second-order reasons.[16] A "first-order" reason is a reason in favor of or against the performance of an action. At this level, conflicts between reasons are decided by assessing their relative weight in the balance of reasons. On the contrary, a "second-order" reason is a reason either to act or not for a first-order reason. A second-order reason to act for a first-order reason is what Raz calls a "positive second-order"

11 Raz 1986: 46 (emphasis in the original).

12 According to Mian (2002), Raz faces a problem to explain how an agent can establish that an authority is better than his own judgment to satisfy underlying reasons (Mian 2002: 114–116). It seems that I can accept that the authority is likely right if I am able to have a level of knowledge that allows me to judge the balance of reasons and thus to assess the probable success of the directive. But if this is the case, then the directive cannot be preemptive or exclusionary, since I would follow the directive as a reliable source to conform with underlying reasons if I evaluated its content as likely right according to such reasons. In other words, the possibility of determining the conditions of the normal justification thesis from the agent undermines the preemptive one (115). However, this criticism does not consider enough that the agent can believe the likely success of the authority due to reasons external to the content of the rule. As I will say below, considerations like the record and success of the authority in enacting norms, its epistemic credentials, its influence over other people, and other considerations of this sort can support our considering its norms as likely right, even when we are not able to know whether the directive's content *exactly fits with* the exigencies of underlying reasons. These reasons external to the content of the rule can be seen as considerations backing our taking the rule as a reliable guide in conforming with underlying reasons. Mian does not discuss why a position of this type would fail. He briefly says that the agent could be helped by its perception of an authority's past directives and their outcomes, but he does not argue against this idea (116). I thank an anonymous referee for having suggested addressing Mian's objection. We will see that a more serious problem for Raz has to do with the rational refusal to follow rules and its impact on intentional action.

13 The balance of reasons refers to the ponderation of the weight or strength of the relevant reasons in a given situation.

14 A significant subject reviewed below is how those excluded or displaced reasons can be determined.

15 In the *Morality of Freedom,* Raz speaks about "preemptive reason," characterized as "a reason which displaces others" (Raz 1986: 42).

16 Raz 1990: 36.

reason, while a second-order reason to not act for a first-order reason is what he terms a "negative second-order" reason, or "exclusionary reason."[17] Thus, an exclusionary reason is a reason to not act on the basis of first-order reasons. On this ground, Raz introduces the concept of a "protected reason," which consists at once of a first-order reason to Φ, and a second-order exclusionary reason to not act on the basis of first-order reasons against Φ.[18] Accordingly, a protected reason is a reason in favor of doing something that defeats first-order reasons thanks to its exclusionary character and not by its relative weight. In this way, authoritative rules are essentially protected reasons that, while excluding our action based on some conflicting first-order reasons, are able to stand for an indirect path for maximizing conformity with underlying reasons.

According to Raz, there are some circumstances where it is justified to resort to the exclusionary service of authorities. He presents at least two kinds of decision-making circumstances through "the argument from expertise"[19] and "the argument about coordination."[20] The argument from expertise simply remarks that it could be justified to follow the authoritative directives of an expert in cases of uncertainty or lack of information in the decision-making process. Uncertainty could be either the result of mere ignorance or the product of a choice to avoid irrational decision-making costs implied in a full deliberation to access relevant information. The argument about coordination, on the other hand, establishes that following authoritative directives could be the best way to achieve social coordination when attempts to act according to individual judgment on the merits of the case likely turns out to be ineffective. In both cases, it would be justified to treat authoritative directives at once as both reasons to do something and exclusionary reasons displacing (some) first-order considerations. Thus, authorities would perform a mediating role between agents and the reasons they already have by improving conformity with these.

In the next section I will sketch Rodríguez-Blanco's criticism of this idea of an exclusionary reason. This criticism is based on a conception of the normativity of law and intentional rule-following relying on the guise-of-the-good model.

3 AUTHORITATIVE RULES AND THE "GUISE OF THE GOOD"

For Rodríguez-Blanco, the "standard" view of intentional action – according to which action is fundamentally a causal product of mental states, i.e., desires

17 Raz 1979: 17; Raz 1990: 39.

18 Raz 1979: 18.

19 Raz 1986: 67–69; Raz 1990: 63–64, 195.

20 Raz 1986: 30–31, 49–50, 56, 73; Raz 1990: 64, 195.

and beliefs[21] – provides an excessively simplified perspective, unable to grasp relevant features of practical intentionality. She calls the standard approach the "two-component model",[22] because it divides action into two main ingredients: mental states and behaviors. The standard model aims to explain intentional action by establishing causal relations between these two constitutive poles from the perspective of an external observer, from the third-person point of view.[23] In this way, the intentional action of, for example, making a sandwich, could be explained by causally connecting that behavior to both the desire to eat something (a pro-attitude) and the belief that making a sandwich is the suitable conduct to satisfy it. Nonetheless, in Rodríguez-Blanco's conception, which follows Anscombe,[24] the standard model overlooks a fundamental point in explaining the structural nature of intentional actions: an intentional action is a complex unity composed of progressive stages whose production is controlled along its complete performance by the agent. Under this consideration, intentional action is not conceived as an external bodily movement plus psychological states,[25] but as a continuous process toward an end carried out by the agent. In consequence, this idea of intentional action privileges the first-person or deliberative point of view, because it is based on the practical perspective of the subject who decides and acts. The agent intentionally acts due to the fact that he is guided toward an end that *he considers* valuable, an end enabling him both to identify relevant actions and to control the production of their successive steps. In this way, valuable ends or "grounding reasons as good-making characteristics" serve as guides for the agent in the practical articulation of all the partial stages of the complex performance of his action. Reasons as good-making characteristics are convergent points allowing the intelligible unity of intentional action.[26]

From this standpoint, intentional action is equivalent to action done for the conception of a reason,[27] and the first-person point of view would be the suitable perspective for approaching intentional actions, because it provides a better explanation of their complex structure. Furthermore, ideas closely connected

21 Cf. Davidson 1963. Davidson considered that the causal basis of intentional actions is what he called a "primary reason." This reason consists of a combination of two mental states: a pro-attitude (desires, impulses, etc.) and an instrumental belief.

22 Rodríguez-Blanco 2014: 25.

23 Rodríguez-Blanco 2014: 25.

24 Anscombe 1963.

25 Rodríguez-Blanco 2014: 62.

26 Rodríguez-Blanco 2014: 28, 47, 61.

27 Rodríguez-Blanco 2014: 40. For an argument in favor of intentional actions made for no reason, see Alvarez 2009. I am not debating here the possibility of cases of intentional actions made for no reasons, or whether the guise-of-the-good model has the capacity to make sense of these apparent cases. I am only discussing how we could understand intentional rule-following from the guise-of-the-good model of intentional actions, without taking part in those discussions.

to practical intentionality, such as self-control and self-guiding, would be better vindicated than under the "two-component model."[28] In the same vein, since the background of reasons why pursuing an end becomes valuable is key to understanding the complex performing of intentional action, then asking the agent *why* he acts in a certain manner is then the sound way to know the reason as a good-making characteristic making the unitary articulation of his action intelligible. Thus, the why-question is a methodological tool enabling us to reconstruct the complex constitution of intentional actions as a unitary whole.[29]

This consideration of actions based on reasons as good-making characteristics, reasons regarded by the agent as valuable ends that could be made explicit by the why-question methodology, is the core tenet of the guise-of-the-good model of intentional action.[30] Rodríguez-Blanco tries to approach the normative nature of authoritative legal rules and the possibility of intentional rule-following by resorting to precisely this model. For Rodríguez-Blanco, legal rules have to be based on reasons as good-making characteristics if they aim to have some normative role in practical reasoning able to support and guide intentional actions. As external demands, legal rules can have the kind of normative influence that involves intentional action if the agent conceives of the value of their content as a result of his evaluation of grounding reasons.[31] In this fashion, her explanation of the normative nature of law in terms of grounding reasons as good-making characteristics is closely connected with the explanation of intentional rule-following. *We can intentionally follow a legal rule if we act based on our assessment of the suitability of its content in the light of grounding reasons*.

Likewise, the why-question methodology allows us to extract the grounding reasons of legal norms, and thereby the rational end which normatively engages agents in following the rule in an intentional way. In intentional rule-following, rules cannot be the primary reasons for action; these primary reasons are those grounding the value of following the rule's content.[32] In this way, the relevant force of legal rules is dependent on their grounding reasons as good-making characteristics; the reason-given character of the law is related to the conception of values beyond it. Take the case of someone following the rule "Separate your garbage for recycling." If we ask him why he does that, he could say, "Because the law demands it." But from Rodríguez-Blanco's point of view, the rule itself

28 The standard view has to face the well-known objection focused on its incapacity to explain deviant causal chains, as well as other challenges concerning its instability when it comes to securing the perdurability of intentions. Cf. Rodriguez-Blanco 2014: 44–45. On the extensively discussed problem of deviant causal chains, see Stout 2010.

29 Rodríguez-Blanco 2014: 45–47. On this, see Anscombe 1963: ch. 6.

30 Rodríguez-Blanco 2014: 30.

31 Rodríguez-Blanco 2014: ch. 2.

32 Rodríguez-Blanco 2014: 140.

cannot be a sufficient answer in explaining intentional actions.[33] Instead, we could keep asking why he follows the rule, and now he can answer, "Because recycling is important in taking care of the environment". Obviously, we can ask again why he should do that, and finally he could say, "because a clean environment is essential to preserving human life, and human life is valuable in itself." The value of life would be the final grounding reason explaining his intentional action of separating his garbage for recycling.[34] Although Rodríguez-Blanco does not make this point clear, grounding reasons as good-making characteristics should be based on some agent's conception of ultimate values, because they are the only reasons that seem to stop the iterative question *why?* by not serving deeper ends. In this regard, I think that there is wide agreement that authoritative legal rules – regardless of their contents – are not themselves ultimate in that sense.

Keeping this in mind, it is possible to understand Rodríguez-Blanco's critique against the idea of exclusionary reasons. Rodríguez-Blanco thinks that, to the extent that rules cannot themselves be ultimate reasons guiding intentional actions, they can be intentionally followed only if the agent acts on the assessment of their contents according to further grounding reasons. However, the understanding of legal rules as exclusionary reasons would leave the evaluation of grounding reasons outside the motivation of actions. Exclusionary reasons would disable the action based on the assessment of the value of the content of the rule according to grounding reasons – which, in Raz's terminology, would amount to underlying reasons[35] – and thus the intentional adherence to the rule.[36] Consequently, authoritative legal rules as exclusionary reasons could not be practical binding guides allowing agents to act (intentionally) under the conception of the good that the action involves.[37] Raz's concept of exclusionary reasons would involve that "[w]e cannot characterise our actions as *intentional*."[38] "From a textual analysis of Raz's works we can infer that [...] we do not follow

33 That would imply the highly problematic position that legal rules in themselves, independently of their content or usefulness, have a kind of ultimate value.

34 For a similar example, see Rodriguez-Blanco 2014: 142.

35 Rodríguez-Blanco 2014: 158.

36 Rodríguez-Blanco 2014: 140, 158–159.

37 It is noteworthy that Raz (1990: 179–182) distinguishes between *conforming* with a reason and *complying* with a reason. Someone *conforms with* a reason only if he performs the action required by such a reason in the situation in which it applies. On the other hand, someone *complies with* a reason if he not only acts in accordance with that reason but acts that way because he *judges* that that reason requires it. Exclusionary reasons are practical considerations which lead us to *conform with* underlying reasons in situations where acting in our own judgment on them turns out to be unfavorable. In such contexts, it would be rational to renounce *complying with* underlying reasons in order *to conform* with them by following exclusionary reasons. According to Rodríguez-Blanco (2014: 155–159), mere conformity with rules is not compatible with intentional actions.

38 Rodríguez-Blanco 2014: 155 (emphasis in the original).

legal rules intentionally."[39] "Therefore, *contra* Raz, I argue that, in the normal cases, we follow legal rules *intentionally*."[40]

However, it remains to be seen whether Rodríguez-Blanco's own account of the practical nature of authoritative legal rules is suitable, and whether her criticism of exclusionary reasons is pertinent. In the next two sections, I will focus on both points.

4 ON THE PRACTICAL RELEVANCE OF LAW: A PROBLEM FOR RODRÍGUEZ-BLANCO

It goes without saying that Rodríguez-Blanco's proposal raises a significant number of issues in legal philosophy, the philosophy of action, political philosophy, and moral philosophy. Here, I would like to focus on the question of the practical relevance of law. If it is true that intentionally following legal rules completely relies on the evaluation we make of their contents according to the requirements of grounding reasons, then it is unclear in which way rules could have a distinctive practical effect in rational rule-following. Rules are relevant in decision-making when they do not entirely depend on a judgment about its content in the light of grounding or underlying reasons to be rationally obeyed. If the rule has to exactly coincide with our judgment on the exigencies of grounding reasons to be rationally followed, it makes no real difference in rule-guided choice; it will be redundant as to the agent's rational decision. The rational agent would perform the prescribed action even if the rule did not exist. Hence, and even though it may sound striking, the guise-of-the-good model of intentional action would imply that intentional rule-following is possible only if legal rules are superfluous. However, Rodríguez-Blanco realizes this problem and tries to overcome it.[41] She addresses the practical relevance of authoritative legal rules by considering that it is possible to act according to a *presumption of the goodness* of the rule or directive "*without avowing* the grounding reasons of the legal rules."[42] In other words, it is possible to rationally follow legal rules without avowing or endorsing grounding reasons *as evaluative parameters for judging the identification of their requirements with the contents of legal rules*.

Her solution, though somewhat obscure, is that we could follow authoritative legal rules *as if they were* a good sort of thing, thanks to: (1) our confidence in the correctness of an authority's claims, and (2) our recognition of an authority complying with most, or all, of the eight desiderata of the rule of law. Authorities' claims would be pieces of "insufficient evidences" which enable us

39 Rodríguez-Blanco 2014: 157.

40 Rodríguez-Blanco 2014: 156 (emphasis in the original).

41 Rodríguez-Blanco 2014: 142.

42 Rodríguez-Blanco 2014: 160 (emphasis added).

to create a *presumption* about the goodness of the rule, without judging its content pursuant to grounding reasons as good-making characteristics. In the first case, what seems to be the crucial point of Rodríguez-Blanco's argument is that we could presume the goodness of the rule if we can rely on the capacity of an authority to establish prescriptions useful to achieving some valuable end, due to the fact that acting fully guided by our own judgment on grounding reasons would turn out to be unfavorable in certain situations. Authorities, for example, could be useful both in contexts of uncertainty and in contexts of coordination.[43] In the second case, when authorities comply with most of the eight desiderata of the rule of law,[44] they would be able to create a presumption about the goodness of the authoritative rule because they show the sound procedure involved in good lawmaking and judging. This last aspect is closely connected with the first consideration, because good lawmaking and judging would be relevant to achieving some valuable goals – e.g., social coordination.

However, some doubt might be had about the presumption of the goodness of authoritative legal rules. If we can act under a presumption of the goodness of a rule without avowing or endorsing grounding reasons as evaluative parameters to judge its content, how could it be possible to intentionally follow the rule under the guise-of-the-good model advocated by Rodríguez-Blanco? As we have seen, for Rodríguez-Blanco we can intentionally follow a legal rule if we avow or endorse grounding reasons as evaluative parameters in judging legal contents. Yet we are now told that we are able to act guided only by a presumption of the goodness of the rule *without* avowing grounding reasons as normative guides in assessing its content, from which it follows, in Rodriguez-Blanco's own terms, that the rule loses its normative power and cannot be intentionally obeyed.

Given the previous problem, an alternative option for Rodríguez-Blanco is to modify her own approach to intentional rule-following. In accordance with this alternative, intentional rule-following is also plausible when we do not act based on our own judgment about the value of the content of the rule. What matters for intentional action is the consideration of the goodness of the rule to achieve further ends, and for this *it is not necessary* to evaluate its content according to grounding reasons. The rule can be conceived as something good to follow even when we do not achieve that axiological conception through the evaluative identification of its content with the exigencies of grounding reasons.[45] Since

43 "To coordinate our different activities and pursue the good, we act on the presumption of the goodness of legal authority" (Rodríguez-Blanco 2014: 163).

44 As set out in Fuller (1969: 38–39).

45 Adam Perry's (2015) account of the acceptance of rules sets something similar in considering that acceptance can be held independently of belief about the content of the rule. According to Perry, the attitude of acceptance toward the rule can rely on presumptions or fictions about what ought to be done. This by no means signifies that a legal rule constitutes a distinctive rea-

we would not be able, in certain situations, to satisfy grounding reasons if we acted based on our own evaluative judgment about them, it would be possible to trust that the rule is good when authority has the relevant qualities to lead us to achieve such valuable ends. The record and success of the authority enacting norms, its epistemic credentials, the respect it enjoys in the community, its influence over other people, and other considerations of this sort (not directly related with the contents of rules) can support our considering or presuming its norms as *good* in complying with grounding reasons even when we are not able to know what such reasons exactly require. In other words, we could intentionally act by trying to conform with grounding reasons through obedience to the rule without being based on the direct identification of the action they require. Nonetheless, it is interesting to emphasize that if this modified approach is possible, then Rodríguez-Blanco's criticism of Raz's conception seems to fail. Raz could argue that, *mutatis mutandis*, an agent can intentionally obey rules as exclusionary reasons. Thanks to considerations not directly connected with the content of the rule, the agent can conceive that authority has relevant qualities to indirectly lead him to satisfy valuable underlying reasons through its exclusionary commands – in the relevant contexts where he acknowledges he is not in the best position to decide. In this regard, Raz could say that an agent following authoritative rules as exclusionary reasons could see them *as good in indirectly complying with* underlying reasons, so it does not matter if he did not act based on his direct judgment on the specific actions that excluded reasons require.

In this way, Rodríguez-Blanco's account seems to be caught on the horns of the following dilemma: either she tackles the problem of the practical relevance of legal rules dispensing with the endorsement of grounding reasons as normative guides for identifying legal contents (her solution), but then legal rules cannot be intentionally obeyed on her own approach of intentional rule-following, or she modifies her original approach to intentional rule-following and accepts that it is not needed that intentional action relies on the judgment on legal contents according to grounding reasons, but then rules as exclusionary reasons can be intentionally followed and her criticism of Raz does not hold.

I contend that Rodríguez-Blanco's modified approach to intentional rule-following is right. The sources of the conception of goodness concerning intentional rule-following do not have to stem only from an assessment of the suitability of the content of the rule to adhere to grounding or underlying reasons. On the other hand, I agree that it is conceptually possible to intentionally follow rules under the description of exclusionary reasons. However, I also consider that there are *some* circumstances where rules understood as exclusionary reasons dispense with the rational conception of value needed to perform inten-

son for action *thanks to its mere acceptance*, only that it is possible for there to be an adequate account of the acceptance of rules which is not directly based on the value of their contents.

tional actions; I refer to situations where the agent knows that the content of the rule is wrong in terms of the reasons the rule aims to exclude. The issue is that Raz's conception is not successful in addressing cases of critical rejection of the rule based on its content in the light of excluded reasons. In other words, it does not assimilate cases where the agent conceives the rule as *valueless* concerning the reasons under the scope of the authority. Let us consider this point more closely and how it affects intentional rule-following.

5 EXCLUSIONARY REASONS AND THE "GUISE OF THE GOOD"

As we saw before, an exclusionary reason is a second-order reason which excludes acting based on our judgment on conflicting first-order reasons. According to Raz, a second-order reason always prevails when it conflicts with the first-order reasons it aims to exclude, in virtue of its higher-order level.[46] This implies that if we accept that an authoritative rule is not only a first-order reason to do something, but also an exclusionary reason to not act on our judgment on the balance of excluded underlying reasons, then our judgment on the unsuitability of the content of the rule regarding such excluded underlying reasons should always be excluded from the motivation of our actions. To put it differently, an agent cannot base his action of not following the rule on the direct assessment of its content in the light of excluded underlying reasons, for exclusionary reasons prevent our judgment on excluded reasons from having any influence in rational motivation.

It is true that, in some places, Raz briefly points out that obedience to a norm can be affected on the basis of first-order reasons: there could be both exceptions to the norm and cases outside its scope.[47] First of all, Raz contends that a norm regarded as an exclusionary reason "does not have to compete with *most of the other reasons* which are likely to apply to situations governed by the norm".[48] The set of reasons excluded by an exclusionary reason stands for its scope.[49] Therefore, according to Raz, the scope of exclusion of the norm over first-order reasons is not absolute,[50] and there is a minority of cases where the norm could not be decisive: "There may be other conflictive reasons not excluded by the norm. [...] The complicating factors apply only in a minority of cases."[51] In this

46 Raz 1990: 40, 46, 79.

47 Raz 1990: 79–80, 187–188.

48 Raz 1990: 79 (emphasis added).

49 Raz 1990: 46.

50 This is fully coherent with Raz's formulation of the preemptive thesis quoted above, since the rule does not exclude all conflicting reasons; rather, it "should exclude and take the place of *some* of them" (Raz 1986: 46, original all italicized).

51 Raz 1990: 79.

sense, a case falls under an exception to the rule when the reasons excluded by the rule apply to the case, but there are conflicting reasons outside its scope that also apply to it and are considered as prevailing over the excluded reasons, and so over the rule. Take the example of the rule "Never deceive." This rule can reflect and exclude reasons under its scope related to honesty and moral integrity. However, it might happen that there is another more important reason outside the scope than those reasons within it, as when a human life is in danger, which justifies the exception of not following the rule in some cases.[52] On the other hand, a case falls outside the scope of the rule when the reasons excluded by the rule do not apply to the case governed by it.[53] This could be called a case of nonapplication. Imagine that a rule prohibiting vehicles from accessing the park reflects and excludes reasons related to the road safety of visitors, but park staff use a vehicle to take the garbage out when the park is closed because there are no visitors. In this case, the reasons under the scope of the rule do not apply to the use of the vehicle, as there is no possibility of hurting visitors when there are none in the park.

In both examples, our judgment on first-order reasons justifies the practical refusal to follow the rule. When it comes to exceptions, the judgment on reasons outside the scope of the rule supports not following it. Here there is a comparison between first-order reasons: the weight of the nonexcluded first-order reason prevails over the weight of the norm as a first-order reason reflecting some other reasons.[54] When it comes to cases of nonapplication, the judgment on the reasons under the scope of the rule supports that it is not needed to follow the rule in order to comply with them. The rule as a first-order reason is not overridden, but it loses its normative force in such a specific case.[55] However,

52 Raz 1990: 187.

53 Raz 1990: 187.

54 Raz says: "In a case to which a reason incompatible with the norm, but not excluded by it, applies one must determine what one ought to do on the balance of reasons, comparing the weight of the norm as a first-order reason with the weight of the competing reason" (Raz 1990: 77). In the example, the value of life outstrips the importance of honesty or moral integrity, and thus the rule "Never deceive" as a first-order reason.

55 Perhaps what I call cases of nonapplication can be understood under what Raz calls "cancelling conditions" (Raz 1990: 27). According to Raz, a cancelling condition is a fact in virtue of which a reason loses its normative force. This fact need not be a reason itself, and when it appears, there is no conflict between reasons that has to be decided by their relative strength. Suppose that you needed a ride to the airport next week, and I promised you that I would do it. This promise was a reason to give you a ride. Suppose now that you release me from my promise. The fact that you now release me form my promise is not a stronger reason overriding the promise; instead, it is a condition that cancels the promise as a reason. In the case of the park, it seems to be something like this: the fact that there are no visitors in the park is not a reason overriding the rule, but a situation which makes the rule lose its normative force in the situation. The norm loses its status as a normative guide in that specific occasion because there is no danger in using the vehicle.

these brief Razian considerations cannot make out the rational refusal to follow the rule based on the reasons the rule excludes.

First of all, Raz does not make clear how to determine the reasons a rule excludes. One available criterion is that the range of excluded reasons is determined by a weight comparison among all the relevant reasons concerned in the situations covered by the rule.[56] By this criterion, a conflicting reason (a reason against the rule) can be considered as excluded, and thus under the scope of the rule, if it is assessed by the addressee as not strong enough to justify disobedience. On the contrary, a conflicting reason can be considered out of scope when it is assessed as stronger than the reasons supporting the rule, and thus as able to justify disobedience. The problem with this criterion is that the alleged reason under the scope of the rule would not, paradoxically, be excluded. What defines an excluded reason is that it cannot be part of the balancing of reasons determining how to act, but according to the criterion, the status of the excluded reason would depend precisely on the judgment on its strength or on its weight against the rule. In other words, the reason is excluded from the motivation of actions *when* it is pondered by the addressee as unable to justify disobedience, but that means that the actions that are not supposed to be based on the ponderation of the excluded reason ultimately rely on such a ponderation.[57] In the "rational pedigree" of the motivation of the action will appear the assessment of the reason at stake. Hence, the identifying criterion for the "excluded" reasons stands in opposition to their excluded nature.

However, it is fair to say that Raz, in his later work, says that authoritative rules "exclude reliance on conflicting reasons, not all conflicting reasons, but those that the law-maker was meant to consider before issuing the directive."[58] But this is a vague criterion that can be charitably read in the following way. The reasons authority was meant to consider are reasons which apply to the addressee before the directive and which, on the available evidence, are related to the subject, area, or domain over which the authority was entitled to decide and which represents its jurisdiction.[59] This reading leaves at least three kinds of reasons outside the scope of the rule: (1) those which are not related to the domain the authority covers; (2) the conflicting reasons related to the authority's domain based on evidence not available until the moment of the directive; (3) those which, although related to the authority's domain and covered by the rule, arise in future exceptional situations which the authority was not able to consider. For example, the labor authority which requires industrial employees to wear safety

56 On this, see Gans 1986: 385 and Gur 2007: 198.

57 Like a Trojan horse, the ponderation of the alleged excluded reason gets surreptitiously folded into the motivation of the action through the identifying criterion of such a reason.

58 Raz 2009: 144.

59 Raz (1990: 189) says that "legitimate authority has the right to issue directives within the sphere of its jurisdiction."

helmets can consider that this rule resists possible conflicting reasons related to the matters it was empowered to decide on: health and safety. Thus, conflicting reasons ultimately based on considerations of health and safety fall within the scope of the rule as excluded reasons, and cannot be considered by the governed as motives of his action. Of course, the same authority can be entitled to decide on a wide range of different topics and to pronounce on the respective balance. The wider the range, the greater the number of excluded reasons.

By contrast, reasons outside the scope of the rule would be: (1) conflicting reasons existing before or after the directive is issued, which are relevant to the case covered by the rule but are not related to the subject the authority was empowered to decide on (in this case, reasons not related to health and safety);[60] (2) conflicting reasons which existed before the directive and are related to the authority's jurisdiction, but which at the time of issuance were unknown due to unavailable reasonable evidence (for example, it may be discovered, after the directive is issued, that the helmet is made of a potent carcinogenic material); or (3) conflicting reasons that are related to the authoritative jurisdiction but come into existence after the rule was issued, and were not foreseen by the authority (for example, that the helmet causes a new employee a rare but severe allergy).

Yet, taking for granted that the criterion is fully coherent with the idea of an exclusionary reason, the problem with the rational refusal to follow the rule remains. If I am sure that the authority is wrong about the balance of reasons that, on the evidence available, it was meant to consider before issuing the directive, I cannot refuse to follow the rule based on my judgment on such reasons. Imagine that the labor authority, before issuing the rule, knew that the helmet is carcinogenic, but that the authority requires the helmet anyway because of a wrong ponderation. If an employee is sure that the helmet seriously damages his health and safety, it seems natural to think that he can refuse to follow the order requiring the helmet to be worn. However, on the conception of exclusionary reasons, this could not be the case: that the helmet is carcinogenic is an excluded reason within the authority's jurisdiction (health and safety); therefore, it cannot be a reason on which the action is based. In cases where I do not have reasons to distrust the authority's capacity, but I am able to know that the content of the rule is not favored by the balance of the *excluded* reasons, I have to obey the rule anyway because the protected nature of the rule favors obedience. My judgment on conflicting excluded reasons should be rooted out from the rational motivation of my action. As a result of these considerations, Raz's proposal makes the rational rejection of the rule, in the light of the balance of excluded reasons, unfounded. This forces the conclusion that when we are sure

60 This would be the case of the aforementioned rule "Never deceive": the authority was empowered to exclude reasons related to integrity and honor, but not considerations related to the protection of life.

of the wrongness of the rule according to the balance of excluded reasons, we equally have to obey the rule in a blind and irrational way.

The previous criticism implies that following rules as exclusionary reasons is not fully compatible with intentional actions under the guise-of-the-good conception. We can accept that in relevant contexts – like those of coordination or uncertainty – it could be rational to follow an authority's commands as an indirect way to comply with certain ends, but this intentional action could not be completely detached from the critical assessment on the action ordered in the light of "excluded" reasons. The intentional agent does not act according to the rule if he considers that its content *does not have any value* in light of the (binding) reasons it aims to serve. Nonetheless, according to Raz's conception, our action cannot rely on our appreciation of the balance of excluded reasons but must rely on the rule as a protected reason. Raz's conception has irrational consequences at odds with intentional rule-following, since it requires the agent to take the norm as a reason to act and to rule out actions against the norm based on excluded reasons, even when the agent is sure that the ordered action is *not good* regarding the excluded reasons the norm serves. Strictly speaking, this is not the same as Rodríguez-Blanco's criticism of Raz, but a weak version of it. According to Rodríguez-Blanco, on the guise-of-the-good model, legal rules as exclusionary reasons cannot be intentionally followed at all. I restrict myself to the most moderate claim that *when* the agent is sure of the valueless character of the content of the rule in view of the reasons the rule aims to exclude, then there is no conception of value needed to perform the intentional action of obeying the exclusionary command. In other words, the understanding of rules under the description of exclusionary reasons is not compatible with intentional rule-following when the agent conceives of the lack of value of the prescribed action regarding the excluded reasons.

In summary, Rodríguez-Blanco's solution for explaining the rational relevance of law conflicts with her own approach to intentional rule-following. Moreover, we have considered that Raz's conception of exclusionary reasons is not fully compatible with the guise-of-the-good model of intentional action, since the agent should act according to the rule even when he knows that it is valueless regarding the balance of reasons excluded by it. We thus have the following picture. On the one hand, Rodríguez-Blanco's original approach to legal normativity and intentional rule-following is unable to explain the practical relevance of law. On the other hand, Raz's conception of exclusionary reasons involves irrational consequences able to prevent legal rules from being intentionally followed. The key question, then, is: is it possible to have an approach to intentional rule-following that addresses the practical relevance of legal rules without implying irrational consequences? I believe that what I called Rodríguez-Blanco's modified approach to intentional rule-following, which we

saw can face the problem of irrelevance by accepting that the rule can be seen as good to follow even when the agent does not identify the legal content with the exigencies of grounding reasons, is able to overcome that challenge because it is fully compatible with the rational refusal to follow rules.

6 CRITICAL CONTROL AND RULES

I think it is possible to consider that legal rules are valuable tools with which to achieve worthy ends, without sacrificing the possibility that they are rationally relevant in the practical reasoning of intentional agents. But before moving forward, I would like to make two things clear. Firstly, I will understand that a reason is a fact that counts in favor of believing or doing something.[61] For example, the fact that a cup of wine is poisoned is a fact which counts in favor of (i.e., is a reason for) not drinking out of it. Secondly, I will understand that legal rules constitute facts associated with a type of normative force which is not intrinsic but derived, since their binding power, as Raz and Rodríguez-Blanco accept,[62] depends on the suitability of rules to achieve ends different from the rule itself. The issue, then, is how to grant authoritative legal rules a relevant practical role without implying irrational consequences, since we acknowledge in advance that they in themselves have no ultimate practical force (unlike moral or prudential final ends, which *would* have such force).

In order to avoid the Scylla of irrationality and the Charybdis of irrelevance in intentional rule-following, it could be useful to start by considering the Razian decision-making contexts where authority could play a relevant practical role, without bringing the problematic idea of an "exclusionary reason" into the picture; that is to say, without accepting negative second-order reasons, and thus without accepting that there are reasons excluded in advance from the rational motivation of actions. To begin with, we have circumstances of uncertainty or lack of information. In these cases, we can consider the instrumental nature of the concept of an indicator rule.[63] According to Donald Regan, indicator rules are guides to action adopted to deal with cases where we are not in a suitable position to decide on our own on a specific subject due to lack of information, some high costs associated with the decision-making process, and

61 I consider that this is the best ontological approach to normative reasons against conceptions advocating that reasons could be taken as propositions or mental states. Nonetheless, it is not possible for me to address this interesting and complex contemporary debate here. For discussion on the ontological nature of practical reasons, see Alvarez 2010 and Dancy 2000.

62 Raz (2009: 148) says that "[t]he service conception makes the legitimacy of authorities turn primarily on their value in achieving something beyond them, i.e. conformity to background reasons existing independently of them."

63 Regan 1989: 1004–1012.

the like.[64] These guides are based on considerations that allow us to rely on the rule's success in leading us to act according to the balance of reasons, when we do not know whether its content matches with them in the particular case at hand. Rules such as "Avoid more than 1 person in the elevator at a time during the pandemic" or "Refrain from having sexual intercourse with your students" could be good examples of indicator rules. Following Regan, a proper approach to indicator rules shows that these cannot be treated as either perfectly transparent or completely opaque.[65] A rule is treated as perfectly transparent when we "see through" to its underlying reasons on every occasion, and we act accordingly depending on our judgment about them, that is, when we act according to the rule *only* because we consider that its content identifies what its underlying reasons require. On the contrary, we treat a rule as completely opaque if we follow it as such, regardless of its underlying reasons. The rule, in this sense, blocks our view, preventing us from "seeing through" to its underlying reasons. In this frame, an indicator rule could not be treated as completely opaque, for it would not have any *indicative* function in terms of its probability of leading us to acting consistently with its underlying reasons.[66] The rule would be followed as if it were an end in itself, no matter its content, even if we were sure it is wrong in

64 Regan 1989: 1004.

65 Regan 1989: 1012.

66 It is important to make clear that the distinction between opaqueness and transparency in the case of indicator rules, a distinction I take from Regan, cannot be equated with the senses of opaqueness and transparency first used by Raz in "Reasoning with Rules" (Raz 2009: 203–219). In the case of Regan, the distinction primarily points to the *attitude* that agents take toward rules as guides to action; in the case of Raz to the way in which facts – like the existence of legal rules – relate to the value of actions, and how that affects the *constitution* of practical reasons. As we saw, for the indicator rule model, the question is how an agent accepts and follows the rule in light of its justification: if the rule is followed solely on the basis of an agent's beliefs about the rightness of its legal content, that is, solely on the basis of its further justificatory reasons, it would be treated as "transparent"; if it is followed solely on the basis of the rule itself, without considering whether it is suitable in view of further justificatory reasons, it would be treated as "opaque." By contrast, although Raz does not refer to transparency and only focuses on opaqueness, it can be said that the distinction between them is instead about *facts* and their contribution to the value of actions. According to Raz, "reasons are facts which show what is good in an action" (Raz 2009: 205). With this in mind, the distinction can be drawn as follows: a fact is "transparent" in relation to an action when it indicates what is good in or about the action, and this enables the fact to be a reason for that action. For example, that a cup of wine is poisoned is a fact that identifies the action of not drinking out of it as valuable, and thus that fact can *constitute* a reason for that action. On the other hand, a fact is "opaque" regarding an action when the fact does not disclose any good quality in it, which presents us with a puzzle as to the possibility of rules being reasons, as they *themselves* do not seem to point to any value in the action they prescribe. In this sense, it would not be clear how a rule *in itself* would be able to favor actions and thus be a distinctive reason, not a summary of other justifying reasons. This last problem has been addressed by authors like Rawls (1955), Lyons (1965), Hodgson (1967), and more recently Hass (2021). I argue below that when it comes to coordination and the democratic origin of norms, it is possible that rules themselves constitute reasons for action.

the light of underlying reasons – something that is irrational. Nonetheless, if we treated rules as perfectly transparent, they would "make no real contribution to decision-making at all";[67] all the guiding activity would be placed on agents' judgment on underlying reasons, leaving the rule as a useless showcase which does not play any *indicative* role at all. So analyzed, rules are irrelevant.

