

On the Authority of Transnational Law

Sobre la autoridad del derecho transnacional

Sobre a autoridade do direito transnacional

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ABSTRACT

This research aims to evaluate the contours of the authority of transnational law and its consequences in the globalization of law. At the time when the norm is a source for the constitution and legitimacy of power, power is a source for the production and application of the norm. To this end, this text presents the interfaces of the classic precepts of categories such as legitimacy, territory, power, and authority related to State normative production, in contrast to national and transnational demands. It was concluded that the authority that presents itself to transnational law influences national law from the outside so that the basis of the authority's support is not based on economic precepts but on institutional and normative responsiveness to the emerging demands and pretensions. For the development of this research, the inductive method was used, operationalized by the techniques of operational concepts and bibliographic research.

Keywords: Authority; transnational law; normative production.

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RESUMEN

Esta investigación tiene como objetivo evaluar los contornos de la autoridad del derecho transnacional y sus consecuencias en la globalización del derecho. En el momento en que la norma es una fuente de constitución y legitimidad del poder, el poder es una fuente para la producción y aplicación de la norma. Con este fin, este texto presenta las interfaces de los preceptos clásicos de categorías como legitimidad, territorio, poder y autoridad relacionados con la producción normativa estatal, en contraste con las demandas nacionales y transnacionales. Se concluyó que la autoridad que se presenta al derecho transnacional influye en el derecho nacional desde el exterior, por lo que la base del apoyo de la autoridad no parte de preceptos económicos, sino de la capacidad de respuesta institucional y normativa a las demandas y pretensiones emergentes. Para el desarrollo de esta investigación, se utilizó el método inductivo, operacionalizado por las técnicas de conceptos operativos e investigación bibliográfica.

Palabras clave: autoridad; derecho transnacional; producción normativa.

RESUMO

Esta pesquisa tem como objetivo avaliar os contornos da Autoridade do Direito Transnacional e suas consequências com a globalização do direito. Ao passo que a norma é fonte de constituição e legitimidade do poder, o poder é uma fonte para a produção e aplicação da norma. Para tanto, este texto apresenta as interfaces dos preceitos clássicos de categorias como a legitimidade, o território, o poder e a autoridade relacionadas à produção normativa estatal, em contraposição às demandas nacionais e transnacionais. Concluiu-se que a Autoridade que se apresenta ao Direito Transnacional influencia o Direito nacional do exterior, de forma que a base de apoio da autoridade não se baseia em preceitos econômicos, mas na capacidade de resposta institucional e normativa às demandas e reivindicações emergentes. Para o desenvolvimento desta pesquisa, foi utilizado o método indutivo, operacionalizado pelas técnicas de conceitos operacionais e levantamento bibliográfico.

Palavras-chave: autoridade; direito transnacional; produção normativa.

Introduction

A more careful analysis of the emergence of transnational law requires critical assessments of the foundations and limits of the exercise of authority and its relationship to the territory, notably of national States. At the time when the norm is a source for the constitution and legitimacy of power, power is a source for the production and application of the norm. If, in the architecture of the modern State in its many facets, the norm was related to the power for social prevention and control within its territorial borders, in the forbidden-permitted logic, the tension that operates with the widening of the acts of globalization has originally transited between homogenization and assimilation.

The prime objective of this research was to evaluate the contours of the authority of transnational law and its consequences in the globalization of law. To accomplish the objective, this text presents the interfaces of the classic precepts of categories such as legitimacy, territory, power, and authority related to State normative production, in contrast to national and transnational demands.

The sequence of arguments presented aims primarily to address the problem of the authority of transnational law that exercises its power in the area of normative production over a given territory, moving smoothly over the idea of territory as a constitutive element of the State.

