http://dx.doi.org/10.18623/rvd.v16i34.1455

LEGAL FRAGMENTATION AND GLOBAL ENVIRONMENTAL LAW

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ABSTRACT

This scientific research report has the general objective of contextualizing the appearance of a Global Environmental Law in the scenario of legal fragmentation between Law and non-Law norms. Specifically, it has three other objectives, namely: (1) to examine the process of legal fragmentation brought about by globalization and transnationalism; (2) to identify the law and non-Law frameworks; and (3) to specify, according to this background, the space of an intended Global Environmental Law. As a research problem, the following question was formulated: Is there a space, in the fragmented legal phenomenon, for the emergence of a global law of an environmental nature? The hypothesis proposed as positive was confirmed in the final considerations, mainly using *soft law* cases and regulated self-regulation. To achieve that, the study was based on the deductive method and bibliographical research, on category and the operational concept as research techniques.

Keywords: self-regulation; global Environmental Law; *soft law*.

A FRAGMENTAÇÃO JURÍDICA E O DIREITO AMBIENTAL GLOBAL

ABSTRACT

O presente relato de pesquisa científica ostenta o objetivo geral de contextualizar a emergência de um Direito Global Ambiental no cenário de fragmentação jurídica entre normas de Direito e não-Direito. Especificamente, apresenta outros três objetivos, a saber: (1) examinar o processo de fragmentação jurídica ocasionado pela globalização e pelo transnacionalismo; (2) identificar as matrizes de Direito e de não-Direito; e, (3) delimitar, nesse pano de fundo, o espaço de um pretenso Direito Ambiental Global. A título de problema de pesquisa, formulou-se a seguinte indagação: há espaço, no fenômeno jurídico fragmentado, para a emergência de um direito global de índole ambiental? A hipótese aventada como positiva se confirmou nas considerações finais, mormente se valendo de expedientes de soft law e autorregulação regulada. Para tanto, o estudo se valeu do método dedutivo e da pesquisa bibliográfica, da categoria e do conceito operacional como técnicas de pesquisa.

Palavras-chave: *autorregulação; Direito Ambiental global; soft law.*

FOREWORD

At present, the fragmentation of the juridical phenomenon is as conspicuous a circumstance as its roots, based on globalization and transnationalism, whose initial driving forces were, respectively, world economy and commerce. This globalized transnational structure and its self-regulatory practices give rise to the birth of unique and unofficial regulations managed on the fringes of National Governments, hitherto the holders of the sovereign power do dictate the law and freely apply it.

This is how, at first, the consequences of globalization and transnationalism inflicted on the nation-state are emphasized, which take away from the latter the power of solely dictating the law and applying it autonomously. Later on, noticing that the globalized transnational structure gives rise to an unofficial technical and specific set of rules produced in the fringes of the States, it accurately situates the Law and non-Law scenarios, the latter being driven by the establishment of a nearly solely private institutional order that branches down along fields so far belonging solely to government agencies. This infiltration is based on the following rationale: Legislative production stems directly from social and economic development, due to new demands and political, technical, ideological and legal pressures, so that the State itself ends up taking advantage of "transnational private laws" to impart them with governmental facets.

At the end of this paper, *soft law* and self-regulation are identified as Global Environmental Law resources.

1 THE PROCESS OF FRAGMENTATION LAW IS CURRENTLY UNDERGOING

As already announced, it is well known and agreed upon that Law is undergoing a phenomenon of fragmentation whose roots are embedded in globalization[1] and, consequently, in the transnationality[2] of

1 "Globalization, a process considered inescapable and that moves towards the 'open society' or the 'Great Society', whether we prefer Popper's or Hayek's phrase, tends - which is no longer a discovery - to invade all the spaces of social, economic and political life. [...] Once considered as multinationals, companies - which nowadays changed into true transnational corporations - have become capable of explosively expanding their production, with their bargaining and haggling power boosted at the level of an economy that has become planetary. Players currently taking center stage in global economic relations largely escape national and international regulation. A *lex mercatoria* has been established; rules that pretend to be international and ensure the spreading of free trade are created on a daily basis, imposing themselves on national rights and turning into international trade law. The State, which in principle still holds the monopoly of law, appears as a structure that is increasingly absent when we deal with actual legal relationships, which are increasingly moving on the fringes of "State law". (ARNAUD, 2006, p. 18).

