

Superlegality, global law and the transnational corruption combat*

Superlegalidade, direito global e o combate transnacional à corrupção

Márcio Ricardo Staffen

PhD. in Comparative Public Law by Università degli Studi di Perugia - Italy. Doctorate and Master degree in Legal Science by Universidade do Vale do Itajaí - UNIVALI. Post-Doctorate Internship in Transnational Law - Università degli Studi di Perugia (CAPES / PDE). Professor at the Stricto Sensu Post-Graduation Program in Law – Faculdade Meridional/ IMED. Honorary Professor of the Faculty of Law and Social Sciences of the University Inca Garcilaso de la Vega (Peru). Lawyer (OAB / SC).
E-mail: marcio.staffen@imed.edu.br

Revista Brasileira de Direito, Passo Fundo, vol. 14, n. 1, p. 111-130, Jan.-Abr., 2018 - ISSN 2238-0604

[Guest article | Artigo convidado]

DOI: <https://doi.org/10.18256/2238-0604.2018.v14i1.2491>

Como citar este artigo / How to cite item: [clique aqui/click here!](#)

Abstract

The present research aims to study the problem of transnational corruption combat and global normative flows, based on Carl Schmitt's theory of superlegality. Although Carl Schmitt has not faced the issue of transnationality, transnational actors and corruption, his thoughts about the world legal revolution and superlegality provides a qualified space for mirroring the issue of transnationalism and the fight against corruption. In order to do so, the text begins with the approach to the theory of superlegality, then it goes through the study of the fight against corruption from the logic of transnationalism and Global Law, in order to conclude that the means of prevention and repression of corruption acts can be qualified as superlegitimate files that condition the legitimacy and legality of the Law, be it national or global. The inductive method was used for the development of the present research operationalized by the concepts of operational concepts and bibliographical research.

Keywords: Carl Schmitt. Superlative. Corruption. Global Law.

Resumo

A pesquisa que se apresenta objetiva estudar o problema do combate transnacional à corrupção e os fluxos de normatização global, a partir da teoria de superlegalidade de Carl Schmitt. Em que pese Carl Schmitt não ter enfrentado o tema da transnacionalidade, dos atores transnacionais e da corrupção, seu pensamento sobre a revolução legal mundial e superlegalidade propiciam um espaço qualificado para o espelhamento com o tema do transnacionalismo e do combate à corrupção. Para tanto, o texto principia pela abordagem sobre a teoria de superlegalidade, perpassa o estudo sobre o combate à corrupção desde a lógica do transnacionalismo e do Direito Global para, ao fim, concluir que os meios de prevenção e repressão aos atos de corrupção podem ser qualificados como expedientes de superlegalidade que condicionam a legitimidade e a legalidade do Direito, seja ele nacional ou global. Utilizou-se, para o desenvolvimento da presente pesquisa, o método indutivo, operacionalizado pelas técnicas de conceitos operacionais e da pesquisa bibliográfica.

Palavras-chave: Carl Schmitt. Superlegalidade. Corrupção. Direito Global.

1 Introduction

In 1978, Carl Schmitt published one of his last texts, after decades of fruitful and remarkable scientific activity. In the article published by the newspaper *Staat*, entitled “*Die legale Weltrevolution: politischer Mehrwert als Prämie auf juristische Legalität*” the state theorist faces the problem of the compulsion that certain peoples suffer from an intensive legality.

In parallel lines, Carl Schmitt, launches interesting bases on the theme of global geopolitics, new legal demands and even relevant guidelines for the study of sustainability, without losing, however, its characteristic feature of analysis of the friend-enemy relationship, in its Constitution Theory¹.

The research presented here aims to study the problem of transnational combat against corruption and global normative flows, based on Carl Schmitt’s theory of superlegality. Although Carl Schmitt has not directly faced the issue of transnationality, transnational actors and corruption, his thinking about the world legal revolution and superlegality provides a qualified space for mirroring the issue of transnationalism and the fight against corruption.

However, for the purposes of the present study, the debate will be focused especially on the themes of super-legality and emergence of supra-state powers, as Carl Schmitt pointed out, without losing sight of the temporal gap between the paper under discussion and the contemporary problem of Global Law and the transnational pretension to combat corruption.

It is interesting to note that in the article “*A revolução legal mundial: superlegalidade e política*”, Carl Schmitt does not express a judgment of value on globalization, which is different from that found in the text “*Nomos*”. In the latter, he identifies globalization as an absolute evil responsible for the rupture between the territorial and political space². Another peculiarity of the article “*A revolução legal mundial: superlegalidade e política*” derives from the use of the expression “*política*” and not its famous categorization of “*político*”, perhaps (on the plane of trying to evaluate the author’s intentions) it’s the reason of Carl Schmitt to link the place of the politician to the State³.

As a research hypothesis, guided by the deductive method, it is postulated that in the current stage of fighting corruption, especially by transnational mechanisms linked to Global Law, there is a clear characterization of a superlegality derived from formulas of moral, technological, economic and ideological use of the notion of legitimacy to ascend to a higher level of legality (superlegality) and, from then on, to establish new

1 SCHMITT, Carl. *Teoría de la Constitución*. Madrid: Alianza, 1992.

2 SCHMITT, Carl. *Il Nomos della terra nel diritto internazionale dello “jus publicum europaeum”*. Milano: Adelphi, 1991.