So, neither full opacity nor transparency captures the structure of indicator rules. On the indicator-rule conception, a rational agent can consider several reasons external to the content of the indicator rule allowing him to place trust in its likely success (the rule's record in similar circumstances, the rule-giver's relevant epistemic characteristics, etc.). Nonetheless, he can refuse to act according to the rule either when he has the rational conviction that it implies a *wrong* action on the balance of reasons or when he comes to consider that the external considerations in support of his reliance on the rule are flawed. So, as I see it, there is a double dimension in which indicator rules are under our negative practical control regarding our commitment to acting consistently with underlying reasons: (1) when it comes to considerations external to the content of the rule which would enable us to conceive of its lack of relevance, and (2) when it comes to considerations regarding actions required by the rule (their contents) that would show that it *does not fit with* the balance of underlying reasons (regardless of whether the external considerations are satisfied). I will call the former "critical control over the rule's *support*,"[68] and the latter "critical control over the rule's *content*".[69] Regarding the latter, there are no conflicting reasons

67 Regan 1989: 1011.

68 In several passages, Raz accepts the possibility that an authority lacks power over the agent based on reasons external to the rule, reasons involved in what I call "critical control over the rule's support." For example, in the *Morality of Freedom,* he says that if an authority is bribed in making a decision or is otherwise drunk, or if there is additional information showing that the authority is not better than the agent at deciding on the affairs concerned, then the authority loses legitimacy to command (Raz 1986: 42, 67–68). Similarly, in his later work, he refers to the idea that someone or somebody can be a legitimate authority if their function is knowable, i.e., the agent must be able to have trustworthy beliefs that a certain authority is better than his own judgment at conforming with reasons that already apply to him in the relevant cases (Raz 2009: 147–148). If an agent cannot have reasonable beliefs about an authority's suitable performance or this feature itself is unknowable, then he is not subject to such an authority. As I understand Raz, those reasonable beliefs in the authority's capacity to fulfil its functions would rely on reasons external to the content of the rule. Be that as it may, it is worth noting that none of this affects my previous criticism of Raz, because that criticism drew on the inability of his conception to address the rejection of rules based on considerations about their *contents* in the light of excluded reasons. Likewise, the indicator-rule conception just introduced does not suffer from such an inability, as it does not accept the idea of excluded reasons, and thus it is coherently open to the critical rejection of the rule due to its content in the light of the matters on which the authority is empowered to command. This last point substantially separates the indicator-rule conception from Raz's account.

69 Since the normative force of rules is derived from further justificatory reasons, the value of the rule cannot be independent of its content. If this content conflicts with the exigencies of underlying reasons, the rule cannot be said to be valuable.

displaced in advance from the rational motivation of actions as in the case of rules as exclusionary reasons.

It is worth remarking that critical control over the rule's content could undermine our following it in at least two ways: when either (a) we are sure that the prescribed action will not accomplish the rule's specific ends (effectiveness mistake) or (b) we do not know whether the action is mistaken, but we do know that, even if successful, it undercuts more relevant reasons in the balance of underlying reasons that override the rule's end. Obviously, if we come to possess the capacity to identify whether the prescribed action is exactly what the underlying reasons require, and we act on this knowledge, then the rule is no longer an indicator rule: it loses its indicative function and becomes completely transparent (i.e., irrelevant).

Thus, legal rules can be considered as indicator rules useful in contexts of uncertainty. The rule supplants our evaluative identification of the particular action demanded by the underlying reasons, since we are in no condition to act based on our own judgment about them. But the rule does not prevent us from acting based on either our critical control on its external support or our critical control over its content regarding the set of reasons justifying the rule. Furthermore, on the indicator-rule conception, the authoritative rule is primarily a reason to *believe* that the agent has practical reasons which favor acting just as the authority orders.[70] The rule does not properly count in favor of doing something, so it does not objectively affect the agent's normative situation. But it is an epistemic reason with an important practical role, because the rule influences rational obedience by showing that it is good to follow its content to conform with uncertain reasons which are relevant for the agent.

Similarly, an account of authority does not need to draw on the conceptual resource of exclusionary reasons in order to approach coordination problems. Following Lewis, a coordination problem is a subset of strategic situations where each implicated subject must perform actions compatible with others' actions in order to obtain mutually beneficial outcomes.[71] In this kind of strategic interaction, agents have to choose to do something, among several alternatives, that successfully aligns with others' actions in a complex web of reciprocal expectations: there would not be a relevant reason to prefer one alternative over others (for instance, driving on the left or on the right), and the agents' practical choice is decisively based on their expectations about one another, i.e., it is conditioned by others' actions that may be chosen. It is known that it is possible to get out of this collective situation when a coordination equilibrium – an alternative combination of choices where all would be better off if nobody acted

70 On this point, I follow Regan (1989: 1022), who in turn echoes some of Raz's comments (Raz 1986: 28–31).

71 Lewis 1969: ch. 1.

otherwise – is salient, i.e., when this alternative stands out from the rest in the eyes of all agents involved.[72] An authoritative directive can make a practical option salient. If each agent considers that the authoritative directive provides a solution which stands out for everyone, then all agents can act following that solution, and can, in this way, achieve coordination. Nonetheless, in this case, rational agents do not exclude their critical perspective on the authority. First, their rational choice is responsive to reasons external to the rule, this is to say, it is responsive to considerations – not based on the prescribed action – about the causal effects of the rule in the web of reciprocal expectations. Second, the rational agent could refrain from performing the prescribed action when he either knows that its content is not suitable to achieving coordination, or it goes against more relevant reasons than achieving coordination on the balance of reasons. Consequently, in a similar way to contexts of uncertainty, rational agents handle critical control over considerations external to the content of the rule and critical control over its content.

In the same way, it could be possible to talk about another practical context where authority could play a relevant role for rational agents, without resorting to exclusionary reasons. I am thinking of cases where the satisfaction of valuable ends is connected to the *origin* of norms, cases where what is relevant is either *how* the norm was enacted or *who* enacted it. For example, if we accept that the democratic procedure vindicates values we endorse – like autonomy and equality – the fact that a democratic authority orders something is a reason to act even if, under certain circumstances, we do not agree with the established action in a concrete case. Our compliance would be *a way* to respect the values at stake: it would show respect for egalitarian participation and for the autonomy of others. Naturally, just like in cases of coordination and uncertainty, in this case it is possible to exercise critical control over both the rule's external support and its content. For example, if we have reason to believe that the rule is not a product of a procedure attached to the relevant moral standards of participation, then the authoritative rule loses its relevance regarding the endorsed moral values. Likewise, even if the rule is based on right procedures, rational agents are attentive to its content. If we are sure that the prescribed actions are wrong according to the values of democratic procedure – for instance, the same values of autonomy and equality could demand that we act otherwise when the norm violates them seriously – then it could be justified to refrain from acting pursuant to the authority.

It is noteworthy that the practical contribution of rules concerning cases of coordination and democratic procedure cannot be considered under the epistemic description of indicator rules. This last kind of rule is a guide that *indicates* probably right actions whose *effective* correction depends not on au-

72 Lewis 1969: 35.

thoritative utterance, but on reasons existing independently of it which we are not in a position to assess because of our various epistemic limitations. In this sense, as we said above, the indicator rule is a reason to believe in the existence of previous reasons to act according to the prescribed action, but it itself does not constitute a reason for that action. The justification relies only on the rule's underlying reasons that are *presumptively sufficient* for the prescribed action. According to the thesis of presumptive sufficiency, a valid reason, i.e., a reason which is not defeated or cancelled, is a presumptively sufficient reason for φ when it determines that φ should be done.[73] In the context of indicator rules, valid underlying reasons are sufficient to support the prescribed action *independently of the rule*. The rule is only a credible epistemic guide to the actions for which the underlying reasons are sufficient. In this frame, the rule makes no contribution to the practical reasons the agent has. Conversely, coordinative and democratic contexts are able to show that the sufficiency of underlying reasons does not hold. Regarding the former, the rule can make a particular solution salient by influencing the web of reciprocal expectations. When it actually has this causal power, the authoritative utterance *makes* the prescribed action right for each of the agents involved seeking coordination. In this way, when an authority has the power to make a practical solution salient, its commands constitute a reason for an action which could not directly be supported by underlying reasons. The rule *introduces* an action that should be done to comply with underlying reasons demanding coordination, a specific action which need not be favored by those reasons *before* the existence of the rule – in other words, a justified action for which underlying reasons need not be sufficient.[74] Similarly, in the case of the democratic origin of rules, the rule constitutes a reason by being the outcome of a democratic procedure. The procedure introduces an action that is favored by the existence of the rule and that could not be supported by the underlying reasons before the democratic decision, a circumstance that counts against their sufficiency.[75]

73 Hass 2021: 419. I thank an anonymous referee for suggesting I address the thesis of presumptive sufficiency.

74 Hass (2021: 425–429) raises a dilemma about this kind of answer against the sufficiency of the underlying or justificatory reasons of rules. According to him, this type of answer either relies on an uninteresting mechanical conception of actions, or it cannot reject a conception of rule-following preventing justificatory reasons from being sufficient. I disagree with Hass, but both horns of the dilemma deserve a careful answer that for reasons of space I cannot give here. In any case, suffice it to say that I think the content and scope of both objections is not quite clear, and that the second horn of the dilemma would beg the question, because it seems to me that Hass presupposes, but does not show, the sufficiency of justificatory reasons in the relevant cases.

75 I think that legal rules may constitute genuine reasons for actions even though the underlying reasons are sufficient. *Contra* Hass (2021: 424–425), this means that the sufficiency of underlying reasons can be compatible with the distinctive constitution of reasons from rules. For example, it is possible that, in cases of coordination, the agents involved have a reason to do the

Thus, it can be said that the practical relevance of rules in rational rule-following can be due either to the epistemic benefit of indicator rules for decision-making or to the constitution of the rule itself as a reason for action. So far, I have explored three cases in which legal authorities can play a relevant role in rational rule-following, dispensing with the idea of "exclusionary reasons": cases of uncertainty, cases of coordination, and cases of values related to the democratic origin of norms.[76] In all of these cases, the rule can be relevant because it can be rationally obeyed without our relying on our judgment as to whether its content coincides with the requirement of further justificatory reasons. We have also seen that, on our approach, rational agents maintain a dual rational control in rule-following: they maintain a "critical control over the rule's *support*," and a "critical control over the rule's *content*."[77] Accordingly, our approach can avoid the charge of irrationality that affects Raz's conception, because there are no excluded reasons in rational motivation.[78] This means that there are no conflicting reasons precluded in advance from being the direct motive of our disobedience. In this regard, the proposed understanding of rational rule-following is *fully* compatible with the guise-of-the-good model of intentional actions. An agent following legal rules in the three abovementioned contexts acts intentionally, since he sees the rule as good *to the extent that* he considers it as able to allow him to act consistently with further justificatory reasons (grounding or underlying reasons).

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prescribed action for a coordinative reason, which makes that action salient, that is *different from* the coordinative rule. Hence, the rule is able to constitute *a second reason* for the same action when it has causal influence over the agents, which reinforces the reciprocal expectation of them for the same solution. In this example, we can know that the rule constitutes an autonomous reason because, if the other coordinative reason were absent, the rule could still count as a reason for the prescribed action. In other words, regardless of the existence of other sufficient reasons for the specific prescribed action, the rule can still count as a distinctive reason.

76 However, I consider that some other cases could be added to this characterization. It is possible that an agent without any kind of relevant epistemic limitation strongly disagrees with the content of a legal norm, but its enactment produces a reason for him to obey, as his disobedience can have relevant effects on the reasons which apply to him. In these cases, the influence of rules draws on the consequences of its enactment for the structure of the balance of reasons.

77 In the analytical jurisprudence, it has been considered that the concept of a "content-independent reason" is able to distinguish the kind of reason that a legal rule is (cf. Hart 1982; Raz 1986: 35–37; Green 1988: 41–56, 225–226). Yet this concept has been interestingly attacked (Marwick 2000). I believe that it is possible to defend a sense of content-independent reason compatible with the ideas I am proposing. However, I avoid using the notion because it requires a careful treatment which I cannot engage with here.

78 Recently, Adams (2021) tried to defend the concept of an exclusionary reason through a "justificatory" account aimed at coherently explaining cases where the characteristics of the commanded action apparently defeat our following the rule. Nevertheless, this account is based on an understanding of the distinction between first-order and second-order reasons that I am not sure holds.

7 CONCLUSION

In spite of accepting that Raz's concept of exclusionary reasons has irrational consequences, incompatible with intentional actions under the guise-of-the-good model, I argued that Rodríguez-Blanco's account of intentional rule-following fails to address the practical relevance of rules. I have argued for an alternative conception on which it is possible to get around both insufficiencies in the frame of the guise-of-the-good model of intentional action which Rodríguez-Blanco advocates. On this understanding, there are contexts where authoritative legal commands could be seen as relevant facts under the critical supervision of rational agents pursuing the good. It goes without saying that I did not pretend to exhaust either the universe of practical situations where legal rules could be relevant in rule-following or the ways in which the explored contexts can mutually affect each other in decision-making. A full analysis able to deepen all of these issues will have to wait for another opportunity.

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Rule of Law transnacional, reglas y acción humana

Algunas observaciones al "What Makes a Transnational Rule of Law?" de Verónica Rodríguez-Blanco

En «*What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law*», Verónica Rodríguez-Blanco explora la posibilidad –y oportunidad– de la existencia de un *Rule of Law* (en adelante, *ROL*) a nivel transnacional. El objetivo de este trabajo es discutir brevemente algunos puntos relativos a diferentes facetas de la propuesta de Rodríguez-Blanco: la pregunta correcta acerca del *ROL* y su visión particular acerca de la acción humana (sección 2); el tipo de explicación acerca de las reglas, estándares, reglamentos y principios (sección 3); las definiciones de *ROL*, coerción, y libertad (sección 4); las partes de la relación relevante y la noción de derecho transnacional (sección 5), y la estructura de las relaciones relevantes en contextos nacionales y transnacionales (sección 6). Intentaré, por una parte, mostrar cómo estos puntos pueden presentarse como relativamente problemáticos y por tanto debilitar la integridad de la propuesta de Rodriguez-Blanco; y, por otra parte, ofrecer algunas alternativas acerca de cómo estos problemas podrían ser resueltos para fortalecerla. A través de esos comentarios intentaré también mostrar cuáles serían, en mi opinión, los puntos importantes a considerar para cualquier discurso o propuesta sólida relacionada con éstos. Finalmente, concluiré con algunos comentarios finales (sección 7).

Palabras clave: Rule of Law, derecho transnacional, coerción, agencia, Rule of Law transnacional

1 INTRODUCCIÓN

En «*What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law*»,[1] Verónica Rodríguez-Blanco explora la posibilidad –y oportunidad– de la existencia de un *Rule of Law* (en adelante, *ROL*) a nivel transnacional. Partiendo de la idea de que el *ROL* pue-

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1 Rodriguez-Blanco 2018.

de ser el «mecanismo más eficiente para controlar la coerción (…) y la voluntad arbitraria que los seres humanos pueden ejercer unos sobre los otros»,[2] Rodríguez-Blanco trata de responder a las siguientes preguntas: ¿es necesario un *ROL* en contextos transnacionales? Si lo fuera, ¿cuál sería la concepción más adecuada de este *ROL* transnacional? ¿Cuáles serían sus elementos constitutivos, y cómo estos lograrían el objetivo de controlar la coerción y la imposición de una voluntad arbitraria sobre los seres humanos?

A la primera pregunta, la respuesta de Rodríguez-Blanco es afirmativa. Por un lado, rechaza discutir acerca del *Rule of Law* en contextos internacionales sea superfluo pues en esos contextos no hay un Estado[3] al cual controlar y, por lo tanto, no habría coerción o poder arbitrario del cual protegerse o liberarse.[4] Rodríguez-Blanco señala que la coerción es definida, por un lado, como el ejercicio de violencia psicológica o física, y/o opresión o amenazas; por el otro, está definida por la arbitrarieda.[5] Incluso si en el contexto transnacional no existiera la coerción en el primer sentido, definitivamente sí puede existir coerción en el segundo sentido.[6]

A la segunda pregunta, la respuesta de Rodríguez-Blanco es doble. En primer lugar, rechaza las teorizaciones clásicas cuyo punto de partida es la búsqueda de una concepción adecuada de *ROL* en el contexto nacional y luego, una vez encontrada, proponen transponerla automáticamente al contexto transnacional. La razón de este rechazo es que, según Rodríguez-Blanco, estas teorizaciones clásicas pasan por alto la premisa fundamental de cualquier argumento, en cualquier contexto, a favor del *ROL*: la necesidad de un entendimiento adecuado de la acción humana y del seguimiento humano de reglas. La pregunta correcta acerca del *ROL* sería, por tanto, cómo los participantes cumplen con o siguen reglas, estándares, regulaciones y principios (en adelante, RERP),[7] y cómo el derecho creado por seres humanos puede vincular a otros seres humanos y guiarlos en sus conductas.[8]

En segundo lugar, Rodríguez-Blanco propone una visión particular acerca de la acción humana a fin de contestar a esta última pregunta. Propone entender a los seres humanos como «criaturas eudaimónicas»: seres cuya voluntad ansía y desea «*good-making characteristics*» o valores. A la búsqueda y producción de estas «*good-making characteristics*» o valores están dirigidos todos los movimientos y actividades humanas y, así, las vidas y acciones humanas sólo pueden entenderse a través del entendimiento de su gramática o lógica sub-

2 Rodriguez-Blanco 2018: 209.
3 O, el cualquier caso, una organización con similar o idéntica capacidad coercitiva.
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.

yacente (el *logos*).[9] Siguiendo esto, si las razones jurídicas para la acción son formuladas como genuinas «*good-making characteristics*» o valores por legisladores y jueces, sólo entonces los destinatarios del derecho podrían considerarse vinculados a seguir los RERPs sin verse sujetos a la voluntad arbitraria de otro ser humano. Ello así pues cumplirían con –o seguirían a– los RERPs intencional y voluntariamente, por compartir o reconocer, admitir o adherir («*avow*»[10]) a las «*good-making characteristics*» o valores (genuinos o creídos como genuinos) que subyacen a estos RERPs.

Si los RERPs no son creados sobre la base de «*good-making characteristics*» o valores, o si estos no son claros o evidentes, entonces los agentes sufrirían coerción por arbitrariedad: se encontrarían sujetos a la voluntad arbitraria de otro. Evitar una situación tal es justamente la función del *ROL*, especialmente de un *ROL* transnacional: exigir que «las razones o logos como valores o "*good-making characteristics*" se encuentren embebidos en la creación de RERPs transnacionales, y esto permite a los agentes en el contexto transnacional elegir RERPs porque se encuentran basados en tales razones o logos».[11] El *ROL* transnacional sería así el mejor mecanismo posible para garantizar la transparencia de estas razones o logos, y su capacidad de ser conocidos, por parte de los agentes.[12]

En este trabajo, propongo discutir brevemente algunos puntos relativos a diferentes facetas de la propuesta de Rodríguez-Blanco: la pregunta correcta acerca del *ROL* y su visión particular acerca de la acción humana (sección 2); el tipo de explicación acerca de los RERPs (sección 3); las definiciones de *ROL*, coerción, y libertad (sección 4); las partes de la relación relevante y la noción de derecho transnacional (sección 5), y la estructura de las relaciones relevantes en contextos nacionales y transnacionales (sección 6). Intentaré, por una parte,

9 Rodriguez-Blanco 2018: 214, 223–224. Valen aquí dos aclaraciones. La primera es que las «*good-making characteristics*» podrían ser definidas de la siguiente manera: i) "P" es una *good-making characteristic* si "si X tiene 'p', se sigue que X es intrínsecamente bueno"; ii) La propiedad "P" es una *good-making characteristic* si un acto resulta en la producción de bien en virtud de tener tal propiedad. La segunda es que Rodríguez-Blanco adhiere a una teoría de la acción intencional (de corte anscombiano) para la cual el entendimiento de (el significado de) una acción humana implica o supone comprender el "*point*" (sentido y propósito) de ésta, pues cada acción intencional es una secuencia de acciones orientadas hacia el fin último de ésta (cfr. Anscombe 2000). Desde este punto de vista, entonces, estas «*good-making characteristics*» no sólo son aquello que cada ser humano persigue con sus acciones, sino también aquello que hace inteligible como un todo (tanto para el agente como para el observador) los pasos sucesivos de cada acción intencional. Volveré sobre esto en el punto 2. Para un mayor desarrollo desde la perspectiva de Rodríguez-Blanco, cfr. por ejemplo Rodriguez-Blanco 2014: cap. 2; Rodríguez-Blanco 2021: 41–42, 49–50.

10 «*Avow*» es una palabra que en inglés puede tener muchos matices (reconocer, aprobar, adherir, afirmar, sostener, etc.). En mi opinión, no hay palabra en castellano a la que pueda traducirse que los mantenga todos. Por este motivo, he decidido indicar el término en inglés original y usar un combinado de palabras para traducirlo.

11 Rodriguez-Blanco 2018: 216.

12 Rodriguez-Blanco 2018: 221.

mostrar cómo estos puntos pueden presentarse como relativamente problemáticos y por tanto debilitar la integridad de la propuesta de Rodriguez-Blanco; y, por otra parte, ofrecer algunas alternativas acerca de cómo estos problemas podrían ser resueltos para fortalecerla. A través de esos comentarios intentaré también mostrar cuáles serían, en mi opinión, los puntos importantes a considerar para cualquier discurso o propuesta sólida relacionada con éstos. Finalmente, concluiré con algunos comentarios finales (sección 7).

2 SOBRE LA PREGUNTA CORRECTA DEL *ROL* Y LA ACCIÓN HUMANA

2.1 Sobre la pregunta correcta acerca del *ROL*

Uno de los puntos más sugerentes de la propuesta de Rodríguez-Blanco es, justamente, que la pregunta correcta acerca del *ROL* –independientemente del contexto– es diferente a la pregunta de la que parten los autores empeñados en defender concepciones formales o concepciones sustantivas del *ROL*. Esta pregunta correcta es formulada por Rodríguez-Blanco así: ¿cómo cumplen los participantes con los RERPs, y cómo el derecho creado por seres humanos es capaz de vincular a otros seres humanos y guiarlos en sus conductas?[13]

Frente a tal pregunta, uno podría preguntar: ¿es realmente una única pregunta, o podría tratarse en realidad de dos preguntas independientes? En otras palabras, ¿es lo mismo preguntarse cómo el derecho creado por seres humanos puede vincular a otros seres humanos, y preguntarse cómo el derecho puede guiarlos en su conducta? Rodríguez-Blanco parece asumir o bien que se trata de la misma pregunta, o bien que trata de dos preguntas diferentes pero dependientes. Sin embargo, es posible –y deseable– problematizar esta asunción.

Cómo el derecho puede guiar la conducta humana puede ser entendida como una pregunta descriptiva centrada en los elementos que causan u originan la acción de un agente. Usando una terminología diferente: es una pregunta acerca de los motivos o razones motivacionales para la acción de un agente.[14] Por otra parte, qué tipo de pregunta sea la segunda –esto es, cómo el derecho creado por seres humanos puede vincular a otros seres humanos– depende del significado dado a "vincular". Si el significado es asimilable a "causar", entonces esta segunda pregunta podría considerarse como una mera especificación de la primera. Si el significado es en cambio asimilable a "obligar", en el sentido de crear deberes (genuinos), estaríamos entonces frente al así llamado problema de la normatividad (jurídica).[15]

13 Rodriguez-Blanco 2018: 211–212.

14 Cfr., por ejemplo, Redondo Natella 1996, and Alvarez 2017.

15 Cfr. nota 18.

A mi entender, hay al menos cuatro preguntas o interrogantes que están presentes –o que pueden ser reconstruidos desde– la "pregunta correcta" originaria de Rodriguez-Blanco:

(Pregunta 1) ¿Qué explica la acción humana?

(Pregunta 2) ¿Qué debería hacerse /cuál sería el medio (más) adecuado para producir[16] la acción humana?

(Pregunta 3) ¿Qué vincula –en el sentido de crear deberes (genuinos)– a los seres humanos?

(Pregunta 4) ¿Qué justifica considerar a alguien como vinculado a actuar (y, por tanto, justificados tanto el requerimiento de la realización del acto como la crítica de su no realización)?

Estos son interrogantes que centran su atención en diferentes aspectos de la acción humana: su explicación, justificación y crítica. En este sentido, la primera pregunta apunta a la explicación –sea en sentido causal o no causal– de la acción humana. Se trataría por tanto de una pregunta eminentemente descriptiva, relacionada con aquellos elementos –los motivos o motivacionales– que producen en cualquier modo la acción de los agentes.[17]

Por otra parte, la segunda pregunta apunta a la identificación de un medio adecuado para lograr un fin concreto: causar la acción humana. Es una pregunta eminentemente teleológica: apunta a postular un medio que, con determinadas características bajo determinadas condiciones, pueda causar la acción humana de determinado modo. En este sentido, la segunda pregunta está íntimamente relacionada con la primera pregunta: cuál sea el medio que puede llegar a causar la acción (segunda pregunta) es algo que solamente puede entenderse una vez que se haya entendido cómo se explica la acción humana (primera pregunta).

Ahora bien, las preguntas tercera y cuarta no parecen estar en el mismo nivel de discurso que las primeras dos, ni parecen tener una conexión necesaria con éstas. La tercera pregunta puede ser entendida como una versión del bien conocido problema de la normatividad (jurídica): ¿cómo es que el derecho, siendo creado por seres humanos, puede generar deberes (genuinos)? En otras palabras: ¿es posible que una creación humana pueda generar deberes (genuinos) a terceros? Un análisis en profundidad de este problema y sus posibles respuestas excede por lejos el objetivo del presente trabajo. Basta aquí con señalar

16 Uso aquí "producir" para no tomar partido acerca de si se trataría de una explicación de corte causalista o no causalista, aunque me parece indudable que el formato de la pregunta (medios-a-fines) presupone que el medio se considere en algún modo una condición al menos necesaria de la producción o del logro de ese fin.

17 En contra de considerar que las razones motivacionales como algo idéntico a las razones explicativas, cfr. por ejemplo Alvarez 2017.

que el problema de la normatividad ha sido generalmente entendido no como un problema descriptivo, sino uno normativo o prescriptivo.[18]

La cuarta pregunta está, en cierto sentido, relacionada con todas las otras: el vínculo es la noción de coerción como arbitrariedad –y responsabilidad por las propias acciones, y autonomía– en la cual Rodríguez-Blanco está especialmente interesada. Si la acción humana es causada de un determinado modo o a través de un determinado medio (primera pregunta), y si ese modo o medio no se ha producido (segunda pregunta), entonces sería arbitrario o en cualquier modo no justificado considerar a un agente como vinculado (tercera pregunta) y, por tanto, no justificado el requerir a un agente que actúe de determinada manera (cuarta pregunta). También sería arbitrario criticar a un agente por no actuar de determinada manera si el agente no ha sido capaz –o no ha encontrado la forma– de "producir" o causar su acción, y tampoco estaría justificado considerar al agente como vinculado a actuar de una determinada manera (especialmente, cumplir con una determinada regla).

Por tanto, la pregunta correcta que identifica Rodríguez-Blanco en relación con el *ROL* puede ser una de estas cuatro preguntas, puede ser todas, o puede ser solamente algunas. En este sentido, no es completamente claro cuáles de estas preguntas –si alguna– son aquellas que Rodríguez-Blanco considera como parte de su pregunta correcta y/o considera en cualquier modo conectadas. Sea como sea, es sumamente importante tomar en consideración esta ambigüedad de la pregunta correcta de Rodríguez-Blanco, pues permitirá analizar otros puntos de la propuesta de Rodríguez-Blanco (especialmente aquellos que parecen presuponer que, si la acción de un agente puede ser producida o causada –preguntas 1 y 2–, entonces es posible considerar al agente como vinculado y requerir que actúe –preguntas 3 y 4–).[19]

2.2 Sobre el tipo de acción y la explicación de la motivación

Asumamos aquí que la pregunta correcta relacionada con el *ROL* es aquella que propone Rodríguez-Blanco; y que, para responderla, se debe comprender la acción humana de los agentes a efectos de identificar qué tipo de acción se lleva a cabo al cumplir con RERPs. Esta comprensión permitiría, asimismo, identificar los casos en los cuales un agente sufre de coerción por arbitrariedad al momento de cumplir con RERPs y cuándo no.

18 Cfr., para un muy buen ensayo introductorio, Muffato 2015). Para un análisis en profundidad, véase por ejemplo Redondo Natella 2018, Redondo Natella 1999.

19 La importancia de considerar este tipo de ambigüedades al momento de analizar propuestas o discursos es fundamental. Mi intención aquí ha sido no sólo distinguir analíticamente el punto a efectos de analizar el trabajo objeto del presente comentario, sino también proponer un esquema claro y explícito que pueda resultar útil para realizar análisis futuros de problemáticas relacionadas con la acción humana y el derecho: por ejemplo, pero no únicamente, aquellas relacionadas con la autoridad del derecho.

En su texto, Rodríguez-Blanco propone analizar la acción humana utilizando dos propiedades posiblemente independientes:[20] la voluntariedad y la intencionalidad.[21] Así, existirían tres tipos básicos de acción humana: acción voluntaria e intencional o "acciones de hombres y mujeres"[22] (en adelante, acciones de Tipo 1); acción voluntaria y no intencional o "acciones humanas"[23] (en adelante, acciones de Tipo 2); y acción no voluntaria y no intencional (en adelante, acciones de Tipo 3).[24] Siguiendo este esquema, Rodríguez-Blanco parece defender que las acciones de un individuo en relación con una regla (RERPs en sentido amplio), es decir las acciones relevantes para defender las tesis centrales relacionada con el *ROL* transnacional y el concepto de coerción como arbitrariedad, son "acciones de hombres y mujeres": acciones voluntarias e intencionales, de Tipo 1.

Asumiendo sin discutir las nociones de intención y acción intencional propuestas por Rodríguez-Blanco,[25] creo que pueden realizarse dos observaciones críticas. La primera es de tipo consecuencialista, relativa a las consecuencias de las nociones adoptadas para el fin perseguido por Rodríguez-Blanco en su trabajo. La segunda es de tipo metodológico, relacionada con el caso central de acción humana con el que Rodríguez-Blanco se compromete.

En cuanto a la primera observación, la intencionalidad de las acciones[26] de Tipo 1 tal como asumida por Rodríguez-Blanco pareciera o bien depender de una justificación *ex post* realizada por parte de un agente a quien, en el contexto

20 Rodríguez-Blanco analiza si lo son o no, y se decanta por considerarlas "posiblemente independientes". Cfr. Rodriguez-Blanco 2018: 212ss. Asumiré esta conclusión de Rodríguez-Blanco sin discutirla.

21 A mi entender, las reflexiones acerca de la intencionalidad en el marco del trabajo Rodriguez-Blanco se refieren a la intencionalidad de un agente individual. Queda abierta la pregunta acerca de si se podrían extender estas reflexiones, así como sus consecuencias, también a los casos de agentes colectivos; en cuyo caso, cabría preguntarse no sólo acerca de qué noción de intencionalidad colectiva podría usarse (véase nota 24) sino también cómo deberían concebirse a estos agentes o sujetos de la relación relevante (ver secciones 4 y 5). Elaborar sobre estos puntos excede muy ampliamente el objetivo del presente trabajo. Agradezco al/la revisor/a anónimo/a que insistió sobre la clara pertinencia de señalar este punto, y de dejar planteados estos interrogantes.

22 Rodriguez-Blanco 2018: 218.

23 Rodriguez-Blanco 2018: 218.

24 El aparente Tipo 4 (acción no voluntaria e intencional) no es tomada aquí en consideración dado que se presenta como una imposibilidad lógica con base en la definición de intencionalidad de Rodríguez-Blanco.

25 Discutirlas excede ampliamente el objeto del presente trabajo, y ameritaría un largo trabajo separado para tratar el tema adecuadamente. Ello así pues qué signifiquen 'intención' y 'acción intencional' ha sido, y sigue siendo, objeto de ardiente debate. Para una introducción, cfr. por ejemplo (Mele 2009; Wilson & Shpall 2016; Setiya 2018). Agradezco la aguda sugerencia del/la revisor/a anónimo/a que me ha urgido a clarificar este punto, y a mejorar sustancialmente las ideas expresadas en este punto.

26 La terminología utilizada aquí hace únicamente referencia a "acciones" (acción en sentido positivo), sin que parezcan ser consideradas las "omisiones" (acción en sentido negativo). Esta elección se ha realizado únicamente por cuestiones de brevedad, y para no entrar en el debate

de una práctica intersubjetiva de justificación, se le pregunta por qué ha hecho lo que ha hecho;[27] o bien ser una adscripción externa –justificada o no–[28] por parte de un observador. En el primer caso, y esto es señalado por Rodríguez-Blanco, existen obvios problemas relacionados con la veracidad o genuinidad del testimonio del agente: éste puede no saber o entender por qué lo ha hecho, y admitirlo; puede no saber o entender por qué lo ha hecho, e inventar un porqué; o puede, sabiéndolo o entendiéndolo, responder con un "porqué" diferente.[29] En el segundo caso, incluso si se tratara de una adscripción justificada por el contexto institucional o social tal como la propone Rodríguez-Blanco, en última instancia no deja de ser eso: una adscripción externa.

Esto trae algunas consecuencias, a mi criterio, indeseadas para el fin perseguido por Rodríguez-Blanco. Por una parte, pareciera que en todos los casos de descripción del agente (salvo quizás en el último), las acciones objeto no son de Tipo 1 sino de Tipo 2. Sólo por una racionalización *ex post* podrían llegar a transformarse –reconstruirse o considerarse– como acciones de Tipo 1. Si esto es así, pareciera que entonces no se podría usar el sentido y propósito que caracterizan a las acciones de Tipo 1 (voluntarias e intencionales) como respuesta a la pregunta de qué explica la acción humana de un cierto modo; en todo caso, lo que explicaría son las prácticas de justificación de la acción humana. Esto, a su vez, afectaría también su respuesta a la pregunta acerca del medio (más) adecuado para producir la acción humana de un cierto modo, que es precisamente donde Rodríguez-Blanco propone centrar la discusión acerca del *ROL* (pregunta 2).

Por otra parte, el caso de la adscripción de intencionalidad representa potencialmente un problema para la respuesta a esta pregunta 2. Por un lado, no parece poder asegurarse de que no se trate de una reconstrucción, en términos de acciones de Tipo 1, de acciones de Tipo 2; así, lo que se ganaría en inteligibilidad de las acciones se perdería en potencial eficacia en cómo producirlas. Por el otro, e incluso si se tratase de acciones de Tipo 1, no serviría como base para una respuesta determinante a la pregunta 2. Ello así pues el grado de justificación de la adscripción podría, a lo sumo, garantizar un grado de probabilidad importante de eficacia de un determinado medio en la producción de la acción humana de un determinado modo, i.e. intencionalmente y sin coerción (preguntas 2 y 4). Como consecuencia, el medio propuesto no pueda considerarse

sobre si – por ejemplo – las omisiones tienen el mismo estatus que las acciones (participando así de las mismas consideraciones que aplican para estas últimas).