Power, as well as authority are relational, relative, and always embodied in society. Any field of relations and social networks is, among others, a field of power (von Benda-Beckmann et al., 2012), consequently of the exercise of authority when legitimate. The exercise of power, therefore, concerns not only the relations between the government, its institutions, its affairs or citizens, but also the non-State organizations. According to Von Benda-Beckmann et al. (2012), power “is” the potential for mobilization capable of generating consequences, varying according to the social organization observed, that is, if we examine power as inscribed in rules and legal institutions, or as an element of ideologies, or in social relations, or in the actual social interactions that are structured by them, which reproduce and change. It is precisely from

this exercise of power that authority derives its legitimacy through its ability to respond to social claims through the exercise of human rights.¹

Still, in the field of preliminary clarifications, it is worth highlighting the condition of study on the public authority, not as a single manifestation of national States and their institutions, but as a diffuse manifestation in the face of the flows generated within globalization. In the contemporary confusion between public and private spaces, it seems pointless to segment the place of emergence of authority, given its vagueness, even with strong theoretical divergence. As the private actors are influential in government, economic, empowerment, safety, and well-being affairs, it does not seem advisable to typify them as mere private agents, governed by the reminiscences of “private law” (Biersteker & Hall, 2002, p. 203).

Given this, it is important to emphasize the empirical absence of a center of authority to govern globalization and, consequently, to guide global law, and there is no motivation for this to happen. Therefore, it is necessary to see in contemporary hegemony the need for the insertion and acceptance of mechanisms of coercion and consensus, as sustained by Žižek (2013). Thus, hegemony must be subject to conflict and dispute as a condition of renewal and defense, according to dialogical attributes. However, there is another challenge to be overcome towards the essence of renewal and improvement of hegemonic positions, as there is a weak condition in the counter-hegemony installed at the time that it is concerned only with specific issues, without effective political aspects related to the whole of the problem. Nationalism, for example, even though sponsored by “strong” States, has not been able to circumvent the forces of globalization, largely serving as a rhetorical argument or impetus for neo-colonialist claims.

¹ In this sense: “Their authority is legitimate to the extent that they obtain the consent of the governed and exercise certain rights within those domains” (Biersteker & Hall, 2002, p. 205).

Authority, Power, and Territory

Although the centrality of capitalism with current hegemonic authority is maintained (mistakenly), it must be pointed out that capitalism itself is not hegemonic; after all, the “American century” is over, and a period has begun in which multiple poles of global capitalism has been formed. In the US, Europe, Russia, China, and perhaps Latin America as well, capitalist systems have developed with specific colorings: the US represents neoliberal capitalism, Europe remains of the welfare State, Russia is an oligarchic capitalism, China, the authoritarian one, and Latin America, the populist. With the failure of the US attempt² to impose itself as the only world superpower—the universal police force—there is now a need to establish the rules of interaction between these local poles with regard to their conflicting interests (Zizek, 2014).

On the other hand, the flows of globalization have surpassed the mere understanding of its compulsory link with capitalism. Globalization, in its various manifestations, is no longer restricted to the aspect of economic theory. A significant portion of the authority expedients and norms of global flows do not retain economic aspects at their core. Therefore, the support base of the authority is not backed by precepts of economic order but of institutional and normative responsiveness to the emerging demands and pretensions. From the measurement of institutional capacities that some classic authorities face, mitigation and new positions gain rise.

Not long ago, the basic structure of law and authority in most countries was defined by the governing principles of their respective constitutions. Globalization has confirmed Santi Romano’s hypothesis that the law applicable in the territory of a given State can no longer be understood only by the domestic constitution and the institutions from which it derives its authority. It stems from a multiplicity of sources fed by a multiplicity of actors that establish the emergence of a new law. Diagnosing the crisis of the liberal State model against the demands of national or internationally important social sectors, Santi Romano

² To Richard Falk (1998), the material cause of the collapse of the American ideal can be explained by the lack of a general belief in the solvency of the promises made.

demonstrated in 1909 the stumbling condition of the State, at that time motivated by the State's inability to offer effective solutions to society and the emergence of institutions aimed at such a goal,³ but which are currently associated by common sense with the flows of globalization.