3 SCHMITT, Carl. *O conceito do político*. Belo Horizonte: DelRey, 2009.

standards of obedience, altering the functioning of constitutional institutions by national and transnational pressures, of public entities, but also by the performance of new actors.

However, two clarifications are necessary. First, the study under discussion does not aim to analyze the flows of transnational corruption; what is being discussed are the dynamics beyond national states that aim to fight corruption, being it local, national, international or transnational. Then introducing the debate on the influences of morality on the notion of superlaw does not mean that this study argues in the face of moralism whether corruption is good or not, this is not at issue here. Therefore, the use of morality is strongly associated with the idea of public political / moral morality.

2 Superlegality and the formation of Global Law

Regardless of the skeptical context of state functions evaluation, Carl Schmitt assumes as a presupposition for his study the premise that national states can not be considered unrelated to the process of global legal revolution because, in its judgment, the State is responsible by the promotion of a state-legal revolution, and thus, bearer of relevant legality.⁴

In order to justify the use of the notion of superlegality, Carl Schmitt first analyzes basic precepts of legality and legitimacy, in order to demonstrate the practical impact of superlativity, both in national territories and in super-state spaces. He argues that the idea of legality represents a formula of obedience and discipline used by both state entities and corporations in order to force obedience.⁵

Consequently, the achievement of legality necessarily leads to the primacy of prior obedience to all normative prescriptions, armed forces control, justice administration, interpretation of new situations generated in the social sphere, finance and bureaucracy. Using the construction of Max Weber and Karl Marx, it comes to the reduction of legality as obedience, obligation and possibility. Not by chance, interpret legality as true political benefit, given its value capacity that adds more value.⁶

As regards legitimacy, Carl Schmitt retains his classical conception by synthesizing it according to the formula of identity and moral, ideological and philosophical self-representation of a state order at a given historical and political moment⁷. Thus, legitimacy would lend itself to promoting the self-legitimization of

4 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 100.

5 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 100.

6 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 100-101.

7 SCHMITT, Carl. *Legalidade e legitimidade*. Tradução de Tito Livio Cruz. Belo Horizonte: DelRey, 2007.

states, according to self-appointed attributes. In the more distant past, legitimacy was settled in the dynasties and consanguinity, then, it was transferred to democratic movements⁸. However, with the advent of supra-state actors, the point of support of legitimacy does not remain unchanged.

After attuning to basic concepts, Carl Schmitt approaches the subject of superlegality, categorizing it as standards that have a stronger validity than those imposed by ordinary norms⁹. While recognizing such superlaw standards are associated with the legal-constitutional context¹⁰, being represented in the modern constitutional democracies like the legislative mechanism of stabilization of the institutions and the normative changes¹¹, Carl Schmitt recognizes the “recent” twist of this attribute to become porous to supra-state patterns and the influence of legitimacy. As he attests, “*A legitimidade aparece então como uma espécie de legalidade superior, e se transforma também num método de forçar a obediência.*”¹²

However, Carl Schmitt also launches the idea of superlegality to dimensions beyond national state domains, because of the progress, as a force of dynamicity to become general and global legitimacy. Thus, scientific, technical and industrial development, in his view, would be sufficiently empowered to force obedience, notably due to the global condition of its functionality.¹³

Considering scientific, technological, industrial, economic and mercantile progress as propulsive springs of the present society, and that such flows guide moral, cultural and humanitarian progress, Carl Schmitt warns of the need for an emergency global unity to control the encounters and mismatches of these dynamics. Thus, in these progresses, the ways in which the world legal revolution Schmitt are articulated, also underlines the urgent need to move forward with political progress.¹⁴

At this point, Carl Schmitt opens up an interesting path to Global Law. Although without using this nomenclature, it diagnoses a relevant point of the sedimented studies in this system, especially when it signals to the phenomenon of the

8 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 101.

9 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 101.

10 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 102.

11 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 101 e 103.

12 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 102.

13 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 103.

14 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 104-105.

“englobement” of national, international, state and supranational evolutions¹⁵. Using Perroux’s contribution, the German theorist looks at the external pressures that affect the mode of production and application of national law. In conclusion, he concludes that the point of legality of a world revolution continues attached to “*pluralidade de legalidades nacionais particulares*.”¹⁶

If previously the nomos was directly connected with the question of territory and theology¹⁷, currently the nodal issue of the production of law is a result of economic and industrial influence. In early 1978, he described the capacity of a large corporation to take the world space, reconfiguring the idea of a normative “production apparatus”, specifically¹⁸. In addition to that, he will predict that the conquest of universal policy will open space for the takeover and conversion into universal police. Consequently, this process associated with the intensive dependence on legality would convert the Law into legality, therefore, into mere obedience.

For Carl Schmitt, the problem gains extension when analyzed on the confinement prism of the normative domestic activity of each State that would tend to close to avoid the action of the universal policy. The unfolding of this reaction would involve the reallocation of “*política do mundo*” as Schmitt calls it, for “*política do equilíbrio do poder mundial*”. States, on the other hand, would only be able to maintain their sovereign legality practices if they hindered the modes of legal intervention against the influence of supra-state powers. To do so, they should delimit which political enemy to be confined by the door of legality.¹⁹

Despite the recommendation, Carl Schmitt in the closing arguments concludes that the “*revolução legal mundial desemboca em uma série de revoluções nacionais e estatais*.”²⁰. Using the European Community case under construction as a reference, he concluded that the force put by universal policy is more intensive than that proposed for Europe. In this context, it inserts the idea of a patriotism of the human species, as an element capable of conferring political unity but which, because of the natural circuit of behavior, tends to be converted into legality.