2 "The phenomenon of transnationalization is the new worldwide situation, arising mainly from the

the juridical phenomenon. This phenomenon goes beyond the traditional national-international polarity, all of which evinces that social sectors are autonomously producing rules in the face of the nation-state, forming a unique system of norms.

The influence of globalization on the State and its power is severe, and it may be speculated that at first the phenomenon caused an expansion of the organization characteristic among the more developed States, as they achieve an unparalleled power over political and economic communities. Secondly, the character and nature of government power will drastically diminish among the rest of the States. These empty States will have limited practical authority and will function essentially as corporations for specific purposes. Thirdly, power is transferred to the so-called private sphere, as agent of the first category of States and competitors against the second category, or the latter two - small States and private entities - may undergo mergers. Private players, as agents of large States, may also have more power than empty Small states. Fourth, authority and sovereignty should become more diffuse, and therefore less based on traditional notions of territoriality. This will benefit of larger States, whose status will increase, and harm the others, empty States, which will tend to lose coherence as autonomous, superior and independent players. (BACKER, 2005, p. 266).

As we saw, Law, which needs to conform to social manifestations of the current historical time, has not remained immune to the advances of the globalizing process, either because such changes have changed the notions of time and space, or because, crucially, they have redefined the old thinking of seeing Law and State as one.

In short, globalization has obliquely given rise to a legal globalization, which has directly impacted the relationship between Law and State. And everything indicates that the process of fragmentation of Law is gradually and increasingly taking away from the nation-state the power - sovereign up to that point - of autonomously producing and enforcing norms. According to McGrew (1997, p. 3), the paradigm

intensification of economic-commercial operations in the postwar era, which is characterized - especially - by deterritorialization, capitalist expansion, weakening of sovereignty and emergence of a legal order produced on the fringes of state monopoly. Transnationalization is not a distinct phenomenon from globalization, because it was born within its context, having characteristics that can make for the emergence of the transnational Law category." (STELZER, 2009, p. 16). Another framework, however, understands transnationalism as a transnationalization of the litigiousness of public law, a phenomenon that would break the dualistic chain of International Law. By this process, norms of international or transnational law would be adopted in national courts, not only for the purpose of obtaining reparations and compensation, but rather as part of a political dispute that goes beyond the court's ruling. (KOH, 1991).

consolidated since the "Peace of Westphalia" was broken. This paradigm established the State on the pillars of sovereignty, territoriality, autonomy and legality, giving rise, in the words of McGrew, to the "Westphalian international".

According to Archibugi (2008: 55-56), the progressive impetus of globalization processes has greatly increased the qualitative and quantitative importance of external influences, altering the way power is exercised in all States (no longer due to citizens-government-State). Areas where a State can make its own decisions autonomously are therefore becoming increasingly limited. In the end, the State has lost its power as sole lord of order. (ARNAUD, 2007, p. 3).

Staffen (2016, p. 184) us that economic globalization brings with it a process of legal globalization, unifying legal behavior and inducing the circulation of previously - mostly contractual - drafted models. Indeed, as well noted by Cotterrell (2012, p. 340), the globalization process must be understood as a physical representation of a systemic interdisciplinary structure, whose flows are not restricted to economy.

Even though he has reservations and objections on the subject of Global Law, Varella (2012, p. 433) presents a fairly accurate summary of current challenges. According to him, three phenomena evinces the fragmentation of Law. The first is associated to the multiplication of law-producing sources that affects one of the basic elements of international law. The second is represented by the appearance of private regimes that directly affect the hierarchy of norms and their means of validation. Finally, there is the multiplication of conflict resolution mechanisms, which exposes the decentralized condition of power.

This novel shaping gives rise to a scenario where the normativity is separated from the (un)necessary coercive element that justified the existence of a centralized decision-making body.

> State authority and power have become diffused in an increasingly globalized world characterized by the freer trans-border movement of people, objects and ideas. This has led some international law scholars, working from the American liberal tradition, to declare the emergence of a new world order based on a complex web of transgovernmental networks. (LAMBERT. 2010, p. 1).

In this scenario, it seems inexorable to re-appraise the relationship between Law and State, since the notion of centralized power that is inherent

to the modern nation-state is no longer able to explain, translate and apply the law-making aspect of the transnational phenomenon. This diagnosis was also made by Habermas (2001, p. 69), for whom the functions of the State can only be fulfilled at a level similar to the present if they move on national States to political organisms capable of somehow adopting a transnational economy.