Although the historical cutoff is important today, despite the emergence of new actors in full exercise of their faculties, there is an unprecedented opening to sovereign acts of other States in domestic affairs, as Von Bogdandy (2014) points out. Thus, if before national States were formally bound by the internal claims of society and institutions sovereignly recognized by them, the transit of the last 60 years has set exposure lines for horizontal interference between sovereign States on the fringes of the standards of public international law.

From the perspective of territory, authority, and rights, according to Sassen (2015), this change set standards for innovation and reframing of certain elements with a denationalized configuration that can operate at different levels of (national) State territory. The secular process of verticalization of authority, from the notion of divine delegation, passing by the construct of territoriality guided by constitutional provisions of authority and rights, has shifted to move also by geopolitical criteria (Sassen, 2015).

National, supranational, and international institutions should not be viewed solely as the organs of a complete joint federation as designed for the models of national States. However, the powers conferred on national, supranational, international, and transnational authorities are so closely interconnected because of globalization and the interconnected functioning of the institutions that the legitimacy of the exercise of national public authorities can only be verified in this *multilevel* context.

³ “La crisi dunque dello Stato attuale si può ritenere che sia caratterizzata dalla convergenza di questi due fenomeni, l'uno dei quali aggrava necessariamente l'altro: il progressivo organizzarsi sulla base di particolari interessi della società che va sempre più perdendo il suo carattere atomistico, e la deficienza dei mezzi giuridici e istituzionali, che la società medesima possiede per fare rispecchiare e valere la sua struttura in seno a quella dello Stato.” (Romano, 1950b, pp. 322-323). Translation: The crisis of the present State can therefore be considered to be characterized by the convergence of these two phenomena, which one necessarily aggravates the other: the progressive organization on the basis of particular interests of society that is increasingly losing its atomistic character, and the deficiency of the juridical and institutional means, which the society itself possesses to make its structure reflect and be validated within the one of the State.

This scenario calls for a new criterion for the legitimacy of authority, which imposes the need for national and global horizontal and vertical alignment. Problems of the legitimacy of one authority, endowed with public authority, negatively affect the decisions of other authorities (von Bogdandy, 2014).

The point of reference for this legitimacy is a stock of common basic principles, at least for the global, transnational, supranational, international, and national institutions that touch everyday social life. Particularly relevant among these are principles such as human rights, the rule of law, transparency, and democracy, not only with regard to doctrinal constructions but also legitimacy (von Benda-Beckmann, 2012; von Bogdandy, 2014). It seems fair to say that principles derived from human rights, the rule of law, and democracy are now recognized as relevant references for all exercise forms of the public authority. However, this is only a starting point for consolidation (von Bogdandy, 2014). In other words, the law must be recycled as a social product, fed from global, international, supranational, and national sources and institutions. Moreover, it is worth remembering the doctrine of Romano (2008), for whom the law arises from the need, which changes the scope of application of fundamental principles and affects their importance. The interpretation and development of these principles should be incorporated into a transnational, supranational, international, and comparative dimension (von Bogdandy, 2014), re-signifying, in turn, the regulatory mechanisms based on authorities responsible for the production of the standard and its satisfaction (Darnaculleta i Gardella, 2005).

Authority Arising from Necessity

Authority becomes much more a matter of enforceable principles than the use of force or coercion. Given this, there will be no legally defensible authority without ballast in democratic attributes, for example. The case of the proliferation of non-governmental organizations (NGOs) and their difficulty to contain capillarity helps to illustrate this statement.

Global, transnational, supranational, and international institutions, rooted in other legal orders, now have a noticeable and formative impact

on social interaction within national institutions. The gait that is printed is basically driven by the external-internal flow (von Bogdandy, 2014). However, in the light of Richard Falk's (1998) teachings, full proof of this reallocation of authority lies in the United Nations' (UN) shrinking of the originally intended universal protagonism, directly derived from the erosion of its members' State capacities.