Even without expressly using concepts such as Global Law, transnationalism and globalization, Carl Schmitt, in his time and manner, presents relevant precepts for the

15 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 105.

16 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 105.

17 SCHMITT, Carl. *Il Nomos della terra nel diritto internazionale dello “jus publicum europaeum”*. Milano: Adelphi, 1991.

18 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 105.

19 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 107-108.

20 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 113.

analysis of national law from the foreign, legal and institutional interferences, direct or indirect. Even if the approach to the binomial friend-foe is avoided, the confluence of legitimacy, legality and superlawfulness is extremely current.

In the context in which Carl Schmitt emphasizes the perennial need for legality suffered by society, it is possible to reestablish the duality that exists between law and legality and then use the argument that calls for legality as the reverse side of the discourse that denies the existence of Global Law. As explained elsewhere²¹, the denial of the existence of Global Law by the doctrine is synthesized by the supposed absence of impositiveness and cogency of its norms, which prevents it from being associated as Law, therefore, confusing exactly Law and legality.

At the start of the legal discussion on the consequences of globalization, Martin Shapiro, for example, peremptorily stated that Global Law would not exist. He based his position on the lack of a single entity capable of producing and applying standards at the global level. In addition, he affirmed that there were no signs that ensure the universality of the Law, the lack of a universal Right valid for all States or the diversity of norms that govern human relations without a basic communion point.²²

However, a posteriori, Martin Shapiro admitted that there are legal precepts which circulate globally phenomena that are universally common, such as the protection of good faith, the express prediction of the dignity of the human person as a legal norm²³, the guarantee of freedom, the requirement of reasonableness, the infeasibility of an impartial third party for the resolution of conflicts, occurring at a global level, even without a universal court²⁴, thus relativizing its skeptical position in relation to Global Law. In this sense, the global character of these precepts propitiate their application beyond the states to which they were designed or confined.

Given this scenario, the combination of the proposal worked out and Carl Schmitt's warning about the confluence between legality and legitimacy, especially when legitimacy appears as a "*espécie de legalidade superior e, se transforma em um método de se forçar a obediência*"²⁵ is signaling the use of super legality in the scope of Global Law.

Although Martin Shapiro has mitigated his (skeptical) position regarding the existence of Global Law, there continues to be a clash over his Law and Global

21 STAFFEN, Márcio Ricardo. *Interfaces do direito global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018.

22 SHAPIRO, Martin. The globalization of law. *Indiana Journal of Global Law Studies*, Indiana, v. 1, n. 1, p. 37-64, 1993.

23 STAFFEN, Marcio Ricardo; ARSHAKYAN, Mher. The legal development of the notion of human dignity in the constitutional jurisprudence. *Revista Brasileira de Direito*, Passo Fundo, v. 12, n. 2, p. 108-126, dez. 2016.

24 SHAPIRO, Martin. The globalization of law. *Indiana Journal of Global Law Studies*, Indiana, v. 1, n. 1, p. 37-64, 1993. p. 63.

25 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 102.

nature on the one hand repulsing this phenomenon, on the other hand, theorizing and analysis on ontology and the teleology of Global Law. However, both support their propositions from the judgment they make in relation to the state in the contemporary world, measuring the evaluation by the exercise of the sovereign authority they possess²⁶. David Held and Antony McGrew acknowledge that the clash between skeptics, statists and globalists, however, can not stop the flow of globalization in the distribution of power, culture, economy, inequalities and forms of government, which is why there is a need of a Global Right (cosmopolitan, in the adjectivation of the authors).²⁷

So following the arguments produced by Carl Schmitt, in parallel, it is possible to determine that the problem does not lie in the existence or not of the Global Law, but in the assimilation of its capacity for cogitation according to standards of prior obedience, guided by the centrality of State as the central engine of the imposition of obligations. What is really undermined, not by the extinction of the State, but by the advent of new actors who confront or influence it formally and materially.

As previously stated, Global Law aims to establish normative instruments beyond state exclusivity with the capacity to reach the multiplicity of actors that move through global processes. In the proposition that is made here, the global attribute serves to systematize legal phenomena that share facts generated extra, trans or supraterritorial, as pointed out Maria Mercè Darnaculetta i Gardella²⁸. What is seen, unlike the universalistic orientation, is the construction of materially standardized legal presuppositions.

The confluence of these episodes makes the Global Law, on the one hand, expresses the energy generated by globalization on the Law and its institutions; and on the other hand, arises from the need to establish rule of law requirements for its actors and their actions²⁹. Nevertheless, the sharing of universal legal precepts, such

26 Armin von Bogdandy, for example, given the conceptual conditions, questions the existence of a Global Law, although, it recognizes the development of legal mechanisms of global projection and with ample spreading. VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 1004. Following this argument: “Es decir, no existe un ordenamiento jurídico global por lo menos desde los parámetros tradicionales del positivismo jurídico.” DARNACULLETA I GARDELLA, Maria Mercè. El derecho administrativo global. Un nuevo concepto clave del derecho administrativo? *Revista de Administración Pública*, Madrid, n. 199, enero-abril 2016. p. 48.