This background shows that the transition of nation-states into the transnational era is urgent. This transition is based on a) a new configuration of the political system, and b) the replacement of the monocentric power structures of nation-states for a polycentric distribution of power where a great diversity of transnational and national players cooperate and compete among themselves. (BECK, 1999, p. 27).

2 "LAW" AND "NON-LAW"

The existence of rules that, in spite of being coercive and forceful against the State bodies themselves, are not the product of an institutionalized, vertical and centralized structure of power, is clear. This rule producing on the fringes of the State is what we shall call here "non-Law", The word "Law" being used only for norms derived from the classic structure of the Modern Constitutional State[3], which is the first object we will analyze.

The notion of what is conventionally called "Law" includes a set or system of state norms produced by levels of democratic political representation and carried out by specialized state institutions, with high horizontal coordination and vertical integration (bureaucratic organization). The subjects are taken, on the one hand, as voters who delegate the production of norms to their representatives, and, on the other, as passive recipients of legal norms, which are incorporated into their will by means of commands that determine the ways they should behave. According to this notion, Koerner (2006, p. 150) emphasizes that Law still has clear borders, in a threefold sense: 1) disciplinary, since it is theoretically approached as a closed system to the other forms of normativity, the power structures, and social relations; 2) political, since the times and modes of application of Law are separated from the processes of its production; and 3) national,

3 "Modern Constitutional State should be understood as that type of political organization that emerged from the bourgeoisie and American revolutions of the eighteenth and nineteenth centuries, whose major characteristics were sovereignty based on a territory, the tripartition of powers, and the gradual implementation of representative democracy." (CRUZ e BODNAR, 2009, p. 56).

since Law is associated with state sovereignty, making the State the sole legitimate producer of Law. Maybe we should add a fourth: 4) limiter, which brings together Law as a guarantee and limitation of power (not only of the State, but of any oppressing power).

This structure of Law as a legal order based on the theory of legal norms (set or system) has its historical basis on two classic works of Normative Positivism, namely, Hans Kelsen's Pure Theory of Law (second edition, 1960) and Norberto Bobbio's A Theory of Legal Order. It is, in fact, a positivist legacy those claims to define Law through self-legitimation: Law is that which is produced based on specific rules of the system itself, by an authority considered as having powers or attributions to do so, and following a rigid procedure of elaboration.

As a consequence, Law production sources are a monopoly of the State by means of the Executive, Legislative and Judicial Powers, which are responsible, respectively, for the implementation, creation and application of rules. It is, therefore, precisely in these latter ones that Law is summed up and established in the compiled codes and laws, never allowing for value judgments of the legal phenomenon, let alone the use of sources supra-legal sources or sources outside the legal system. That is why Law requires a high degree of generality and abstraction, which characteristics diminish and simplify the legal matter (use of few but highly abstract concepts). We then have legal rules derived from a Public Power that are abstract, impersonal and roughly edited with *ex nunc* effects. This all converges into cogency and legal certainty (predictability of Law), which are major legal values for the legal principles. Interpreting Law from this structure means looking for the objective meaning of the text or the subjective will of its author, which leaves no room for the interpreter's discretion or for any forms of consensus.

Although this legal-doctrinal notion is the one most widespread in the twentieth century, and regarding the springs of Law, the most theoretically developed, it is necessary to accept that it has been surpassed in the wake of the fading of the nation-state (loss of sovereign power to autonomously make and apply Law held in the past) before the above-discussed influences of globalization and the transnationality of the legal phenomenon. Indeed, the inadequacy of the Law scene to the new fragmented structure of "Law" matches the paradigmatic substitution[4] of

4 "[...] "Paradigms are the universally acknowledged scientific achievements that, for some time, provide model problems and solutions to a community of practitioners of a given science." (KUHN, 1994, p. 13).

Modernity for Postmodernity[5].

Non-Law, in its turn, is defined as the regulation originating - by coercive or consensual means - from entities that are not central to the political situation and are not in exclusive possession of the law-making power, *grosso modo,* private players or players without public connections, connections that regulate concrete and even personal relationships clearly private in nature, without disregarding that, transversally, they affect public law relationships. To the point, contrary to what one might suppose, non-Law does not come up only in situations where there is a gap or limbo in Law (official legal regulation, coming from a centralizing political body that solely holds law-making power), but is produced and developed on the fringes of the latter in an autonomous way.