In this sense, the weakness of the UN is proportionally linked to the crisis of the State. However, moving along these lines, it must be considered that while the UN faces difficulties in asserting itself as an effective authority, certain organizations, agencies, and other related bureaucratic branches succeed, mainly because they can provide concrete answers to contemporary problems. This confirms the theory presented, that the authority to prosper in times of globalization is that recognized as effective in the face of emerging needs.

Nevertheless, such inflection does not proceed only in the eminently public sphere, but in the same or more aggravated condition towards non-public actors. In Sassen's (2015) words, there is an "external geography of power" (p. 514), which aims to alter or compose domestic spaces in a partial and specialized way, by regulatory authorities that compose new regulatory frames through self-regulation and soft law, for example. Thus, it would not only operationalize the porosity of sovereignty but, at the same time, the occupation of the territoriality of law from the outside.

The instrumental perspective, as an activity of regulation, is now guided by patterns of pragmatism in view of the regulator's ability to normalize the conduct of the regulated, corresponding to their needs. According to Darnaculleta i Gardella (2005), the regulation that emerges today is not sustained by hierarchical predictions but by the effectiveness of the modulation of social dynamics. It, therefore, corroborates the notion that public authority no longer compulsorily gravitates to sovereignty (Cervantes, 2014).

The principle of sovereignty holds the key to a better understanding of this transformation of the classical foundations of public law; according to Von Bogdandy (2014), who, paraphrasing Georg Jellinek (1882), asserts that the capacity for everything can be explained "through sovereignty and by sovereignty". Sovereignty, understood in the sense

of the rule of law, justifies the validity of all law in the will of the State and defines its superior authority, assumed as the unity of all actions of a multitude of diverse institutions to all other spheres of society (von Bogdandy, 2014).

Since its consolidation, this understanding has been tied to the notion of territory as an object of the State, just as private property would be to private individuals. Thus, according to Romano (1950d), the State could only exercise the exclusive imperium by subjecting absolutely all private entities, especially its citizens —which it cannot achieve from its origin. This principle of sovereignty coined the shape of domestic public law from the Westphalia Treaties to that of public international law, but in diametrically opposite directions: The rule of law has an unmistakably commanding structure, while public international law is a manifestly non-interventional structure (von Bogdandy, 2014).

The consolidation of globalization as behavior undermines the famous premise of the classic principle of sovereignty, according to which States are “independent communities” in the exercise of their imperium. This is the framework for the phenomenon that is immediately relevant: global, transnational, supranational, and international organizations affect social interaction in States so autonomously that sovereignty cannot assume the whole construct but make it more complexly engraved, especially by the multiplication of actors with which the State relates or is impacted (Sassen, 2015). The real influence of these institutions makes their classification as hermetic public authorities seem more unfeasible. In other words, the exercise of public authority is the fundamental structural feature that State institutions share today with non-national institutions (von Bogdandy, 2014).

However, the support of the State’s public authority during Modernity, in addition to sovereignty, was maintained by the webs of submission arising from nationality and citizenship, both associated with the principle of *ius solis*. The expression norm-duty, or the exaggerated concern for the cogency of the norm, according to Catania (2010), represents the sequence of John Austin’s habit of obedience. It turns out that these institutes are also being put on the brink of globalization and, above all, by the State’s neglect of its citizens, leaving the extremes of commercialization of nationality/citizenship, as in the case of Malta.

These episodes offer a condition of maintenance to the national State, though linked with new requirements, new social commitments. If the notion of the continuity of the State and the absence of the predisposition of globalization to extinguish it is clear, it is important to highlight the emergence of national-global dynamics that demand the exercise of authority while dispensing with the “Westphalian” territoriality as an exclusive and hegemonic acting scenario (Sassen, 2015).