27 HELD, David; MCGREW, Antony. *The global transformations reader: an introduction to the globalizing debate*. 2. ed. Cambridge: Polity, 2003. p. 43 ss.

28 DARNACULLETA I GARDELLA, Maria Mercè. El derecho administrativo global. Un nuevo concepto clave del derecho administrativo? *Revista de Administración Pública*, Madrid, n. 199, enero-abril 2016. p. 42.

29 DARNACULLETA I GARDELLA, Maria Mercè. El derecho administrativo global. Un nuevo concepto clave del derecho administrativo? *Revista de Administración Pública*, Madrid, n. 199, enero-abril 2016. p. 22.

as Human Rights, Human Dignity, Equality, Rule of Law, Transparency and, more recently, the fight against corruption represent the warning of Carl Schmitt when finding that, at a given moment, legitimacy presents itself as a kind of superior legality, which demands obedience as such legality in a condition of superlegality.

Moreover, when Carl Schmitt justifies as a basis for solidification of superlegality, the technical, scientific, industrial and economic development, with global spread and conditions of obliteration, he provides a new point of investigation for the phenomenon of the fragmentation of Law, the emergence of new actors with normative ability and soft law as the source of the Law, all these as fundamental processes in the development of Global Law.

The recurrence of events of economic, environmental, health, political, humanitarian, energy crises, as well as the rise of risks arising from the terrorist threat accelerated the formation of polycentric clusters for the management and regulation of these new manifestations. On the contrary, the accelerated development of new technologies, goods and services, has made the normalization of these flows from different states³⁰.

This diagnosis represents the resizing of the state and international institutions of a monistic-dualistic³¹ as Philip Jessup had foreseen, but with much more consistent cogs of those anticipated in the mid-1950s³². The Global Law strands are articulated at multiple levels, governments, local administrations, intergovernmental institutions, ultra-state and national courts, networks, hybrid (public-private) organisms, non-governmental organizations and individuals themselves.

30 Although working with the theory of legal regimes, it is worth mentioning the arguments of Salem Hikmat Nasser: “Regimes jurídicos transnacionais, para serem jurídicos, ou devem pressupor uma definição de direito diferente, de modo a diferenciá-los do que faz jurídicos os regimes que fazem parte do direito internacional público, ou devem pressupor uma definição ampliada, mais inclusiva, que possa abarcar ambos tipos de conjuntos de normas, regras etc. Num mesmo fôlego, direito do comércio internacional, direito do meio ambiente, *lex mercatoria*, *lex constructionis*, *lex digitalis*, são oferecidos como exemplos desses regimes funcionais que seriam a expressão da fragmentação do direito global”. NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, 2015. p. 104.

31 According to Armin von Bogdandy: “They also lead into a dead end from the point of view of theories designed to capture the entire legal constellation, both analytically and normatively. Dualism ultimately shares the fate of the traditional principle of sovereignty. Monism with public international law at its apex shares the weaknesses of world constitutionalism as a paradigm for grasping the existing law.” VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 1005.

32 “I shall use, instead of ‘international law’, the term ‘transnational law’ to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories” JESSUP, Philip. *Transnational law*. New Haven: Yale University Press, 1956. p. 136.

By similar lines, the position of Harold Koh, for whom the process of transnationalisation of the Law gains shape from the complementarity of the actors responsible for activating the process (transnational norm entrepreneurs) next to the governmental norm sponsors, develop normative standards of transnational / global nature, later to be introduced in the national scope of each State.³³

One of the most complete demonstrations of these phenomena is associated with the growing wave of new specialized bodies with attributions of control and regulation, competing or even subtracting state functions progressively observed from technical standards, certifications, stamps, indicators and rankings. As a result, internally, the Legislative, first and then the other powers of each state become deprived of their traditional legality, in the view of Carl Schmitt, for entities stranger to the political-institutional glossary.

If the European Union or the Organization of American States is taken as a reference, as supranational entities, it will be seen that the internal legal area of the respective members did not open only to the “top”, but also “sideways”, so that the members can now be considered part of the shared legal area. Thus, given a logical analysis, it is possible to affirm that if legality, in the concept of Carl Schmitt, is contracted in the national (domestic) territory; by virtue of the horizontal movements, it can expand (or retreat) consequently in the extraterritorial scope, according to its condition of responsiveness³⁴, in other words: in their capacity to impose obedience in a context of reaction³⁵.

In this context, the very superlawfulness in Carl Schmitt’s notion described here would no longer be a prerogative of the State generically. Although there are “strong” States, the use of super-legality, from economic and industrial progress, has decomposed the notion of the sovereign space of States, in this regard, to place superlawty at global levels, justifying it with greater intensity the very use of the term “englobement”. Therefore, Carl Schmitt’s thesis of superlegality is nowadays confirmed with best indicators through the Global Law files.

3 Superlegality and the transnational corruption combat

Even without specifically studying the phenomenon of transnationalism and emerging global law, Carl Schmitt, from his approach to superlawism, provides a skilful bias for the analysis of transnational combat cases against corruption. First, however

33 KOH, Harold Hongju. *Why Transnational Law Matters*. Faculty Scholarship Series, 2006, paper 1793. Disponível em: <http://digitalcommons.law.yale.edu/fss_papers/1793>. Acesso em: 20 mai. 2017.