27 Aquí Rodríguez-Blanco sigue la "*metodología del ¿por qué?*" propuesta por G.E.M. Anscombe en Anscombe 2000.

28 Cfr. Rodríguez-Blanco 2021, donde Rodríguez-Blanco realiza una defensa de acerca de la posible irrelevancia de la descripción del agente de sus elecciones en contextos donde exista un trasfondo institucional tal de hacer "inteligibles esas elecciones" (p. 47).

29 Cfr., por ejemplo, Rodríguez-Blanco 2021: 51ss.

como práctica o conceptualmente necesario, sino un medio cuya necesidad y/o eficacia sería contingente o falsable.

La segunda observación es de tipo metodológico, y tiene que ver con la elección de lo que podría ser el caso central o significado focal de acción humana que parece subyacer a la propuesta de Rodríguez-Blanco.[30] Si las acciones de Tipo 1 parecen ser mayoritariamente producto de reconstrucciones *ex post* o de adscripciones externas, ¿cuál es la buena razón para usar las acciones de Tipo 1 como el caso central de acción humana, en vez de usar acciones de Tipo 2? Usar acciones de Tipo 1 como el caso central significa que las acciones de Tipo 2 deben ser consideradas como casos marginales o no centrales de acción humana. Si fuera cierto que las acciones de Tipo 2 constituyen una cantidad proporcionalmente superior de las acciones humanas,[31] entonces esta elección metodológica contribuiría a una descripción o reconstrucción teórica distorsionada del fenómeno de las acciones de los seres humanos. Esto afecta tanto a la respuesta de la pregunta 1 como de la pregunta 2.

Una posible salida a esta dificultad metodológica sería decir que las acciones de Tipo 1 son el tipo de acción que *debería* ser llevado a cabo, y por tanto debe ser considerado como el caso central de acción humana. Sin embargo, esto parece ser un discurso prescriptivo y, por tanto, no funcionaría como una premisa adecuada de la cual inferir algunas de las conclusiones que son sacadas al final del artículo; especialmente, aquellas relacionadas con el *ROL* como el medio (más) adecuado para lograr el objetivo de guiar el comportamiento humano libre de coerción. La fuerza de una propuesta como la de Rodríguez-Blanco descansa precisamente en afirmar la verdad de una proposición de medios-a-fines (la respuesta a la pregunta 2) y, a este propósito, no parece suficiente afirmar que las acciones del agente *deben ser* acciones de Tipo 1, ni que éstas pueden ser reconstruidas *ex post* como tales. Por el contrario, es necesario afirmar que *es el caso* que las acciones del agente son acciones de Tipo 1.

Hasta aquí, hemos analizado algunos puntos centrales metodológicos y conceptuales para el inicio del análisis. Por un lado, hemos visto que la que Rodriguez-Blanco llama la "pregunta correcta en relación con el *ROL*" puede en realidad ser una multiplicidad de preguntas, y que no es completamente claro cuáles de estas preguntas –si alguna– son aquellas que Rodríguez-Blanco considera como parte de su pregunta correcta y/o considera en cualquier modo conectadas (punto 2.1). Por otro lado, hemos visto que pueden existir dificultades con respecto al tipo de acción humana que Rodriguez-Blanco considera central para dar respuesta a la "pregunta correcta": por una parte, relacionadas con algunas consecuencias indeseadas de la noción de "intencionalidad" asumida por

30 Para un análisis en profundidad de la particular metodología del caso central de Rodríguez-Blanco, véase por ejemplo Rodriguez-Blanco 2007.

31 Cfr., por ejemplo, Haidt 2001.

Rodriguez-Blanco y el modo de reconocerla o adscribirla en relación con las acciones; por otra parte, relacionadas con la elección por parte de Rodriguez-Blanco de la "acción voluntaria e intencional" como el caso central o significado focal de 'acción humana' (punto 2.2).

Hecho esto, conviene ahora concentrarse sobre el contenido en sí mismo de la "pregunta correcta" y el modo en el cual Rodriguez-Blanco construye su respuesta a ésta. Comenzaremos, así, por el análisis de la respuesta que Rodriguez-Blanco da a la que hemos reconstruido como pregunta 1: "*¿Qué explica la acción humana?*".

3 SOBRE EL TIPO DE EXPLICACIÓN DE LAS REGLAS Y EL *LOGOS*

En relación con la pregunta 1, Rodríguez-Blanco sostiene que una persona sólo puede ser realmente guiada y motivada por una regla si reconoce, admite y/o adhiere ("*avow*") al *logos* de la regla (o de RERPs en general).[32] En este sentido, define el caso paradigmático de la normatividad jurídica como "*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*".[33] Son precisamente estos valores o "*good-making characteristics*" los que constituyen el *logos* del derecho.

Ahora bien, se abren algunos interrogantes en relación con este *logos* en cuya existencia se apoya la propuesta de Rodríguez-Blanco. Los señalaré brevemente a continuación.

3.1 ¿Cuál *logos*? El *logos* de la regla, del derecho, y de la producción normativa

En el texto objeto de este comentario, cuando se habla del *logos* de los RERPs parece hacerse referencia indistintamente a varias situaciones que podrían, y deberían, diferenciarse.

Por ejemplo, puede diferenciarse entre el *logos* del derecho como sistema institucionalizado y el *logos* de cada RERP individualmente considerado. Asimismo, puede diferenciarse el *logos* de las actividades de los creadores de derecho (*«lawmakers») y el logos de los propios RERPs como producto de estas actividades. También puede diferenciarse entre el logos* de un RERP en particular; el *logos* de los creadores de derecho relacionado con producir RERPs en general; el *logos* de los creadores de derecho relacionado con producir ese RERP en particular; el *lo-*

32 Cfr. por ejemplo Rodriguez-Blanco 2014, Rodriguez-Blanco 2016.

33 Rodriguez-Blanco 2014: 199 (como se citó en Rodriguez-Blanco 2016: 15).

gos de un agente relacionado con seguir RERPs en general; y el *logos* de un agente relacionado con seguir un RERP en particular; y así sucesivamente.

Estas distinciones son fundamentales para resolver un interrogante central cuya respuesta podría determinar la solidez o debilidad de la propuesta de Rodríguez-Blanco: cuál sería el *logos* que debería ser puesto a disposición de los individuos de modo claro, no turbio, no confundido y no contradictorio a fin de que el derecho pueda guiar (adecuadamente) sus conductas (pregunta 2 y, conectadas, preguntas 3 y 4). Por poner un ejemplo: el *logos* de cualquier RERP particular –que, por definición, es intrínsecamente relativo a su contenido específico– puede no ser el mismo que el *logos* de la actividad de crear reglas en general, y/o con el hecho general tener reglas (independientemente de sus contenidos específicos).

En este sentido, aceptando que este *logos* existe y que debe ser puesto de determinada manera a disposición de los agentes, entiendo que sería fundamental definir claramente cuáles *logos* son aquellos que estarían abarcados por esta consideración. Asimismo, en mi opinión sería también fundamental teorizar acerca de la posible existencia de *logos* generales y *logos* particulares, y acerca de cuáles serían las eventuales relaciones entre los diferentes *logos* que puedan aplicar a una misma situación (por ejemplo, relaciones de acumulación, de jerarquía, etc.). Esto permitiría, en primer lugar, establecer un criterio claro para determinar si efectivamente el *ROL* está siendo cumplido o no; y, en segundo lugar, establecer diferentes grados de gravedad de una eventual violación del *ROL* basada en cuál o cuáles *logos* no están siendo puestos a disposición de los agentes –y en qué modo–.

3.2 Sobre el acceso (epistémico) al *logos*

Asumamos aquí que está dada la situación ideal para lograr que los RERPs guíen la conducta de los agentes: esto es, se sabe exactamente cuál es el *logos* relevante; este *logos* fue puesto a disposición de los agentes; y este *logos* puesto a disposición es claro, no confuso, no turbio, y no contradictorio. Es esta situación que, según Rodríguez-Blanco, debería garantizar el *ROL* como medio para lograr el fin de guiar las conductas de los agentes de modo adecuado, sin coerción.

El interrogante que surge aquí es cuál es el modo en el cual los agentes acceden, o accederían, a ese *logos*. Pueden imaginarse dos géneros de situaciones: uno donde ese acceso se consigue con algún tipo de mediación de otros agentes, y otro donde se consigue sin ningún tipo de mediación de ese tipo.[34] Veamos ambos con más detalle.

34 Una clasificación alternativa, más completa y detallada, podría ser la siguiente: i) situaciones con mediación; i.a) situaciones con mediación de otros elementos o entidades que no sean agentes; i.b) situaciones con mediación de otros agentes; i.b.1) situaciones con mediación

En el primer caso, la mediación que procede de otros agentes puede ser total o parcial,[35] y provenir de los creadores del RERP o de intérpretes de los RERPs entendidos como competentes. Así, puede ser que el creador del RERP (por ejemplo, en el preámbulo de una ley o en sus trabajos preparatorios) exprese que el *logos* del $RERP_x$ es *Y,* o que un intérprete competente sobre RERPs (considerado como autoridad epistémica sobre el asunto) afirme que el logos de $RERP_x$ es *Y*. Ahora bien, esta situación da lugar a dos tipos de interrogantes. Por una parte, uno bien podría preguntar si esto sería suficiente para considerar que los agentes acceden al *logos* y que por tanto podrían (o estarían) motivados por éstos. ¿Contaría como "conocimiento" del *logos*? Si así contase, ¿bastaría *ipso facto* con ese conocimiento del logos, o se necesitaría algo más? Y quizás la pregunta más acuciante: ¿hay una conexión intrínseca entre el conocimiento de estos *logos* y su reconocimiento o adhesión ("*avowal*")? Por otra parte, esta situación bien puede ser considerada como una mera multiplicación de instancias. Si el agente no sigue el $RERP_x$ porque fue emitido por *Z*, sino porque adhiere al *logos* subyacente a $RERP_x$, ¿por qué entonces aceptaría que el *logos* de $RERP_x$ sea *Y* sólo porque así lo afirma *Z* (o cualquier otra persona)?[36]

En el segundo caso, se trataría por hipótesis de una situación donde los agentes reconstruyen o aprehenden el *logos* de los RERPs sin ningún tipo de mediación de otros agentes. Aquí la pregunta central sería cómo podrían los agentes efectivamente acceder a este *logos*, especialmente en contextos donde los RERPs son el producto de procesos decisionales (incluso deliberativos) en los cuales los agentes no han tenido ningún tipo de participación ni tienen la posibilidad de participar en su eventual modificación. Asimismo, no es claro cómo podría lograrse una uniformidad en la aprehensión de ese *logos*, especialmente en contextos de comunidades fuertemente plurales; y esta uniformidad parece fundamental para a su vez lograr el objetivo de guiar sus comportamien-

completa de otros agentes; i.b.2) situaciones con mediación parcial de otros agentes; ii) situaciones sin mediación. El problema con esta clasificación alternativa se pone en la propia posibilidad de la existencia de i.a) (¿de qué tipo de mediación se estaría hablando?) y, en todo caso, si existiría una diferencia real entre i.a) y ii). Un ejemplo podría ser el de la "razón". ¿Podría un ser humano acceder al *logos*, sin hacerlo en cualquier modo a través de la razón? Esto lleva a preguntarse seriamente en qué sentido se podría hablar de mediadores que no sean otros agentes. Aquí no puedo ofrecer una respuesta clara a este interrogante, que requeriría una investigación mucho más desarrollada y profunda. Por ese motivo, he decidido simplificar la clasificación a efectos de la discusión de los temas del presente trabajo.

35 Lo que llamo aquí mediación completa sería, aprovechando la terminología de Raz, aquella donde lo producido por el mediador fuera tomado como una razón excluyente por el agente. Una mediación parcial sería aquella donde lo producido por el mediador fuera tomado como una razón de primer orden, quizás con algún peso específico por el especial rol o estatus del mediador, que de ningún modo reemplaza o excluye necesariamente al resto. Cfr. Raz 1999.

36 Una pregunta similar se ve replicada frente a discursos sobre la autoridad la proponen como una mediación completa, como puede ser entendido el discurso de Raz. Cfr. por ejemplo Maniaci 2018, Maniaci 2019.

tos con base en un único *logos*. Estos interrogantes adoptan particular relevancia cuando se consideran contextos que tienen ambas características (esto es, no participación en procesos decisionales y comunidades fuertemente plurales): contextos como, justamente, el contexto transnacional.

En conclusión: es evidente que la noción de *logos* de una regla o RERP es fundamental para la posición de Rodriguez-Blanco, ya que sólo a través de su reconocimiento, admisión y/o adherencia un agente puede ser realmente guiado y motivado por estos. En este sentido, parece igualmente fundamental que se diferencien entre los diferentes *logos* que están relacionados con la existencia misma de esas reglas o RERP y que se determine exactamente cuál sería el *logos* que debería ser puesto a disposición de los individuos de modo claro, no turbio, no confundido y no contradictorio a fin de que el derecho pueda guiar (adecuadamente) sus conductas. Por otra parte, una vez realizada esa determinación, sería igualmente fundamental establecer con claridad cuál es el modo a través del cual un agente puede acceder a ese *logos*, y definir si ese acceso se da a través de intermediarios o no.

Una definición sobre ambos puntos resulta, a su vez, esencial para examinar y analizar uno de los puntos centrales de la propuesta de Rodriguez-Blanco: la noción de coerción como arbitrariedad, y la noción de *ROL* como el medio para controlarla.

4 SOBRE LA DEFINICIÓN DE "RULE OF LAW", LA DEFINICIÓN DE COERCIÓN, Y LA LIBERTAD

Asumiendo que el *ROL* puede de hecho ser el "mecanismo más eficiente para controlar la coerción del Estado y la voluntad arbitraria que los seres humanos puedan ejercitar unos sobre otros",[37] en esta sección me gustaría discutir la noción de coerción utilizada y defendida por Rodriguez-Blanco, en particular la noción de coerción como arbitrariedad.

'Coerción' está caracterizado, dice Rodríguez-Blanco, por dos rasgos centrales: 1) el ejercicio de violencia psicológica o física, y/u opresión o amenazas; y 2) la arbitrariedad. En particular, la coerción como arbitrariedad implica que la persona, que debería poder elegir y actuar, no puede elegir ni ser guiada por ningún estándar racional dado que las razones o *logos* que proveen una base para la acción aparecen confundidos, turbios, no claros o contradictorios.[38] En un sentido negativo, esto significaría que un agente se encuentra libre de coerción como arbitrariedad si puede acceder a las razones o *logos* en los cuales se

37 Rodriguez-Blanco 2018: 209.

38 Rodriguez-Blanco 2018: 212.

basan los estándares racionales existentes y, en consecuencia, puede elegir y ser guiado en su acción por esos estándares.

Esta definición de coerción-como-arbitrariedad (y su correspondiente definición de libertad por oposición), es luego utilizada para realizar dos afirmaciones: (1) la coerción (entendida como coerción por arbitrariedad) existe no sólo en el ámbito nacional sino también en el ámbito transnacional; por lo tanto, la preocupación por la protección del agente contra la coerción también se está presente en el ámbito transnacional; y (2) el *ROL* –entendido en su versión robusta– es la solución adecuada para proteger al individuo contra la coerción tanto en el ámbito nacional como en los ámbitos no nacionales (internacional, transnacional, global).[39]

Algunos aspectos de esta definición de coerción como arbitrariedad pueden ser discutidos. En primer lugar, 'arbitrariedad' puede ser usado para designar al menos tres situaciones diferentes que, en mi opinión, no solo pueden ser diferenciadas sino que además deberían ser consideradas independientemente. En este sentido, parece posible trazar una clara diferencia entre arbitrariedad como "no tener razones para X", como "tener malas/incorrectas/no válidas/insuficientes razones para X", y como "no poniendo (suficientemente, adecuadamente) a disposición las razones para X".

En el primer caso, el problema surge de una completa ausencia de razones –sean motivacionales y/o justificativas– para X. En el sentido caso, en cambio, el problema no es la ausencia de razones sino el tipo o cualidad de las razones existentes para X. Por último, en el tercer caso el problema no es la ausencia o la calidad de las razones para X –éstas bien podrían existir y ser razones válidas–, sino el hecho de que estas razones no son puestas a disposición de los agentes relevantes, los destinatarios de los RERPs, ya sea completamente –esto es, completa falta de comunicación de éstas– o parcialmente –esto es, no son claras o son contradictorias–.

La noción de coerción por arbitrariedad de Rodriguez-Blanco, a mi entender, no permite hacer una clara diferenciación de estos tres casos. Como consecuencia, no queda claro a cuáles de estas tres posibles acepciones –sino a todas ellas– se aplicarían las consideraciones de Rodriguez-Blanco acerca del *ROL*. Asimismo, esta ambigüedad (potencial) de 'coerción por arbitrariedad' también vuelve poco claro qué significaría que un agente se encontrase libre de coerción por arbitrariedad.

En relación con este último punto, si he entendido correctamente, un agente se encuentra libre de coerción por arbitrariedad si puede acceder a las razones o *logos* de los estándares racionales existentes, sólo así siendo capaz de elegir y ser guiado por éstos. Esta definición reduciría 'arbitrariedad' al primer y tercer caso

39 Agradezco a M. Victoria Kristan por sugerirme la introducción del contexto "global" entre los posibles contextos relevantes.

(deben existir razones, y deben ser puestas –adecuadamente– a disposición de los agentes relevantes); no habría espacio o relevancia para el segundo caso (el hecho de que las razones sean correctas, suficientes, válidas o de cualquier otro modo adecuadas).

¿En qué sentido podrían considerarse libre de coerción los agentes que no reconocen o adhieren al *logos* que les ha sido puesto a disposición, pero sin embargo no pueden elegir no realizar aquello que les es requerido? Ésta es una cuestión particularmente importante dado que toma en consideración los casos en los cuales los agentes se encuentran en una situación que –incluso si no hay violencia o amenazas involucradas, y a pesar del hecho de que el *logos* relevante ha sido puesto a su disposición perfectamente– de todas formas el agente no tiene real posibilidad de realizar una elección.[40]

En estos casos, los agentes se encuentran en una situación similar a aquella de los casos en los cuales no hay razones en las cuales se basen los estándares, o donde estas razones no les han sido puestas a disposición. En todos estos casos, los agentes no pueden elegir y ser guiados por estándares o razones: sea porque no hay estándares racionales (primer caso), porque el *logos* de esos estándares no les ha sido puesto a disposición (tercer caso), o porque no reconocen o adhieren al logos disponible pero simplemente no pueden elegir no hacer aquello que es requerido de ellos (cuarto caso).

Por supuesto, es posible argumentar que en este último caso los agentes no estarían *cumpliendo* con el estándar sino sólo *conformándose a* éste, por razones prudenciales; y que la propuesta de Rodriguez-Blanco está justamente basada en la noción de *cumplir* con los estándares.[41] Sin embargo, es difícil ver por qué –si la principal preocupación de la propuesta es encontrar un modo adecuado de garantizar una guía de la acción humana que esté libre de coerción, en todo contexto en el cual esta acción pueda ser realizada– estos casos deberían quedar fuera de la consideración. Me parece que evitar estos casos es algo a lo que el *ROL* también debería aspirar.

Estas consideraciones con respecto a la noción de coerción por arbitrariedad de Rodriguez-Blanco, y a cuáles serían en definitiva los casos en los cuales el *ROL* actuaría como el mecanismo más eficiente para controlarla, son es-

40 Estas son situaciones donde, por razones contextuales, existen tales consecuencias negativas para el agente en caso de no realizar lo que es requerido que parece no poder hablarse de verdadera elección entre realizarlo y no realizarlo. Si a alguien "no le queda más remedio que" realizar aquello que es requerido de su parte, porque por ejemplo de ello depende su pertenencia a un grupo de cuya membresía depende una gran parte de su plan de vida, pareciera ser que no ha existido una verdadera posibilidad de elección de su parte. Es una situación en la cual se pone a disposición de los agentes el *logos* de un RERP, y al mismo tiempo existe o se genera un contexto en el cual las consecuencias de no adherir a éste sean tales que la no conformidad destruiría o afectaría fuertemente los planes de vida del agente (o lo forzaría a tener que cambiarlo).

41 Acerca de la diferencia entre "conformarse a" y "cumplir con", cfr. Raz 1999: 178–182.

pecialmente importantes a los efectos de pasar al siguiente estadio de análisis: aplicarlas, junto con todas aquellas elaboradas en las secciones anteriores, al contexto del "derecho transnacional".

5 SOBRE LAS PARTES DE LA RELACIÓN EN EL ANÁLISIS Y EL CONCEPTO DE "TRANSNACIONAL"

Hasta aquí, he aceptado sin discusión cuatro asunciones: 1) el sujeto que amerita protección –agente, participante, persona– se trata de un ser humano; 2) la identidad y características del sujeto el cual se debe proteger son indiferentes para el análisis; 3) la identidad y características del sujeto que sería titular del "*ROL* transnacional" son indiferentes; y 4) puede construirse un discurso general acerca del *ROL* independiente del contexto (nacional, internacional, transnacional, global).

Sin embargo, al momento de intentar aplicar al contexto del "derecho transnacional" los argumentos de Rodriguez-Blanco con respecto a la acción humana y al *ROL*, surgen algunos interrogantes que pueden poner socavar la integridad de su propuesta.

(5.1) El primer interrogante es: ¿quiénes son exactamente los sujetos que participan en la relación relevante bajo análisis una vez que el contexto del derecho transnacional es tomado en consideración? Si bien parece seguirse de las observaciones de Rodriguez-Blanco que los sujetos relevantes siempre son personas físicas –por ejemplo, la enorme relevancia dada por Rodriguez-Blanco al entendimiento de la acción *humana*, así como su acuerdo con la afirmación de que el *ROL* es el mejor instrumento para evitar el *ejercicio de voluntad arbitraria de los seres humanos sobre otros seres humanos*[42]), la multiplicidad de actores, instituciones y sistemas normativos en el derecho transnacional[43] permite preguntarse si no se trata de una asunción demasiado rápida y/o demasiado estrecha.

Esta pregunta también permite una consideración acerca de cuál es la relación relevante, esto es, la relación en el marco de la cual Rodríguez-Blanco afirma que el *ROL* –con las características que defiende– cumple con la función de proteger a los sujetos relevantes de la coerción, especialmente de la coerción por arbitrariedad. En el caso del derecho nacional, las relaciones relevantes parecen relati-

42 Rodriguez-Blanco 2018: 209. El énfasis es mío.

43 Puede argumentarse que esta multiplicidad de actores, instituciones y sistemas normativos también se encuentra en otros contextos, especialmente en el derecho nacional estatal. Sin embargo, en contextos estatales generalmente es entendido que instituciones y otros sistemas normativos dependen en última instancia –para su existencia y funcionamiento– del sistema jurídico nacional. Aquí sólo quiero señalar que, en contextos internacionales y transnacionales, esta dependencia puede ser controvertida. Asimismo, en lo que respecta por ejemplo a contextos internacionales públicos, los actores no son personas físicas sino personas jurídicas –generalmente Estados, pero también algunas organizaciones internacionales–.

vamente claras: Estado-persona y persona-persona. Sin embargo, en el caso del derecho transnacional habría una multiplicidad de relaciones posibles, y no todas incluyen directamente a una persona física como una de sus partes. Por mencionar algunas: Estado-individuo; organización internacional-individuo; agencia transnacional (ni estatal ni internacional)-individuo; individuo-individuo; Estado-Estado; Estado-organización internacional; Estado-agencia transnacional; organismo supranacional-Estado; organismo supranacional-individuo; etc.[44]

A pesar del común denominador que parecería agruparlas a todas –el que se trate de un contexto donde (pretendidamente) existe un estándar de conducta cuyo cumplimiento sería de algún modo exigido y/o exigible–, no parece tan claro que las conclusiones de Rodriguez-Blanco acerca del seguimiento de reglas (especialmente RERPs) y su particular noción de *ROL* basada en éstas sirvan igual y globalmente para todas estas relaciones. Por un lado, estas conclusiones parecen estar basadas en la idea de que una parte de la relación relevante –especialmente, la parte a ser protegida– es necesariamente una persona física. Sin embargo, esto no parece ser siempre el caso en el contexto transnacional; e incluso si Rodriguez-Blanco bien podría argumentar que en última instancia siempre se trata de personas físicas, incluso indirectamente, la mediación de instituciones sólo agregaría más complejidad y dificultades a los temas discutidos arriba en las Secciones 1, 2 y 3.

Por el otro lado, las conclusiones de Rodriguez-Blanco parecen también estar pasadas en la idea de que una parte de la relación relevante es aquella que ha creado el estándar relevante y que requiere su cumplimiento. Sin embargo, algunas de las posibles relaciones en el contexto transnacional parecen estar pasadas meramente en una relación de requerimiento de estándares o bien creados por un tercero o bien creados por ninguno (por ejemplo, RERPs consuetudinarios). Más aún, algunas de las posibles relaciones pueden ser una combinación de múltiples partes en diversos roles. Imaginemos un caso donde *A* (ciudadana de *M*) requiere de *B* (ciudadana de *J*) el cumplimiento de un $RERP_x$ emitido por *C*. En este ejemplo, podrían identificarse entre tres y cinco diferentes partes: una parte a la que le es requerido el cumplimiento de un RERP [*A*]; una parte que requiere ese cumplimiento [*B*]; una parte que ha emitido el RERP [*C*]; una parte que tiene los medios (o la capacidad/competencia) de hacer cumplir el RERP [por hipótesis, *J*]; una parte que está a cargo de la protección de la parte requerida [por hipótesis, *M*].

Este caso también muestra una incertidumbre subyacente pero fundamental a la propuesta de Rodriguez-Blanco: la identidad del titular de un eventual *ROL*

44 Por motivos de simplicidad, he decidido no agregar ejemplos de relaciones en las cuales los Estados actúan como intermediarios –ya sea como aplicadores o como titulares de obligaciones y derechos– entre otros actores –otros Estados, organizaciones internacionales, organizaciones supranacionales, agencias transnacionales, etc.– y determinados individuos a estos vinculados por un vínculo jurídico de, por ejemplo, ciudadanía.

transnacional. En otras palabras: incluso si fuera claro cuáles son las partes a las cuales y contra las cuales proteger, ¿quién sería el titular del deber de protección? ¿Cuál sería el criterio para asociar a un cierto titular de deber con una determinada parte –ya sea para protegerla, o para proteger contra ésta– en esa relación relevante? Una respuesta clara a esta incertidumbre parece ser fundamental para el éxito de la propuesta de Rodriguez-Blanco.

(5.2) Es probable que este primer interrogante y sus complejidades deriven a su vez de un segundo interrogante, relacionado con la noción de derecho transnacional que Rodríguez-Blanco utiliza –pero que no enuncia explícitamente– en su trabajo.[45] Esta falta de definición explícita de una noción tan central puede ser problemática en dos sentidos. Por un lado, no permite tener una idea clara de cuáles serían los elementos que abarcaría 'derecho transnacional', produciendo en consecuencia una fuerte indeterminación no sólo en relación con la identidad de las partes de la relación relevante sino acerca de los tipos de estándares –especialmente, en relación con su fuente u origen– que podrían ser potencialmente considerados. Por otro lado, vuelve difícil entender si habría siempre un elemento de voluntariedad en la relación relevante entre las partes relevantes –esto es, los RERPs considerados han sido voluntariamente aceptados y/o la relación ha sido contraída libremente por las partes– o si, por el contrario, esto no sería un elemento necesario[46].

Como es sabido, el contenido de la noción de derecho trasnacional dista de ser pacífico y determinado; aún más, la propia posibilidad de la existencia de un derecho transnacional como una suerte de *tertium datur* entre derecho nacional y derecho internacional es controvertida. Un análisis de este tema y discusión excede largamente el objetivo del presente comentario.[47] Sin embargo, las dificultades señaladas en el párrafo anterior ya pueden apreciarse tomando la ya clásica definición de Jessup de derecho transnacional. Jessup sostuvo que el derecho transnacional incluye todo derecho que regula acciones o eventos que trascienden fronteras nacionales; esto incluye derecho internacional público y privado, así como «otras reglas que no encajan del todo en tales categorías estándar».[48] Entre estas últimas, por ejemplo, podrían incluirse normas jurídicas claramente estatales cuyos efectos se trasladen (adrede o accidentalmente) más allá de las fronteras.[49]

45 Este problema fue también señalado, durante la discusión del artículo en el congreso "En teoría hay mujeres (en teoría)", por Jordi Ferrer Beltrán y M. Victoria Kristan.

46 Desarrollaré más este punto en la Sección 6.

47 See, for example, Cotterrell 2012 and Scott 2009.

48 Jessup 1956: 1.

49 Esto es sumamente relevante dado que, dependiendo del contexto de análisis, puede decirse que las reglas que pertenecen a cada contexto estén dirigidas a actores diversos: por ejemplo, en el derecho internacional público, a Estados (y organismos creados a través de tratados entre Estados); en el derecho internacional privado, a Estados y personas físicas/jurídicas; en el derecho nacional, personas físicas y jurídicas en el marco de un determinado territorio; y así sucesivamente.

Frente a este rango tan grande de posibilidades, pareciera fundamental para la propuesta de Rodriguez-Blanco el tener una definición de trabajo clara, explícita y delimitada de 'derecho transnacional', así como una argumentación explícita a favor de su estatus como una categoría autónoma y un claro entendimiento de cuáles serían los actores relevantes en el derecho transnacional. Esto permitirá, por una parte, entender exactamente en qué contexto es aplicable la propuesta y/o diferenciar entre diferentes contextos con características particulares que requerirían consideraciones adicionales. Por otra parte, una vez que los contextos han sido delimitados, permitiría entender mejor el argumento de Rodriguez-Blanco acerca de la coerción como arbitrariedad como el posible caso central de coerción en el contexto del derecho transnacional.

De esta forma, sería posible distinguir entre contextos no nacionales donde no existen actores que puedan ejercer coerción entendida como el ejercicio de violencia, opresión o amenazas –donde, por tanto, o bien no ninguna posibilidad de coerción o el único tipo posible de coerción sería coerción como arbitrariedad–, y contextos no nacionales donde de hecho hay actores que pueden ejercer algún tipo de coerción en esta primera acepción. Además, sería posible distinguir entre contextos transnacionales donde la participación de los actores relevantes en la relación relevante es voluntaria –esto es, donde los estándares y sus efectos se aplican a los actores sobre la base de sus consentimientos–, y contextos transnacionales donde la participación de los actores no es voluntaria.

Por último, sería posible establecer diferencias –a los efectos del análisis– entre, al menos, la acción de los agentes individualmente considerados, especialmente si se trata de agentes que no poseen ningún rol institucional; la acción de agentes considerados desde la perspectiva de sus roles institucionales; y la acción de instituciones (Estados, organismos, agencias, personas jurídicas en sentido amplio). Esto permitiría a su vez definir mejor cuál es el sujeto relevante al cual están dirigidas las consideraciones de Rodríguez-Blanco –por ejemplo, si hacia los individuos; si hacia los oficiales de cada sistema jurídico; si hacia los Estados considerados como sujetos de derecho internacional, etc.–, y también evaluar si las conclusiones a las que llega Rodríguez-Blanco se aplican de igual modo independientemente de quién sea el sujeto cuya acción y comportamiento se pretende guiar.

6 ACERCA DE LA ESTRUCTURA DE LAS RELACIONES EN LOS CONTEXTOS NACIONALES Y TRANSNACIONALES

Finalmente, quisiera agregar una consideración final al análisis, aquí relacionada con la idea de Rodríguez-Blanco de que el *ROL* ha sido siempre teori-

zado dentro del contexto nacional y luego, en todo caso, proyectado al ámbito internacional y transnacional. Como he señalado en la Sección 1, el artículo de Rodriguez-Blanco es justamente un intento de invertir la lógica de esta teorización y de reemplazarla por una lo suficientemente genérica para ser útil en cualquier contexto en donde existan estándares de conducta, de cumplimiento exigible, a través de los cuales se pretenda guiar la conducta de los actores relevantes. El *ROL* siempre es necesario pues en cualquiera de esos contextos puede existir coerción, señala Rodríguez-Blanco, aunque sea sólo en la forma de arbitrariedad.

Mi consideración es la siguiente: quizás el punto principal de la teorización clásica del *ROL* –partiendo del contexto nacional– no es la idea de que, en la relación relevante para el *ROL*, siempre hay una parte que posee un monopolio de fuerza suficiente como para imponerse a la otra parte (primera acepción de coerción). Si éste fuera el caso, podría aceptarse que la transferencia *ipso facto* de la estructura de esta relación a aquellas que pueden encontrarse más allá de las fronteras estatales es ciertamente difícil.[50] Por el contrario, es posible que la principal intuición subyacente a la teorización clásica sea ora: la idea de que al menos una de las partes –a la cual le es exigido el cumplimiento con un cierto RERP–no tiene alternativas (realísticas) para elegir no cumplir con el RERP como le requiere la otra parte.

Esta falta de alternativas puede ser entendida de múltiples maneras, que pueden ser combinables entre sí. Para dar algunos ejemplos: si el sujeto ha entrado voluntariamente o no a la relación relevante; si su capacidad de elección –entre realizar o no la acción– es real o no; si el sujeto puede voluntariamente salir de –o renunciar a– la relación o no. Cuando se considera el derecho estatal, puede entenderse que los agentes se encuentran en una relación para con el Estado en la cual, generalmente,[51] ni han entrado voluntariamente, ni pueden renunciar o salir voluntariamente, ni existen alternativas realísticas a cumplir o no con los RERPs requeridos. En el único sentido relevante en el que se podría hablar de voluntariedad es en el marco de algunos sectores del sistema jurídico, los cuales se aplican a los diferentes actores únicamente si y sólo si éstos lo deciden: por ejemplo, el derecho de los contratos, el derecho de las sociedades comerciales, etc. En este caso, de todas formas, una vez que la relación ha sido voluntariamente asumida, usualmente las partes no pueden sustraerse con la misma voluntariedad; e, incluso si la relación relevante es una entre sujetos privados, de todas formas el Estado es la fuente última detrás de los RERPs relevantes.

50 Aunque en realidad pueda ser fácil si se considera una concepción de la coerción más amplia de la que, como hemos visto en la Sección 4, Rodríguez-Blanco parece asumir aquí.

51 Por motivos de simplicidad, dejo aquí de lado casos como la adopción de ciudadanía, naturalización, apatridia, etc.

Uno podría preguntarse: ¿cuánto del derecho transnacional escapa realmente a esta estructura? Rodríguez-Blanco trae a colación el ejemplo de la *lex mercatoria*, que sugeriría una relación entre partes cuya entrada es voluntaria y, bajo ciertos parámetros, una igualmente voluntaria salida. Sin embargo, y teniendo en cuenta lo señalado en la Sección 5, quizás tomar un caso como el de la *lex mercatoria* para ejemplificar un caso central de derecho transnacional pueda resultar engañoso. A menos que se defina de modo muy restrictivo, es posible encontrar numerosas situaciones bajo el rótulo de 'derecho transnacional' pueden ser fácilmente representadas bajo la misma estructura que las relaciones en el marco del derecho estatal.