In fact, it is not alone the effects of globalization and transnationalization that have resulted in the process of legal fragmentation mentioned above. The rigidity of the Law system and its straitjacketing in spite of the inversely proportional speed of financial and market relations also contribute to the existence and development of non-Law. Therefore, it is also this characteristic of Law of remaining closed, the product of a progress inherent to the kind of positivist knowledge that underlies it, and which is confirmed by the national will via its democratic representation, which has cause to worldwide surgence of the so-called "non-Law zones". That is why the legal mode of production is incapable of keeping up with postmodern socio-cultural development. (ARNAUD, 2007, p. 22-23).

Law, in its autonomy, was alive and lives on, developed and still develops outside the cone of shadow and the constricting rails of the so-called official Law; this is an inevitable consequence of it not being an aspect of power and the State, but of society as a whole. It is not an anarchic discourse, but rather is the record of the actual reality that makes up the plurality of legal systems. It is, in the words of Grossi (2007, p. 67), the great realm of the freedoms of Law, which, in fact, does not match the majestic and respectable legal order of the State.

Teubner (2005, p. 81) calls this shape a "new legal pluralism",

5 "In the American continent, this term is used by sociologists and critics. It means the state of a culture after the transformations that affected the rules of the games of science, literature and the arts from the nineteenth century on. [...] Postmodernism is considered as disbelief toward meta-narratives. It is, undoubtedly, an effect of the progress of the sciences; but this progress, in turn, presupposes it. The lake of use of the metanarrative device of legitimation corresponds above all to the crisis of metaphysical philosophy and of the university institution that relied on it. [...] Postmodern knowledge is not only an instrument of the powers. It sharpens our sensitivity to differences and strengthens our ability to withstand the immeasurable. In itself, it does not find his *raison d'être* in the homology of experts, but in the paralogia of the inventors." (LYOTARD, 2006, p. XVI-XVII).

given birth independently of the State, operating in several "informal" fields and giving a new dress to legal pluralism, because it uncovers, on the dark side of sovereign Law [non-Law], the subversive potential of oppressed discourses.

> The new legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering. Instead of mutual influences between two separate entities, this perspective sees plural forms of ordering as participating in the same social field. (MERRY, 1988, p. 873).

Nevertheless, it must be acknowledged that the subtlety of this partial contact between Law and non-Law is intense, almost fluid. To the point that, for example, Teixeira and Köche (2013, p. 94), say it is quite possible in this scenario to be simply describing the social phenomenon or even encompassing moral or consensual norms. In any case, they conclude, the notion of what is especially legal has been lost, since it no longer bears the seal of officialdom of the State. Along these lines, the question arises: is non-Law (species), after all, Law (gender)? Indeed, it is. An ""unofficial" Law, as Teubner (2005, p. 82) calls it, but Law.

Currently, different sectors of world society are establishing themselves with "relative autonomy" before the nation-state, as well as before international politics; these sectors produce, from themselves, unique global legal systems, as defined by Giddens (1991, p. 70). It is important to point out that, when Giddens talks about society, it would be a good idea to understand it as Taylor (2000, p. 236) defines it, namely that "peoples have their own identity, purpose and even a will outside any political structure. In the name of that identity, following that will, they have the right to make and unmake structures." And, of course, inserted in these structures, one finds the non-Law system (which, ultimately, is Law). Furthermore, even though it is possible for private or technical-financial regulations to double as Law, this does not happen by opposing or superseding it, but in tandem with it. And this is because Law is not happy to just defend entrenched positions, but also carries out establishing functions, which assumes the creation of an imaginary of new social and historical meanings and the deconstruction of the old meanings that oppose them. (OST, 2004, p. 19).

Moreover, accepting normative production without the centrality

and power of the State (non-Law) and understanding it, nevertheless, as Law (gender) is an imperative condition for understanding the legal phenomenon. Not doing so is tantamount to ignoring the normativity of "unofficial laws," which are generally more binding than those derived from centralized powers such as the State.

3 THE GLOBAL ENVIRONMENTAL LAW SPACE

Consider the scenario of legal fragmentation sketched in the preceding sections: Law, as a genre, divided into two species: Law and non-Law. The first encompasses the normative production of a state nature, thus with emphasis on public authority; it is abstract, impersonal, cogent, based on territorial sovereignty and a producer of norms that roughly bear *ex nunc* effects and affect factual situations through of subsumption. The second is forged and brings together norms produced by the private sector; its nature, therefore, is clearly that of private power. It is concrete, personal, cogent or consensual, ignores borders and sweeps territories, giving rise to *ex tunc* effect norms, which are applied to relationships by means of arbitrated (search for agreement) or regulated (regulated self-regulation) measures.