34 FALK, Richard. *Law in an emerging global village*. A post-Vestfalian perspective. Ardsley: Transnational Publishers, 1998. p. 28 ss.

35 Tal qual em: SCHMITT, Carl. *Il Nomos della terra nel diritto Internazionale dello “jus publicum europaeum”*. Milano: Adelphi, 1991.

it must be emphasized that from a material point of view researches from Global Law observes global legal claims that expand transnationally, among them, more recently, the fight against corruption.

In studying the social, institutional, technological, legal and economic movements of the last ten years it is possible to conclude that the pretension of fighting corruption has ceased to be confined by state borders, on the one hand; in another hand it challenges a transnational / global confrontation not only on the institutions of Criminal Law.

From the self-annihilation of the Tunisian Mohamed Bouazizi, through “Operação Lava Jato” and the impeachment of Dilma Rousseff in Brazil, the arrest of FIFA officials in the United States and Switzerland, the impeachment of Park Guen-Hye in South Korea to the arrest of members of Saudi Arabia’s royal family, expulsion of members or the nebulous case of the Argentinean submarine ARA San Juan, the theme of the corruption combat and its transnational extension ended up becoming a condition of legitimacy, as a moral, ideological and philosophical self-representation of a social order, such as which Carl Schmitt³⁶.

The cases cited above also point out that the episodes following each “accusation of corruption” have instilled through multiple flows the fight against corruption as a condition of legitimacy of who (person or institution) seeks or retains power. They are horizontal and vertical flows, domestic or foreign, national or global, public or private that indicate and / or cross information and dialogue for the persecution of involved in practices of corruption. Governments and institutions legitimize themselves from the discourse of transnational combat to corruption.

Therefore, the transnational fight against corruption, in addition to escaping from the criminal logic, of strict legality, now presents itself with a case of superlegality arising from a legitimacy that appears as a kind of superior legality, transforming itself into a method of forcing obedience, as Carl Schmitt prescribes, when in cases of superlawity³⁷.

Given the current context, the claim of super-legality of the transnational fight against corruption can be appreciated according to specific parts, but that make up the totality of the pretension. Thus, it should be emphasized: moral discourse, technological development, the emergence of new authorities of global action and the world legal revolution (or Global Law).

36 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 101.

37 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 102.

3.1 The moral speech

For a long time, almost continuously, the fight against corruption is fueled by moral discourse. Even the conceptualization dimension of corruption itself is of a moral nature, explains Marie-Laure Susini³⁸. Since Paul's conversion process, including the Inquisition and Jacobinism, the issue of corruption has systematically advanced beyond the juridical lines of its typification.

In the Brazilian case, for example, corruption is statistically the greatest fear of the population, overcoming violence, unemployment and the difficulties of access to education and health. The moral weight of the fight against corruption has taken the place of political morality in matters such as dignity of the human person, human rights and democracy. Institutions and authorities now enjoy legitimacy, in pragmatic terms, in proportion to their actions to combat corruption.

This is a phenomenon that is not restricted only to institutions and public authorities, private initiative, corporations and nongovernmental organizations follow the same path, when adopting practices of compliance, accountability, ombudsman and / or publish information, statistics and indicators on corruption. It would be at this point to characterize the Heidenheimer Taxionomy in the gray tonality, since political elites remain repellent in relation to the fight against corruption, but the discourses of the diffuse majorities demand for their confrontation³⁹.

According to Alberto Vannucci, corruption practices must be contained in specific and strategic fronts, both through mechanisms of transparency and proportional institutional support. The first of the fronts is to approach the vertical axis of the main relationship with the agents, focusing on the effectiveness of formal rules, contractual clauses and enforcement mechanisms to compensate the perverse incentives gathered between agents and corruptors, due to the asymmetry of information, which needs to be trimmed. At the horizontal level, there is a broad set of social variables that can encourage or weaken collective action, positive recognition of the value of the law, internalized adherence to public ethics, or vice versa to strengthen internal regulation - that is, extrajudicial institutions - corrupt business.⁴⁰

According to Carl Schmitt's exposition, and taking initiative to advance historically from it, there is a strong confluence of the moral issue raised in the theory of superlegality, especially for the use of legitimacy in times of representative democracy with the current state of art of anti- corruption.

38 SUSINI, Marie-Laure. *Elogio da corrupção: os incorruptíveis e seus corruptos*. Tradução de Procópio Abreu. Rio de Janeiro: Companhia de Freud, 2010.

39 HEIDENHEIMER, A. Perspectives on the perception of corruption. HEIDENHEIMER, A.; JOHNSTON, M. *Political corruption*. Concepts and contexts. New Brunswick: Transactions Publishers, 2001.

40 VANNUCCI, Alberto. Challenges in the study of corruption: approaches and policy implications. *Revista Brasileira de Direito*, Passo Fundo, v. 13, n. 1, p. 251-281, mar. 2017. p. 268-269.

The fight against corruption turned into the struggle of the good against the bad, political morality was deferred in the name of the moralism of the masses, which influences the construction of the new political morality and, consequently, the exercise of legitimacy and superlegality. Overall the enemy is identified.