Además, pensar que en la *lex mercatoria* no exista coerción en otro sentido que no sea coerción como arbitrariedad (por el mero hecho de que no existe una parte con el monopolio de la fuerza en el territorio donde se encuentra la parte exigida) parece –como he señalado en la Sección 4– una forma muy estrecha de considerar la coerción. La coerción también abarca la posibilidad de que una parte genere un estado de cosas en la cual restrinja fuertemente, en ocasiones al punto de anular, la capacidad de un agente de llevar adelante su plan de vida.[52] Para ello, no es necesario ningún monopolio de fuerza o amenaza o violencia: basta, por ejemplo, con una sanción genérica que no pueda imponerse o un aviso público de no cumplimiento que bien puede significar la pérdida de reputación –algo sumamente importante en contextos como los de *lex mercatoria*–, y la quita de algún tipo de membresía o algún tipo de acto que en cualquier modo impida al agente de ser sujeto de un cierto sistema normativo o grupo –membrecía o calidad de sujeto necesaria para ese agente particular como medio para llevar adelante su plan de vida, incluso si para otros agentes esta posible quita o impedimento sean completamente inocuos.

7 CONCLUSIÓN

En «*What Makes a Transnational Rule of Law? Understanding the Logos and Values of Human Action in Transnational Law*», Rodríguez-Blanco ha sugerido poner atención particular sobre varias ideas que, a mi criterio, son de gran relevancia para la teoría y la filosofía del derecho. Una de ellas es cómo el contexto transnacional tensa el entendimiento, y la posibilidad de aplicación, de conceptos jurídicos generalmente dados por asumidos. Otra de ellas es la atención dada a la coerción como un problema omnipresente en contextos jurídicos, independientemente de si son nacionales, internacionales, transnacionales o globales; y a la coerción como algo más que la violencia, un hecho muchas veces

52 Véase, por ejemplo, Celano 2013: 129-151, Anderson 2017.

olvidado al teorizar acerca de las relaciones de poder en contextos jurídicos.[53] Finalmente, la atención dada al *ROL* como el medio (presuntamente) más adecuado para evitar la coerción sobre los agentes en todos los contextos en los cuales los agentes pueden encontrarse, que en la actualidad cada vez más se trata de contextos no estrictamente nacionales, es siempre fundamental.

Con esto en mente, mi intención con este trabajo ha sido poner en relevancia aquellos interrogantes sobre puntos que podrían ser claves para fortalecer la propuesta de Rodríguez-Blanco. Creo que una clarificación sobre los interrogantes relacionados con la acción humana y con el tipo e identificación del *logos* de los estándares, así como la posible adopción de una noción de coerción más amplia y una toma de posición explícita y detallada acerca de qué debe entenderse por derecho transnacional, serían de suma utilidad para lograr su objetivo. Por último, espero además que estos comentarios puedan resultar útiles para cualquier otra persona que se embarque en la investigación de estas ideas y puntos que, como señalaba al inicio, a mi entender resultan de gran relevancia para (al menos) la teoría y la filosofía del derecho.

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Julieta Rabanos*

Transnational Rule of Law, coercion, and human action

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

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).

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

1 INTRODUCTION

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

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1 Rodriguez-Blanco 2018.

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?

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]

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]

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

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 charac-*

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).

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]

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

teristic 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; Rodriguez-Blanco 2021a: 702–703; Rodriguez-Blanco 2021b: 49–50. Rodriguez-Blanco clarifies John Finnis's objection to legal positivism in the shape of Hart's theory, namely, that it is unstable because it uses the notion of an internal point of view, which does not have sufficient discriminatory power to distinguish between good and less good legal norms, between rational and non-rational court decisions, etc. Finnis's view is that understanding a human action in law involves understanding what the point of the action is, that such understanding requires use of the Aristotelian focal Meaning (or central case). 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.

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

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]

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.

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]

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":

(Question 1) What explains human action?

12 Rodriguez-Blanco 2018: 211–212.

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

14 Cf. footnote 17.

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

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

(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)?

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]

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).

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]

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),

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 Redondo Natella 2018.

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).

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

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.

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

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.

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.

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.

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.

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 ac-

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 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.

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.

tions 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.

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.

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

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.

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.

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).

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*

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.

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

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

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

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

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.

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.

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.

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*

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 situa-

tion 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.

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.

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]

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

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 Maniaci 2019.

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.

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.

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

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.

"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

36 Rodriguez-Blanco 2018: 209.

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.

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]

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*".

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.

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.

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

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.

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).

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]

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).

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.

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".

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.

5 ON THE PARTIES IN THE RELEVANT RELATIONSHIP AND THE NOTION OF TRANSNATIONALITY

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).

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.

(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]

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/

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.

person; state/state; state/international organization; state/transnational agency; state/supranational organism; supranational organism/person; and so on.[43]

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.

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*).

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.

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.

(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]

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]

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

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.

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.

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.

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

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.

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.

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.

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.

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)

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.

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

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.

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

51 See e.g. Celano 2013: 129-151; 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.

said at the beginning, I think are of great importance to (at least) the theory and philosophy of law.

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SYMPOSIUM ON THE VISIONS OF CONSTITUTIONALISM: INSTITUTIONS

Edited by Donald Bello and Ana Cannilla

Constitutional scholars are concerned with the pressing issues that liberal democracies face today and thus strive to rethink and improve the theory and practice of constitutionalism accordingly. By bringing together leading experts in constitutional and political theory to discuss relevant issues of constitutional government and democratic theory, this symposium on Visions of Constitutionalism responds to that concern.

Readers of Revus will enjoy a wide range of novel approaches to constitutionalism. Bringing fresh ideas to the fore, rethinking core debates and developing key ideas in constitutional theory and practice, the sysmposium unfolds in two issues of Revus. In the previous issue, our contributors originally point out challenges and shortcomings of contemporary constitutional theory, dealing with them in ways that develop fruitful new philosophical lines of constitutional thought. In this issue, our authors pose urgent questions of institutional design and shed light on how to make different views of constitutionalism work, ranging from theoretical proposals on how to institutionalize different forms of constitutionalism to relevant analysis on the institutional instantiations of constitutional theories presenting themselves as alternatives to more traditional approaches which underscore the role of constitutions as curbs on majoritarian political power.

We hope the symposium will help readers assess whether or to what extent our received views of constitutionalism and institutional design are fit for the purpose of tackling current political challenges to liberal democracies. Examining sundry relevant problems of constitutional theory and practice, our contributors present an ample breadth of perspectives that will add to the existing literature on constitutionalism and contribute to pushing the field of constitutional thought forward in relevant and original ways.

Chiara Valentini*

Deliberative constitutionalism and judicial review

A systemic approach

Deliberative constitutionalism is an emerging field that combines constitutional theory – and its emphasis on legal limits to political power – with deliberative democratic theory – and its idea of political deliberation as the source of democratic legitimacy. This combination creates a new framework to address questions of legitimacy that arise in constitutional democracies. The article contributes to this growing area of research by exploring its potential to address the legitimacy of judicial review. First, the article argues that this potential lies in the integration of constitutional theory with a *systemic* approach to deliberative democracy and the nested idea of a deliberative *system*. Second, the article draws on this integration to account for the legitimacy of judicial review as an institution embedded in – and shaped by – a deliberative, representative, *system*.

Keywords: constitutionalism, deliberative democracy, judicial review, representation

1 INTRODUCTION

"Deliberative constitutionalism" (hereinafter DC) is an emerging paradigm that seeks to combine in new terms constitutionalism and deliberative democratic theory, two fields that are potentially in tension.[1] Constitutionalism is traditionally concerned with legal constraints on majoritarian politics, justified by the protection of rights as the ultimate standard of legitimacy. Deliberative democratic theory has established itself as a family of views maintaining that "public deliberation" among "free and equal citizens is the core of legitimate political decision-making and self-government."[2] DC aims to bring these ideas and standards from one field into the other. Such cross-fertilization seeks to create a *new* framework to "redirect longstanding debates" in both fields.[3] With the works of Worley, Levy, Kong and others[4], DC seeks to develop a fuller account of legal institutions as key components of deliberative democratic settings and, on the other hand, of democratic deliberation as part of a constitutional order. In these terms, DC develops – and builds on - the various insights into the

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1 For an overview of this emerging paradigm, see Kong & Levy 2018a: 626; Levy, Kong, Orr & King 2018; Worley 2009.

2 Bohman 1998: 401.

3 Kong & Levy 2018b: 3.

4 See the works cited in notes 1, 2, 3 and Bello Hutt 2020: 69.

connection between deliberative democracy and constitutionalism provided by Habermas, Rawls, Nino, Michelman, Sunstein and others.[5] As such, it is establishing itself as a meta-theoretical paradigm "capable of unifying other constitutional theories about the legitimacy of public power arrangements".[6]

My aim is to contribute to this emerging paradigm, by exploring its potential for deepening our comprehension of judicial review, that is, the power of judges to review the constitutionality of laws produced by political representatives. In fact, the legitimacy of this power has been relatively overlooked by current literature on DC[7], except for the ambition of bringing about a change of perspective on the role of courts in constitutional democratic systems.

Indeed, proponents of DC explicitly strive to address the legitimacy of judicial review in new terms: "instead of focusing on the question of whether judicial review is illegitimate because it frustrates the democratic will, we claim that judicial review is legitimate to the extent that it facilitates democratic deliberation, both *within institutions* of public power – *including the courts* – and *within wider society*".[8] Although not thoroughly developed by the DC literature, this claim sets out a new approach to judicial review, shifting attention from tensions between adjudication and democratic deliberation to their *integration* into a more complex structure: the former – through judicial review – becomes constitutive of the latter and vice versa, within a broader institutional and social setting.

Current developments in the theory of deliberative democracy go in the same direction devising courts and adjudication among the different institutions and activities involved in democratic deliberation. I refer, here, to the "systemic turn"[9] in deliberative democratic theory, which foregrounds the idea of "a set of distinguishable, differentiated, but to some degree interdependent parts, often with distributed functions and a division of labour, connected in such a way as to form a complex whole".[10]

Along these lines, the theory of deliberative democracy is undergoing a change of perspective, no longer focusing on single, specific fora or moments of deliberation that present the highest of deliberative capacities. It is now becom-

5 See footnote 31.

6 Kong & Levy 2018a: 626. As pointed out by Bello Hutt 2020, "Nowadays, deliberative constitutionalism is explicitly presented as a clear and distinct idea that keeps" the tensions internal to the concepts of constitutionalism and democracy "at bay".

7 So far, the new literature on DC has not provided a full, systematic analysis of judicial review and there are no chapters devoted to this topic in the *Handbook of Deliberative Constitutionalism* (Bächtiger, Dryzek, Mansbridge, & Warren 2018).

8 Kong & Levy 2018a: 634.

9 The idea of "deliberative system" was introduced by Mansbridge 1999: 211. For a "manifesto" of the systemic approach, see Mansbridge et al. 2012: 1–26. For a critical reconstruction, see Owen and Smith 2015.

10 Mansbridge et al. 2012: 4.

ing comprehensive, encompassing the whole range of fora and activities that together perform deliberative functions.[11] This approach relies on a broad notion of deliberation, an interactive conception of legitimacy, a system-level evaluation[12] and, also, a systemic account of political representation.[13] Altogether, these elements point to a new "state of deliberative democracy" challenging us to reconsider the place and role of the judiciary.[14] DC allows us to meet this challenge, providing a framework to bring this systemic account of deliberative democracy into constitutional theory so as to sharpen our outlook on constitutional practice and judicial review. Or so I will argue.

My analysis will proceed as follows. In section 2, I will outline the main tenets of DC and the question of judicial review. In section 3, I will present the systemic approach to deliberative democracy. In section 4, I will bring this approach and DC together, to propose a systemic version of DC (hereinafter SDC) and address the legitimacy of judicial review as part of a deliberative, representative system. In section 5, I will briefly conclude.

2 DELIBERATIVE CONSTITUTIONALISM

DC seeks to combine in new terms insights from constitutionalism and deliberative democratic theory, allowing for a fuller view of the constitutional practice than either theory can provide alone. By this, DC aims at bringing "to the general normative claims of deliberative democratic theory a specifically institutional and *legal* focus"[15] and, at the same time, considers how constitutions, and their legal provisions – concerning rights and the separation of powers – bear on democratic deliberation.[16] It *creates* a framework to do so. DC is not about merely aggregating different theoretical components, but rather unifies these to produce something novel.[17] It provides the analytical tools to capture how the deliberations of judicial and legislative actors, and citizens, impact on constitutional law. At the same time, it can comprehend the various roles that (constitutional) law plays in those deliberations. From such an integrated perspective, we can re-orient the debates in constitutional and deliberative democratic theory that have coalesced around different points.

11 Mansbridge et al. 2012: 22. The roots of this account are in Habermas' idea of a "two-track" deliberative democracy, advanced in Habermas 2015.

12 Bello Hutt 2017.

13 Mansbridge 2003; Kuyper 2015; Bohman 2012; Mansbridge & Rey 2015.

14 Bello Hutt 2017: 77.

15 Kong & Levy 2018a: 625.

16 Kong & Levy 2018b: 2.

17 Kong & Levy 2018b: 1.

For a long time, the "courts-legislatures axis"[18] has been at the core of constitutionalist debates, concerned with the democratic legitimacy of judicial review. Political deliberation and deliberative actors have been cast as counterparts of adjudication and courts, to be constrained and/or supported by the law. Meanwhile, debates in deliberative democracy have been primarily concerned with the features and value of political deliberation, conceived as the normative core of democratic systems and the basic standard of legitimacy. Law and legal actors have been left generally in the background, as ancillary or potentially counter-deliberative.

DC seeks to go beyond such limited view. It aims at a deeper understanding of the connection between democratic deliberation and constitutional law and how they shape each other. In this sense, DC revives and advances the strand of constitutional theory that sought to develop "an account of deliberative democracy within the context of a liberal constitutional framework".[19] DC seeks to address the many questions that are still open along this path, concerning "whether and if so how the deliberative ideal is consistent with constitutional limits on democratic decisions, such as separation of powers, a bill of rights, and judicial review".[20]

DC draws our attention to such questions and, furthermore, pursues a fuller answer to them.

On the one hand, it seeks to go beyond the traditional approach of deliberative democratic theory to constitutionalism, characterized by "generic views" that "overlooked much of what is institutionally distinctive about constitutions".[21] Indeed, "to the extent that there was a body of established deliberative democratic constitutional theory it remained abstract and largely unmoored from any 'particular legal and constitutional tradition'".[22] On the other hand, DC aims at recasting the approach of constitutionalist theories to democratic deliberation. In fact, such theories traditionally focus on principles of equality and liberty, leaving aside the questions concerning the nature of democratic deliberation and how constitutional law may "contribute to and construct – or at times frustrate – more deliberative forms of democracy".[23]

The point of DC is to go beyond one-sided views of constitutional democracies, by bringing together two orders of questions.[24] The first concerns the con-

18 Kong & Levy 2018a: 625.

19 Worley 2009: 431, making reference to the works of Ackerman, Nino, Habermas, Sunstein, and Michelman.

20 Freeman 2000: 417.

21 Kong & Levy 2018b: 2.

22 Kong & Levy 2018b: 2.

23 Kong & Levy 2018b: 7.

24 Kong & Levy 2018a: 629.

tribution of democratic deliberation to the production and application of the law, going from constitution-making to the relationship between constitutional rigidity and public deliberation. The second order of questions concerns how (constitutional) law impacts on democratic deliberation by "filtering" the preferences and interests that are the object of deliberation and/or by "telescoping," that is, modelling public discourse.[25]

This analysis, then, covers the level of first-order deliberation – democratic deliberation directly affecting the interests of citizens – and the level of second-order deliberation – deliberation *about* deliberation, regarding how first-order deliberation should unfold.[26] By this, DC seeks to appreciate how the law acts *on* deliberation – to support and/or control it – and *in* deliberation – as part of its object/framework. This outlook on the law also applies to judicial review and the disputed questions of legitimacy that it raises.

2.1 The question of judicial review

The judicial power to review the constitutionality of laws is extremely controversial for it instantiates the tension between the rule of law and the rule of the people internal to constitutional democracies. As such, this power has been subject to growing theoretical interest[27] alongside the influence of constitutional adjudication on the evolution of contemporary legal systems. Descriptively, the analysis of constitutional law has been largely centered on what constitutional courts do and how their action impacts on legal doctrines. Normatively, this analysis has played a crucial role in assessing the actual and future developments of constitutional systems. In particular, this assessment has been affected by a fundamental concern with the so-called "counter-majoritarian difficulty"[28] allegedly raised by judicial review, wherein courts, i.e. non-representative institutions, can contradict the will of legislatures, i.e. representative institutions. This difficulty makes the democratic legitimacy of judicial review controversial, raising many disputed questions. Some concern the position of courts in constitutional systems and the boundaries of their sphere of action, others pertain to how judicial review should proceed *within* those boundaries.

Proponents of DC strive to address the counter-majoritarian difficulty and these questions by drawing on "insights from deliberative democracy that can dissipate some of the force of the constitutional legitimacy dilemma."[29]

These insights can shed light on processes and fora in which judicial review and the democratic will do not counter each other, but come together within

25 Kong & Levy 2018b.

26 Kong & Levy 2018a: 630; Levy & Orr 2016.

27 Friedman 2002.

28 Bickel 1962.

29 Kong & Levy 2018a: 626.

a broader deliberative practice. By this, the attention shifts from the extent to which "judicial review frustrates the democratic will" to how far it "facilitates democratic deliberation, both *within* institutions of public power – *including the courts* – and within wider society."[30] The point is to appraise judicial review as bringing democratic deliberation *within* courts, and courts as *fora* of democratic deliberation *alongside* political institutions and society *as a whole*.

As such, DC can advance an established strand of constitutional theory[31] inspired by aspects of the liberal, and republican, traditions of constitutionalism.[32] Following the "deliberative turn"[33] within political theory, between the 1980s and 1990s, this constitutionalist strand proposed a complementary relationship between judicial review and deliberative democracy, with the former enhancing the latter. This view – call it the "judicial enhancement" view – has also been induced by dissatisfaction with "monistic" and "rights-foundationalist" solutions[34] to the counter-majoritarian difficulty, which have divided constitutional theory for a long time. The former defend a majoritarian view of democracy and see judicial review as legitimate as long as it supports majoritarian political processes and decisions. The latter identify rights as the foundations of democracy and prioritize judicial review, and the judicial enforcement of rights, over majoritarian politics. Both solutions address the tension between majoritarian politics and judicial review by assigning priority to one over the other. Attempting to mediate between these extremes, the "judicial-enhancement" view has devised judicial review and the political process as both necessary and complementary elements of constitutional democracies in which rights and popular sovereignty constitute each other through democratic deliberation.[35] From this, it follows a "division of labour between participatory and expert deliberative institutions"[36] based on a "dualistic deliberative criterion"[37] of democratic legitimacy, requiring political institutions to be deliberative representatives of the people and courts to be fora for a skilled deliberation, enhancing political deliberation.

As such, the "judicial enhancement view" has focused on the courts-legislatures axis, leaving underexplored the broader setting in which they interact. DC

30 Kong & Levy 2018a: 634.

31 I refer to the theories of Ely 1980, Habermas 2015, Ackerman 1991, Michelman 1987, Rawls 1993, Eisgruber 2001, Friedman 1993, Nino 1998, Sunstein 1996, and Alexy 2005.

32 This strand brings together different theories, influenced also by Habermas 2015 and Rawls 1993. As noted by Floridia (2018: 35), these theories have been influenced by – and also helped to build – deliberative democratic theory.

33 See, among many works, Dryzek 1990; Bohman 1994; Cohen 1989; Gutmann & Thompson 1996.

34 A distinction by Ackerman 1991.

35 See, above all, Habermas 2015, and the idea of jurisgenesis in Michelman 1987.

36 Bello Hutt 2017: 81.

37 Bello Hutt 2017: 81.

ultimately seeks to illuminate this setting with ideas and standards borrowed from deliberative democratic theory. I follow this path, arguing that a particular approach, currently emerging within deliberative democratic theory – the systemic approach – can help DC to advance the "judicial-enhancement" view and elucidate the link between judicial review and deliberative democracy.

Bello Hutt has warned against this possibility, claiming that the "judicial-enhancement view" is not compatible with the systemic approach.[38] First, the idea of judicial review as a form of deliberation complementing and enhancing democratic political deliberation ultimately centers on courts as deliberators of a special kind, deserving a pre-eminent position that is neither justified nor justifiable in a deliberative *system*.[39] A system of this sort keeps *together* the several institutions engaged in the deliberative enterprise, challenging judicial supremacy. Second, in a democratic deliberative system, everyone should contribute to deliberation but a restricted, politically insulated, group – such as a court – should not be entitled to have the final say. Adjudication is not democratically *representative* and therefore should not prevail over the deliberations of representative actors.[40]

These concerns are particularly salient for our purposes. The first – call it the "supremacy concern" – focuses on the tension between the authoritative dimension of judicial review and the dialogic nature of democratic deliberation. The second – call it the "representativeness concern" – focuses on the tension between the non-representative nature of courts and the constitutive role of political representation in a deliberative democratic system. Undoubtedly, the "judicial enhancement" view leaves some space for these tensions. It tends to emphasize the courts' role on the constitutional scene, grounding their legitimacy in the enhancing impact of their authoritative, skilled decisions on democratic deliberation. And it can also tend to emphasize the courts' non-electoral accountability and political insulation.[41] Nonetheless, this view does not run *against* a systemic approach to deliberative democracy. Rather, this approach provides ideas and standards that enrich such a view, allowing to address the concerns about judicial supremacy and representativeness. Before expanding on these claims, let me outline in greater detail the systemic approach.

38 Bello Hutt 2017: 81.

39 See also Bello Hutt 2018.

40 Bello Hutt 2017: 96.

41 As highlighted, in different terms, by Rawls 1993, Sunstein 1996, Eisguber 2001, Michelman 1987, and Nino 1998.

3 THE SYSTEMIC APPROACH TO DELIBERATIVE DEMOCRACY

According to the systemic approach, contemporary democracies should be analyzed and addressed as deliberative systems: "complex entities in which a wide variety of institutions, associations, and sites of contestation accomplish political work."[42] These also include informal networks, foundations, schools, *and* courts.

Of course, relevant systems, here, are those "broadly defined by the norms, practices, and institutions of democracy" and comprise three basic elements: first, a minimally restricted public space.[43] Second, an empowered space, in which binding collective decisions are taken through the activities of courts, alongside "legislatures, political parties, cabinets, intergovernmental organizations, and so forth."[44] Third, mechanisms of transmission between those spaces, which work "bidirectionally" so that deliberation in the empowered space can shape existing interests and preferences, and vice versa.[45] The different subjects that act in these spaces – especially those acting in the empowered space, including courts – must fulfill standards of legitimacy built around the idea of deliberative capacity. This is the capacity to accommodate an authentic, inclusive, and consequential deliberation.[46] Deliberation is authentic if it can "induce reflection" without coercion, "connect claims to more general principles, and exhibit reciprocity."[47] It is inclusive in that a broad range of interests, ideas, and positions are permitted so that people encounter a plurality of views.[48] It is consequential if it has "an impact on collective decisions or social outcomes."[49]

The various subjects and processes that populate the different spaces of the system manifest the deliberative capacity in different terms and to varying degrees. Furthermore, they may lack the deliberative capacity required to undertake legitimate actions, but they may borrow aspects of this capacity from other subjects and processes. Indeed, their legitimacy must be assessed based on their position within a *system* structured so as to connect its different articulations.

Looking at deliberative democracy in this way has two advantages. Descriptively, it captures the complexity of contemporary democracies and enables us to appraise the distribution of deliberative work across them without necessarily assuming the supremacy of one component over others. In this respect,

42 Mansbridge et al. 2012.
43 Dryzek 2009: 1385.
44 Kuyper 2016.
45 Kuyper 2016: 312.
46 Dryzek 2009: 1399.
47 Dryzek 2009: 1382.
48 Kuyper 2016: 313.
49 Dryzek 2009: 1382.

deliberative democratic theory relies on ideas of "distributed deliberation,"[50] "institutional differentiation,"[51] and "multiple deliberative moments."[52]

Normatively, the idea of a deliberative system attends to the *whole* set of actors, processes, and sites, that perform institutional and non-institutional activities of deliberation. It calls our attention to their interdependence and how this affects their legitimacy. In these terms, this idea guides our analysis so as to appraise the deliberative capacity of each component of a system in light of its connections to other components.[53] These connections work as "transmission belts" of deliberative capacity[54] so that the system's components can complement or replace one another.[55] Deliberative legitimacy, thus, also depends on the position and role that a certain component has within the system *in relation to* other components.[56] By this, the systemic stance captures a key aspect of democratic legitimacy related to the cross-fertilization of deliberative capacity.[57] The different parts of a deliberative system concur in different ways, and moments, to a broader practice, but none of them, *per se*, exhausts such practice. They integrate each other and, in these terms, they *contribute* to the fulfillment of the system's basic functions.[58] An epistemic function, concerning the production of preferences and decisions informed with respect to the facts, by means of open and transparent discussions, and inclusive of all relevant considerations and reasons. An ethical function, concerning the establishment of mutual respect among members of the democratic community. A democratic function, concerning the inclusion of various concerns and claims as vital to *democratic* deliberation. The systemic approach, then, allows for a "nuanced application" of such functions, "modulating their relevance and weight"[59] in response to the features of the system under examination.

Vermeule defends a similar view of constitutional orders. According to this view, a constitutional order is "a system of systems"[60] having "emergent properties" that may differ "from the properties of its components." On the other hand, the single components may have properties that the system, as a whole,

50 Goodin 2005.

51 Bohman 2007.

52 Parkinson 2006.

53 Parkinson 2006.

54 Kuyper 2016: 308.

55 Mansbridge et al. 2012: 3.

56 Owen and Smith (2015) remark that this analysis may not be enough. Indeed, it can be complemented by assessing how systemic virtues or flaws influence the system's components and how these components relate to the whole system.

57 Mansbridge et al. 2012: 5.

58 Mansbridge et al. 2012: 22.

59 Mansbridge et al. 2012: 12.

60 Vermeule 2011: 3.

does not display.[61] From this perspective, a constitutional order is a two-level system: a first level on which the single components of the system operate; and a second level on which those components are systemically interconnected. Such a structure is characterized by "system effects," so that the single components – on the first level – display their own properties and perform their own activities, whereas at the systemic level those components are brought together into a complex whole that displays different features and operates in different terms.[62]

By detecting these effects, a systemic outlook on constitutional orders helps us to avoid making "invalid claims"[63] about constitutional law and theory especially with regard to crucial aspects of the legitimacy of constitutional orders that are related to the differentiation between the order and its components. More specifically, it allows us to appreciate that the legitimacy of the order may depend upon conditions that differ from the legitimacy conditions that apply to the institutional components of that order. Indeed, "if a constitutional order is democratic, somehow defined, it does not follow that each of the institutions that comprise it must itself be constituted in a democratic fashion. The overall order may be democratic only because one or more of its component institutions is designed to act in an undemocratic fashion, in order to check the self-destructive tendencies of democracy."[64]

With this in mind, let me return to DC and judicial review.

4 RE-FRAMING THE QUESTION OF JUDICIAL REVIEW

Existing accounts of deliberative systems have not yet fully addressed the role of courts, but they provide some elements to do so. They contemplate courts as deliberative agents placed in the empowered space(s) of the deliberative system, which interact with other deliberative agents[65] in a broader practice of democratic deliberation. In the system, the activities of legislators differ from those of "judges, executives, and members of the general public"[66]: the structure and function of each setting come with different kinds of constraints on deliberation. However, all settings share some core constraints establishing "impartiality in public deliberation" and pursuing reciprocity. Reciprocity, here, stands for the search for "mutually justifiable reasons" and a tension towards "mutually

61 Vermeule 2011: 5.

62 For this distinction, see Rey 2020.

63 Vermeule 2011.

64 Vermeule 2011: 4.

65 Courts are explicitly identified as components of the deliberative system, for instance, by Mansbridge et al. 2012, as well as Dryzek 2009, 1384–1385.

66 Krause 2008.

binding decisions on the basis of those reasons."[67] Such reciprocity constraints, in the judicial domain, boil down to a set of decision-making standards and mechanisms, going from argumentative reasonableness to dialogic mechanisms and public hearings.[68]

This aspect is highly relevant for our purposes. In a system, deliberative activities may well unfold in different domains under different constraints, but they are ultimately integrated into a unitary practice. The systemic approach draws our attention to the wholeness of this practice, and, by this, it offers new, valuable elements in analyzing the connection between judicial review and democratic deliberation.[69]

First, it takes this analysis beyond the "courts-legislature" axis to encompass the full range of actors and sites involved in democratic deliberation and place courts within its scope. I refer, for instance, to the deliberative activities of the executive branch and/or citizens[70], and how they interact with courts and judicial deliberations.

Second, the systemic approach highlights the interdependence between the judicial and other components of a deliberative system, within a unitary practice. It highlights how the deliberative capacity, and legitimacy, of all those components are the result of systemic interactions.

Third, the systemic approach reveals the two levels on which judicial activities bear on democratic deliberation. The systemic level on which those activities – alongside law-making and many others – constitute democratic deliberation as a *practice* that keeps them together. And the specific levels on which judicial and other particular activities occur, in their own domains and under their own constraints.[71] By differentiating these levels, the systemic outlook uncovers a fundamental distinction, which is crucial for understanding and justifying legal institutions and which, as I have argued elsewhere, also applies to adjudication and judicial review.[72] I refer to the distinction between the level on which a practice takes form and the level on which the instances of that practice occur.[73] Descriptively, this distinction is relevant because it captures the complexity of practices bringing together distinct, though interconnected, activities and actors. Normatively, this complexity bears on the justification of those practices.

67 Krause 2008, drawing on the account of Gutmann & Thompson 2000.

68 On public hearings see Gargarella 2019; Tushnet 2016.

69 As pointed out by Bello Hutt (2017), providing a first attempt to account for the role of courts in a deliberative system. He takes a different route from the one I set out in this paper.

70 Sunstein 2017; Tushnet 2016; Gargarella 2014; Gargarella 2019.

71 See Krause 2008.

72 Valentini 2019a.

73 Rawls (1955: 3) elucidates the idea of practice as "any form of activity specified by a system of rules which defines offices, roles, moves, penalties, defenses, and so on, and which gives the activity its structure."

Indeed, as argued by Rawls and Hart on punishment and property,[74] it is one thing to inquire into the reasons that justify a specific act as part of a certain practice; it is another to inquire into the reason for the practice itself.[75] Addressing a practice requires us to inquire into its general justificatory aim, by expounding the reasons for the practice itself.[76] Addressing the particular instances of a practice requires us to inquire into the immediate aim of those instances and to expound the reasons for which they occur and fall within its scope. A systemic stance captures precisely this gap. In descriptive terms, it allows us to refine our analysis and avoid those "pitfalls" that result from neglecting "system effects."[77] I refer, on the one hand, to the "fallacy of division" that occurs when we assess a constitutional order as democratic and, therefore, we appraise its components as acting democratically as well. On the other, I refer to the "fallacy of composition" that occurs when we assess a component as acting undemocratically and, therefore, we appraise the whole constitutional order as undemocratic. On this basis, we can reframe the normative analysis of the counter-majoritarian difficulty. The central question is no longer whether courts should act democratically, but rather whether, and how, they can be components of a democratic system even if, and when, they act undemocratically. As mentioned before, a systemic approach allows us to avoid making the mistake of arguing "from the premise that the overall constitutional order should be democratic to the conclusion that an undemocratic court must be undesirable".[78]

In all these respects, a version of DC embedding the idea of a deliberative *system* – SDC – can re-define our analysis of judicial review and democratic deliberation. In short, it sheds light on judicial review as embedded in – and shaped by – a practice of deliberation, rather than an external activity that merely enhances deliberation: it is *constitutive* of democratic deliberation and we should address it accordingly.

Here, two challenges arise. First, we need to flesh out the idea of adjudication and judicial review as part of a system of *deliberation* that brings *together* different actors and activities. This entails addressing the "supremacy concern" mentioned previously. Second, we need to flesh out the idea of adjudication as part of a *democratic* system of deliberation, which requires us to address the "representativeness concern". Let me sketch two possible paths to meet these challenges from the perspective of SDC.

74 Rawls 1955; Hart 1959.

75 Hart 1959: 3.

76 As pointed out by Rawls 1955 and Hart 1959.

77 Vermeule 2011: 55.

78 Vermeule 2011: 56.

4.1 Adjudication *and* deliberation

A first challenge concerns the idea of adjudication as part of a *deliberative* practice unfolding within a *system*. As noted, the authoritative aspect of adjudication, especially in judicial review, stands in tension with the idea of courts as components of a system *concurring* with other components in the deliberative work. Indeed, adjudication is an enterprise of a distinctive kind. If we define deliberation "minimally" to mean "mutual communication that involves weighing and reflecting on preferences, values, and interests regarding matters of common concern",[79] adjudication is a deliberative enterprise.[80] Internally, it unfolds as a reason-weighing process. Externally, it works as a reason-giving process, justifying judicial decisions with arguments addressed to others. However, a deliberative *system* seems to require something more, namely deliberative cooperation, or dialogue. And in order to enter a dialogue with citizens and other institutional bodies, courts should go beyond reason-weighing and reason-giving. They should also be transparent with respect to their decision-making process – at least in some phases – as well as inclusive and receptive with respect to the reasons and arguments of other institutional and non-institutional components of society. This does not mean that courts should decide solely on the basis of those reasons and arguments, but that they must consider them and enter into "constitutional dialogues" with other institutions and citizens.[81] Along this line, current developments in judicial practice point to the embedding of dialogic mechanisms.

As Gargarella observes, a set of practices of dialogic constitutionalism is emerging, albeit with some difficulties: the use of the notwithstanding clause in Canada; the "meaningful engagements" encouraged by the South African Constitutional Court; and the adoption of public hearings in Argentina and Brazil.[82] In particular, "Dialogue has become synonymous with the Commonwealth model of rights protections, championed as a means of maximising the advantages and minimising the disadvantages of constitutional and parliamentary protections of rights through facilitating legislative responses to judicial determinations of rights".[83] More specifically, as pointed out by Young, the Canadian notwithstanding clause permits legislatures to act "notwithstanding" judicial rulings on rights. Furthermore, it permits proportionate legislative restrictions on some *Charter* rights. This clause has inspired the legal mechanisms of rights protection in many Commonwealth systems, such as those of New Zealand and the United Kingdom. The model emerging out of these

79 Bächtiger, Dryzek, Mansbridge & Warren 2018.

80 *Contra* Bello Hutt 2018.

81 On dialogic accounts, see Tushnet 2009 and Gargarella 2014.

82 Gargarella 2019: 68.

83 Young 2018: 126.

mechanisms is characterized by "four essential institutional features".[84] The first feature is a Charter of Rights with a constitutional or statutory status. The second is the provision of "mandatory rights review of legislation by the political branches before enactment," and the third is a judicial constitutional review of legislation. The fourth is that "notwithstanding this judicial role," there is the legislative power to "have the final word on what the law of the land is by ordinary majority vote." As Young notes, "these mechanisms help to combine legal and political controls over rights, the aim being to maximise the benefits and minimise the weaknesses".[85]

Of course, these mechanisms can be improved. Nonetheless, they show the dialogic potential of judicial review, which, from the perspective of SDC, is extremely relevant: we cannot address judicial review as part of a deliberative *system* if we do not appraise its dialogic dimension.

At the same time, we cannot avoid dealing with its authoritative dimension. Indeed, adjudication is a *judicial* activity and an essential aspect of jurisdiction is the power to make decisions with binding effects.[86] An account of judicial review that does not address both aspects misses one of its distinctive features, with the risk of being descriptively inaccurate as well as normatively inadequate.[87]

Ultimately, both dimensions are equally important for our understanding of the link between adjudication and democratic deliberation.[88] Accordingly, current efforts in constitutional theory attempt to weaken the tension between them.