On the other hand, the pragmatic-utilitarian resourcefulness of the State itself in “playing the game” (Staffen, 2018) cannot be ruled out, in accordance with strategic interests regarding the imposition of its sovereignty over the territory, abdicating certain matters or losing them and trying to consolidate them in others. At a time when the “Westphalian” paradigm has focused on land territory, current predictions show a State race (led by “strong” States) to dominate deep oceanic lands beyond exclusive economic zones but involving non-State actors in these projects. This conforms to the typical architecture of transnationalism, as already explained, demonstrating two solid cardinal points. First, as a discursive compression of the foreign and domestic, making them difficult to distinguish (Greenhouse, 2012) —e.g., concepts such as national, foreign, terrorism, public or private— and second as a series of executive alliances between national governments or other actors, undermining some of the classic attributes of State authority.

The traditional understanding of public authority is based on the concept of State authority, which in turn characterizes the monopoly of force and the sovereign territorial authority of the State. Since neither global, transnational, and supranational nor international authorities are endowed with this, authority should be defined more broadly. As a result, public authority must be understood as a reasoned capacity to restrict in fact or legally the freedom of other actors or to determine how they use theirs (von Bogdandy, 2014).

If, on the one hand, Bretton Woods aimed to set guidelines for international governance, on the other, it broke with the Treaties of Westphalia, as it made national borders porous and reshaped the means of exercising public authority. Notwithstanding this evidence, according to Sassen (2015), Bretton Woods has had a very significant side effect as the desired autonomy of certain States in the global order has been

hampered by the power of transnational corporations, companies, and transnational organizations capable of altering their domestic institutional capacities and unbalancing the State powers. Even the events of the 2008 crisis, in which the national State returned to the ordination of the citizens and companies in its custody, were not sufficient to construct an example of a State that exercises sovereign and exclusive authority in the course of acts under development in its territory.

In light of the *modus operandi* of many institutions that escape national attributes, the concept of public authority must, however, go beyond legal obligations. The same applies to soft law acts of transnational/global institutions: they may also limit the freedom of other legal matters or otherwise determine how they are used. This happens whenever a generated pressure can be resisted by other subjects with only a degree of difficulty (von Bogdand, 2014).

There is also a principle's consideration that supports this broad conceptualization of authority. It should be noted, according to Von Bogdandy (2014), that the classification of an act as the exercise of public authority does not imply its legitimacy. Faced with the emergence of multiple actors, it is necessary to know: When is the exercise of authority a phenomenon of public authority? Global, transnational, supranational, and international public authority can be understood as any that is based on a competency that was itself provided by the joint action of public actors —usually States— to fulfill a public function that was allowed as such by those actors. The public nature of the exercise of “authority” depends on the legal basis. Thus, the analyzed institutions exercise public authority that has been given to them by the political communities based on legal acts (whether binding or non-binding). The fundamental concept here is action, which, from a legal point of view, must be understood as an expression of individual freedom (von Bogdand, 2014).

Even in a chronologically spaced context, there are interesting propositions in Romano for the global scenario, especially about the power of law and issues that permeate authority. From the perspective of institutionalist theory,⁴ it can be concluded that its main point lies

⁴ From the warning of Massimo La Torre, the institutionalist theory used in this work is stressed in the position of Santi Romano, because from Weinberger and MacCormick the

first in reading the exhaustion of monolithic institutional State models, then in its concern to order social flows from the new manifestations of political pressure that they seek in reality (and with it the need) to build their rights and their authority (Romano, 1950a, 2008).

However, the authority of “global governance” institutions is also increasingly embedded in the fold of this logic, as evidenced by the mechanisms of extra-legislative legislation, global administrative law, and specialized international courts. In liberal and democratic States, authority is closely linked to the duty of public institutions to serve the common interest and to comply with fundamental principles (von Bogdand, 2014), principles that should be mirrored in global expedients. For no other reason, the global law under construction cannot depart from the substantial satisfaction of participation, transparency, democracy, and human rights.