3.2 Technological progress

Regarding technological development, the immediate contribution of the communication networks, especially the internet, must be punctuated, as they have provided diffuse, accessible and dynamic channels for the control of public acts. The so-called “information age” in a society that connects into networks has launched the lights, practices hitherto performed underground and difficult to track.

Access to information led to the multiplication of actors in readiness to follow practices seen as corrupt in abbreviated time gap and in a transnational way, while also feeding networks with new information or statistics. As a right result, the notion of advertising had been replaced by the claim to transparency, which meant broad and continuous monitoring of public acts in development and not just the final act.

Transparency has become a gigantic window enabling governments and institutions to be monitored by means of access to information and especially the internet. To a certain extent, in addition to providing new elements of control and monitoring, the transparency derived from contemporary technological development has redimensioned the bases of democratic procedures, debating the legitimacy of democracy as representation in government and demanding clarity on the defense of interests, representation expenses and the substantial nature of the bond between representative and represented.

It is not by chance that the imposition of transparency as an ethical-material criterion for the management of public affairs produces a new possibility of obliging obedience, in paraphrase to Carl Schmitt⁴¹ which undoubtedly produces an added value through the new communication and information technologies. Thus, the results of digital technological progress were associated with the ideology of progress aimed at extinguishing human failures, among them, corruption⁴².

3.3 New global authorities

The emergence of new global authorities in fighting corruption also serves to demonstrate the construction of this superlegality. If before the theme of corruption

41 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 100-101.

42 SUSINI, Marie-Laure. *Elogio da corrupção: os incorruptíveis e seus corruptos*. Tradução de Procópio Abreu. Rio de Janeiro: Companhia de Freud, 2010. p. 155 ss.

combat was attached to the territorial and sovereign limits of the States, with the advent of globalization on a planetary scale, the elimination of corruption became a global agenda.

Whether for ideological, moral, technological, commercial or humanitarian reasons, the pretension of fighting corruption is a global legal claim that adds to the relationship of fundamental legal rights of Global Law. At the same time, combating corruption is the main objective of a series of global actors that use governance tools to investigate, report, certify and report on local, national, international and global corruption practices, as is the case with International Transparency or numerous other observatories and specialized bureaucratic sectors.

In turn, internal pressures cause national bureaucratic structures to also launch anti-corruption initiatives beyond their territorial jurisdiction, aiming at the prevention and repression of such conduct, as can be seen in the actions of the State Department of Justice); of the Attorney General's Office (Brazil)⁴³; of the Office of the Prosecutor of the Republic (Peru); of the Chinese Communist Party (China); of the Basel Committee (Switzerland), for example. In common, both modalities of authorities with global action in the fight against corruption are self-legitimizing in the face of the capacity to satisfy their objectives.

It is precisely from this exercise of power that derives the authority that is legitimized by the capacity to respond to social pretensions through the exercise of rights⁴⁴. Therefore, the exercise of public authority is the fundamental structural characteristic that state institutions today share with non-national, transnational and / or global institutions⁴⁵. Comparatively, cases like Panama Papers, Paradise Papers or Vatileaks signal the intensity of the transnational actors and condition the national institutional guidelines.

On the other hand, especially the global players, they exert strong pressure on national sovereign powers to introduce preventive and repressive mechanisms to combat corruption. In these cases, the Legislature and the Executive become the recipients of "recommendations" from abroad to adjust their regulations and

43 Starting from an institutional analysis, the present behavior is observed with the unfolding of the nickname Operation Car-wash, in Brazil. Since the first investigations, and especially since its judicial phase, the syndicated episodes in Brazil have served as parameterization for investigations and similar charges of the modus operandi in 17 other countries (Argentina, Chile, Peru, Ecuador, Colombia, Panama, Guatemala, El Salvador, Salvador, Dominican Republic, Venezuela, Mexico, United States of America, Antigua and Bermuda, Portugal, Norway, Mozambique and Angola).

44 Thus: "Their authority is legitimate to the extent that they obtain the consent of the governed and exercise certain rights within those domains." BIERSTEKER, Thomas J; HALL, Rodney Bruce. Private authority as global governance. HALL, Rodney Bruce; BIERSTEKER, Thomas J. *The emergence of private authority in global governance*. Cambridge: Cambridge University Press, 2002. p. 205.

45 VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 986.

regulations. In Brazil, for example, the explanations of draft laws (broad sense) against corruption, subsidized by indicators, rankings, memorandums and statistics of organizations such as the World Bank, International Transparency, Basel Committee, FATF, WADA and International Monetary Fund⁴⁶.

Thus, referring to Carl Schmitt's theory of superlegality⁴⁷ it can be said that such agents indirectly legalize their values in the domestic sphere, as the political parties and revolutionary movements once did, with the aim of creating a superlegality.

3.4 The world legal revolution (or Global Law)

It must be recognized, at the outset, that corruption combat, directly linked to the rule of transparency and publicity, takes on a position of global legal pretension. The integrity of institutions and global legal behavior is an essential condition for Global Law and other institutes that are interrelated with it.

In addition to the normative changes promoted in the internal legal files, typical actors of transnationalism through soft law and / or self-regulation develop their own procedures for combating and correcting conduct with the capacity to develop acts of manifest corruption, as an example, mention the mechanisms of accountability and compliance. There is a real symbiosis between public spheres with private spaces, internally and / or externally to the geographic territories of the nation states. However, the normative sources emanate from national public domains with projection and effectiveness in the extra-national private sector and, in other cases, derive from the private initiative with destiny to the behaviors of public institutions, governmental or otherwise.