Challenging the view of courts as "legalist distractions from deep moral reasoning,"[89] Mendes accounts for adjudication as a form of deliberation, notwithstanding its authoritative features. In conceptual terms, "law is deliberative to the extent that it allows for the weighing of various reasons for action".[90] In institutional terms, it is deliberative insofar as "judges deliberate with each other within collegiate adjudication".[91] These connections mostly concern how deliberation becomes part of adjudication, through the reasoning and decisional dynamics adopted within courts. Beyond these connections, then, there are also connections concerning how adjudication becomes part of – and contributes to – democratic deliberation. Such connections are based on dialogic practices, which makes it possible to contest and give inputs to judicial decisions, so that

84 Gardbaum 2013: 30–31.

85 Young 2018: 127.

86 Kyritsis 2017: 119, with reference to courts acting as "practical authorities" in the terms of Raz 1986.

87 As argued by Kyritsis 2017. See also Tremblay 2005: 617.

88 See Klatt 2019.

89 Mendes 2013.

90 Mendes 2013: 53.

91 Mendes 2013: 53. On internal/external deliberation in adjudication, see also Ferejohn & Pasquino 2002: 21–36.

the arguments and decisions of courts address and build on the arguments and decisions provided by other institutional actors or citizens. And vice versa.[92]

Notwithstanding these linkages, it might be argued that adjudication is not *fully* deliberative and cannot be cast as part of a deliberative *system* due to a fundamental gap between adjudication and deliberation.[93] The gap concerns the purpose of such activities: the point of adjudication is to decide and settle issues, whereas deliberation need not seek to reach a decision.[94] Moreover, through judicial review, adjudication comes with *final* decisions, which allow courts to have a final say on constitutional issues.

The systemic approach offers some resources to address these points.

First, the idea of political deliberation as an activity not aimed at deciding raises some questions. In fact, the "decisional element" seems to be crucial in political deliberation: "politics demands authoritative decisions that command obedience. Decisions compel deliberation with a practical course of action that a group or a political community needs to select".[95] Deliberation presents a decisional feature shared by adjudication and the other activities – such as lawmaking – that unfold in the system's empowered space. This feature characterizes those activities in various ways, under different constraints, and to varying degrees. In this sense, there might well be a gap between adjudication and political deliberation. Yet, such a gap does not imply that adjudication cannot be part of a democratic, deliberative practice that tales from systemically. SDC sharpens our outlook on this aspect, so as to differentiate the activity from the practice – the immediate point of the former from the overall point of the latter – and, at the same time, to grasp how they recursively constitute each other.

Second, deciding is not equivalent to having the final say.[96] In systemic terms, the practice of democratic deliberation boils down to a set of differentiated but interconnected activities with the aforementioned functions – epistemic, ethical, and democratic. Such activities are structured so as to integrate the initiative of legislative bodies with the supervision of constitutional courts and citizens' participation in the decision-making processes on issues of public relevance. These activities instantiate the communicative exchange under different constraints and in different ways, i.e. by enacting laws, reviewing laws, taking part in public juries, and so on. The different actors involved in that

92 On dialogic practices, see Gargarella 2019. On "external connections," see also Ferejohn & Pasquino 2002.

93 Bello Hutt 2017.

94 Bello Hutt 2017: 83.

95 Mendes 2013: 14.

96 "Political deliberation survives a decision" (Mendes 2013: 15). Friedman (1993: 644) points out that "the notion of judicial finality seriously overstates the impact of a judicial decision […] A judicial decision is an important word on any subject. But it is not necessarily the last word."

exchange exercise different competences, within different boundaries. Setting these boundaries requires identifying "who" is competent to intervene on a certain issue, at a certain time. In the case of courts, such identification boils down to determining *if* judicial actors are competent to adjudicate an issue and, therefore, if that issue is justiciable. The criteria of justiciability depend on the view of the constitutional democratic order in which courts operate and of the relationship between courts and legislatures. The deliberative view of democracy is the basis for different criteria of justiciability, depending on the particular version of that theory that we take into account. What the different versions have in common is that they provide "deliberatively-oriented" criteria of justiciability that do not settle judicial competences once and for all. Rather, they allow the scope of judicial competences to be adjusted, from time to time, based on the possibility that courts contribute to democratic deliberation at a systemic level and the extent to which they can do so. In these terms, we may assess courts' deliberative capacity as a second-order capacity, that is, as the ability to take part in the practice of democratic deliberation along with other actors, in systemic terms, even though they do not have the first-order capacity of being deliberative actors themselves. In such terms, the limits to justiciability basically depend on the possibility of supporting democratic deliberation through adjudication. Within those limits, then, courts can operate so as to *contribute* to systemically democratic deliberation, through the interplay with other actors and, in particular, with legislative actors. Setting the terms in which they should operate requires us to determine "how" judicial bodies should exercise their competence and handle the issues that fall within the scope of their legitimate action. The criteria of adjudication depend on the grounding view of the constitutional law and the nested idea of adjudication and its relationship with democratic deliberation. From the perspective of deliberative constitutionalism, law and adjudication can contribute to democratic deliberation by supporting/securing the conditions and the results of the communicative processes through which that deliberation unfolds. Within the SDC framework, in particular, adjudication can make this contribution even if it is not, by itself, a deliberative activity. In systemic terms, adjudication can be the component of a deliberative democratic system insofar as it supports a deliberative practice within which judicial review interacts with political deliberative actions.

The decisions produced through judicial review, indeed, should be regarded as the product of *inter*actions, primarily involving courts and legislatures. The latter take decisions that determine the content and form of the laws reviewed by the former. By this, they settle, from time to time, the boundaries – and contents – of judicial review. The results of this review, then, affect, from time to time, the validity of laws and the legislative choices required to replace unconstitutional laws.

In these terms, judicial decisions are not "final". Rather, they are part of a *series* of decisions integrated in a practice unfolding over time. As SDC highlights, the single instances of this practice, in which adjudication is embedded, might (not) result in the court – as much as the legislature – settling a certain issue.[97] Such a trait, however, relates to those particular instances and must be understood and addressed accordingly, acknowledging that it is part of a broader practice in which judicial, legislative, and other deliberative activities shape and constrain each other, in a *system*. Their democratic legitimacy depends on a cross-fertilization of deliberative capacity. And such cross-fertilization occurs in light of the division of deliberative work that regulates their interaction. Note that such division of work, from a systemic perspective, follows criteria of *differentiation* among integrated deliberative tasks that do not imply the supremacy of one deliberative agent over others, or the fact that this agent "knows better," but which simply follow from a distribution of tasks within a deliberative community.[98]

In these terms, SDC goes beyond the "judicial enhancement" view and its dualistic deliberative criterion of legitimacy. There are not two separate tracks of legitimacy – one for the courts and another for political, deliberative actors – but two, ultimately interdependent tracks, being unified in a systemic track. Within this track different deliberative actors are required to *systemically* fulfill deliberatively-oriented standards of legitimacy. Such fulfillment arises from a cross-fertilization of deliberative capacity in that "two venues, both with deliberative deficiencies, can each make up for the deficiencies of the other".[99] This point is crucial in assessing the legitimacy of judicial actions, especially in the forum of constitutional adjudication. These actions are not exempt from criteria of legitimacy requiring a systemic exercise of deliberative capacity: they must *contribute* to a practice of democratic deliberation. Yet, assessing whether these actions display the required degree of deliberative capacity requires us to also consider those deliberative actions that may complement, or not, possible judicial deficiencies.[100]

Be that as it may, the problem with casting adjudication as part of a democratic deliberative system may not be with courts *deciding*, but rather with the (allegedly) *non-representative* nature of judicial decisions. In a *democratic* system, the legitimacy of decisions and actions taken by legislative bodies is grounded (also) in their quality of democratically elected representatives. For courts, the representative ground is allegedly absent, since they are non-elec-

97 Besides, constitutional courts can decide and yet not settle an issue, as Bickel (1962) observes in order to cast adjudication – and judicial review – as characterized by "passive" virtues.

98 Mansbridge 2009: 386.

99 Mansbridge 2009: 3.

100 This view is close to current accounts of courts as part of a "cooperative" (Kyritsis 2017) or "balanced" (Klatt 2019) institutional scheme. They rely, however, on the idea of courts as non-representative institutions, which I challenge in this paper.

toral, independent bodies. From the perspective of SDC, however, such lack of representativeness can be questioned, as I shall argue below.

4.2 Adjudication and representation

A second challenge arising within the framework of SDC is whether or not adjudication is a form of *democratic* deliberation, that is, whether we can understand adjudication as a form of *representative* deliberation. In fact, contemporary deliberative democratic theory has made room for the idea that representation supports democratic deliberation and, in such terms, is a constitutive element of complex *democratic* systems, at least with respect to some institutional actors and spheres.

Representation is, in general terms, to "make present in some sense something which is nevertheless not present, literally or in fact".[101] By political representation we understand making "present in public policy-making processes voices, opinions, and perspectives that are not present." This form of representation is democratic when it "applies to the voices, opinions and perspectives – i.e. the will – of the people, making political decisions responsive to it".[102]

Traditionally, in fact, democratic representation boils down to a "responsive" relation between representatives and representees[103] with the former being deputies that act for the latter, as "delegates" or "trustees" depending on whether or not they are directed by the representees.[104] In such a relation, accountability mechanisms are based on elections and representatives exercise a judgment informed by voters' interests and views[105] even though they might take an independent view that reflects *their* view of a just society.[106]

Courts, by contrast, are generally conceived as non-representative institutions. They are not appointed by elections and are not electorally accountable. Furthermore, courts do not exercise dependent judgment, but are independent institutions that can resist political pressures: precisely for this reason, we entrust them with the task of supervising the legislature.[107]

From a systemic perspective, this is a partial, reductive, view of democratic representation in a deliberative democracy. Indeed, the systemic turn has brought a systemic approach to democratic representation, too: "cross-fertilization helps to shed light on the changing nature of representation, democracy, and legitimate political power," as well as the interactions therein.[108]

101 Pitkin 1972: 8.
102 Valentini 2019b, drawing on Dovi 2018.
103 Pettit 2010.
104 Pettit 2010; Pitkin 1972.
105 Kyritsis 2017: 128.
106 Kyritsis 2017: 129.
107 Kyritsis 2017: 129; see also Harel 2019.
108 Kuyper 2016: 322; see also Bohman 2012.

Representativeness, from this perspective, should be assessed beyond the characteristics of single representatives to also consider their position within the deliberative system. And electoral criteria should combine with deliberatively-oriented criteria applying – systemically – to both electoral and non-electoral representatives. The legitimacy of the latter, in particular, should be addressed by assessing their position in a representative *system* that "should be judged normatively as a whole."[109]

As such, we should ask what position we can assign to courts in a *representative* system, and what criteria we can adopt to assess their contribution to such system. Being, in general, non-electoral and independent bodies, the idea of a responsive relation with the constituency does not apply.

An alternative idea of representation, however, may help us. As I have noted in other works,[110] we can refer to Pettit's idea of an indicative relation between the representees and a representative, in which the latter "stands for" the former.[111] In this kind of relation, representatives are not required to track the representees' preferences and to act on the basis of such preferences. Rather, they are indicators of how the representees *would* decide or act if they were in the representatives' position. After election or appointment, the representees do not control what representatives decide and do, but they can exercise control *ex ante*, through the selection of the representatives and the establishment of constraints on their future decisions and actions.[112] The basis of this relationship is proximity between the representatives and the representees. A proximity that can be understood in terms of resemblance or convergence.

In the first case, the representatives resemble – display some properties of – the representees. In this sense, proximity is the basis of a relationship that is descriptive insofar as the court mirrors, at least in some respects, the members of the community or particular groups within the community.

In the second case, the representatives stand as an indicator, that is, they act as the representees would act if they were in the position to do so. In this sense, proximity is the basis of a relationship that is descriptive insofar as the community – or particular groups within the community – recognize themselves in the court's actions in light of a set of fundamental goals set by the constitution.[113] In other terms, the representatives are indicators insofar as the fact that they are of a certain mind "offers reason for expecting" that the representees "will be of the same mind."[114]

109 Mansbridge 2011: 621.
110 Valentini 2019b.
111 Pettit 2010.
112 Mansbridge 2009.
113 Pettit 2010.
114 Pettit 2010: 427–428.

SDC provides a framework in which the indicative relation, in both forms, becomes part of a *deliberative* representative system and must be characterized accordingly. First, it is grounded in what we may define as "deliberative proximity": resemblance between deliberative bodies and the community and/or convergence between representatives and representees on a set of goals established by the constitution. A convergence to be realized deliberatively, that is, through the practice of deliberation that takes form systemically, involving courts alongside other institutions and the wider community.[115] Second, such deliberative proximity also depends on courts' deliberative capacity. In fact, this is the capacity allowing courts to take part in the practice of deliberation through which they act as indicative representatives. Third, mechanisms of accountability, in the case of courts in a deliberative, representative system, are based on mechanisms of selection according to criteria of professional expertise as well as on judicial reason-giving and dialogic practices.[116] In these terms, we can devise courts as *deliberative proxies* of a constitutional, deliberative community. By interacting with other representatives, they constitute a broader practice of democratic representation but their indicative actions, *per se*, neither exhaust that practice nor present each and all of its features.

As to how courts contribute to this practice – the actions they should perform as deliberative proxies – we can draw on current developments in constitutional theory, characterizing judicial representation in "argumentative,"[117] "reflexive",[118] or "principled" terms.[119] I cannot dwell on the different implications of these ideas here. I can only note that, from the perspective of SDC, they are complementary – rather than mutually exclusive – ways in which courts can act as deliberative proxies of a constitutional community.

5 CONCLUSIONS

The article seeks to contribute to DC, an emerging paradigm combining deliberative democratic theory and constitutionalism in new terms, so as to revive and advance the efforts previously made in the same direction by Rawls, Michelman, Nino and others.

I have argued that DC and the systemic approach to deliberative democracy should be integrated so as to sharpen our analysis of judicial review and its ties to deliberative democracy. This integration allows us to appraise judicial review as a deliberative and representative institution, insofar as it is embedded in –

115 On the representative value of this practice in a system, see Bohman 2012; Kuyper 2016.
116 Pettit 2010; Mansbridge 2009.
117 Alexy 2005; Kumm 2019: 281.
118 Rosanvallon 2011.
119 Eisgruber 2001.

and shaped by – a deliberative, representative, *system*. It does not present all the features of the system. Nor does it perform all the functions of the system. Its purpose may differ from that of the system overall. Still, it is a constitutive component of that system and contributes to its functionality. And we should assess its legitimacy accordingly, taking into account the deliberative capacity that it transmits to – and borrows from – other systemic components. If we are to properly address the deliberative work undertaken by courts through judicial review, we cannot isolate that work from the practice and the system to which it belongs. Rather, we need to appraise its place within them. A systemic version of DC provides a framework to do so.

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Akritas Kaidatzis*

Progressive populism and democratic constitutionalism

Populism entails a critique of liberal constitutionalism. There are many varieties of populism, and hence of populist constitutionalism. This article argues that inclusionary democratic (as opposed to authoritarian) populism is related to popular and political constitutionalism. They share a common concern against the excessive juridification and depoliticization of society, and they call for the democratization of constitutional law, considering its current elitism, professionalism and legalism—that is, its insulation from politics and the people—as a source of peril. The article examines seminal contributions on popular and political constitutionalism by Mark Tushnet, Larry Kramer, and Richard Bellamy. It then identifies the radical-democratic element that these approaches share with progressive populism and discusses some aspects of the populist constitutionalism of the SYRIZA-led government in Greece (2015-2019). Democratizing liberal constitutionalism may counter the rise of authoritarian populism; in that respect, some amount of "healthy" populism might be necessary to fight "bad" populism, the article concludes.

Keywords: populism, democratic constitutionalism, popular constitutionalism, political constitutionalism

1 INTRODUCTION

Scholarship on the relation between populism and constitutionalism has evolved from a rather simplistic approach that sees populism solely as a threat to constitutional democracy to more nuanced elaborations. Scholars now acknowledge that populism's constitutional orientation occupies a place between authoritarian and popular constitutionalism.[1] Moreover, not all populism is the same: there are varieties of populism[2] and hence of populist constitutionalism.[3] Populism can be exclusionary or inclusionary, right-wing or left-wing,[4] authoritarian or democratic.[5] Authoritarian populism is on the rise worldwide[6]—even

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1 Walker 2019.

2 Tushnet 2019.

3 Blokker 2019a.

4 Tushnet 2018.

5 Bugarič 2019a.

6 See, e.g., Bugarič 2019b.

if it's not always clear whether certain cases are populist at all or rather plainly authoritarian.[7] But democratic and emancipatory, or indeed "good," populism is also possible.[8] It is argued, moreover, that only the latter is "true" populism, while the former is "false populism" using populist rhetoric to conceal its authoritarian aims.[9]

Nevertheless, any kind of populism entails a critique of liberal constitutionalism. Populist constitutionalism, understood as the populists' attitude toward constitutionalism, is a form of constitutional critique and "counter-constitutionalism" that

> [B]rings to the fore the intrinsic problems of a one-sided legal constitutionalism grounded in hierarchy, judicial prerogative, foundationalism, and depoliticization, which tends to result in a lack of democratic interaction and engagement of larger society with constitutionalism (Blokker 2018: 125).

The populists' main attitude toward public law is what Paul Blokker calls "legal resentment."[10]

While recent scholarship acknowledges some, perhaps elective, affinity between that kind of critique and popular or political constitutionalism,[11] scholars have been generally reluctant to openly relate the latter to populism.[12] However, like populism, popular and political constitutionalism also entail a critique of constitutional orthodoxy. After all, the very term "populist constitutionalism," before being appropriated by scholars of populism, has been used by constitutional scholars to denote the kind of critical approach to constitutional law that eventually evolved into popular constitutionalism.[13]

In this article, I argue that popular or political constitutionalism informs the constitutional attitudes of those endorsing inclusionary democratic (or "good") populism. Moreover, popular or political constitutionalism provides a means to fight the rise of exclusionary authoritarian (or "bad") populism. The article proceeds as follows: In the next section, I examine popular (or, originally, populist) and political constitutionalism as alternative understandings of constitutional law, challenging the dominant model of liberal or legal constitutionalism. To do so, I briefly discuss the seminal contributions by Mark Tushnet, Larry Kramer, and Richard Bellamy. In section 3, I argue that popular and political constitutionalism share with progressive populism a common concern against the excessive juridification and depoliticization of society. They call for enhanced

7 Scheppele 2019.

8 Howse 2019; Blokker 2019a; Bugarič 2019a.

9 Halmai 2019; *cf.* Fontana 2018, distinguishing between "bundled" and "unbundled populism."

10 Blokker 2019b; 2018.

11 See, e.g., Blokker 2019a; Walker 2019.

12 An early exception being Corso 2014.

13 See *infra* section 2.

popular involvement in determining constitutional meaning, and for the democratization and social responsiveness of constitutional law. In section 4, I test my hypothesis by examining the recent Greek experience. The SYRIZA-led government (2015-2019) adopted a democratic-populist constitutional stance, which seems to be informed by, and at the same time confirm, basic tenets of popular or political constitutionalism. I conclude by highlighting the importance of democratic constitutionalism. In order to fight the threat posed by right-wing authoritarian populism, we need to strengthen the democratic component of liberal democracy.

2 ALTERNATIVE MODELS OF CONTEMPORARY CONSTITUTIONALISM

Judicial review of legislation has been established, almost globally, as an indispensable feature of contemporary constitutionalism.[14] Constitutional courts and constitutional adjudication are these days more powerful than ever. While many have hailed this development as rights-enhancing and power-diffusing, others contend that it might conceal an elite-driven attempt to insulate policymaking from democratic politics, or what has been termed "juristocracy."[15] The dominant model of liberal, or legal, constitutionalism is defined by its emphasis on courts and their ability to restrain politics; or, by the primacy of law over politics. There are several objections to this understanding. Empirically, its emphasis on the judiciary might be misleading since much of constitutional law is (still) made outside of the courts. Normatively, it might be democratically undesirable to leave control of constitutional meaning to unelected judges. This kind of critique leads to alternative understandings of constitutionalism.

In the 1990s, progressive constitutional scholars in the USA contributed to what was originally identified as "populist constitutional law."[16] Rejecting the doctrine of judicial supremacy, they emphasized the role of the elected branches of government, and ultimately of the people themselves, in constitutional law. This kind of critique was later more appropriately re-labeled "popular constitutionalism".[17] In the 2000s, a revival of the old British concept of the political constitution resulted in what constitutional scholars in the UK call "political constitutionalism".[18] This advances the idea that checks on government should be political rather than legal, and should be realized in parliament rather than in courtrooms.

14 Ginsburg 2008.

15 Hirschl 2007.

16 See *infra* sub-section 2.1.

17 See *infra* sub-section 2.2.

18 See *infra* sub-section 2.3.

2.1 Populist constitutional law

As a reaction to the conservative turn of the U.S. Supreme Court, progressive constitutional scholars in the USA contested the doctrine of judicial supremacy, according to which the courts, and ultimately the Supreme Court, are the final and authoritative interpreters of the constitution. The critics lamented the elitist element in judge-made constitutional law and its insulation from the beliefs and aspirations of ordinary people. Notions of popular sovereignty and self-government are central to this kind of critique; as is an underlying assumption, unmistakably populist, that favors the political energy of ordinary people.[19]

The most elaborated exposition of this strand of thought can be found in Mark Tushnet's *Taking the Constitution Away from the Courts*, a book about what the author calls "populist constitutional law",[20] which is thought of as an alternative to "the elitist constitutional law that dominates contemporary legal thinking".[21] Tushnet argues that we tend to overemphasize the courts' role in enforcing the constitution while underestimating the role the political branches, especially Congress, can and do play. Much constitutional interpretation takes place outside the courts, in Congress or elsewhere, and the courts' interpretations frequently interact with those other interpretations. "Constitutional theory," then, "must make sense of how people deal with the Constitution away from the courts if it is to provide an accurate account of our constitutional practice."[22]

How people—as opposed to legal professionals—deal with the constitution is at the heart of a populist theory of constitutional law. Tushnet proposes a distinction between the thick constitution, which "contains a lot of detailed provisions describing how the government is to be organized," and the thin constitution, which refers to "its fundamental guarantees of equality, freedom of expression, and liberty".[23] While people are generally indifferent to the technicalities of the thick constitution, they do care a lot about the fundamental principles of the thin constitution. Politics partly revolves around their proper realization and the choice among competing visions about their meaning. In that respect, by participating in politics, the people contribute to the creation of constitutional meaning. "Populist constitutional law gains its content from discussions among the people in ordinary political forums," Tushnet argues, "and political leaders play a significant role in assisting the people as we conduct those discussions."[24]

Tushnet advances the normative claim that there is no compelling reason why one should prefer the courts' interpretations of the thin constitution over

19 Parker 1993; Balkin 1995. For an excellent overview, see Corso 2014.

20 Tushnet 1999: ch. 8.

21 Tushnet 1999: xi.

22 Tushnet 1999: x.

23 Tushnet 1999: 9-14.

24 Tushnet 1999: xi.

the people's. This rests on the idea that "we all ought to participate in creating constitutional law through our actions in politics".[25] Hence, constitutional responsibility is distributed broadly throughout the population, and constitutional law is "in the hands of the people themselves" not in the hands of lawyers and judges.[26] Populist—as opposed to elitist—constitutional law rests on a commitment to democracy. It takes the people's constitutional considerations, as articulated through politics, seriously. It focuses on democratic and legislative responsibility for enforcing the thin constitution[27] and rejects the idea that the constitution is what a majority of the Supreme Court says it is. For a populist constitutionalist, the constitution would rather be "what a majority of Congress says it is".[28]

A positive argument further supports Tushnet's normative claim. Examined over longer periods of time, courts tend to be "more or less in line with what the dominant national political coalition wants".[29] Despite being portrayed as a counter-majoritarian institution, judicial review has, on balance, a rather small overall effect; it actually matters less than we tend to assume. Engaging in a thought experiment, Tushnet contends that abolishing judicial review wouldn't make much difference to society or to the liberties of the American people.[30] States such as the UK or the Netherlands prove that a reasonably well-functioning democracy need not have US-style judicial review. After all, courts may still enforce rights even without the power of judicial review *of legislation*. They can review executive action that infringes constitutional rights; and they can always enforce statutory rights.

Populist constitutional law, Tushnet concludes, enables us to "take an active role in constructing our constitutional rights without relying on the courts to save us from ourselves".[31] It "returns constitutional law to the people, acting through politics".[32] We shouldn't be scared by that prospect if we acknowledge that "the Constitution belongs to us collectively, as we act together in political dialogue with each other—whether we act in the streets, in the voting booths, or in legislatures as representatives of others".[33] The closing line of his book is: "As Lincoln said, the Constitution belongs to the people. Perhaps it is time for us to reclaim it from the courts".[34]

25 Tushnet 1999: 157.
26 Tushnet 1999: 182.
27 Tushnet 1999: 69.
28 Tushnet 1999: 52.
29 Tushnet 1999: 153.
30 Tushnet 1999: ch. 7; Tushnet 2011.
31 Tushnet 1999: 174.
32 Tushnet 1999: 186.
33 Tushnet 1999: 181.
34 Tushnet 1999: 187.

Tushnet's approach might seem parochial, as it only deals with U.S. constitutional law. Others have made similar claims in a more conceptual and less context-dependent way. Most prominently, Jeremy Waldron argued not only that judicial review is democratically illegitimate but also that, in a reasonably well-functioning democracy, there is no reason to suppose that rights are better protected by this practice than by legislatures.[35] Nevertheless, Tushnet's contribution is important because he tests his claims in a real existing democracy—and one that is peculiarly fixated on the practice of judicial review. Tushnet's argumentation is remarkably clear-cut exactly because he examines an extreme case.

2.2 Popular constitutionalism

Scholars soon abandoned the term "populist constitutional law." This must have something to do with the pejorative sense that populism started to acquire.[36] Larry Kramer, in his book *The People Themselves: Popular Constitutionalism and Judicial Review*, came up with a terminologically more appropriate alternative.[37]

Popul*ar* constitutionalism is "the active sovereignty of the people over the Constitution."[38] For most of its history, Kramer argues, "American constitutionalism assigned ordinary citizens a central and pivotal role in implementing their Constitution,"[39] until relatively recently, when the idea of judicial supremacy prevailed. In the past, Americans understood fundamental law as "law created by the people to regulate and restrain the government", whereas ordinary law was understood as "law enacted by the government to regulate and restrain the people".[40] Hence, while government officials, and ultimately the courts, are the authoritative interpreters of ordinary law, fundamental law cannot be interpreted authoritatively by the same persons it is supposed to regulate; this is the people's duty. Popular constitutionalism is about "[t]he people's interpretive authority—their active control over the meaning and enforcement of their constitutions".[41]

The people enforce the constitution through politics and within the political system by employing what Kramer calls "political-legal" devices.[42] These can take various forms. The people may act directly, exercising their rights to vote, petition or assembly. Or indirectly, through their elected representatives. Or even through the courts. Popular constitutionalism is not incompatible with

35 Waldron 2006.
36 Stavrakakis 2017.
37 Kramer 2004; 2005.
38 Kramer 2004: 8.
39 Kramer 2004: 8.
40 Kramer 2004: 29.
41 Kramer 2004: 48.
42 Kramer 2004: 108.

judicial review as long as the courts act as agents of the people, engaging in "a 'political-legal' act of resistance".[43] Crucially, this means that courts may only refuse to enforce a law when its unconstitutionality is "clear beyond dispute".[44] Judicial restraint is a built-in mechanism of popular constitutionalism.

This has been "the dominant public understanding" over much of American history, Kramer contends.[45] As president Roosevelt famously asserted in a speech in 1937, the constitution is "a layman's document, not a lawyer's contract", and "[w]henever legalistic interpretation has clashed with contemporary sense on broad national policy, ultimately the people and Congress have had their way",[46] Clearly, this no longer holds true. Kramer describes the process of change as the "assimilation of fundamental law into ordinary law",[47] a process of depoliticization and professionalization of constitutional interpretation, which came to be dominated by legal professionals and, ultimately, by the courts. Constitutional law gradually lost its distinctiveness as a special kind of popular law and "was recast as a kind of ordinary law",[48] the kind of law that is the proper domain for lawyers and judges.

This goes hand in hand with a subtler and more profound change in the understanding of popular sovereignty. For popular constitutionalists, the people are always present in a constitutional democracy, actively preserving sovereignty over *their* constitution. They shape, through the course of everyday politics, the way the constituted powers interpret the constitution. For judicial supremacists, on the other hand, popular sovereignty is only expressed at the rare moment of founding when the people act as the constituent power, only to virtually disappear thereafter. Hence, while the former consider judicial review "mainly as a device to protect the people from their governors", the latter view it "first and foremost as a means of guarding the Constitution from the people".[49] But then, "a lawyerly elite" are in charge of the constitution rather than the people.[50] Kramer concludes by urging Americans to reclaim their constitution: "The Supreme Court is not the highest authority in the land on constitutional law. We are".[51]

Acknowledging that the term proposed by Kramer is more appropriate than his own,[52] Mark Tushnet clarified that popular constitutionalism is embedded within the structures of the political system and operates in and through politi-

43 Kramer 2004: 92.
44 Kramer 2004: 98-99.
45 Kramer 2004: 207.
46 Kramer 2004: 217 (quoting F. D. Roosevelt).
47 Kramer 2004: 168, 185.
48 Kramer 2004: 164.
49 Kramer 2004: 132.
50 Kramer 2004: 228.
51 Kramer 2004: 248.
52 Tushnet 2005: 2015.

cal institutions.[53] It is about people acting in ordinary politics—only a (small) part thereof is people in the streets. It does not call for some form of plebiscitary democracy;[54] nor for bare majoritarianism or legislative supremacy.[55]

2.3 Political constitutionalism

By the turn of the century, several constitutional developments in the UK—i.e., supremacy of EU law, jurisdiction of the European Court of Human Rights, the Human Rights Act 1998 granting UK courts the power to review legislation—advanced the idea of what came to be known as legal constitutionalism. Critics contested the emerging constitutional orthodoxy as both undemocratic and ineffective, insisting that checks on government should be political rather than legal and should be realized in parliament by the people's representatives rather than in courtrooms by judges.[56]

A radical elaboration is Richard Bellamy's *Political Constitutionalism*, which the author boldly summarizes as an attempt to defend democracy against judicial review.[57] Bellamy's argument is that rights are better protected through democratic politics than through judicial enforcement. He claims that common perceptions about courts as essential safeguards against arbitrary rule rest on assumptions that don't hold in reality. Especially in hard cases, "legislatures neither perform so poorly nor courts so well" as is usually assumed.[58] His central claim though is normative, based on the contested nature of rights. In an open and democratic society, there is not, and cannot be, a single "true" or "correct" understanding of any given right, waiting for the courts simply to unveil. Reasonable and well-meaning people frequently disagree over the content of rights and their relationship to each other. By striking down democratically enacted legislation, courts may simply substitute their own understanding for the people's as determined by their representatives. "Far from guarding against a largely mythical tyranny of the majority," then, the checks imposed by judicial review on majoritarian decision-making risk "entrenching the privileges of dominant minorities and the domination of unprivileged ones".[59]

It is rather "the workings of actually existing democracies," i.e., party competition and majority rule based on political equality and governmental account-

53 Tushnet 2013a.
54 Tushnet 2015.
55 Donelly 2012.
56 Tomkins 2005.
57 Bellamy 2007: 260.
58 Bellamy 2007: 9.
59 Bellamy 2007: vii.

ability, that "offer adequate, if not perfect and certainly improvable, safeguards against domination and arbitrary rule".[60] Specifically:

> A procedure that allows all views to be expressed, seeks to a degree to integrate them and show equal concern as well as respect to the various issues different perspectives raise, and allows decisions to be challenged and amended to take into account new information and changing values and circumstances, should have a greater chance of securing the assent and collaboration of the political community than one that devolves this decision to a group that is neither representative of, nor directly accountable to, popular opinion. For what touches all should surely be decided by all (Bellamy 2007: 51).

Hence, democratic decision-making should be seen as actively promoting, rather than threatening, constitutional values.[61]

Bellamy is well aware that the global trend is in the opposite direction, toward the American style of legalism and judicial review. But he insists that legal constitutionalism "is more likely to be part of the problem—helping corrode the very democratic processes it seeks so inadequately to replace," while the real danger is "tyranny by unrepresentative minorities rather than a majority".[62] Nevertheless, as he acknowledges that there are elements of both legal and political constitutionalism in most constitutions, his analysis leaves room for *some* kind of judicial review. Mark Tushnet—who, interestingly, considers political constitutionalism as a better term for what Americans call popular constitutionalism[63]—links political constitutionalism to weak-form judicial review, which allows for legislative responses to courts' constitutional specifications.[64] Bellamy seems to endorse this connection.[65]

Political constitutionalism's basic premise, the distinction between the political and the legal constitution, has been questioned as either "a rather outdated contrast" concealing the mixed nature of the constitution[66] or as leading to "an entirely fruitless debate".[67] Despite internal critiques within the political constitutionalist literature,[68] there is nevertheless a strong, and undeniably populist, message in it: more power should be given to the people acting through politics to create constitutional meaning.

60 Bellamy 2007: vii.
61 Bellamy 2007: 145.
62 Bellamy 2007: 262-3.
63 Tushnet 2011: 587 fn. 20; Tushnet 2013a: 8.
64 Tushnet 2013b.
65 Bellamy 2019.
66 Tomkins 2013: 2275.
67 Loughlin 2019: 12.
68 Goldoni 2012.

3 COMMON GROUND: DEMOCRATIC VS LIBERAL CONSTITUTIONALISM

Despite differences both between and within them, these alternative understandings of constitutionalism share some common ground. The most apparent is that they are meant as a critique of the dominant model of contemporary constitutionalism, or the constitutional orthodoxy. In the U.S. context, this is the doctrine of judicial supremacy. Political constitutionalists call it legal constitutionalism.

Mark Tushnet thinks the term "judicial constitutionalism" more accurately displays the target of both popular and political constitutionalism: not law as such, "but rather the assumption that everything deserving the name 'law' must be enforced by the courts".[69] Skepticism about judicial review and a call for judicial restraint—in the sense that courts should stick to plain constitutional interpretation and avoid sophisticated constructions—are indeed at the core of these approaches. Moreover, popular and political constitutionalism oppose, more broadly, the "tendency to depoliticization" with its "emphasis on legal rationality, the neutrality of the state, and formal-legal proceduralism".[70] This might be better captured by the term, more familiar to populism scholars, "liberal constitutionalism".[71]

There is an obvious terminological difficulty here. Liberal constitutionalism can have two different meanings. In a broad sense, it refers to the constitutional settings of liberal democracy, a governmental system of popular sovereignty under the rule of law. This is "a form of constitutionalism that broadly seeks to protect democracy and limit power",[72] a definition that captures the defining idea—combining democracy with liberalism—of modern representative democracy. This very thin, and therefore very broad, definition only excludes such varieties of constitutionalism[73] that either deviate from liberal democracy despite nominally adhering to it (e.g., illiberal or authoritarian constitutionalism), or refer to alternative systems of constitutional government that reject Western type representative democracy (e.g., Islamic constitutionalism).

But, in a narrow sense, liberal constitutionalism is also used to refer to the constitutional settings of those variants *within* liberal democracy[74] in which the combination of democracy and liberalism comes with a preference, even if only slight, for the latter. Take, for example, this description: Liberal constitutionalism

69 Tushnet 2015: 8; Tushnet 2013: 2250.

70 Blokker 2019b: 535-6.

71 Blokker 2019b: 535-6. Other terms are also used, such as liberal legalism.

72 Ginsburg, Huq & Versteeg 2018: 239-40.

73 Tushnet 2016.

74 Tushnet 2021.

> typically hinges on a written constitution that includes an enumeration of individual rights, the existence of rights-based judicial review, a heightened threshold for constitutional amendment, a commitment to periodic democratic elections, and a commitment to the rule of law (Ginsburg, Huq & Versteeg 2018: 239).