If national legislatures go down a curve with regard to their authority and institutional capacity to regulate social flows, public regulation of self-regulation, according to Darnaculetta i Gardella (2005), exemplarily demonstrates the ascendancy of specialized forms of State intervention in society, not necessarily conforming to their geographical territories.

It is no coincidence that Sassen (2015) proposes the notion of territory nowadays no longer tied to the molds of the Westphalia Peace Treaties, that is, governed by physical boundaries. The author argues that borders are increasingly within companies, global cities, or transnational organizations. Thus, there is a sophisticated process of relocating the landmarks of each border, of each territory. “Global” border-setting processes operate to the greater or lesser extent of regulation and exercise of authority by the responsible institutions with or without State interference (Sassen, 2015). As an illustration, besides the tax havens, it is worth mentioning the concentrated destination of

neoinstitutionalist phase would begin. The neoinstitutionalist theory is avoided because “cade talvolta in una sorta di circolo vizioso. Le istituzioni, infatti, per essa – sono la fonte di validità delle norme, e d'altra parte – secondo tale teoria – senza norme non è possibile avere istituzioni” (La Torre, 1999, p. 139). Translation: sometimes it falls into a sort of vicious circle. The institutions, in fact, on the one hand, are the source of value of the norms, and, on the other, according to this theory, without norms it is not possible to have institutions.

migrants to certain States, international investment policies, academic mobility, technological research centers (Khanna, 2011).

It is evident that the extremes in the action or commission of the responsible institutions may fall into illegality. As Nader (2012) points out, there is an overflow of legal conditions for illegalities when, for example, the process of formal production of the norm and the fulfillment of its attributes result from mere legislative importation aimed at the concentration of powers within the territorial scope of the State or within transnational corporations, characterizing only as new forms of imperialism or colonialism, because, in addition to subverting pre-existing local norms, they leave the authority formally responsible for enforcing the provisions naked. These are norms produced from illegal practices or incorporated by extra-legislative solutions that, at certain times, challenge the Judiciary to preserve or break illegal conditions.

Global, transnational, and supranational institutions usually differ from international institutions in that their acts regularly represent social interaction in the legal areas of States and are not tied solely to the point of State centralism (von Bogdandy, 2014). Notwithstanding the arguments that follow, one of the most widespread demonstrations of these phenomena is associated with the rising tide of new specialized bodies with control and regulatory roles, competing or even subtracting State functions (Cervantes, 2014). As a result, internally, the legislature first and then the other powers of each State become devoid of their public authority to entities outside the political-institutional glossary.⁵

If the European Union or the Organization of American States is taken as a reference of supranational entities, it will be seen that the internal legal area of their members not only opened to “the top” but also “to the side” so that members can now be considered part of the

⁵ “Vi si rivela la sovrapposizione di diversi poteri sullo stesso territorio o la multidimensionalità di quegli stessi poteri, dal momento che essi esercitano influenza e si dichiarano competenti contemporaneamente in dimensioni della vita sociale che sarebbero autonome. Questi caratteri contrastano vistosamente con l’unità sistemica dell’ordinamento, soprattutto se continuiamo ad intenderlo nel senso della modernità per così dire classica.” (Catania, 2010, p. 7). Translation: It reveals the overlap of different powers on the same territory or the multidimensionality of those same powers since they exercise influence and declare themselves simultaneously competent in dimensions of social life that would be autonomous. These characters contrast conspicuously with the systemic unity of the order, above all if we continue to understand it in the sense of modernity as a classic.

shared legal area. Thus, given a logical analysis, it is possible to affirm that if the authority contracts in the national (domestic) territory, due to horizontal movements, it can expand (or retreat) consequently in the extraterritorial sphere, according to its condition of responsiveness (Falk, 1998). This fluctuation, in this case, provides a privileged place for the assessment of competences. This results in certain structural requirements for international organizations, particularly when it comes to the principles related to the protection of human rights and the rule of law (von Bogdandy, 2014).