Global, transnational, and supranational institutions usually differ from international institutions, insofar as their acts regularly represent social interaction in the legal areas of states and are not tied only to the point of state centralism⁴⁸. One of the most complete demonstrations of these phenomena is associated with the growing wave of new specialized agencies with attributions of control and regulation, competing or even subtracting state functions.

46 Only to illustrate the norms published in the last 10 years, from the Brazilian reality, it is possible to point out as direct examples of this optimization of the legificatory activity, with coupling external recommendations: Complementary Act 131/2009 (Transparency Act) and Act 12.527/2011 (Public Access to Information Act), a direct influence of the rules of the NGO Transparency International; Act 13.260/2016 (Antiterrorism Act), direct influence of the FATF, through memoranda, to control financial movements to support terrorist groups; Act 13.322/2016 (Anti-Doping Act), adopts WADA prescriptions for control purposes on the use of prohibited substances for sports practice.

47 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 103.

48 VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 990.

Global, transnational, supranational, and international institutions, rooted in other legal orders, now have a marked and formative impact on social interaction in national institutions. The gait that is printed is basically oriented by the external-internal flow⁴⁹. Given the occurrence of this new power, is the need for a new law, capable of submitting it to legal precepts. This is the emergence of Global Law.

However, if the notion of full horizontality of Global Law prevailed, more recently an ontic change in such Law⁵⁰. Despite its non-hierarchical support from the formal (procedural) point of view, it should be noted that certain subjects behave as presuppositions influencing specific norms. Human rights, democracy, dignity of the human person, information, participation, transparency, rule of law, equity, due process of law, resolution of disputes by impartial files and the prohibition of corruption can be listed as valid assumptions for the development of specific norms for the Global Right. Even authors who outline distinct arguments in relation to Global Law acknowledge the existence of globally transcendental cogent precepts in relation to UN authority, for example.⁵¹

In view of this, the condition of ascendancy that takes place in the Global Law is not in line with formal requirements, but of legal assets that are materially considered as founders and guiding standards that operate in specialized scenarios. Therefore, if the normative condition does not result exclusively from formally hierarchical and homogenizing structures, does it remain to investigate the impulse that promotes the emergence and adoption of certain precepts as normative sources for Global Law? Given current legal experience, there seems to be a predisposition for multiple institutions to recognize and respect normative sources that can respond to dynamic and complex yearnings with a focus on being and being-behaviors to be regulated.

In association with the postulates of Carl Schmitt, it is necessary to understand the opening of his theorization for the files of the Global Right, especially in the thematic of the superlegality. At this point, both the analysis of “englobement” and the conversion of Law into legality, since the occurrence of a world legal revolution, are patterns of cohabitation between the theory of superlegality and Global Law.

49 VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 984.

50 STAFFEN, Márcio Ricardo. *Interfaces do direito global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018.

51 VARELLA, Marcelo D. *Internacionalização do direito: direito internacional, globalização e complexidade*. Tese apresentada para obtenção de livre-docência junto à Universidade de São Paulo. Universidade de São Paulo. Faculdade de Direito. São Paulo, 2012. p. 432 ss; DARNACULLETA I GARDELLA, Maria Mercè. El derecho administrativo global. Un nuevo concepto clave del derecho administrativo? *Revista de Administración Pública*, Madrid, n. 199, enero-abril 2016. p. 46-47; HELD, David; MCGREW, Antony. *The global transformations reader: an introduction to the globalizing debate*. 2. ed. Cambridge: Polity, 2003. p. 43 ss; VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014. p. 984.

Finally, in relation to the theory of super legality, the transnational pretension to combat corruption and its comparison with the proposal of Global Law, there is an ultimate point to be addressed from the German constitutionalist. For Carl Schmitt, once achieved, universal politics will become universal police⁵². At the moment, this seems to be the end result for the fight against corruption. It contributes to this process, the elevated position of legitimacy found in the fight against corruption, fueled by moral discourse, technological sophistication and the influence of various transnational agents. Therefore, the fight against corruption is, at global levels, on the border between politics and the police, and the law, on the other hand, seems to be a superlative on this theme.

4 Final considerations

From significant examples, the corruption combat has turned into a new global legal pretension, ceasing to be just a criminal type, or incriminating norm. It no longer presents itself as a domestic problem, becoming a demand for broad and diffuse correction.

The same crusade that has been installed to eliminate despotic regimes and slavery, for example, seems to be influencing anti-corruption practices. Just as once democracy and human rights were defended as a legitimating criterion for the law and its institutions, today, eradicating corruption is becoming the keynote of legitimacy. It should be noted that the technological process that allows the maximum incidence of transparency, pushes the moral process of fighting corruption, both at the local level and at the global level.

Using the idea of Carl Schmitt, the transnational confrontation of corruption oscillates in its trajectory between the universal policy and the universal police, represented by the proliferation of new actors and the resizing of institutions linked to the States for the treatment of the matter. After the exposition of acts of corruption, scenes of “englobement” that direct national legality into the quadrants of legality arising from the “world legal revolution”, in Schmitt’s words, enter into scenes.