The liberal component appears rather thick here, while the democratic relatively thin, virtually reduced to safeguarding free and fair elections.[75] Democracy, however, is more than that. Others may prefer variants of liberal democracy in which the combination of democracy and liberalism comes with a preference, even if only slight, for the former. These are variants of democratic (as opposed to liberal in the narrow sense) constitutionalism.[76]

Liberal constitutionalism in the broad sense is an overarching category encompassing different variations of both democratic and liberal constitutionalism in the narrow sense. Of course, we need not stick to this terminological ambiguity. We can always distinguish the latter category by calling it legal or judicial constitutionalism, or perhaps more appropriately, constitutional liberalism.[77] The nomenclature is not important. The point here is that, when we talk about critiques of liberal constitutionalism, we do not always mean the same thing. Populism entails such a critique. Popular and political constitutionalism also do. In some cases, these coincide, in others, not.

Popular and political constitutionalism's critiques emerge from within liberal democracy.[78] They only oppose liberal constitutionalism in the narrow sense while remaining within the ambit of liberal constitutionalism in the broad sense. While unequivocally accepting both sides of "the defining tension of modern constitutionalism",[79] they nevertheless aim to reinforce the democratic component of representative democracy by democratizing constitutional law. They are versions of *democratic constitutionalism*.[80] On the other hand, this is exactly what *some* versions of (democratic) populism also aim for.[81] At the same time, other versions of (authoritarian) populism extend their constitutional critique to liberal constitutionalism in the broad sense, and therefore to liberal democracy as such.[82]

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75 Liberal constitutionalism in that narrow sense tends to overemphasize the limiting aspect of constitutionalism, while downplaying its enabling aspect; see Scott 2013.

76 See Post & Siegel 2009.

77 Scheppele 2019.

78 Which, however, need not be identified with modern representative democracy as we currently know it. As Hélène Landemore has recently shown, alternative understandings of liberal democracy are not only thinkable but also feasible. Indeed, her notion of "open democracy" with its emphasis on popular rule is closely related to democratic constitutionalism (Landemore 2020).

79 Walker 2019: 519.

80 See Bellamy 2007: ch. 6 on "the democratic constitution."

81 See *supra* fn. 8.

82 Bugarič 2019b; Halmai 2019; Scheppele 2019.

Of course, as there are varieties of populism, there are also varieties of popular or political constitutionalism,[83] which, although often associated with progressives and the political left, may also appeal to the political right.[84] Nevertheless, there is a tentative connection between at least some versions of inclusionary and emancipatory left-wing populism and those versions of popular or political constitutionalism that are inspired by a radical-democratic vision. There is a well-known quote by Roberto Unger that forcefully captures exactly that kind of connection.[85] Unger identifies as one of the "dirty little secrets" of contemporary jurisprudence its "discomfort with democracy" and the "fear of popular action:"

> The discomfort with democracy shows up in every area of contemporary legal culture: in the ceaseless identification of restraints upon majority rule, rather than of restraints upon the power of dominant majorities, as the overriding responsibility of judges and jurists; in the consequent hypertrophy of countermajoritarian practices and arrangements; in the opposition to all the institutional reforms, particularly those designed to heighten the level of popular political engagement, as threats to a regime of rights; in the equation of the rights of property with the rights of dissent; in the effort to obtain from judges, under the cover of improving interpretation, the advances popular politics fail to deliver… Fear and loathing of the people always threatened to become the ruling passions of this legal culture (Unger 1996: 72-73).

Popular and political constitutionalism's critique of excessive juridification is a response to exactly the kind of concerns that Unger voices. This *democratic* critique is marked by its anti-elitism, anti-professionalism, and anti-legalism.[86] The creation of constitutional meaning is not reserved for legal elites acting through formal-legal procedures; it is equally a matter for "ordinary" people acting within "ordinary" politics and through "ordinary" legislation.[87] There is a strong inclusionary and emancipatory element in this approach.

But there is also in (at least some versions of) progressive populism.

4 PROGRESSIVE POPULISM AND DEMOCRATIC CONSTITUTIONALISM IN GREECE 2015-2019

Following the global trend, in recent decades the Greek judiciary has more intensely used its power to review legislation. While Greece has no constitution-

83 Goldoni & McCorkindale 2019.

84 Gee 2019; Schmidt 2011.

85 The Unger quote appears in both Kramer 2004: 241-242, and Bellamy 2007: 1-2, 209.

86 A familiar counter-critique, most forcefully articulated by David Dyzenhaus, is that by questioning liberal constitutionalism, academics on the left undermine law's normativity and hence seem to embrace a Schmittian notion of "the political" (Dyzenhaus 2004). However, as both Tushnet and Kramer have shown (*supra*, section 2), popular and political constitutionalism is all about political actors generating constitutional meaning, hence consciously acting constitutionally, and thus not pure decisionism.

87 The adjective "ordinary" (politics, citizens, law, legislation etc.) appears 55 times in Tushnet 1999; 121 times in Kramer 2004; and 35 times in Bellamy 2007.

al court, the Council of State, the highest administrative court, has assumed a role vaguely resembling one, especially after 2011 when legislation enabled it to hear cases in pilot trials.[88] The delegitimization of the political system during the same period, due to the fiscal crisis, seems to have contributed to this trend. In this section I will discuss three high-profile constitutional cases decided by the Council of State and the reaction of the SYRIZA-led government (2015-2019).

Left-wing SYRIZA (the acronym standing for *Coalition of the Radical Left*) won national elections both in January and September 2015 on a strong anti-austerity and anti-establishment agenda. As an opposition party, it was exemplified as a case of left-wing populism.[89] Despite watering down its populist discourse while in government, SYRIZA nevertheless retained significant elements of an inclusionary and democratic populism, even if in a mild and low-key fashion.[90] The way the SYRIZA-led government responded to seminal constitutional judgments exhibits, I argue, the interplay between progressive populism and popular or political constitutionalism.

(a) Immigrants' citizenship case.[91] A 2010 statute, initiated by the center-left PASOK government, enabled second generation immigrants to obtain Greek citizenship.[92] In 2013, the Council of State found the statute unconstitutional and annulled implementing secondary legislation.[93] The judiciary thus deprived members of a minority of a right the legislature had previously given them. The decision was hailed by the coalition government then in power, whose main partner, the conservative *New Democracy* party, opposed immigrants' citizenship. Finding the previous majority's statute unconstitutional, the Council of State effectively aligned itself to political change.

A new statute, initiated in 2015 by the SYRIZA-led government, restored the immigrants' right to citizenship with only minor changes.[94] Equal rights for immigrants have been high on SYRIZA's agenda, related to its populist rhetoric of being a government for "the many," in contrast to the corrupt elites of the establishment that only really care about "the few".[95] This time, the judiciary didn't react, and the statute has been successfully implemented ever since.

(b) Pension cuts case.[96] Legislation enacted in 2012 induced significant pension cuts, which disproportionately affected higher-income pensioners.[97] Part

88 Law 3900/2010.
89 Stavrakakis & Katsambekis 2014.
90 Katsambekis 2019; Kioupkiolis & Katsambekis 2020.
91 See Christopoulos 2017.
92 Law 3838/2010.
93 Council of State judgment 460/2013.
94 Law 4332/2015.
95 Katsambekis 2019; Markou 2017.
96 See Kaidatzis 2021.
97 Laws 4051/2012 and 4093/2012.

of the second economic adjustment program agreed between the Greek government and its creditors, the cuts were imposed on top of previous cuts imposed by the first program. In a pilot trial decided in June 2015, the Council of State ruled that the 2012 cuts were unconstitutional.[98] It thus provided millions of pensioners with an entitlement to claim restoration of their pensions. The Council of State only found the cuts unconstitutional *after* the 2015 governmental change,[99] reflecting the SYRIZA-led government's stark opposition to economic adjustment and the ensuing austerity. Again, the Council of State effectively aligned itself to political change.

Soon thereafter the government succumbed and consented to a third program and a new austerity package, this time, however, offset by welfare policies for its most vulnerable victims. Restoring pensions under these conditions would require a massive re-allocation of budgetary resources, which would mostly affect the needy and poor. Consistent with its inclusionary populist claim to represent "the have-nots," the government chose not to restore pensions, in order to preserve its welfare policies. The Council of State judgment remained practically ineffective.

(c) Religious education case. In September 2016, the education minister of the SYRIZA-led government approved new religious class curricula that were interreligious and enabled all pupils to attend class.[100] Until then, schools provided Christian orthodox religious education, and non-orthodox pupils were excused from class.[101] In March 2018, the Council of State found the ministerial decision unconstitutional and annulled it.[102] Once again, the judiciary deprived members of a minority group of a right that this time the executive had given them.

The government's response was to simply defy the ruling. In 2017, having enacted a decision identical to the one annulled, the education minister refused to revoke it, and the new religious class curricula remained in force.[103]

What do these cases show us? First, despite widespread belief to the contrary, courts often *are* majoritarian institutions. In both the immigrants' citizenship and the pension cuts cases, the Council of State seems to have followed the electoral cycle. Second, and again, despite widespread belief to the contrary, the political branches often do a better job than courts in protecting minorities'

98 Council of State judgment 2287/2015.

99 In October 2014, the Council of State (judgment 3410/2014) found that the pension cuts were *not* unconstitutional but referred the case to the plenary session.

100 Ministerial decision 143575/2016.

101 Special religious education is offered in some parts of Greece for pupils of the Muslim minority and the Jewish communities.

102 Council of State judgment 660/2018.

103 Eventually, ministerial decision 101470/2017 was also annulled in October 2019 (Council of State judgment 1749/2019), when SYRIZA was no longer in government.

rights.[104] In both the immigrants' citizenship and the religious education cases, the Council of State deprived minorities of acquired rights. It was the political branches—the legislature and the executive—that created those rights in the first place. And they did so despite large parts of the electorate being hostile to equal rights for immigrants, or inter-religious education. The Council of State, then, might have actually ruled in favor of a majority in the population (again, this is majoritarianism, albeit of a different kind).

Third, courts do not just protect rights as a matter of principle, but also effectively shape and reshape public policies. The pension cuts case seems to be about enforcing pensioners' economic rights. These, however, require vast budgetary resources, which will inevitably reduce social spending on other policies. The Council of State decision effectively benefits people from the middle classes who are relatively better-off, as they at least get a pension, and they have privileged access to courts over and to the detriment of the poor and socially excluded.[105] Thus, it favors a privileged minority over unprivileged ones.

Perhaps more interesting is the way the political branches, "the people through politics"—here, a progressive populist majority—responded to constitutional judgments with which they disagree. What does that show us? First, it is perfectly possible for the political branches to *insist* on promoting rights, even in the face of judicial decisions that erroneously find rights-promoting legislation unconstitutional.[106] Moreover, the elitist preoccupation that politics is not suitable for protecting minorities' rights, which are inevitably dependent on the judiciary, might be plainly wrong.[107] Finally, committed political majorities may eventually get what they want despite an opposing judiciary: the constitutional judgments discussed here did not have, as a practical matter, any considerable effect.

All this seems like a manifestation of popular or political constitutionalism in practice,[108] practiced by a left-wing populist party in government, combining the rhetoric of being a government for "the many" with an inclusionary and emancipatory agenda for unprivileged minorities, be it immigrants, religious minorities, or the poor.[109]

104 For both assumptions, see Yowell 2018.

105 Kaidatzis 2021.

106 Tushnet 2015: 7-8.

107 See Tushnet 1999: 124, 127.

108 Admittedly, there is a thin line between refusing to enforce a judgment on constitutional grounds and just plainly ignoring it. The Greek government's stance was constitutionalist because it was informed by an alternative constitutional vision.

109 This agenda has also been manifested in laws 4356/2015 recognizing civil partnership for same-sex couples, 4491/2017 recognizing the right to change gender identity, and 4538/2018 allowing same-sex couples to foster children.

5 CONCLUSION

Popular and political constitutionalism entail a forceful critique of the dominant model of liberal (or legal) constitutionalism, and both share a common concern against the excessive juridification and depoliticization of society. They call for the democratization of constitutional law, considering its current elitism, professionalism, and legalism—that is, its insulation from politics and the people—as a source of peril. This kind of critique informs some varieties of left-wing inclusionary democratic populism. A prominent, even if rare example, is the mild and low-key populist constitutionalism of the SYRIZA-led government in Greece between 2015-2019, which seems to be informed by, and at the same time confirm, basic tenets of popular or political constitutionalism. The radical-democratic element contained both in (at least, some versions of) popular and political constitutionalism and in (at least, some versions of) progressive populism, seems to provide a means to fight authoritarian populism. It might not be a coincidence that, despite having been brutally affected by the fiscal crisis, Greece did not experience the rise of authoritarian populism as other parts of Europe did. The message, then, seems to be that in order to deter authoritarian populism, we need to strengthen the democratic component in liberal democracy. Some amount of "healthy" populism might be necessary to fight "bad" populism.

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Mark Tushnet*

Institutions for realizing popular constitutionalism

This essay discusses how several institutions might be designed to implement popular constitutionalism within a liberal constitutionalism frame. The institutions are (1) forms of direct popular legislation such as referendums, (2) imperative mandates or instructions to representatives that the representatives must follow, sanctioned by automatically removing a noncompliant representative from office, and (3) modern communications technologies used to elicit citizen views as an alternative to voting (or polling). As to referendums, it critiques arguments (1) that referendums can oversimplify complex policy options in ways that sometimes produce outcomes that are indefensible in principle, incoherent, and inconsistent with what the people would prefer after the kind of deliberation that occurs in representative assemblies, and (2) that referendums systematically, though not inevitably, threaten rights of minorities that liberal constitutionalism guarantees. As to imperative mandates, it argues that objections track those to referendums, and offers parallel responses. And as to modern communications technologies, it focuses on such concerns that they fail to take advantage of specialized knowledge, and argues that overestimate the degree to which specialists actually have specialized knowledge and underestimate the degree to which such knowledge is available within a population of ordinary people and observes that sometimes domains in which specialized knowledge really is required can be identified in advance and exempted from these mechanisms.

Keywords: popular constitutionalism, referendums, imperative mandates, deliberative polling, Icelandic constitutional reform

1 INTRODUCTION

According to one prominent view, lawyers' comparative advantage over political theorists (shared with some political scientists) is found in their understanding of institutional design: how the formal rules defining institutions affect how they operate, how particular institutions can be combined into an overall institutional system that achieves desired goals more effectively than any single institution can, and – to some extent – how considerations of power affect how institutions operate and interact. This expertise in institutional design contrasts with expertise in conceptual analysis.

For that reason this Essay is not a defense of popular constitutionalism as a version of or alternative to liberal constitutionalism.[1] It takes as a given the proposition that some version(s) of popular constitutionalism are compatible

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1 The "thin" (that is, undemanding) definitions of liberal and popular constitutionalism that animate this Essay are developed in more detail in Tushnet & Bugaric 2021.

with liberal constitutionalism, and discusses how several institutions might be designed to implement popular constitutionalism within a liberal constitutionalism frame. The institutions are (1) forms of direct popular legislation such as referendums, (2) imperative mandates or instructions to representatives that the representatives must follow, sanctioned by automatically removing a noncompliant representative from office, and (3) modern communications technologies used to elicit citizen views as an alternative to voting (or polling).[2] I assume that popular constitutionalism does not require direct popular participation in all forms of law-making including directly making fully enforceable laws, but allows for the possibility that representative government (of a deliberative rather than merely technocratic sort) will have a quite extensive domain.[3] Implicit in these preliminary comments is the proposition that not all proponents of popular constitutionalism (or, in some versions, not all populists) are anti-institutional in principle.[4]

2 REFERENDUMS

Legislation by the people themselves may be the cleanest example of popular constitutionalism. Scholarship on referendums[5] worries, though, about whether – or rather about the extent to which – direct popular legislation is compatible with liberal constitutionalism. I consider here what I believe to be the two most prominent concerns: (1) that referendums can oversimplify complex policy options in ways that sometimes produce outcomes that are indefensible in principle, incoherent, and inconsistent with what the people would prefer after the kind of deliberation that occurs in representative assemblies, and (2) that referendums systematically, though not inevitably, threaten rights of minorities that liberal constitutionalism guarantees.[6]

2 None of the institutions are essential to implementing popular constitutionalism, but their use is widespread enough to make examining them a valuable exercise. These institutions and others are the subject of a large scholarly literature. For overviews, see Elstub & Escobar 2019.

3 Specifically, representatives will not be confined to merely "working out the technical details" of policies adopted by the people through, for example, direct legislation, but will (over a reasonably wide range) deliberate over and choose fundamental policies, subject to post-hoc control by the people through elections.

4 For a defense of that proposition, see Tushnet & Bugaric 2021: ch. 12 (which also develops other observations in this Essay).

5 I use the term "referendums" to refer to all forms of direct legislation by the people. In U.S. law at least, direct legislation is sometimes done by means of what are known as initiatives, which – where they exist – have somewhat different prerequisites and consequences from referendums. Similarly with "referrals" in some European systems of popular legislation. These institutional details do not affect the general thrust of my arguments and for that reason I refrain from discussing them.

6 An additional feature – sometimes amounting to a "concern" – of referendums is that they can be the instruments of parties rather than the people directly, and more particularly can be

2.1 Complexity

The Brexit referendum illustrates many aspects of the first concern. The implications of one of the options – Exit – were unclear because Exit could occur in many ways. We can call this a problem of *complexity*: The people were asked to choose between a simple option and a complex one.[7] Even a referendum cast in "yes-no" terms can be complex. Consider for example a referendum on this question: "Should the following complicated tax law be adopted?" Complexity cannot be eliminated by offering the people several options: "Remain", "Exit on the following terms", and "Exit on these alternative terms", or the like. Formulating a complete set of options may be difficult or impossible. Even more, a referendum with more than two options makes the appearance of a Condorcet voting paradox possible, even likely if (as seems likely) the complexity is not characterized by those features of policy choices that make preference rankings single-peaked.

The idea of a voting paradox brings out one key problem with referendums on complex issues. Begin with the observation that policy proposals that are complex in this sense have numerous components. A person might prefer component A to component B only if the overall policy also contains component M. Some such preferences might be non-negotiable, so to speak. The "only if" is quite strong. Other such preferences might be weak. The voter's view is that having components A and M is desirable, but a policy that contains component A but not M is tolerable if the policy contains a substantial number of other components unrelated to A and M (and similarly for other people and other components).[8]

This phenomenon can occur with respect to ordinary legislation considered by a representative assembly. Sometimes it is said that a referendum presents people with a choice that cannot be amended or tinkered with to come up with a better option. In contrast, it is said, legislators can negotiate until they have

the instruments of chief executives seeking a quasi-plebiscitary personal mandate. I put this issue to one side because my interest here is in the possibility of referendums as an institution for realizing popular constitutionalism, not in the conditions that increase the likelihood that such a possibility will be realized. Qvortrup 2019, collects a number of extremely valuable essays on these matters. The literature on referendums is extensive. For a good relatively recent overview, see Contiades & Fotiadou 2017. Much in what follows echoes arguments made already in that literature.

7 For an overview of the problems associated with complexity, see Morel 2018: 149. Constitutions that exclude financial, budgetary, and tax issues from referendums (Albania, Azerbaijan, Denmark, Estonia, Greece, Hungary, Italy, Malta, Poland and Spain on the initiative of the citizens, Portugal, and North Macedonia) may reflect the concern that complex matters are unsuitable for submission to referendum. For a discussion of complexity in connection with two referendums in New Zealand in 2020, which would have authorized legislation decriminalizing cannabis (the referendum failed), the other of which dealt (ambiguously) with either assisted suicide or withdrawal of support for continued life (which passed), see McLean 2020.

8 There is another sense of complexity that I explore below – issues that are complex because any simple resolution implicates competing policy and value concerns.

before them a complex proposal that has a chance of being satisfactory to a majority. That contrast is overdrawn. Referendum proposers have an interest in allowing discussion and modifications that increase the proposal's chance of adoption once submitted. A representative can refuse to vote in favor a proposal that fails to satisfy a non-negotiable requirement; a voter can vote "No" on any proposal that similarly fails to satisfy her non-negotiable requirements. Representatives can make judgments that the proposal before them, while not perfect, is on balance better than the status quo; so can voters.

But, one might say, legislators have an opportunity to take successive votes. If a complex proposal is defeated on the floor because it is not on balance acceptable to a majority, representatives can retreat to the committee room and modify the proposal, then present the modification to see if it is acceptable – and they can do so repeatedly.[9] Referendums are one-shot events, with no opportunity for a do-over. This is not a necessary characteristic of referendums. In principle the people could be asked to vote repeatedly on variants of rejected proposals.[10] In practice, though, successive referendums on variants are unlikely.

This counsels in favor of imposing some conditions on referendums. Referendums on complex issues might be allowed only if the proposal put to the voters makes its components clear: When the ballot proposal says "Exit", it means "Exit on the following terms". In institutional terms, we would have to authorize someone to determine that a proposed referendum satisfied these or other requirements. In constitutional systems with a tradition of constitutional review or with a tradition of robust *ultra vires* review, the solution is simple: The courts, whether constitutional or administrative, decide whether a proposal satisfies the requirements of simplicity or clarity.[11]

A clear policy can be a bad one, of course, just as legislation can be bad. The solution to a bad statute is to repeal it. The solution to a referendum that

9 Note that this solution is unavailable when the proposal fails because it contains some component or components that are non-negotiably unacceptable to enough representatives or voters to defeat the proposal, and altering those components would make the proposal unacceptable to another group large enough to defeat it.

10 Note that this is different from the question of whether there should be in principle some limit on the ability to do over a referendum that *accepts* a complex proposal – the issue mooted in discussions of whether it would be proper to hold a second Brexit referendum. I discuss this issue separately.

11 Experience in the United States with rules that limit legislation or referendums to a "single subject," and experience in the United States and elsewhere with rules that prescribe different paths to adoption for constitutional amendments, revisions, and replacements shows that applying criteria of simplicity and clarity is not a simple task.
The Reference re Secession of Quebec, [1998] 2 SCR 217, held that a decisive majority on a clear question of unilateral secession would create a constitutional duty in the government to negotiate in good faith over the terms of secession. In response, Parliament enacted the Clarity Act, 2000 (S.C. 2000, c. 26). Its terms would (in the event) require interpretation and application by the Supreme Court, which the U.S. experience suggests might be troublesome.

generates bad policy is the same. We can allow the legislature to treat a policy adopted through referendum as it treats any other piece of legislation, subject to immediate revision or even repeal. Or, we can allow the legislature to modify a policy adopted through a referendum only after a prescribed period such as two years. Or, we can allow modifications of referendum-adopted policy only by a second referendum.[12]

Complex policies, and some simple ones, have other characteristics. They have to be integrated into the existing corpus juris, and they might fit badly or cause unanticipated consequences. A distinctively U.S. example is this: A referendum strictly limiting a legislature's ability to modify the existing property tax system may lead legislatures to increase sales taxes in ways that have troubling distributional effects, and it almost certainly will cause people to stay in the homes they own longer than is good for them.[13] Again in principle there is a simple solution to this problem when it arises. A referendum-adopted law directing the adoption of a policy with these characteristics should impose an obligation on the legislature to adapt the corpus juris to this new feature.[14] And, if and when unanticipated consequences appear, the overall policy-making system should be allowed to address those consequences as described above, by amending or repealing the enacted piece or legislation.

Suppose we do say that referendums should be allowed only if they offer a choice between two clear policies. Where a complex policy is placed before the public, the alternative should be "No" rather than another complex policy, because "forcing" a choice between two complex policies does not allow a voter to express a preference for the status quo or for another complex policy.[15]

12 Because referendum-adopted policies are not different in principle from representative-adopted legislation with respect to quality, I doubt that there could be a principled reason for barring successive referendums when (in the view of enough people) the referendum-adopted policy have turned out to be unwise.

13 A person might reject a job offer that has a greater long-term payoff than does her current job but would require that she sell her house and move to another city, because she discounts the future payoff excessively and then finds that retaining the benefit of a capped property tax exceeds the long-term benefit of the new job.

14 Here too referendum-adopted legislation is not all that different from representative-adopted legislation: Any significant piece of legislation can require changes in other laws, and good institutional design puts mechanisms for adaption in place.

15 Two semi-technical notes: (1) Some referendum systems in the United States allow the presentation of competing policies on a single ballot, in the form of yes-or-no votes on each separately, with rules determining which of two (or more) proposals receiving majority support becomes law. (2) The problem of a forced "false" choice can be mitigated by setting a threshold for participation for any successful referendum, thereby counting abstention as a "No" vote on both alternatives. A typical example is to say that a referendum can only become law if a majority of the registered voters voted on the proposal (and a majority of them voted for it). Because some voters believe voting to be a civic obligation, this probably cannot solve the problem posed by false choices.

We might be concerned that clarity as a solution to the problem of complexity would create a different problem. In politics clear and accurate policy descriptions might be misleading. This might be particularly true of complex policies presented to the public as a list of clear components. Ordinary people might focus on one or two of the components on the list and not appreciate how those components might interact with other components in ways that alleviate (or exacerbate) the voters' concerns. Even more, political leaders might make one or two components the focus of their campaigns for or against the referendum, again with misleading effect.

One can imagine institutional responses to concern about misleading clarity. In the United States presumptively disinterested officials are sometimes charged with developing neutral and accurate descriptions of ballot propositions that are distributed to the public in advance (and that sometimes appear on the ballot as well). The British Electoral Commission did force a change in the Brexit referendum's wording to make it more neutral and clear, though of course the outcome suggests that attempting to purify the questions put to the voters might fail.

More significant, though, the concern about misleading clarity rests on assumptions about voter incompetence. And popular constitutionalism rests on the contrary assumption, that ordinary people are generally competent (or, perhaps more accurately, are at least as competent as the representatives they elect) in making political decisions. Perhaps critics of referendums could develop more precise accounts of specific forms of voter competence that would be consistent with the assumptions of popular constitutionalism, accounts that would allow some but not all referendums on complex policy questions.

2.2 Referendums on rights

Should simplicity be another criterion for referendums? Consider a referendum on the question, "Should the legislature guarantee a minimum income of at least X – adjusted for inflation – to every person residing in the nation?"[16] This proposal is clear. It is not simple, though. It implicates complicated policy questions: How much less (if at all) will people work if guaranteed a minimum income? What will the effects on economic growth be? It also implicates moral questions: What duties do we have to non-citizen residents, whether long-term or otherwise?

The same concerns about voter competence arise in connection with the policy dimension of this and similar proposals. The moral dimension is some-

16 The example is adapted from a referendum in Switzerland. A similar example can be found in a 2015 Greek referendum. Syriza proposed a referendum asking the Greeks to support Syriza. In fact, the referendum endorsed an austerity program proposed (or imposed) by external financial agencies, or as some put it, whether Greece would remain in the European Union. For a discussion, see Fotiadou 2017.

times thought to raise different concerns. The problem is not that some moral questions are complicated. Rather, the problem is something akin to self-interest: Voters asked about the rights of non-citizens are, it is suggested, likely to undervalue those rights relative to their own rights or, more important, their own interests.[17]

This concern is brought home most clearly in suggestions that it is inappropriate to subject questions about individual rights to referendums.[18] John G. Matsusaka's conclusion from his review of referendums in the United States is that "[i]nitiatives do pose a threat to minority rights, but … the threat is not immense."[19] The most common example from recent history is the Swiss referendum approving a limitation on the construction of minarets. Yet, we should keep in mind the equally recent Irish referendums on marriage equality and abortion (and the Australian quasi-referendum on marriage equality) in thinking about the "no referendums on individual rights" proposition.

These examples suggest that we could benefit from a more differentiated analysis. I make a stab at providing one in what follows.[20]

First, I have found it useful to distinguish between what I call the core of an individual right and that right's specifications.[21] The core consists of the general and typically quite abstract statement of the right – "freedom of speech" or "freedom of religion" – coupled with uncontroversial examples (paradigms, we might call them) of the right's violation. So, for example, the core of freedom of speech uses the paradigmatic example of seditious speech – speech critical of government policies that is said to undermine public confidence in the government and, for that reason, to impair the effective implementation of the criticized policies. The core of freedom of religion uses the paradigmatic example of a government policy prohibiting religious believers from engaging in practices they regard as central to their religious commitments.[22] Specifications arise

17 This formulation assumes that interests are categorically less important than rights, though not that sufficiently weighty interests can justify impairments (a technical term in the relevant legal discourse) of rights.

18 For an overview of the problems associated with rights-related referendums, see Fatin-Rouge Stefanini 2018.

19 Matsusaka 2020. Drawing on a comprehensive data set of referendums in U.S. States, Matsusaka (2020: 209-210) observes that referendum outcomes tended to favor women and be adverse to marriage equality and minorities disadvantaged by English-only laws.

20 The issues taken up next raise difficult and deep questions about the proper analytic structure for thinking about fundamental rights, about which there is of course an extensive literature. Because this Essay is not the place for a detailed engagement with that literature, I simply state my positions on the relevant questions. For somewhat more extended discussions that do engage the literature, see Tushnet 2016.

21 I have thought about this distinction more in connection with freedom of expression, but I am reasonably confident that it applies more generally.

22 For accuracy, I add that both examples involve presumptively impermissible government actions but that sometimes the presumption can be overcome. Much of the law associated with

when government policies trigger concern that the right *might be* violated in circumstances not covered by the core.

I have two thoughts about the implications of the core-specification distinction. First, the government policies associated with specifications typically serve non-trivial public interests in a not entirely unreasonable way. Consider restrictions on tobacco advertising: In the language that prevails in comparative constitutional discourse, such restrictions impair the advertisers' free speech interests in the service of important public health goals. One might reasonably believe that specifying the content of a right of free expression so as to allow such restrictions is reasonable – though of course one could reasonably take the converse view.

In these and similar cases, we can see how reasonable people could disagree about whether the government policy does indeed violate the right. It is not clear to me that ordinary people are incompetent or likely to be biased in evaluating whether a referendum threatens rights in a case of specification. Or, more narrowly, perhaps we can make progress in figuring out the difference between the Swiss minaret referendum and the Irish referendums by thinking about why ordinary people might have been biased in the first but not the second and third cases.[23]

Second, I speculate that violations in the core result at least as much from self-interested decisions by political leaders – from representative government – as from self-interest among the general population. This is clearest with respect to sedition law: Political leaders who develop policy are likely to be especially sensitive about criticisms of their policies, perhaps more so than the voters they represent. For that reason they may be more likely to adopt a sedition law than would the people through a referendum. Similarly, John Hart Ely's account of the proper bases for constitutional review refers to the fact that the "Ins" are sensitive to challenges from the "Outs". And here he rather clearly had legislators in mind, not the voters they represent.

This second thought might also lead to a more refined account of the circumstances under which referendums implicating questions of individual rights might be appropriate – roughly, in cases involving specifications rather than core violations. I note one difficulty, though: Political leaders might see political advantage in promoting a referendum on a specification even if ordinary people on their own would not put the referendum process in motion.[24] This might suggest some sort of institutional response, through the development of some limits on the role political leaders can play in referendum campaigns.

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these examples deals with the standards for determining when the presumption is overcome.

23 The simple answer – bias against historically despised minorities – is placed in question by the Irish examples.

24 Will Partlett's (2012) work on president-led referendums in central Asian post-Soviet nations is particularly instructive here.

What such limits (consistent with ideas about freedom of expression) could be is unclear to me, though.

2.3 Conclusion: The domain of referendums

As noted in the Introduction, popular constitutionalism does not require the comprehensive substitution of policy-making by the people directly for policy-making by representative assemblies. Put more directly: Referendums will deal with only some areas of public policy. In my view we are unlikely to develop substantive criteria for identifying those areas. Rather, the domain of referendums will be determined by the people's views about which policies are important enough to be put to the people (and perhaps secondarily, the people's views about which of *those* policies is tractable to adoption by referendum).

3 IMPERATIVE MANDATES (INSTRUCTIONS)

Some constitutions prohibit imperative mandates or binding instructions from voters to the representatives they elect. Such mandates, in their strongest form, are self-enforcing: A representative who votes against instruction loses her seat in the legislature.[25]

Imperative mandates come in two forms. One is connected directly to ideas of popular constitutionalism. Constituents instruct their representatives to cast specific votes on identified policies. Call this a candidate-focused imperative mandate. Importantly, such mandates are binding (enforceable institutionally) while (ordinarily) party platforms are not: Party platforms typically identify policies that party leaders pledge to do their best to implement but departures from a platform by party leaders and as a result by party members are frequent and are subject only to sanctions by voters in succeeding elections.[26]

The other form of the imperative mandate is less directly connected to popular constitutionalism. In this variant political parties develop platforms, candidates who run on the party platform promise to vote only as the platform requires, those who are elected are expelled from the party if they break that

25 More precisely, such mandates are enforced by parliamentary institutions whose decisions either are not reviewable by the courts or are reviewed according a quite generous standard of "good faith" in determining whether the legislature properly concluded that the representative had defied an instruction.

26 A line of decisions by the Supreme Court of Israel holds that coalition agreements are enforceable contracts and that courts have the power to determine whether a government policy is inconsistent with a firm pledge in the governing party's platform. As far as I know, that court has not actually held that a government policy violated the coalition agreement or a platform pledge. And, again as far as I know, the Israeli Court is an outlier on this issue compared to other constitutional courts. For a discussion, see Barak-Erez 2002.

pledge and lose their seats. Voters support parties, which gives party leaders a base in the people that popular constitutionalism recognizes.

The most common form of this party-focused variant prohibits "aisle crossing", that is, the defection of as candidate from the party of which she was a member when elected, to some other party. Bans on aisle crossing raises complex questions about government stability, particularly in systems with proportional representation. A ban on aisle crossing, or more broadly imperative mandates tied to party platforms in toto, is generally thought to give party leaders too much power. I am generally persuaded by the arguments against party-focused imperative mandates. Those arguments are not as powerful against candidate-focused mandates, and the tighter connection between such mandates and popular constitutionalism justifies retaining them as part of the tool-kit of popular constitutionalism.

Critics offer several reasons that even candidate-focused imperative mandates are undesirable.[27] First, they are in principle inconsistent with the proposition that legislatures are deliberative bodies because they bar a representative from deliberative exchanges with respect to the instruction's subject. Not only is the representative barred from entertaining compromises,[28] the representative can respond to reasoned arguments against the policy at issue with the unreasoned assertion that her constituents dictate her vote.[29]

Second, critics argue that imperative mandates are undesirable on policy grounds. They prevent the legislators subject to them from bargaining over the issue, even when the legislator's constituents would in fact be better off if – in exchange for abandoning the required position – the legislator secured some entirely independent policy (giving up a position on legalization of marijuana, say, in exchange for a large program of grants to support drug-treatment programs).[30]

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27 For an overview, see European Commission on Democracy Through Law (Venice Commission) (2009).

28 In addition, depending on how the rule allowing instructions is interpreted, the representative might be barred from considering alternatives that might be more effective in accomplishing the policies sought by the representative's constituents.

29 The concern about deliberation is sometimes phrased as a requirement that legislators represent the nation "as a whole" rather than only the constituents who elect them. That version of the concern raises deep questions about foundational political theory that I do not intend to address here. I simply note my position that making sense of that view in a world characterized by political pluralism is extremely difficult, and all the solutions of which I am aware would not support the proposition that representatives should not reflect the views of only their constituents (one of the groups in the pluralist universe).