If, in the center of this bifurcated scenario, a compass were handled, which of the two sides would the magnetic needle point as the north? Surely, non-Law. This is pernicious since; would the legal security of codes, constitutions or treaties be missed in the swampy terrain of extremely technical, specialized and corporate rules? Perhaps; however, codification and dogmatism have long failed to ensure the enjoyment of the rights they promise, nor does the State displays the healthy condition of autonomously applying the rights it enumerates.

The truth is that this stage of History and this background of an almost libertine economic transnationality require a parameter, especially with regard to Environmental Law; and it is important for this parameter to be of protection and defense. It has already been found out that the legal scenario cannot handle this enterprise and, on the other hand, non-Law, at its own discretion, will move toward self-regulation.

In order to get a sense of the how important the globalized transnational structure is, Gatto (2011, p. 3) points out that in 2011 there were more than 82,000 transnational corporations and 810,000 subsidiaries, which carried out practically all existing branches of activity

and had offices all around the world. Considering that this number has increased in five years and that the UN (2016) recognizes only 193 States, the presence of this structure in the lives of the approximately seven billion people inhabiting the Earth is quantitatively significant. Also talking about this matter, Stiglitz (2007, p. 303) says that "In 2004, General Motors' revenues amounted to $ 191.4 billion, more than the GDP of nearly 150 countries. In the financial year of 2005, Wal-Mart earned $ 285.2 billion, more than the total GDP of sub-Saharan Africa."

Therefore, to relegate the situation to an ethical voluntary effort of market forces would be tantamount to act based on a resounding and puerile ambiguity, a misconception that is made clear by situations such as the failure of the tailings dam of Samarco Mining Company in Mariana, Minas Gerais - possibly the greatest environmental disaster in the history of Brazil. It is, therefore, precisely in this crux of the matter that the appearance of an Environmental Law is also proving to be global, transnational.

This is why it could be assumed the appearance of a system of national and regional environmental protection, mainly of extraterritorial application[6], possibly represented by some directives and regulations of the European Parliament and Council, such as Directive 2001/18/CE which aims at regulating and lending greater efficiency and transparency to the process of granting authorizations for the deliberate release and sale in the market of genetically modified organisms. Likewise, Directive 2009/28/EC regulates on the promotion of the use of energy from renewable sources.

In addition to presenting rules with extraterritorial effects, European law shows itself open to the participation of non-governmental players in the drafting and implementation of environmental legislation. As an example, voluntary private certification schemes are accepted and acknowledged, through an accreditation procedure, as a means of proving

6 The extraterritorial application of protective norms is nothing new, especially when it comes to safeguarding Human Rights - and one must never forget that the right to a healthy and balanced environment is one the most basic human rights. "[...] 15 peasants from Myanmar, claiming anonymity for safety reasons, filed a lawsuit against UNOCAL - Union Oil Company of California (later absorbed by Chevron) before the California Federal Court of Appeals, grounded on the Alien Torts Claims Act. They argued that the oil company used soldiers and militias to protect its facilities, violating human rights, committing murders and rapes without distinction, as well using slave labor. In its defense, UNOCAL argued that the pleading was not legally enforceable, on the grounds that extraterritoriality of the rule was forbidden, and on merit that those acts were carried out by the State of Myanmar and outsourced companies. In its ruling, the California Federal Court of Appeals concluded that UNOCAL knew and/or should have known of the human rights violations by its agents or contractors, and should therefore compensate for damages. Due to that, UNOCAL complied with the decision in in 2005." (STAFFEN, 2015, pp. 93-94).

the implementation of "sustainability criteria" indispensable for the sale of biofuels in the European market; this way, the way the sustainable quality of biofuels used to achieve the promotion of renewable energy in the transport sector is controlled is a practical manifestation of transnational law. (ANDRADE, 2013, p. 22).

The United Nations itself approved the Earth Charter in 1983, which advocates the need for recognize Nature as a "being", not as a mere object to be used by human beings, a subject where the South American continent provides abundant examples, many of which are of a constitutional nature. Article 71 of the Constitution of Ecuador lays down that Nature has the right to existence, maintenance and regeneration of its vital cycles (essential ecological processes), a guarantee that can be defended by any person, community or village. Likewise, Article 34 of the Bolivia Constitution also guarantees broad legal protection to Nature, admitting that any individual or group can defend the rights of a river or a river basin, for example, before the Judiciary Power.