This is the meeting point between Carl Schmitt’s perspective on the so-called world legal revolution and the precepts of Global Law. There is a consensus in both proposals that the aforementioned model aims, at multiple levels, by various agents and by various flows to avoid normative divergences in absolutely relevant and sensitive matters, as is the case of the corruption combat.

Individuals, associations, nongovernmental organizations, observatories, corporations, political parties and movements, international organizations and

52 SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997. p. 106.

governments gradually introduce the fight against corruption as the “patriotism” of the moment. Therefore, facing the issue of corruption through differentiated legitimacy advances to characterize a superlegacy that directly or indirectly alters the gravitational axis of Law and its institutions.

It is possible to discuss the intensity of the corruption combat, however, assessing the relevance of fighting corruption or not today is a clash. Even if a national state chooses to be lenient, external pressures will condition it. Here the hypothesis of superlawty for outstanding obedience is confirmed. There are risks in this crusade, symbolized by the idea of universal police against corruption, however, confrontation by the constitutional legal system, by itself, does not show full powers.

The superlative theorem is valid and adequate to measure the state of art of transnational combat against corruption and its association with Global Law. It explains the structure and the meaning of the problem, especially with regard to the motivations of normative production and institutional behavior on such social demand. However, now that the “enemy” is identified, what is done with it?

* Text produced during the study period as Visiting Scholar at the Max Planck Institute for Comparative Public Law and International Law - Heidelberg, promoting the Coordenação de Aperfeiçoamento de Pessoal de Nível Superior (CAPES).

References

- BIERSTEKER, Thomas J; HALL, Rodney Bruce. Private authority as global governance. HALL, Rodney Bruce; BIERSTEKER, Thomas J. *The emergence of private authority in global governance*. Cambridge: Cambridge University Press, 2002.
- DARNACULLETA I GARDELLA, Maria Mercè. El derecho administrativo global. Un nuevo concepto clave del derecho administrativo? *Revista de Administración Pública*, Madrid, n. 199, enero-abril 2016.
- FALK, Richard. *Law in an emerging global village*. A post-Vestfálian perspective. Ardsley: Transnational Publishers, 1998.
- HEIDENHEIMER, A. Perspectives on the perception of corruption. In: HEIDENHEIMER, A.; JOHNSTON, M. *Political corruption*. Concepts and contexts. New Brunswick: Transactions Publishers, 2001.
- HELD, David; MCGREW, Antony. *The global transformations reader: an introduction to the globalizing debate*. 2. ed. Cambridge: Polity, 2003.
- JESSUP, Philip. *Transnational law*. New Haven: Yale University Press, 1956.
- KOH, Harold Hongju. *Why Transnational Law Matters*. Faculty Scholarship Series, 2006, paper 1793. Disponível em: <http://digitalcommons.law.yale.edu/fss_papers/1793>. Acesso em: 20 mai. 2017.
- NASSER, Salem Hikmat. Direito global em pedaços: fragmentação, regimes e pluralismo. *Revista de Direito Internacional*, Brasília, v. 12, n. 2, 2015.
- VARELLA, Marcelo D. *Internacionalização do direito: direito internacional, globalização e complexidade*. Tese apresentada para obtenção de livre-docência junto à Universidade de São Paulo. Universidade de São Paulo. Faculdade de Direito. São Paulo, 2012.
- SCHMITT, Carl. A revolução legal mundial: superlegalidade e política. *Lua Nova*, São Paulo, n. 42, p. 99-117, 1997.
- SCHMITT, Carl. *Il Nomos della terra nel diritto Internazionale dello "jus publicum europaeum"*. Milano: Adelphi, 1991.
- SCHMITT, Carl. *Legalidade e legitimidade*. Tradução de Tito Livio Cruz. Belo Horizonte: DelRey, 2007.
- SCHMITT, Carl. *Teoría de la Constitución*. Madrid: Alianza, 1992.
- SCHMITT, Carl. *O conceito do político*. Belo Horizonte; DelRey, 2009.
- SHAPIRO, Martin. The globalization of law. *Indiana Journal of Global Law Studies*, Indiana, v. 1, n. 1, p. 37-64, 1993.
- STAFFEN, Márcio Ricardo. *Interfaces do direito global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018.

STAFFEN, Márcio Ricardo; ARSHAKYAN, Mher. The legal development of the notion of human dignity in the constitutional jurisprudence. *Revista Brasileira de Direito*, Passo Fundo, v. 12, n. 2, p. 108-126, dez. 2016.

SUSINI, Marie-Laure. *Elogio da corrupção: os incorruptíveis e seus corruptos*. Tradução de Procópio Abreu. Rio de Janeiro: Companhia de Freud, 2010.

VANNUCCI, Alberto. Challenges in the study of corruption: approaches and policy implications / Desafios no estudo da corrupção: abordagens e implicações políticas. *Revista Brasileira de Direito*, Passo Fundo, v. 13, n. 1, p. 251-281, mar. 2017. ISSN 2238-0604.

Disponível em: <<https://seer.imed.edu.br/index.php/revistadedireito/article/view/1809>>. Acesso em: 13 abr. 2018. doi: <https://doi.org/10.18256/2238-0604/revistadedireito.v13n1p251-281>.

VON BOGDANDY, Armin. Common principles for a plurality of orders: A study on public authority in the European legal area. *International Journal of Constitutional Law*, Oxford, v. 12, n. 4, out. 2014.