30 A related concern is that a representative under instructions might refuse to vote for a different policy when circumstances have changed in a way that makes the policy about which she has received instructions clearly unwise. This concern can be addressed by finding that voting "against instruction" in such circumstances does not trigger removal from office.

Many of the concerns about imperative mandates track those about referendums. They limit deliberation within the legislature rather than in the public discussion of a proposed referendum once it is placed before the people. They preclude or at least impair the adoption of more effective or more politically acceptable alternatives to the mandated policy. They can offer simple solutions to complex policies.

Candidate-focused imperative mandates are a partial substitute for referendums. A referendum generates enforceable policy for the relevant jurisdiction when it obtains the required vote in the jurisdiction as a whole. In contrast, imperative mandates and instructions generate single legislative votes for policies, which become enforceable law only when a majority of representatives are bound by the mandate or when enough uninstructed representatives join those bound by the mandate.

The first form of imperative mandate differs a bit from referendums: it is adopted at one time, enforced at another, and circumstances might have changed between those times. How significant that difference is in light of the fact that referendums are proposed and often voted on well before they are implemented (as was true of the Brexit referendum), is unclear to me.[31]

4 NEW METHODS OF ELICITING INFORMATION AND CONSENT

Referendums produce enforceable laws that reflect popular preferences. They identify those preferences with a binding vote. Other ways of identifying preferences provide valuable information without resulting in enforceable law. I have described elsewhere two requirements of what I call "modest constitutionalism": that policy be made through generally reliable methods of eliciting consent from citizens, either through reasonably free and fair elections or through other methods of consultation,[32] and that policy generally be responsive to the preferences of a wide range of citizens.[33]

Over the past generation scholars and practitioners of institutional-design have explored mechanisms for identifying popular preferences consistent with a popular constitutionalist version of these requirements of modest constitutionalism. These mechanisms are good candidates for inclusion in the set of

31 I thank an anonymous reviewer for identifying the possible significance of the temporal gap.

32 The possibility of non-electoral consultation is raised in Rawls 1993.

33 The qualification "generally" is important, because some liberal democracies will surely adopt policies that occasionally are consistent only with the preferences of a small, usually elite, group. A system with "veto points" that produce a systematic skew in policy might be a democracy if the skew is not too great. If such policies are pervasive, though, we would be tempted to refrain from calling the system of government a democracy.

institutions for implementing popular constitutionalism. I describe a few here and then identify some problems with them.[34]

4.1 Deliberative polling

Political scientist James Fishkin developed a technology he calls deliberative polling. In ordinary polling the pollster asks a large number of randomly selected people a series of relatively short questions, sometimes preceded by a tiny bit of information to set the context. A typical question might be, "Do you think President Trump's policies are helping the nation's economy, hurting the nation's economy, or aren't making much of a difference?" Answering such questions does not take much time.

Deliberative polling brings together a smaller group of randomly selected people for a longer period. A typical deliberative poll covers only a handful of issues, sometimes even just one issue. Deliberative pollsters give the respondents a packet of materials developed by experts describing the issues in some detail from a variety of political and policy perspectives. Then the respondents sit down to talk about the issues. Experience with deliberative polling strongly suggests that people who start out disagreeing with each other can hash out their differences and end up generally agreeing on how to deal with the policy questions they've been asked to consider.[35]

Deliberative polling has been used outside the United States to generate proposals on constitutional matters: Korean unification, schooling in Northern Ireland, whether Australia should become a republic. Perhaps because of the scope of the issues such polls have dealt with, their immediate impact on policy has been relatively small, though the results may have had some modest effect in shaping public debates.[36]

34 Levy (2018: 339), provides an overview of mini-publics, citizen assemblies, and similar mechanisms. A task force created by the mainstream American Academy of Arts and Sciences recommended expanding the use of citizens' assemblies, participatory budgeting and other modes of participatory decision-making, and virtual town halls as a means of "ensur[ing] the representativeness of political institutions." Commission on the Practice of Democratic Citizenship 2020: 41-47.

35 There is some evidence, though, that these deliberations can sometimes push people to polarized positions, apparently when there's a slight imbalance between those who support and oppose each other on issues that both sides care deeply about. Sunstein 2009.

36 See Center for Deliberative Polling (n.d.) . It may be worth noting that juries consist of randomly selected people who making legally significant determinations of criminal and civil liability, and some theorists have suggested that random selection ("sortition") could be used more widely. For example, we might use a representative random sample of the population as the electorate for a referendum rather than a jurisdiction's entire voting population. The Wikipedia entry on sortition has a useful compilation of proposals to use sortition to generate binding law.

4.2 Internet town meetings

Advised by some political scientists, a few members of Congress have conducted "internet town meetings." Instead of physically going to some city council room, the congressmember invites a randomly selected group of constituents to a virtual meeting over the internet. The format appears to foster substantially more thoughtful discussions of contentious issues than in-person town meetings do. Many more constituents can participate, since they do not have to travel to a town hall's physical location, and the congressmember can hold many more internet town meetings than physical ones because the logistics are much simpler.[37]

4.3 Participatory budgeting

Participatory budgeting begins with neighborhood assemblies, usually of volunteers (but other modes of choosing members of these assemblies exist).[38] Each assembly discusses the members' priorities for spending their portion of the city's budget and can recommend not only priorities but amounts to be spent. The recommendations from the neighborhood assemblies are sent forward to a city-wide citizen assembly, composed similarly. That assembly takes the recommendations and determines priorities and budget allocations for each neighborhood and for the city as a whole. Typically these last determinations are simply advisory to the city's governing authorities, although in principle they could be binding, at least if the assemblies also could determine where the revenue to support spending programs would come from.[39] The model of participatory budgeting can be extended to regional and even national budgets.

In late 2019 the parliament of the Brussels region in Belgium adopted regulations embedding a combination of deliberative polling and participatory budgeting in its structure.[40] The regulations authorize the creation of a "parliamentary committee" consisting of fifteen members of parliament and 45 randomly selected citizens to develop policy proposals on specified topics.[41] The committees are to meet for four days of hearings and deliberations, on topics proposed by citizen petitions. The parliamentarians and the citizen-members can generate separate policy proposals, and if so both are voted upon separately – the citizen proposals in secret, the parliamentary ones in public. Proposals

37 Neblo, Easterling & Lazar 2018, describe these town halls.

38 The literature on participatory budgeting is extensive. For discussions with references to the literature, see Ganuza & Baiocchi 2018: 77; Russon Gilman 2016.

39 For a description of participatory budgeting, see Baiocchi 2003.

40 My presentation relies on Reuchamps 2020.

41 The citizens are selected in two stages: a group selected at random from the entire population is invited to participant, and then a subgroup is drawn from those who respond affirmatively to produce what Reuchamps (2020) describes as "a diverse and representative selection" with respect to several demographic characteristics.

that receive majority support are reported to the parliamentary members, who have six months to produce a report describing what has been done with the recommendations, offering "detailed reasons" for its actions. Among the possibilities, of course, is rejection by the Parliament as a whole.

4.4 Drafting a new constitution for Iceland

For about a decade, a "crowd-sourced" constitution has been on Iceland's political agenda. Outraged at the political elite's failures, which culminated in a disastrous financial crisis in 2008, Icelanders developed an innovative process for drafting a new constitution.[42]

The first step was an assembly convened by a nongovernmental organization. The assembly brought together 1,200 people chosen at random from the national census list and 300 representatives of Icelandic companies and other groups, to discuss national problems. Ultimately the assembly recommended adoption of a new constitution. The national legislature then set up elections for a "constitutional assembly." Anyone could nominate himself or herself to sit in the assembly, but people currently serving as political party officers or holding political office were disqualified from serving. More than five hundred people ran for the twenty-five seats.

The constitutional assembly operated as a standard constitutional convention, except that it was internet-accessible. Everything it did was almost immediately available on the internet, and it accepted suggestions from the public for constitutional provisions – the crowd-sourcing part of its design. Some of these suggestions were of course lunatic, and some bolstered ideas that were already on the agenda, but the assembly took some crowd-sourced suggestions seriously.

The public endorsed the constitution the assembly came up with, in a referendum that was technically only advisory to the legislature. The legislature in turn stifled the proposal, partly because Iceland had recovered well from the financial crisis and partly because the legislature's political parties had opposed rewriting the constitution from the beginning. Elections in 2017 revived the idea of adopting the new constitution, because of the new Pirate Party's electoral success. Though that party was ultimately left out of the coalition government, its advocacy of constitutional reform kept the issue alive.[43]

As solutions for our constitutional ills, all of these techniques have obvious drawbacks.[44] People have questioned, for example, the neutrality of the expert

42 For descriptions of the Icelandic process, see Ólafsson (n.d.) and Gylfason 2018.

43 Ireland has used a similar process, though one slightly more controlled by the government in place, to generate proposals for constitutional reform, including the removal from the constitution of a ban on abortion. Carolan 2015.

44 For a more detailed discussion of drawbacks associated with participatory institutions, see Tushnet & Bugaric 2021: ch. 12.

briefing material presented in deliberative polling, and the possibility of getting a truly representative group of people to take the time to participate. The Icelandic constitutional process generated a document that, according to some constitutional experts, had some technical flaws. It has not yet been concluded because, by design, it bypassed the political parties whose support was important in moving the project forward. Notably, though, a new party saw political advantage in backing the proposal, and the new party's success has kept the project alive. No matter what, though, Iceland is an unusual case because the nation's population is under 350,000.[45]

I address in a bit more detail one objection to these techniques. Almost by definition they do not give special weight to those thought to be most knowledgeable about specific matters. It might be thought undesirable for the institution that makes binding policy on matters requiring special knowledge to identify and elaborate good policy to lack guarantees of access to such knowledge.

Popular constitutionalists have several plausible responses to this objection. First, it overestimates the degree to which specialists actually have specialized knowledge and underestimates the degree to which such knowledge is available within a population of ordinary people. Second, it underestimates the degree to which the results counseled by specialized knowledge should often be modified in light of concerns that ordinary people can bring to the table at least as effectively as specialists can. Third, sometimes domains in which specialized knowledge really is required can be identified in advance and exempted from these mechanisms.[46]

Perhaps most important, though, the objection from specialized knowledge is in deep tension with the premises of popular constitutionalism and so with the enterprise of describing institutions that can implement popular constitutionalism.

5 CONCLUSION

Larry Kramer's discussion of popular constitutionalism in the United States stresses the role of what was known as "the people out of doors" – groups of people demonstrating (as "mobs") in support of their accounts of constitutional meaning, coordinating their actions with party leaders.[47] The work of Reva

45 I note, though, that some versions of participatory budgeting have been implemented in cities and provinces with populations much larger than Iceland's. For a worldview overview as of a decade ago identifying some such cases, see Shah 2007.

46 A common example here is the implementation of military strategy: Once the people have chosen the goals they seek through the use of military force, specialists in military operations implement those goals without further input from the people.

47 Kramer 2005.

Siegel and Robert Post stresses the role of social movements in generating constitutional meaning.

Neither of these important accounts of popular constitutionalism in action deals with other institutions – relatively persistent modes of cooperative behavior – that can be the vehicle for popular constitutionalism on a regular basis. Political practices such as those discussed in this Essay set out ways in which institutions can be designed to implement popular constitutionalism. There may well be others already operating, but I hope that this paper gives some flavor of the enterprise of designing institutions for implementing popular constitutionalism.

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Roberto Gargarella*

From "democratic erosion" to "a conversation among equals"

In recent years, legal and political doctrinaires have been confusing the democratic crisis that is affecting most of our countries with a mere crisis of constitutionalism (i.e., a crisis in the way our system of "checks and balances" works). Expectedly, the result of this "diagnostic error" is that legal and political doctrinaires began to propose the wrong remedies for the democratic crisis. Usually, they began advocating for the "restoration" of the old system of "internal controls" or "checks and balances", without paying attention to the democratic aspects of the crisis that would require, instead, the strengthening of "popular" controls and participatory mechanisms that favored the gradual emergence of a "conversation among equals". In this work, I focus my attention on certain institutional alternatives – citizens' assemblies and the like- that may help us overcome the present democratic crisis. In particular, I examine the recent practice of citizens' assemblies and evaluate their functioning.

Keywords: democratic erosion, checks and balances, popular controls, democratic assemblies

1 "DEMOCRATIC EROSION": A PREVIOUSLY UNIDENTIFIED SPECIES?

It was not that long ago that prominent social scientists were expressing renewed hope—even a certain optimism—for the prospects of improved democratic participation. Benjamin Barber published a book on "strong" democracies that found immediate success;[1] Jane Mansbridge had published another the year before that also praised participatory democracies.[2] In recent years, however, the mood seems to be trending in the opposite direction: book upon book, article after article now address the democratic crisis. The literature draws attention to the phenomenon of "democratic erosion": *democracies that no longer die in one fell swoop, but rather slowly, bit by bit*. Instead of succumbing from one day to the next to massive riots or a military coup, democracies nowadays are dismantled piece by piece from within. Through small, outwardly legal moves, democracies are emptied of their representational legitimacy and turn into their opposite. From the government "of the people, by the people,

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1 Barber 1984.

2 Mansbridge 1983.

and for the people," we find ourselves with a government "of a few, managed by a minority, and for the privileged."

Indeed, in recent years, the entire front line of political scientists and many of the best constitutional scholars have begun writing about the same subject: democracy is going through its darkest hours; democracies are failing; democracies are not immortal. Here are a few illustrative examples:

(i) Noted political scientist Adam Przeworski wrote on the subject for several years. He published a book on the issue entitled *The Crisis of Democracies* that speaks of "eroded" democracies dismantled gradually from within. He referred to the phenomenon as democratic backsliding.[3]

(ii) Constitutional law scholar Cass Sunstein published a book on the fall of democracy in 2018, wondering if the phenomenon—generally associated with exotic or far away countries—could also occur in the United States, the cradle of constitutional democracy: "Could it happen here too?", he asked.[4]

(iii) Another renowned constitutional scholar, Mark Tushnet, along with other colleagues, edited a work on "constitutional democracies in crisis".[5]

(iv) David Van Reybrouck advocated for more direct forms of democracy in addition to the traditional form of elections, and famously spoke of "democratic fatigue".[6]

(v) The comparative legal scholar Tom Ginsburg, together with his colleague Aziz Huq, published one of the most notable and informed books of the period, entitled *How to Save a Constitutional Democracy.* (The book's original title was *How Constitutional Democracies Die*, but, on the advice of Supreme Court Justice Judge Ruth Bader Ginsburg, he gave it a more optimistic touch).[7]

(vi) Another author working in comparative law, David Landau, wrote about rising "abusive constitutionalism".[8]

(vii) Together with Daniel Ziblatt, the political scientist Steven Levitsky published one of the most successful books written in the period, on the question: *How Democracies Die*.[9]

3 Przeworski 2019.
4 Sunstein 2019.
5 Graber, Levinson & Tushnet 2018.
6 Reybrouck 2017.
7 Ginsburg & Huq 2019.
8 Landau 2013.
9 Levitsky & Ziblatt 2018.

What explains the sudden appearance of so many works on the democratic crisis—its erosion, its regression, its abuses, its dismantling, its fall, its death, its fatigue—in such a short period, from so many of the best scholars of our time? I would like to reflect a little on the significance of the phenomenon. To do so, I proceed as follows. First, I characterize the kind of "democratic crisis" that we are presently facing and distinguish it from the "crisis of rights" that followed the end of the Second World War. Second, I highlight the presence of a "diagnostic error" in the analysis of the "democratic crisis" or "democratic erosion" that we presently face. I suggest, in this respect, that legal and political doctrinaires have been confusing what we have, namely, a crisis that affects our self-governing capacities, with a (mere) crisis of constitutionalism (i.e., a crisis in the way our system of "checks and balances" works). Expectedly, the result of this "diagnostic error" is that legal and political doctrinaires began proposing the wrong remedies for the democratic crisis. Usually, I claim, they advocated for the "restoration" of the old system of "internal controls" or "checks and balances", without paying attention to the democratic aspects of the crisis that would require, instead, the strengthening of "popular" controls and participatory mechanisms that favored the gradual emergence of a "conversation among equals". Third, I focus on certain institutional alternatives - citizens' assemblies and the like- that may help us overcome the present democratic crisis. In particular, I examine the recent practice of citizens' assemblies and evaluate their functioning. At the end of the paper, after having presented the many virtues that distinguish the recent practice of citizens' assemblies, I present some critical reflections, which suggest that we be more cautious in terms of the optimism that citizen assemblies can generate.

2 TOO SLOW A DEATH: FROM THE CRISIS OF RIGHTS TO THE CRISIS OF DEMOCRACY

From the crisis of rights … A first comment on the growing thematization of the "slow death" of democracy, one that does not question the central essence of the arguments advanced in that body of literature, relates to the shift in the literature's focus. Until a few years ago, the dominant paradigm was distinct in that it focused on what we could call the "crisis of rights." Think of the events that led to the Second World War, the unexpected rise of fascism and Nazism, and the ensuing genocide. Since then, much legal reflection has revolved around protecting rights as a means to prevent another tragedy like the one that affected such a large part of humanity: atrocious political regimes, war, massacres, death on a scale never seen before. As I stated above, a good deal of legal energy has understandably been devoted, for decades now, to the protection of rights, including how to assign them legal protection, how to litigate for them, and de-

ciding how courts should respond to their violations. Many of the best authors of the time—such as Ronald Dworkin in the Anglo-Saxon sphere and Luigi Ferrajoli in the continental European and Latin American spheres—provided expressions of that moment: their theories revolved around the perceived need for the protection of rights. Another way to characterize their reflections would be as efforts at preventing genocide with the law's help. Law, as we know, has always played a part in with the worst dramas suffered by society. Humanity confronted the problem of genocide through conventions and international treaties establishing new rights and new local, national, regional, and international human rights courts to enforce them. The Universal Declaration of Human Rights was adopted by the UN in 1948; The American Declaration on the Rights and Duties of Man (which preceded the Universal Declaration and constitutes the first international agreement on human rights) was also approved in 1948 (the American Convention on Human Rights, or Pact of San José de Costa Rica, meanwhile, was signed in 1969); and the European Court of Human Rights was established in 1959.

In the 1970s, Latin America was gripped by the tragedy of violent dictatorships that regularly carried out "disappearances" and massive rights violations. This led to a powerful resurgence of the human rights movement, one that inspired many countries in the region to incorporate international law into their domestic order, usually assigning it a privileged status. In some countries, such as Argentina and Bolivia, human rights treaties were explicitly incorporated as constitutional norms. In other countries, such as Costa Rica and El Salvador, the treaties were conferred supra-legal hierarchy.[10] Some Constitutions, such as those of Peru and Colombia, included interpretative clauses in their texts that made explicit reference to international law. Others, such as Brazil's, referenced the existence of rights not listed, among which are the treaties to which Brazil is a party. Chile established special duties in the area of human rights and required all state organs to comply with them.

The rebirth of the human rights movement was of such magnitude that activists and militants from the left—the ideological descendants of Marx who had historically repudiated the rights discourse for more than a century—ended up jumping on the human rights boat too. It was a time marked by the drama of massive rights violations and the subsequent constitutionalizing of the human rights paradigm.

… *To the crisis of democracy*. That we spent a couple generations immersed in the paradigm of rights is not bad in itself, but it is a historical fact. It is a fact that had a significant impact on preventing violations of basic human interests that, at the time, seemed to be the rule or normal state of affairs. We had become used to it but we are not any longer.

10 Rossi & Filippini 2010.

Today, a different paradigm seems to prevail, that of the democratic crisis. As I understand it, there is widespread recognition that we are going through a new, very serious situation, which we have not thought about enough. This does not mean that the rights crisis is over: rights continue to be seriously violated in a wide range of contexts. However, the rights crisis no longer seems to be the most pressing crisis. *The perceived urgency is related instead to widespread estrangement from our political systems; distrust in politicians; institutions that either do not deliver what they promise or provide just the opposite; and public organs whose function appears to be the creation and consolidation of new privileges*. These are the days of the "Arab Spring"; of the Argentine "May they all leave!" ("*¡Que se vayan todos!*"); of "Occupy Wall Street" in the United States; of *Syriza* in Greece and of *Podemos* in Spain (two anti-party-political parties); the "yellow vests" (*gilets jaunes*) in France; the young pro-democracy activists in Hong Kong risking their lives; of bitter complaints against the political "caste" that has taken over our governments.

What I would like to add to the discussion of this "new" problem, the problem of democracy decomposing from within until it is too weak to stand, is also very much an "old" problem. Without going into detail, I will just recall the great political scientist Guillermo O'Donnell who spoke of the "slow death of democracy" for many years before studies of "democratic erosion" became fashionable,[11] and who wrote extensively about the "brown areas" of democracy and related issues starting in the late 1980s and early 1990s.[12]

Personally, I am tempted to go much further back than O'Donnell. The particular nature of problem about which we are thinking started much longer ago. To be clear, we are talking about the situation of democracies that do not crumble all at once but fall apart piece by piece while they are dismantled from within. I am interested in showing that the path that leads directly to our current "ills" starts at the very "origin" of our constitutional tradition. In fact, the Latin American hyper-powerful president habitually sought to undermine the controls on his own office. Coups d'état (the "sudden death") tended to occur when the institutional attrition (the "slow death") reached a point where faith in the virtues of institutions to express and channel citizens' demands was completely lost. Just because this "slow death" phenomenon is especially visible in many countries today (or that the tendency for regime change through coup d'état in Latin America appears to have "stopped"), or that in the United States we seem to be witnessing the development of "imperial presidencies", which began emerging decades ago, oriented towards throwing off the balance of the entire system of institutional control from within, does not mean that we are facing a new phenomenon. If anything, we are faced with a long-standing phenomenon

11 O'Donnell 2007.

12 O'Donnell 2010.

that has taken on particular salience in the current circumstances, perhaps because the consequences are so serious and foreseeable.

3 REPAIRING A SHIP AT SEA: RESTORING DEMOCRATIC CONTROLS

Faced with the current crisis and the phenomenon (recent or not, but in any case, now especially salient) of "democratic erosion," it is essential to carefully situate ourselves theoretically to properly recognize what is at stake and determine which adequate responses are available. My impression, however, is that while much of the dominant literature on the subject has the enormous merit of having identified the problem of our time—a problem directly related to democracy—it has been successful in terms of diagnosis and remedy. In what follows, I would like to focus on possible remedies.

An important branch of literature argues that the recent problem of democratic erosion originated in the gradual increase in the power of the executive branch, which led to the gradual dismantling of the system's internal control, and that it was helped along by a general lack of political commitment and participation by citizens. This perspective suggests the recovery of *internal controls* (through a more active and vigilant citizenry) as a way of responding and, most of all, the strengthening *external controls*, that is to say, the restoration of the democratic controls occasioned by the strong executive branches.

The refined and empirically supported work of Ginsburg and Huq argues along these lines. As we saw earlier, Tom Ginsburg and Aziz Huq argued that "the most formidable engine of erosion [of the entire institutional system] would be the presidency, which over time has acquired a plethora of more institutional, political and rhetorical powers beyond [those assigned by the Constitution]".[13] They also emphasized that democracy demands from its members "a certain political morality".[14] They explicitly maintained that "*in the absence of that political morality, nothing in the toolkit of constitutional designers will save constitutional democracy. Design, in short, can go only so far without decency*".[15] I want to emphasize that notable point: without a certain political morality, no tool will enable us to save these constitutional democracies.

Even more radically, Ginsburg and Huq argue that the essential change needed in terms of political morality does not have to do with "incentives or stratagems", but rather "with beliefs and preferences," which are transmitted within "families, schools, churches, mosques, synagogues, workplaces, and so-

13 Ginsburg & Huq 2019: 141. Emphasis added.

14 Ginsburg & Huq 2019: 173.

15 Ginsburg & Huq 2019: 141. Italics added

cial media networks".[16] They conclude: "Without those beliefs, without a simple desire for democracy on the part of the many, the best institutional and constitutional design in the world will likely be for naught". But this kind of position has very serious problems, regardless of the important contributions that Ginsburg and Huq may have brought to the discussion.

I have already referred to the error of considering as new a problem that, in truth, is not (similarly, there is also something problematic about thinking about the question in the light of political evolution in the United States, despite Ginsburg and Huq's explicit effort to avoid all manner of parochialism). There is, however, another significant problem with focusing on "political morality" and the terms with which they do it. The idea that the problem has more to do with "beliefs and preferences" than "incentives or stratagems" seems seriously wrong, especially since it ignores *the "endogenous formation" of character*. More specifically, the authors do not seem to appreciate the relationship between the alleged political apathy of the citizenry and a constitutional system with markedly elitist features, seeming to attribute the indifference instead to some choice or preference on the part of common people. Beyond the diagnostic error that this vision implies, I believe the approach ends up pointing us in the wrong direction by attributing to the citizens something for which the counter-majoritarian institutional system is originally responsible. Without intending to free anyone from their responsibilities (particularly citizens for greater or lesser degrees of "civic virtue," political participation, and respect for rights), I believe it is a serious mistake not to put the main focus of the analysis on the scheme built around principles of democratic mistrust, treating as "personal" a problem that is fundamentally "structural."

In this sense, it seems that citizens might rationally and sensibly choose to shun public affairs, tactically or temporarily withdrawing to a more private sphere, if what they encounter in the public sphere is neglect or aggression by those in government. If, as has happened so many times, active, constant public pressure, (such as the 2001 demonstrations in Argentina that went on for months in the aftermath of the sovereign debt crisis demanding "May they all leave!") does not translate into meaningful change in the political system (again, in 2001, "everyone stayed"), citizens may well decide not to return to the streets except when the circumstances become truly unbearable, extreme. Why mobilize if such pressure commonly turns out to be institutionally useless despite the extraordinary effort? Similarly, if political activism is systematically and historically translated into severe violence (as happened in Colombia where for decades publicly assuming a leftist political position seemed to make you a target for assassination), it makes sense for citizens to be extremely cautious before entering the public sphere. Politics cannot just be for martyrs. Likewise,

16 Ginsburg & Huq 2019: 245.

considering situations more similar to the United States, the institutional situation seems markedly unfriendly to popular participation. In the United States, there are very few incentives (and disincentives!) to vote; the political influence of wealth is overwhelming; matters of collective interest are systematically decided by courts; civic activism is forcefully deterred (through, for example, "strong-arm" security policies that (boastfully) criminalize minor misdemeanors); and so on. In short, the view that Ginsburg and Huq present seems to take the results of an institutional decision to penalize or render civic activism more difficult, as a question of (bad) "attitude" or (poor) "character"—ultimately, of personal morality—, rather than encouraging or facilitating it.

Returning to Ginsburg and Huq, the political proposal for the restoration of "internal controls" ("checks and balances"), also rests on problematic assumptions in at least three ways. The first is the serious diagnostic error that arises *when the problems of democracy and the problems of constitutionalism are superimposed, as if identical*. To understand what I am saying, imagine that one day, miraculously, we managed to restore the old machinery of "checks and balances," thereby putting an end to the widespread abusive practices of the executive, blocking it from future dismantling of control mechanisms, and so on. Even if we magically achieved those ambitious goals, a central part of our problem of "democratic erosion" would remain fundamentally intact. On the one hand, people would continue to feel alienated from power and disconnected from democracy. This is because the problems posed by the crisis of constitutionalism differ significantly from those posed by the crisis of democracy. In other words, people do not feel politically alienated because, for example, judges have lost control of the executive or legislators are too deferential to it, or because there are too few limits on presidential power. *We the People* feel removed from politics because we have very few opportunities to meaningfully participate in the political life of our communities. Others take control over our affairs, telling us which direction the policies that matter most to us will take.

Second Ginsburg and Huq's work involves *a minimalist vision of democracy*. In this minimalist vision, the relevant decision-making power—control of the levers in the Constitution's "engine room"—ought to remain in the hands of a few, while the citizens ought to content themselves with the role of a distant and passive "monitor" of their rulers. As the authors explicitly state, citizen intervention in politics is basically limited to periodic voting.[17] Against this vision, as I understand it, a different vision with Jeffersonian roots deserves to be defended (as I have tried to do). In this vision, citizens must recover not only the power to limit what others do in their name, but above all, recover decision-making

17 Ginsburg & Huq 2019: 244.

power over their affairs ("a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns").[18]

However, Ginsburg and Huq (as Robert Dahl or Adam Przeworski would, for different reasons) tend to subscribe to a thin Schumpeterian conception of democracy, according to which democracy is "an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote".[19] They may subscribe to such a view, above all, for descriptive reasons (to enable comparison of as many political systems as possible). However, in this way too, they naturalize and end up taking as their parameter a model of institutional arrangement that, as I understand it, is a central part of the problem: a "minimalist" vision that contributes to political apathy and aggravates "democratic erosion" (given the "disengagement" that it promotes, or the "commitment" that it does not encourage, in terms of the relationship between citizens and their representatives).

The third criticism that I want to make of Ginsburg and Huq's approach is related to the fact that it seeks—to use Fernando Atria's phrase—*to revive dead ideas*, and in this case "dead institutions" as well.[20] I mean that the institutional system as we know it presents irreparable structural deficiencies related to many issues but, in particular, to the system's incapacity or inability to represent and express the relevant points of view, demands, and needs of an extraordinary number of diverse groups. In this sense, even were the institutional system entirely populated by decent, competent, and "angelic" officials, it would be incapable of satisfying the basic functions expected of it. For proof, look at the enormous dissatisfaction and detachment from politics and sentiment of alienation and disenfranchisement in the most dissimilar of societies. Attempts like Ginsburg and Huq's are laudable and well-intentioned, but the attractive objectives they set seem to close our eyes to the fact that rebuilding a better system of checks and balances basically means "reviving dead ideas." The problem with their solution is not that it is impossible, rather it is futile. We might perhaps, with effort and enormous difficulty, restore the machinery of mutual controls between government branches, but this would not repair the most important breakdown: citizen disaffection, fatigue, and widespread certainty that the institutional system will not help or represent us, that it does not respond to our demands, and that it will continue, primarily, to benefit only a few. All this is also due—in a very central way—to deeper structural problems related, for instance, to the extraordinary difficulty of the existing representative structure to deliver on its original promise. The system was originally devised to represent us all, to serve as a "mirror" of society, to account for the enormous multicul-

18 Jefferson 1816.

19 Ginsburg & Huq 2019: 8.

20 Atria 2016.

tural diversity of our societies. If the stated objective (restoring the old system of controls) is the main remedy offered in response to the problem of "erosion," then the "democratic objection" remains intact.

4 THERE ARE ALTERNATIVES, AND THEY ARE WORTH TRYING

In recent years, we have seen evidence of the exceptional value and, above all, efficacy of concrete experiences of "deliberative assemblies" or "inclusive deliberation". The crisis unleashed by "democratic erosion" has led to the creation of problem-solving alternatives that involve much more inclusive public discussion in places like Australia, Canada, Iceland, and Ireland, among several others. I will specifically address and analyze these experiences in the next section. Here, I will only add that these experiences show in practice what we have already intuited from our theoretical discussion. If the procedure is organized properly, even in the context of extremely numerous, plural, complex, multicultural, diverse, and conflictive societies, inclusive debate is possible and, above all, worthwhile.

The following overview of just a few examples will support my affirmation while demonstrating their rich and extraordinary variety.

The Australian Constitutional Convention (1998). A first important precedent for the emergence of these new assemblies occurred at the 1998 Constitutional Convention in Australia, convened by the government of John Howard (1996-2007). Its mission was deciding whether Australia should become a republic, a decision that would then be put a popular vote. The Assembly included, for the first time, and notably, "common citizens" as active delegates of the convention (which is why some referred to it as a "People's Convention").

The Convention was composed of 152 delegates from all the different states and territories of Australia. Half of the members were appointed by the federal government (36 Commonwealth government appointed delegates and 40 members from the Australian parliaments) and the other half were elected by voluntary mail-in votes.[21] Here, unlike several of the cases that we will examine later, the designated citizens were chosen, not selected at random, and the proceedings were organized following the model of traditional parliamentary debates, rather than the model of deliberative mini-publics. The Convention ran from February 2nd to 13th, 1998, and was considered a great success in many ways because of, first of all, the significant public interest it generated, but also because of the involvement of ordinary citizens throughout the process. Numerous groups that had been completely excluded from the original 1890 constitutional discussions were thus able to participate in a crucial constitution-

21 Winterton 1998.

al debate. In the end, a national referendum rejected the Convention's proposal that Australia convert to a republic.

British Columbia Citizens' Assembly on Election Reform (2005). The Citizens' Assembly of British Columbia, Canada, had its origins, like many of the experiences that we are going to review here, in political crisis. It was spearheaded by a group of political leaders determined to change an imperfect electoral system, but who found themselves unable to overcome the resistance of established political authorities. The solution they found for this tense political situation was creating a Congress of Citizens, whose members would be chosen at random from the voter rolls. One man and one woman were chosen from each electoral district and the proposals formulated by the Congress would be subsequently put to a popular vote. After an initial "training" phase, the Assembly held more than 50 public hearings and received more than 1,000 written submissions, after which its members deliberated on the proposals. In October 2004, the Assembly recommended that the existing "first past the post" electoral system be replaced by a "single transferable vote" system. The proposal received broad support, but not enough to meet the supermajority required to pass.[22]

Ontario Citizens Assembly on Election Reform (2006). Shortly after British Columbia's remarkable example, the Canadian province of Ontario launched a similar proposal. In March 2006, a Citizens' Assembly on Electoral Reform was formed to review the existing electoral system used to choose the members of the Ontario Legislature. The Assembly met twice a month for 6 weekends in 2006. It also held numerous public meetings throughout the province and then took an additional 6 weekends to deliberate on the information gathered and to elaborate its final proposal. In May 2007, the Assembly issued its recommendation that the province adopt a "mixed proportional" representation system (like the system in New Zealand). The recommendation was defeated by a higher margin than the British Columbia initiative (In Ontario, 63% of the voters were against changing electoral systems).

The Dutch Citizen Forum (2006). The Burgerforum Kiesstelsel offers another interesting example of a citizen assembly. The Dutch Forum was created by the Ministry of the Interior and Kingdom Relations and charged with examining options for electoral reform in the Netherlands. To choose the 143 citizens who eventually participated, an initial pool was randomly selected from the country's electoral rolls. Of this initial sample, 1732 citizens volunteered to serve on the Forum. The final 143 were randomly selected from this pool.[23]

22 The recommendation had to be approved by a 60% majority of voters and simple majorities in 60% of the existing 79 districts. The latter requirement was met, but the general vote only obtained 57.7% of the required 60%.

23 However, to guarantee the representative character of the group, some additional characteristics were considered: the final composition had to reflect proportionally the inhabitants by

The Forum was innovative both in its composition (only ordinary citizens were eligible) and in the lottery process used to select its members, and differed significantly from the Canadian examples. Above all, the Forum had a national rather than a local (or provincial, in the Canadian context) dimension. Furthermore, in the Dutch example, the recommendations were presented to parliament, rather than put to a popular referendum. It must also be said that the discussions organized by the Forum did not attract significant general attention.[24]

The "crowdsourced" constitutional reform of Iceland (2009-2013). In the context of the crisis described at the beginning of this chapter, a process of constitutional reform was initiated in Iceland, driven "from below" by citizen grassroots organizations. The process began with a "National Assembly" formed to function as a representative "mini-public" composed of 950 citizens. Its purpose was to discuss the issues and values that should guide the reorganization of national institutions over the course of a single day.[25]

A Constitutional Assembly later chose its members from a group of more than 500 citizen volunteers, among whom professional politicians were ineligible. The final composition of the Assembly was made up of 25 directly elected delegates. The delegates were required to meet for three months (with an additional month if necessary) to discuss and then present a report on constitutional amendments. Among their first measures, the 25 delegates elected as representatives took made the decision to open the constituent discussion to the rest of the citizenry by accepting their input: anyone so interested could send their ideas or opinion to the representatives through social media and follow all the discussions from their home. The assembly's open sessions (they also held some closed ones) were filmed, recorded, and made available to the public.[26] The input gathered ended up totaling around 360 proposals and more than 3,600 comments on the different available platforms.[27]

The draft of the Constitution was finalized on July 29, 2011. On October 20, 2012 a non-binding constitutional referendum was held. The proposals were approved by two thirds of the voters (with around a 50% voter turnout). The proposals then moved to the Icelandic Parliament for ratification. The 2013

province, there had to be an equal representation between men and women, and the group had to be representative of the country in terms of age (de Jongh 2013, 196).