However, without prejudice to the examined normative sources, which focus on Global Law, special attention should be given to *soft law* and self-regulation[7], which are increasingly advancing to new territories, and gaining new powers, new institutions and new rights. Pardo (2005, p. 10) says that the existence of said legal provisions needs to be analyzed from the point of view of transparency and public debate, without influence of the "autism" that aims at denying their existence, in order to study their consequences.

3.1 *Soft law* and self-regulation

Regarding the conceptual aspect, specifically providing a unitary and exhaustive definition of *soft law* is not an easy task, when we consider

7 This consists in: (1) a form of regulation, not the absence thereof, self-regulation being a species of the regulation genre; (2) a form of collective regulation, since there is no individual self-regulation; it involves a collective organization that lays down and imposes certain rules and discipline on its members; and (3) a form of non-governmental regulation. (MOREIRA, 1997, p. 22). The following can be mentioned as examples of self-regulation: (1) professional associations, such as the Brazilian Bar Association, which is considered public self-regulation, since it is exercised by professional representation bodies with public legal status. As it is legally established, the self-regulation of these bodies lends them powers typical of public authorities; (2) the Brazilian Association of Technical Standards (ABNT): an officially acknowledged private regulation agency, a private non-profit organization established in 1940 and acknowledged by Resolution number 7 of the National Council of Metrology, Standardization and Industrial Quality as "the only national standardization body"; (3) Levels of Corporate Governance of the São Paulo Stock Exchange: a differentiated listing segment of shares whose companies voluntarily agree to add to their legal obligations those arising from the risk of their businesses.

the multiple phenomena that fit this operational concept. In a broader sense, it is possible to say that the term in question refers to all those regulation and self-regulation phenomena that differ from the traditional normative instruments originating from a formal deliberative process of legislative production conducted before a power invested with this function and whose essential characteristic is the fact of being devoid of direct binding power.

Signs of resistance commonly associated with *soft law* have appeared in favor of this notion, notably when it comes to its concept and the seemingly antithetical conjugation of its terms (*soft* and *law*). That is to say, it should be impossible to reconcile the *soft* with the idea of rigidity and binding power typical of the law. In this sense, *soft law* would be, from another point of view, not a source of law, but a workaround for the vagaries of International Law. It so happens that *soft law*, as well as self-regulation, is not restricted to the limits of international law, nor does it serve as an integration mechanism of Law. The phenomenon of globalization of legal systems and the advent of a Global Law introduced *soft law* as a normative source in a complex and fluid global legal regime.

Dernaculleta i Gardella (2005, p. 24) define self-regulation as another manifestation of the ability private individuals have of approving and guaranteeing the satisfaction of norms of behavior that they must abide by in the exercise of the activities they are associated with.

From the teleological point of view, both *soft law* and self-regulation take on a triple function in the Global Law scenario. Firstly, as mechanisms for standardization of conduct based on specific and dynamic acts focused on the complexity of the global sphere and its interfaces with local, national, international and supranational spheres. Second, as means of specifying provisions of norms coming from government powers, in order to detail and improve the generality and abstraction of *hard law*. Third, as comparative practices, according to which, the purpose of their adoption is in the directing legal, political, social and institutional behaviors toward choosing more effective, potent and efficient norms.

According to Paixão and Bertoldi (2012), it is necessary to consider that the increasing use of *soft law* and self-regulation measures is due mainly to the context displayed by globalization, together with the diagnosis that state bodies are too blown up and slow in facing concrete and emerging problems. The common use of *soft law* and self-regulation for matters of environment, health, agriculture, technology, communications, security, engineering, trade and business relations is proportional to the

fact that States and International Law bodies avoid dealing directly and effectively with these matters, either by protectionism, or nationalism reasons, or by their own institutional weakness.

The development of techniques and sources of legal production that go beyond the traditional and acknowledged methods and procedures corresponds to a requirement of legal *ratio* with a degree of prevalence over individual production rationales that come up in some sectors of social life included in legal rules; these determine and guide behaviors not only of private, but also public, players.

Soft law encompasses a complex set of instruments that are rationally and voluntarily conceived by several public and private, national, international, supranational, transnational and global, governmental or nongovernmental players, linked to multiple legal systems that, with the aim of achieving a more precise and effective result, decide to manage the dynamic flows of global society, internationally shaping and structuring their bases on the precepts of *soft law*.