Again, if this challenge is observed in the face of more specific cutoffs, the practice of self-regulation, through regulated control, may reveal a tendency to shift from the imposing authority model to cooperative and consensual forms of action, according to the transnational law model, where “jerarquía da paso a la red y la unidad de actuación se quiebra en compartimentos estancos”⁶ (Darnaculleta i Gardella, 2005, p. 376).

The Treaty on European Union, in its article 2, for example, not only sets prerequisites for the supranational community authority, but also for the national public authority, requiring that the institutions of the European Union subsidize democratic consolidation in other States (von Bogdandy, 2014).

The parameters for the public authority of other States exist directly or indirectly as a way of conferring legitimacy on acts produced beyond the national State and its borders, especially due to their content (Staffen, 2018). The fundamental principles of the protection of human rights, the rule of law, transparency, and democracy must be essential for all forms of public authority that have an impact on the territory of a given State (von Bogdandy, 2014).

Finally, the condition of opting for regulatory models matters in the risks of balancing principles between different legal orders and suffers from the defect of being fascinated by two theoretical offers of the early 20th century: monism and dualism. It is not possible to develop any plausible understanding of those focusing on global law. The current legal and political framework in this respect differs fundamentally from

⁶ Translation: hierarchy gives way to the network and the unit of action is broken into staunch compartments (Darnaculleta i Gardella, 2005, p. 376).

the last century (von Bogdandy, 2014), although not even at that time, there was a consensus.⁷ Legal practice clearly does not follow from an amalgamation of legal orders. All essential issues, as Staffen (2018) pointed out, are always answered by reference to a specific legal order. Neither monism nor dualism is more useful as specific constructs, as they cannot offer plausible solutions to any of the relevant legal issues unveiled by globalization. Moreover, according to Von Bogdandy (2014), both theories lead to a dead end from the point of view of the demands designed to capture the entire contemporary legal constellation, both analytically and normatively.⁸

Final considerations

The prime objective of this research was achieved because the work tried to evaluate the contours of the authority of transnational law and its consequences from the globalization of law. Meanwhile, the norm is a source for the constitution and legitimacy of power, and power is a source for the production and application of the norm. The research demonstrated the interfaces of the classic precepts of categories such as legitimacy, territory, power, and authority related to State normative production, in contrast to national and transnational demands.

In turn, when resuming at that time the thesis of the crisis of the national State, considering the arguments already publicized, it must be kept in mind the fact that, until then, the episodes of resignification of the national State had a unifying body of political data—in certain moments the State itself, later the bourgeoisie, then the political parties, and more recently the civil society. However, in the intensification of global pressures, the emergence of such a large entity is not detected. Probably there will be no exchange of this notion for the diffuse manifestation of multiple and plural actors, consolidating the expedients of pluralism.

⁷ Romano (1950b, 1950c, 1950d), for example, had already denounced the problems of monism and the insufficiencies of dualism between 1902 and 1918.

⁸ Similar lines had been given by Gilissen (1972) in his study of theories of law.

Nonetheless, as Von Bogdandy (2014) warns, there are two pluralistic fields. The most radical approach starts from the premise of conflict and reads interaction as a power struggle. Legal rationality is yet another mask. By contrast, the dialogical approach starts from the observation that different legal regimes and institutions can build stable legal relations while maintaining their own normative independence, particularly in the European legal area.

In addition, the complex regime of law production, application, and enforcement, shaped by complex and fluid networks, especially due to the diffusion of authority and the plurality of non-vertical normative sources only, rekindles the appreciation of Romano's (2008) institutional theory of legal pluralism. Beyond legal pluralism, Santi Romano's contribution deserves to be extended to the logic of the authority-territory legal relationship, on precepts of plurality, complexity, dynamics, not always vertical or binary, but open and systemic.