24 On December 14, 2006, the Burgerforum presented its final report to an outgoing People's Party (VVD) minister, recommending some minor changes to the electoral system. The Forum proposed a proportional representation system, in which voters would cast a vote, either for the party of their choice or for the candidate of their choice. In April 2008, however, the proposal was rejected by the ruling coalition that controlled the parliament.

25 They discussed issues such as democracy, human rights, transparency, public ownership of natural resources, more rigorous control over the financial system, etc.

26 Landemore 2014; Landemore 2020.

27 Landemore 2015; Landemore 2020; Suteu 2015; Suteu & Tierney 2018.

election, however, was won by opponents of the new Constitution, who ended up suspending the reform project.

The Irish Constitutional Convention (2012). Despite the rich comparative experience we have in popular and mini-public consultations, it is only in Ireland that we find an example involving two broad deliberative processes, one after the other. The first involves the Constitutional Convention of 2012-14, which became the main antecedent for the Irish referendum on gay marriage (2015). This first process was soon followed by another Citizens Assembly (2016-2018), which became the main antecedent of the 2018 abortion referendum.[28]

As in other instances of deliberative assemblies, the Irish Constitutional Convention grew out of crisis—in this case, the Great Recession of 2010. The Irish government organized the Convention with the intent of reforming its rigid 1937 Constitution. Although the Convention was inspired by the experiences of British Columbia, Ontario, and the Netherlands, it differed from those in composition, as it combined ordinary citizens and elected politicians. As in those examples, however, the citizens were randomly selected. The ordinary citizens comprised two thirds of the Convention, while the remaining third were elected members of parliament.

The Convention was meant to deliberate on several specific issues, including the overhaul of the electoral system and lowering of the voting age, the limitation of the presidential term to five years, gay marriage, and two proposals aimed at increasing the participation of women in politics and public life. These topics were discussed over seven meetings during 2013. The Convention carried on for fourteen months, meeting on average once a month. The recommendations of the Convention were advisory rather than declarative. However, the recommendation presented in the July 2013 report, to hold a popular referendum on gay marriage, acquired special relevance. That referendum was eventually carried out, resulting in the first popular consultation in the history of the country resulting from a process of public deliberation. The referendum to legalize same-sex marriage was approved in May 2015 with the support of 62% of the voters.

The Assembly of Ireland (2016). The 2016 Assembly was composed, as its direct antecedent had been, of 99 randomly selected members along with 99 substitutes. The selection process was coordinated by a market research company and a Supreme Court Justice, and looked at four demographic variants: sex, age, social class, and region of residence.[29] The Assembly functioned as a deliberative mini-public. It generally met all day Saturday and Sunday morning once a month. The members were divided into 7- or 8-people groups who sat around a circular table

28 Farrell et al 2019.

29 The Assembly was originally going to consider five topics, but it ultimately focused its energies on two of them, namely, abortion and climate change. These were the issues where the national government was facing the most intense international pressure.

with two other people: the facilitator who was in charge of ensuring the progression of the discussions as well as civil and inclusive conduct, and an assistant who took notes.[30] The assembly was, in general, very successful, and in the end resulted in a referendum held in 2018 that legalized abortion in the country.

The Constituent Assembly in Chile (2015). In 2011, extended student protests in Chile exposed the weak democratic legitimacy of the political class: the social discontent revealed itself to be extremely deep and unrelated to unfortunate circumstances. As a result of the social unrest, a "mark your vote" campaign was started in advance of the 2013 elections. It encouraged voters to mark their ballots if they were in favor of convening a Constituent Assembly to modify the Constitution, which after decades still carried deep imprints of the dictatorship that promulgated it in 1980. Surprisingly, more than 400,000 voters did just that. In response, shortly after being elected, President Michelle Bachelet announced in April 2015 that she was going to start a constituent process to replace the 1980 Constitution. The process began with an initial "pedagogical" phase to disseminate basic information to the public that lasted from November 2015 until May 2016. Then the most important "dialogue" phase began, involving discussions of reform proposals in citizen assemblies that were organized throughout the country. At the end of the process, more than 200,000 people had taken part in these very rich discussions. Following this stage, a group of experts was charged with "translating" the results of the public discussions into a formal constitutional project. The interesting, although ever conflictive process, was bogged down when it made it to the Congress, whose responsibility was determining when it would be put on the congressional agenda for debates and how those debates would be structured. At this point, a lethal combination of deadlines established by the 1980 Constitution itself, along with waning political will on the eve of elections that the opposition was poised to win, caused the reform project and everything that had led up to it to dissolve—including the citizen interest that the initiative had originally awakened.

5 THE ERA OF ASSEMBLIES: A SHORT INITIAL BALANCE SHEET

The preceding overview was only meant to illustrate an ongoing, evolving phenomenon that does not end with the experiences cited. It does, however, cover the cases most commonly cited as the most notable instances in this "early stage" of deliberative assemblies. Be that as it may, and despite the limited scope,

30 Farrell et al 2019: 116. A typical session consisted of, first, expert presentations (whose main ideas had been provided to the assembly members in advance); then presentations by civic organization; then a question and answer period and small group discussions; and finally individual reflection time when each participant wrote down their thoughts.

the sampled experiences can help us to better think about the phenomenon. In particular, the overview is useful because it provides a body of information that is not limited to the single case of Iceland. As I mentioned, the Icelandic experience may appear too exotic for us to make any relevant generalized inferences. With a broader panorama, the dimensions of the phenomenon can be better gauged, leaving us in a better position to evaluate it. From it, I propose the following initial assessment of deliberative assemblies:

5.1 Dismissing prejudices

First, the cases mentioned help us to dispel a long series of prejudices usually associated with new assembly initiatives. For example, a) the assemblies were not exclusively held in small, homogeneous countries like Iceland, but also in expansive, more populated and multicultural countries like Australia and Canada. Further, b) nor did the assemblies deal exclusively with abstract issues that were removed from most citizens' interests (think of the monarchy vs. republic question in Australia). They also addressed some of the most conflictive and socially divisive issues (leading to the referendums on abortion and gay marriage in Ireland). Furthermore, c) the debates were not limited to technicians, experts, and professionals. For the most part, they also included many participants without advanced degrees or professional qualifications.

5.2 Rethinking assumptions and concepts

Relatedly, I would like to highlight the relevance of these inclusive discussion processes to certain assumptions common in the social sciences regarding the limits of participation and collective deliberation, many of which were challenged to varying degrees. I would also like to draw attention to some of the established notions that these experiences invite us to revisit (many of which were also evident in our examination of the debate over abortion in Argentina).

5.2.1 Rationality and technical knowledge

One of the most extraordinary achievements of these processes involved public education. *Ordinary people quickly became experts on issues of public relevance through the deliberative assemblies*. After a simple process of information and collective discussion, the participants were often able to master complex technical content. The learning that occurs during these practices is very important, especially in an institutional context that often hinders or even actively restricts the participation of the electorate in the discussion of public affairs, alleging (for example) their *rational ignorance*.[31] The proponents of the public choice school

31 With the support of the public choice school of political theory. See, Pincione & Tesón 2006; Tullock et al 2002.

of political theory build their theory by appealing to citizen's lack of information and ("rational") knowledge, which they argue is based on their ("rational") lack of interest in and motivation to tackle complex issues, defined as issues not of their immediate and direct interest (a subject to which I will return). The truth is that the deliberative experiences examined helped to demonstrate the obvious fallacy of the public-choice school's surprisingly resilient assumptions: even in the absence of crucial interest in the subject matter, people can be motivated to participate and learn about complex and divisive issues, and even become, without major difficulty and years of training, "experts." The example of the Canadian Deliberative Assemblies is quite extraordinary in this regard: they dealt with nothing more and nothing less than "electoral systems"—perhaps the most unattractive, technical, and complex field within political science. And yet through the experience, ordinary people who did not have any strong interest at stake or technical training, became experts. All that was necessary was for the process to be well organized in an open, deliberative, and inclusive way.

5.2.2 Motivation

In addition, the Assemblies helped to disprove the widespread assumption in contemporary social science that most people are apathetic and poorly motivated to engage with complex political issues. On the contrary, I argue that people distrust party politics and resist actively participating in politics when they realize that their voices or contributions will not be taken seriously, or that their contributions will be considered only when they can be used to support what has already been decided by others. However, *when citizens recognize that their input will or might be seriously considered, they become motivated to play an active part in collective deliberation and make themselves heard in the interest of finding the best decision possible*.

5.2.3 Deliberation and the transformation of preferences

The Assemblies also confirmed the value of collective deliberation. To begin with, a significant number of social scientists have been skeptical of the value of collective deliberation for years: "Why invite people to argue"—the reasoning goes—"if no one changes their mind?" These scholars looked at public life from the point of view of established *interests,* and from there they minimized the role and nature of open deliberation and therefore resisted the idea vindicated by so many other authors that *deliberation is an appropriate means to favor changing preferences*.[32]

Second, and even more importantly, inclusive deliberation processes such as those examined proved untrue that *when faced with issues that involve one's self-*

32 Elster 1983, Elster 1986.

identity or deep beliefs, or where changing one's opinion implies turning on powerful institutions (like the Church), people are unable to change their opinions, even after exchanging them with others'. The evidence before us shows that even in countries with strong religious convictions, where the Church and other "traditional" institutions have enormous weight, countries with a significant rural population and medium to low levels of education, many people changed their position or qualified their initial positions without major difficulty after processes of broad public debate. We saw this, for example, in the case of two very Catholic countries, Ireland and Argentina, in the discussion over abortion.

Moreover, deliberative processes have also enabled us to appreciate that even—if not especially—in situations of economic crisis or deep, bitter rifts between political factions, it makes sense to continue discussing and investing in the exchange of perspectives, arguments, and reasons.

5.3 Participation and dialogue

At this point, I would like to highlight another relevant fact regarding deliberative assemblies. The organization and results of the deliberative assemblies discussed contrasts starkly with the two most common models of collective decision-making in our countries: *the model of elitist deliberation*, wherein the grand social "experts"—judges, scientists, or whatever their roles are—decide on behalf of everyone and without consulting the public; and *the model of participation without dialogue*—an increasingly common model in Latin America—where citizens are called to decide, abruptly, either yes or no, on issues of public interest, completely neglecting the entire process of discussion and mutual clarification.

5.4 Democracy and rights

There is another fundamental lesson to be learned from these assemblies. Specifically, the way in which they invite us *to critically rethink the relationship between democracy and rights*. I am thinking of the separation between the "sphere of rights" and the "sphere of democracy", which some academics and jurists propose as if they were two distant and untouched realms.[33] As we saw, a good part of contemporary legal doctrine, very particularly in the wake of the trauma and atrocities of World War II (Nazism, fascism, genocides, etc.), began to distinguish between both "spheres" in an effort to "shield" rights from majority interference, which it left under the strict control of experts or judges.[34] Discussions such as those around abortion and gay marriage in Ireland put

33 Ferrajoli 2008.

34 The philosopher Ernesto Garzón Valdés wrote a beautiful and controversial text at the time, in which he alludes to this question, under the title "Don't put your dirty hands on Mozart" (Garzón Valdés 1992).

these issues in a different light that, again, seriously challenges many dogmatic, premature, or unduly conservative statements on the matter. The fact is that *citizens are perfectly capable of respectfully, thoughtfully, and meaningfully discussing basic issues of fundamental rights without jeopardizing the legal construction of rights*. Not only can common citizens do it (again, the process—open, inclusive, without stark power asymmetries—of discussion and its organization is critical), but even more, common citizens have the right to discuss and make decisions on issues that involve rights. Rights are not pre-existing, alien "planets" in a distant orbit that need to be discovered by and entrusted to the "experts" (i.e., the judges).

5.5 Some remarks on institutional design

As a supplementary observation relevant to institutional design, assemblies like the ones reviewed offer some important suggestions and clues about how to avoid some of the major institutional problems of our time. I will point out three very interesting proposals that derive from what we have examined in the previous pages.

First, taking the Canadian assemblies as an example, I would like to call attention to the problem that was decisively recognized: the problem that arises when the officials ultimately in charge of deciding public issues are the people with the most personal interest invested in them.[35] In other words, we have a problem when we give elected officials interested in winning re-election, or extending their mandates, or reinforcing or expanding their competencies, the responsibility (with few or limited controls over them) to set the rules for elections. Hence the wisdom of encouraging—as was done in Ontario and British Columbia—citizens themselves to take part in the decision-making process.

Second, inclusive assemblies teach us about another important topic, namely, the politics of *presence*. In this regard, the experiences described above reaffirm a postulate that came up in a previous section: even though the real, effective "presence" of certain groups in an assembly—as we now know—may not guarantee adequate representation of the demands of the "represented" groups, it is also true, or it seems very clear, that the "absence" of certain points of view greatly increases the chances that the interests at stake (those of women or indigenous communities, for example) will be neglected, misunderstood, or misrepresented.[36] In my opinion, the inclusion of "ordinary citizens" in the debates made it possible to publicly discuss issues that traditional political authorities (for example, predominantly conservative, Catholic, male legislators) wanted to exclude from public debate (i.e., abortion and gay marriage).

35 Ferejohn 2008.

36 Phillips 1995; Kymlicka 1995.

Third, I would especially like to highlight the value of random selection as a means of selecting representatives for political decisions. In my opinion, doing so has been enormously successful on many different levels. In general, neither the public authorities nor the public found the use of lotteries in constitutional matters unfair or inefficient. In fact, in the evaluation phase after the experience, some of the processes reviewed received significant criticism regarding their design and operation (excessively crowded assemblies, for example, or too short a duration), but this was not the case in the use of lotteries. In particular, when lottery mechanisms were refined to make them more sensitive to geographic, gender, or racial distribution, they were largely deemed fair and efficient systems for the selection of representatives.

6 THE PROBLEM OF "CAPTURE": WHEN THE PAST HOLDS BACK THE PRESENT, AND THE OLD WILL NOT LET IN THE NEW

Before closing this review of promising and hopeful experiences, I would like to address a "realistic" note that contrasts with the optimism of the last few pages. The main point is that my emphasis on the potential of "inclusive assemblies" is warranted *despite the clear fact that many (certainly not all) of the experiences were eventually blocked* from achieving their highest goals: the Icelandic Congress, after regaining democratic legitimacy through a recent election, blocked the citizen project for constitutional reform (which also, in a very different framework, occurred in Chile); the Assemblies of Ontario and British Columbia produced remarkable results, in terms of both their technical quality and efficiency, but the referendums to put them into effect were not passed (largely by virtue, of course, of the super-majority requirements established by the government); the Dutch Forum was also "closed from above"; and the debate over abortion in Argentina fizzled after the bill under discussion was rejected by a few votes of senators from the most conservative or "feudal" provinces of the country.

All this reaffirms the concerns expressed centuries ago by the 19th Century constitutional thinker Juan Bautista Alberdi. Alberdi believed that special attention should be paid to the limitations that the prevailing legal context (and I would add, the distribution of power) tended to impose on the introduction and development of new reforms.[37] This dynamic is perhaps the most worrying element when creating or reforming constitutions in times of crisis. In many of the cases examined, in fact, we have found experiences where: i) a profound institutional crisis breaks out; ii) the crisis triggers initiatives favorable to the adoption of ambitious reforms; iii) the ambitious reforms are launched; iv) the

37 Alberdi 1981.

crisis is slowly brought back under control; v) the established authorities (including many of those considered responsible for the crisis) reassert themselves and begin to obstruct or undermine the reforms that had been implemented in response to the crisis.

Additionally, in certain countries (such as in Latin America), where the institutional frameworks tend to be fragile and the structure of controls less powerful than in more "legally developed" countries, government authorities have tended to benefit from those changing circumstances. On certain occasions, they have taken advantage of opportunities to make sure that the reforms are unattainable (for example, by preventing—through the legislative regulations that implement them—the effective application of any new constitutional clauses favorable to popular participation that come out of "inclusive" constituent assemblies), and in others they have used the support for reforms for their own benefit (for example, by expanding the powers of the executive, adding elements to allow their reelection, and so on).

Before concluding this study, I would like to draw attention to a crucial problem that is still pending, one obviously related to the potential of deliberative assemblies. I am referring to the fact that, even if a citizen assembly is convened in the place of the traditional decision-making bodies; even if its deliberations are fruitful; and even if—against the efforts of the established power—the reforms are actually passed (that is, they are not "vetoed," or rendered null by a lack of legislative implementation, or by any other traditional method for blocking them), the proposed reforms of the inclusive assembly—however powerful and promising—may still be frustrated, in practice, by the old powers. *This is because, alongside the "veto points" controlled by the political branches, lies the possibility of "invalidation" by the traditional judiciary*.

Let me offer a dramatic example of the problem. The widely participatory (and highly conflictive) constituent process that took place in Ecuador at the beginning of the 21st century ended with the promulgation of the 2008 Constitution. That Constitution became known worldwide for its "sumak kawsay" clause. The "sumak kawsay" principle of "good living" is taken from ancestral Quechua knowledge, which "establishes a vision of the cosmos different from the western vision, and that arises from communal, non-capitalist roots".[38] This principle was incorporated into the Constitution on the initiative of indigenous groups and advocates (like, for example, the prominent environmentalist Alberto Acosta, who presided over the Assembly sessions for most of their duration). If the adoption of this principle meant anything, it represented a firm decision to protect nature against the risks of capitalist devastation. Shortly after the Constitution's promulgation, however, both the National Congress and the Constitutional Court transformed these radical principles into empty prin-

38 Salazar 2015: 26.

ciples by privileging alternative constitutional interpretations, which allowed the government to carry out natural resource extraction activities with absolute impunity. In other words, the most "revolutionary" clause of all those incorporated into the Constitution as a result of the direct demand of the most disadvantaged groups in the community, was completely subverted as soon as the new Constitution was put into effect. In the end, we are facing the latest manifestation of old problems that worried Alberdi: how is the "past" able to hold back the "present"? how can the old block the "new"?

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Synopsis

Damiano Canale, Carlo Penco

Default reasoning and the law: A dialogue

SLOV. | *Privzeto sklepanje in pravo.* Privzeto sklepanje je pomemben vidik vsakdanjega življenja, ki tradicionalno pritegne pozornost številnih področij raziskovanja, od psihologije do filozofije logike, od ekonomije do umetne inteligence. Tudi na področju prava odvetniki, sodniki in drugi subjekti pravnega odločanja pogosto uporabljajo privzeto sklepanje. V tem prispevku poskušata filozof jezika (Carlo Penco) in pravni filozof (Damiano Canale) raziskati nekatere rabe privzetega sklepanja, ki jih pravna teorija komajda upošteva. Dialog obravnava zlasti pojmovanje dobesednega pomena, pričanje prič in problem nesoglasij med izvedenci v sodnih postopkih. Prispevek je mišljen kot neke vrste kresanje domislic, uporabno za prepoznavanje novih smeri raziskovanja, ki segajo v filozofijo prava, kognitivno psihologijo in filozofijo jezika.

Ključne besede: privzeto sklepanje, kontekst, izvedenci, dokazi, stereotipi, pravna razlaga, dobesedni pomen

ENG. | *Default reasoning and the law: A dialogue.* Reasoning by default is a relevant aspect of everyday life that has traditionally attracted the attention of many fields of research, from psychology to the philosophy of logic, from economics to artificial intelligence. Also in the field of law, default reasoning is widely used by lawyers, judges and other legal decision-makers. In this paper, a philosopher of language (Carlo Penco) and a philosopher of law (Damiano Canale) attempt to explore some uses of default reasoning that are scarcely considered by legal theory. In particular, the dialogue dwells on the notion of literal meaning, witness testimony, and the problem of disagreement among experts in legal proceedings. The paper is intended as a sort of brainstorming useful to identify new lines of research straddling philosophy of law, cognitive psychology and philosophy of language.

Keywords: default reasoning, context, experts, evidence, stereotypes, legal interpretation, literal meaning

Summary: A.1 Philosopher of language – B.1 Legal philosopher – A.2 Philosopher of language – B.2 Legal philosopher – A.3 Philosopher of language – B.3 Legal philosopher – A.4 Philosopher of language – B.4 Legal philosopher – A.5 Philosopher of language

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Synopsis

Yohan Molina

Norms, rationality, and relevance under the "guise of the good"

SLOV. | *Norme, racionalnost in relevantnost pod »krinko dobrega«*. Veronica Rodríguez-Blanco je v več delih predlagala pristop k normativnosti pravnih pravil in namernemu sledenju pravilom v okviru modela »krinke dobrega« namernega delovanja. Trdi, da pri tem pristopu Razovo pojmovanje pravne avtoritete implicira, da pravna pravila ne morejo biti racionalna vodila za namerna dejanja. Avtor trdi, da predlog Veronice Rodríguez-Blanco ne obravnava praktičnega pomena pravnih pravil. Vendar hkrati trdi, da šibka različica njene kritike Raza še vedno drži. Tako je ta razprava ustrezen okvir, iz katerega predlaga premislek o normativnosti pravnih pravil. Ta premislek želi pokazati, kako lahko pravne norme veljajo za racionalna vodila za namerne akterje, ne da bi bile nepomembne v praktičnem sklepanju.

Ključne besede: avtoriteta, pravna normativnost, relevantnost, racionalnost, krinka dobrega

ENG. | *Norms, rationality, and relevance under the "guise of the good"*. In several works, Veronica Rodríguez-Blanco has proposed an approach to the normativity of legal rules and intentional rule-following in the frame of the "guise of the good" model of intentional action. She argues that, on this approach, Raz's conception of legal authority implies that legal rules cannot be rational guides for intentional actions. I will argue that Rodríguez-Blanco's proposal does not succeed in addressing the practical relevance of legal rules. However, I shall argue that a weak version of her criticism of Raz still holds. Thus, this discussion provides a suitable framework from which I will propose a reflection on the normativity of legal rules. This reflection aims to show how legal norms can count as rational guides for intentional agents without being irrelevant in practical reasoning.

Keywords: authority, legal normativity, relevance, rationality, guise of the good

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Synopsis

Julieta Rabanos

Transnational Rule of Law, coercion, and human action
Some remarks on Rodriguez-Blanco's "What Makes a Transnational Rule of Law?"

SLOV. | *Transnacionalna vladavina prava, prisila in človekovo delovanje.* V delu »Kaj tvori transnacionalno vladavino prava? Razumevanje logosa in vrednot človekovega delovanja v transnacionalnem pravu« Veronica Rodriguez-Blanco raziskuje možnost – in priložnost – obstoja vladavine prava na transnacionalni ravni. Namen tega prispevka je na kratko razpravljati o nekaterih točkah, povezanih z različnimi vidiki predloga Veronice Rodriguez-Blanco: pravilno vprašanje o vladavini prava in njen posebni pogled na človekovo delovanje (drugi razdelek); vrsta razlage pravil, standardov, predpisov in načel (tretji razdelek); definicije vladavine prava, prisile in svobode (četrti razdelek); stranke upoštevnega razmerja in pojem transnacionalnega prava (peti razdelek); in struktura ustreznih odnosov v nacionalnih in nadnacionalnih kontekstih (šesti razdelek). Avtorica si po eni strani prizadeva pokazati, kako bi se lahko te točke izkazale za precej problematične in tako spodkopale integriteto predloga Veronice Rodriguez-Blanco, po drugi strani pa poda nekaj predlogov, kako bi te težave lahko rešili v korist njenemu predlogu. S temi pripombami si tudi prizadeva nakazati, kaj so po njenem mnenju najpomembnejše točke, ki bi jih bilo treba upoštevati v vsakem zdravem diskurzu ali predlogu o teh temah. Sklene z nekaj končnimi pripombami (sedmi razdelek).

Ključne besede: pravna država, translacijsko pravo, prisila, agencija, transnacionalna pravna država

ENG. | *Transnational Rule of Law, rules and human action.* 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).

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

Summary: 1 Introduction – 2 On the correct question about the Rule of Law and human action – 2.1 On the correct question about the Rule of Law – 2.2 On the type of action and the explanation of motivation – 3 On the type of explanation about rules and logos – 3.1 What logos? The logos of the Rule, of Law, and of norm production – 3.2 On (epistemic) access to the logos – 4 On the definitions of the Rule of Law, coercion, and freedom – 5 On the parties in the relevant relationship and the notion of transnationality – 6 On the structure of relationship in national and transnational contexts – 7 Conclusion.

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Synopsis

Chiara Valentini

Deliberative constitutionalism and judicial review. A systemic approach.

SLOV. | *Deliberativni konstitucionalizem in sodna presoja. Sistematični pristop.* Deliberativni konstitucionalizem je nastajajoče področje, ki združuje ustavno teorijo – in njen poudarek na zakonskih omejitvah politične moči – z deliberativno demokratično teorijo – in njeno idejo o politični deliberaciji kot viru demokratične legitimnosti. Ta kombinacija ustvarja nov okvir za obravnavanje vprašanj legitimnosti, ki se pojavljajo v ustavnih demokracijah. Članek prispeva k temu čedalje večjemu področju raziskav z ugotavljanjem njegovega potenciala za obravnavo legitimnosti sodnega nadzora. Prvič, avtorica trdi, da je ta potencial v integraciji ustavne teorije s sistemskim pristopom k deliberativni demokraciji in ugnezdeni ideji deliberativnega sistema. Drugič, avtorica se opre na to integracijo, s čimer pojasni legitimnost sodne presoje kot institucije, ki je vgrajena v posvetovalni, reprezentativni sistem in jo ta tudi oblikuje.

Ključne besede: konstitucionalizem, deliberativna demokracija, sodna presoja, reprezentacija

ENG. | *Deliberative constitutionalism and judicial review. A systemic approach.* Deliberative constitutionalism is an emerging field that combines constitutional theory – and its emphasis on legal limits to political power – with deliberative democratic theory – and its idea of political deliberation as the source of democratic legitimacy. This combination creates a new framework to address questions of legitimacy that arise in constitutional democracies. The article contributes to this growing area of research by exploring its potential to address the legitimacy of judicial review. First, the article argues that this potential lies in the integration of constitutional theory with a *systemic* approach to deliberative democracy and the nested idea of a deliberative *system*. Second, the article draws on this integration to account for the legitimacy of judicial review as an institution embedded in – and shaped by – a deliberative, representative, *system*.

Keywords: constitutionalism, deliberative democracy, judicial review, representation

democracy – 4 Re-framing the question of judicial review – 4.1 Adjudication and deliberation – 4.2 Adjudication and representation – 5 Conclusions

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Synopsis

Akritas Kaidatzis

Progressive populism and democratic constitutionalism

SLOV. | *Progresivni populizem in demokratični konstitucionalizem.* Populizem vključuje kritiko liberalnega konstitucionalizma. Poznamo več različic populizma in s tem tudi populističnega konstitucionalizma. Avtor zagovarja tezo, da je inkluzivni demokratični populizem (v nasprotju z avtoritarnim populizmom) povezan z ljudskim in političnim konstitucionalizmom. Skupna jima je zaskrbljenost pred pretirano juridifikacijo in depolitizacijo družbe. Oba pozivata k demokratizaciji ustavnega prava, pri čemer menita, da je vir nevarnosti njegov trenutni elitizem, strokovnost in legalizem – torej izoliranost od politike in ljudstva. Avtor preučuje temeljne prispevke Marka Tushneta, Larryja Kramerja in Richarda Bellamyja o ljudskem in političnem konstitucionalizmu. Nato identificira radikalno-demokratični element, ki si ga ti pristopi delijo s progresivnim populizmom, in razpravlja o nekaterih vidikih populističnega konstitucionalizma vlade pod vodstvom Sirize v Grčiji (2015–2019). Demokratizacija liberalnega konstitucionalizma lahko prepreči vzpon avtoritarnega populizma. Pri tem je morda nujna določena mera »zdravega« populizma za boj proti »slabemu« populizmu, sklene avtor.

Ključne besede: populizem, demokratični konstitucionalizem, ljudska ustavnost, politična ustavnost

ENG. | *Progressive populism and democratic constitutionalism.* Populism entails a critique of liberal constitutionalism. There are many varieties of populism, and hence of populist constitutionalism. This article argues that inclusionary democratic (as opposed to authoritarian) populism is related to popular and political constitutionalism. They share a common concern against the excessive juridification and depoliticization of society, and they call for the democratization of constitutional law, considering its current elitism, professionalism and legalism—that is, its insulation from politics and the people—as a source of peril. The article examines seminal contributions on popular and political constitutionalism by Mark Tushnet, Larry Kramer, and Richard Bellamy. It then identifies the radical-democratic element that these approaches share with progressive populism and discusses some aspects of the populist constitutionalism of the SYRIZA-led government in Greece (2015-2019). Democratizing liberal constitutionalism may counter the rise of authoritarian populism; in that re-

spect, some amount of "healthy" populism might be necessary to fight "bad" populism, the article concludes.

Keywords: populism, democratic constitutionalism, popular constitutionalism, political constitutionalism

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Synopsis

Mark Tushnet

Institutions for realizing popular constitutionalism

SLOV. | *Institucije za uresničevanje ljudskega konstitucionalizma.* Avtor razpravlja o tem, kako bi bilo mogoče oblikovati več institucij za izvajanje ljudskega konstitucionalizma v okviru liberalnega konstitucionalizma. Te institucije so (1.) oblike neposredne ljudske zakonodaje, kot so referendumi, (2.) nujni mandati ali navodila predstavnikom, ki jih morajo predstavniki upoštevati in so sankcionirani s samodejno odstranitvijo predstavnika, ki ne izpolnjuje zahtev, s položaja, in (3.) sodobne komunikacijske tehnologije, ki se uporabljajo za spodbujanje državljanov kot alternativo glasovanju (ali ugotavljanju javnega mnenja). Kar zadeva referendume, avtor kritizira prepričanje (1.), da lahko referendumi preveč poenostavijo zapletene politične možnosti na načine, ki včasih povzročijo izide, ki so načeloma neupravičljivi, nekoherentni in neskladni s tem, kar bi ljudje izbrali po razpravi, kakršna se zgodi v predstavniških skupščinah, in (2.) da referendumi sistematično, čeprav ne neizogibno, ogrožajo pravice manjšin, ki jih jamči liberalni konstitucionalizem. Glede imperativnih mandatov avtor trdi, da ugovori sledijo tistim proti referendumom, in ponuja vzporedne odgovore. Kar zadeva sodobne komunikacijske tehnologije, se osredinja na pomisleke, da jim ne uspe izrabiti specialističnega znanja, in trdi, da precenjujejo obseg takšnega znanja pri strokovnjakih in podcenjujejo obseg, v katerem je takšno znanje na voljo znotraj populacije običajnih ljudi. Avtor še ugotavlja, da je včasih področja, na katerih je resnično potrebno specialistično znanje, mogoče identificirati vnaprej in jih izvzeti iz teh mehanizmov.

Ključne besede: ljudski konstitucionalizem, referendumi, imperativni mandati, deliberativno glasovanje, islandska ustavna reforma

ENG. | *Institutions for realizing popular constitutionalism.* This essay discusses how several institutions might be designed to implement popular constitutionalism within a liberal constitutionalism frame. The institutions are (1) forms of direct popular legislation such as referendums, (2) imperative mandates or instructions to representatives that the representatives must follow, sanctioned by automatically removing a noncompliant representative from office, and (3) modern communications technologies used to elicit citizen views as an alternative to voting (or polling). As to referendums, it critiques arguments (1) that referendums can oversimplify complex policy options in ways that sometimes

produce outcomes that are indefensible in principle, incoherent, and inconsistent with what the people would prefer after the kind of deliberation that occurs in representative assemblies, and (2) that referendums systematically, though not inevitably, threaten rights of minorities that liberal constitutionalism guarantees. As to imperative mandates, it argues that objections track those to referendums, and offers parallel responses. And as to modern communications technologies, it focuses on such concerns that they fail to take advantage of specialized knowledge, and argues that overestimate the degree to which specialists actually have specialized knowledge and underestimate the degree to which such knowledge is available within a population of ordinary people and observes that sometimes domains in which specialized knowledge really is required can be identified in advance and exempted from these mechanisms.

Keywords: popular constitutionalism, referendums, imperative mandates, deliberative polling, Icelandic constitutional reform

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Synopsis

Roberto Gargarella

From "democratic erosion" to "a conversation among equals"

SLOV. | *Od »demokratične erozije« do »pogovora med enakimi«.* V zadnjih letih pravni in politični dogmatiki zamenjujejo demokratično krizo, ki je prizadela večino naših držav, zgolj s krizo ustavnosti (tj. s krizo v načinu delovanja našega sistema »zavor in ravnovesij«). Rezultat te »napake v diagnozi« je pričakovano ta, da so pravni in politični dogmatiki za demokratično krizo začeli predpisovati napačna zdravila. Običajno so se zavzemali za »obnovo« starega sistema »notranjih kontrol« ali »zavor in ravnovesij«, ne da bi se ozirali na demokratične vidike krize, ki bi namesto tega zahtevali krepitev »ljudskih« kontrol in participativnih mehanizmov, ki so spodbujali postopni nastanek »pogovora med enakimi«. Avtor se osredinja na nekatere institucionalne alternative – zbore državljanov in podobno, ki nam lahko pomagajo premagati sedanjo demokratično krizo. Posebej preučuje nedavno prakso zborov občanov in ocenjuje njihovo delovanje.

Ključne besede: demokratična erozija, zavore in ravnovesja, ljudski nadzor, demokratične skupščine

ENG. | *From "democratic erosion" to "a conversation among equals".* In recent years, legal and political doctrinaires have been confusing the democratic crisis that is affecting most of our countries with a mere crisis of constitutionalism (i.e., a crisis in the way our system of "checks and balances" works). Expectedly, the result of this "diagnostic error" is that legal and political doctrinaires began to propose the wrong remedies for the democratic crisis. Usually, they began advocating for the "restoration" of the old system of "internal controls" or "checks and balances", without paying attention to the democratic aspects of the crisis that would require, instead, the strengthening of "popular" controls and participatory mechanisms that favored the gradual emergence of a "conversation among equals". In this work, I focus my attention on certain institutional alternatives – citizens' assemblies and the like- that may help us overcome the present democratic crisis. In particular, I examine the recent practice of citizens' assemblies and evaluate their functioning.

Keywords: democratic erosion, checks and balances, popular controls, democratic assemblies

Summary: 1 "Democratic erosion": A previously unidentified species? – 2 Too slow a death: From the crisis of rights to the crisis of democracy – 3 Repairing a ship at sea: restoring democratic controls – 4 There are alternatives, and they are worth trying – 5 The era of assemblies: A short initial balance sheet – 5.1 Dismissing prejudices – 5.2 Rethinking assumptions and concepts – 5.2.1 Rationality and technical knowledge – 5.2.2 Motivation – 5.2.3 Deliberation and the transformation of preferences – 5.3 Participation and dialogue – 5.4 Democracy and rights – 5.5 Some remarks on institutional design – 6 The problem of "capture": When the past holds back the present, and the old will not let in the new

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