Unlike what Ferrarese (2000) says, *soft law* is not just a "giuridicità camaleontica" that solely serves the market. *Soft law* manifests a will to have Law rule over the forces of globalization and the mobility of goods, services, institutions and individuals, and even over the Economy. It is the most malleable, least rigid but cogent manifestation, which thanks to its *soft* nature can establish itself with greater speed and effectiveness in spaces marked by the stratification of powers and reduced mobility. In short, *soft law* precepts ensure a new guarantee of responsive law.

In general, *soft law* presents itself and stands on pillars that can be characterized as just a concept that opposes the binding normativity of *hard law*, or as a normative core with a specific typology of acts with their own legal origin; it can also be seen as a normative technique, thus represented in its peculiar systematization for the production of its canons or, finally, as a mixture of all these attributes.

In this regard, there is an immediate and perennial result that indicates a dangerous propensity to establish a rigid definition to the phenomenon of *soft law*, as both a function and an institution. After all, the normative, technical or hybrid concepts associated with *soft law* are not completely mistaken. In turn, such an opening of the *soft law* institution shows the increasing and progressive importance that it takes on in Legal Science and in the treatment of intersubjective and institutional relations.

Notwithstanding our respect for that group that prefers to analyze

soft law as only a conceptual attribute, it seems to be counterproductive today to deny the influence that *soft law* measures have on the behavior of legal agents and its respective legal effects[8]. As an illustration only, we should mention the increasingly "binding" role played by Regulations, Codes of Conduct, Protocols, Technical Certificates, Seals and Guidelines issued by supranational, transnational or global players[9]. Therefore, it is not only a matter of private norms with optional application, but rather of the spreading of their cogency beyond the national institutional-sovereign attribute.

In this scenario, what is analyzed is a certain divisive attitude on the merits of *soft law*. On the one hand, *soft law* and self-regulation enthusiasts[10] believe that the *soft law* approach offers many advantages: timely action when governments are stalled; bottom-up initiatives that bring legitimacy, expertise and other additional resources to the development and application of norms and standards; an effective means for the direct participation of civil society in global governance. On the other hand, radical critics[11] argue that *soft law* is tender toward aggressive and opportunistic market players, who, under the protection of softened legality, manage to transfer costs to society and make things difficult for weaker players.

Dernaculleta i Gardella (2005, pp. 26-28) advocate a complementary and new technique of self-regulation, whose rationale lies in the establishment of instruments of public regulation of self-regulation, capable of minimize risks and optimize the levels of protection by means of public efforts to foster self-regulation, that is, empowerment policies

8 In this sense it is important to quote the following in relation to self-regulation: "La que, en términos generales, podríamos llamar la normalización privada, ha dejado de ser una actividad espontánea, desarticulada y parcial para convertirse en un fenómeno sistémico. Hace treinta años, la jurisprudencia alemana, desconcertada ante el avance de las normas técnicas de su potente industria, alumbró una fórmula feliz para catalogarlas: eran meros dictámenes técnicos anticipados, sin valor normativo vinculante. Todavía se podía mantener eso entonces, porque la actividad de normalización técnica estaba todavía muy diversificada – asociaciones profesionales, centros de investigación, grandes empresas y otros sujetos que las elaboraban – y era posible, en principio, conseguir un "contradictamen", otra norma técnica que pudiera aplicarse al caso. Hoy el proceso de normalización industrial se ha sistematizado, se ha cerrado, y el sistema tiende a ofrecer una única solución, válida como mínimo para toda Europa, con lo que la teoría del dictamen se desvanece y nos enfrentamos a la imposición fáctica de la solución única." (PARDO, 2005, p. 16).

9 As an example: European Union Directive on Remote Selling (07/1997), specifically Art. 11.4: "Member States may provide for voluntary supervision by self-regulatory bodies of compliance with the provisions of this Directive and recourse to such bodies for the settlement of disputes to be added to the means which Member States must provide to ensure compliance with the provisions of this Directive."

10 Like Kirton e Trebilcock (2004, p. 05).

11 Like Di Robillant (2006, p. 508-509).

involving the community; the allocation of public property to self-regulation instruments, so that everyone, including the State, can have confidence in self-regulated acts; and regulation of the self-regulation context by making it transparent and democratic.

Thus, for its enthusiasts, *soft law* is likely to produce more effective global governance, foster economic openness, appreciation of human rights ideals, environmental improvement and social cohesion; but for its critics, it is yet another reception pattern of American categories ill-adapted to the fabric of continental European law. (ZERILLI, 2010, p. 10).