Finally, what is extracted from the arguments so far consigned can be summarized in the premises of reallocation of the classic precepts of authority, no longer assimilated with the principle of sovereignty imposed over confined territories, but sustained in the institutional capacity to satisfy locally, nationally, internationally, supranationally, and globally the existing and emerging needs. The authority that regulates contemporary facts does not pour from rigid descendant vertical schemes, in contrast to what the most classical authority theories have hitherto proclaimed. The authority that gained speed and sprawl is at the service of enforcing and effectiveness of justified claims, backed by extraterritorially shared legal precepts. As this condition changes, authority changes.

References

- von Benda-Beckmann, F. (2012). Human rights, cultural relativism, legal pluralism. In F. von Benda-Beckmann, K. von Benda-Beckmann, & A. Griffiths (Eds.), *The power of law in a transnational world* (pp. 115-136). Berghahn.
- von Benda-Beckmann, F., Von Benda-Beckmann, K., & Griffiths, A. (2012). *The power of law in a transnational world*. Berghahn.

- von Bogdandy, A. (2014). Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, 12(4), 980-1007.
- Biersteker, T. J., & Hall, R. B. (2002). Private authority as global governance. In R. B. Hall, & T. J. Biersteker (Eds.), *The emergence of private authority in global governance* (pp. 2013-222). Cambridge University Press.
- Catania, A. (2010). *Metamorfosi del diritto. Decisione e norma nell'età globale*. Laterza.
- Cervantes, A. H. (2014). *La producción jurídica de la globalización económica*. CIICH/UNAM.
- Darnaculleta i Gardella, M. M. (2005). *Autorregulación y derecho público: la autorregulación regulada*. Marcial Pons.
- Falk, R. (1998). *Law in an emerging global village. A post-Vestfálian perspective*. Transnational Publishers.
- Gilissen, J. (1972). *Le pluralisme juridique*. Université Libre de Bruxelles.
- Greenhouse, C. (2012). The military order of 13 november 2001. In F. von Benda-Beckmann, K. Von Benda-Beckmann, & A. Griffiths (Eds.), *The power of law in a transnational world* (pp. 42-43). Berghahn.
- Khanna, P. (2011). *Como governar o mundo: um roteiro para o próximo renascimento*. Intrínseca.
- La Torre, M. (1999). *Norme, istituzioni, valori. Per una teoria istituzionalistica del diritto*. Laterza.
- Nader, L. (2012). Law and the frontiers of illegalities. In F. Von Benda-Beckmann, K. Von Benda-Beckmann, & A. Griffiths. *The power of law in a transnational world* (pp. 56-67). Berghahn.
- Romano, S. (1950a). *Scritti minori*. Giuffrè.
- Romano, S. (1950b). Lo Stato moderno e la sua crisi. In S. Romano (Ed.), *Scritti minori* (v. I, pp. 311-325). Giuffrè.
- Romano, S. (1950c). Oltre lo Stato. In S. Romano (Ed.), *Scritti minori* (v. I, pp. 345-356). Giuffrè.
- Romano, S. (1950d). Osservazioni sulla natura giuridica del territorio dello Stato. In S. Romano (Ed.), *Scritti minori* (v. I, pp. 167-177). Giuffrè.
- Romano, S. (2008). *O ordenamento jurídico*. Florianópolis: Fundação Boiteux, 2008.
- Sassen, S. (2015). *Territorio, autoridad y derechos. De los ensamblajes medievales a los ensamblajes globales*. Katz.
- Staffen, M. R. (2018). Superlegality, global law and the transnational corruption combat. *Revista Brasileira de Direito*, 14(1), 111-130.

Zizek, S. (2013). *Violência: seis reflexões laterais*. Rio de Janeiro: Boitempo.

Zizek, S. (2014). Who can control the post-superpower capitalist world order? *The Guardian*. <https://www.theguardian.com/commentisfree/2014/may/06/superpower-capitalist-world-order-ukraine>