At the same time, *soft law* and self-regulation measures cannot be held responsible for the weakening of nation-state hegemony. The implementation of these normative mechanisms aims, above all, to occupy empty spaces produced by regulatory activities either not exercised or weakly exercised by the State and its agencies. As Grossi (2017) put it, speaking about the medieval legal order its similarities with the current global paradigm, contemporary legal experience brings to light a strongly incisive and widely diffused set of values that create a particular legal mentality, offering precise juridical choices to the greater problems of social life. Therefore, the arguments that place *soft law* and self-regulation instruments as tools for the privatization of legitimate government law-making functions is compromised by their supplementation and normative specification nature.

In addition, we can at once see the emergence of compulsory mechanisms for *soft law* conducts that are not limited to what was once defined as *interna corporis* optional applicability institutions. Making *soft law* prescriptions mandatory is inherent to it; but this happens in a different way than what is attributed to norms arising from the power of the States. Even so, it is worth reiterating the cogent power that both have. In addition, Villary (1960, p. 77) warned that a rule is not legal because it is capable of imposing a sanction, it sanctions precisely because it is legal.

In this sense, once we leave behind the analysis of *soft law* based on the breakdown of the English *hard law* characteristics (as understood by Bernardi, (2009, pp. 02-04), a norm produced via a predetermined procedure under the authority of an entity and/or of an institution that produces a rule with power to bind its addressees), what we see in the dynamics of legal globalization is the expansion of *soft law* as a legal practice precisely thanks to its nature of tending to be free of governmental bonds and for being closer to transnational and global frameworks, of

deterritorialized entities and powers; this way, it is able to offer faster, more accurate and effective responses to global demands, albeit locally/regionally circumscribed.

Soft law is opposed to the traditional instruments of regulation (laws, regulations, treaties, etc.) considered as *hard law*, which is based on the action of the subjects who are responsible for producing such instruments (parliaments, governments, etc.), who deliver a product does not allow for any exception to its fulfillment, except for some legal exemption. The mandatory condition of *hard law* toward its addressees arises from this precept. Therefore, the guarantee of effectiveness of *hard law* is in the presumption of submission of the addressee to the norm.

In spite of the alleged lack of direct binding power, the guarantee of compliance with *soft law* rules lays on the fact that such norms emanate from their respective addressees (self-regulation) or from the interference of the subjects who produced it, by means of their power of persuasion. Normative precepts that are limited to laying down general principles and guidelines, allowing greater autonomy for the addressees to choose the specific modes of performance of *soft law* can also be characterized as *soft law* norms. In this case, it is worth mentioning the experience of the European Union based on Art. 5, § 4, of its incorporation treaty.

Furthermore, going back to the discussion on the binding power of *hard law* vs. *soft law* norms, it is important to emphasize that, by denying the legality of rules that have no sanction power, there is a risk of denying the legality of norms that are part of constitutions, infra-constitutional legislation, and the International Law itself. Paixão and Bernardi (2012) warn that legal science does not especially deny the legality of customs, analogy, equity and general principles of law as sources of law itself.

Also regarding the argument of coercion of norms, it is important to highlight the fact *hard law* attributes are associated with the precepts of the Modern State, which is the exclusive holder of the force required to regulate the conduct of its subjects. Therefore, the maxim of immediate binding effectiveness of the norms gained strength from the symbiosis of Law, power and force that took place in the cores of the national states that emerged after the Peace Treaties of Westphalia.

It is clear that cogency appears as an important element of the legal phenomenon, in tandem with the activity of the legal norm. However, if the problem of the forces and Law pair emerges from the use of force as a point of distinction, there will probably be no legal solution. On the

other hand, if force is the immediate object of only certain norms of legal systems, the thesis of legal systems itself would be harmed, because, as such, they constitute a cohesive body and not isolated points of regulation. Therefore, Mostacci (2008, p. 22) concludes that cogency is a necessary and central element of legal systems and, as such, manifests itself in all their norms.

Hence the relationship between Law and force, especially its use to refute the normative nature of Law and its role as source of *soft law*, does not stand in the face of the above arguments. The problem is not in the degree of rigidity and authority of Law, but in the new form of enforcement of cogency by the authority in charge, which ceased to be absolutely sovereign, territorialized, and bureaucratic to gain attributes of fluidity, interconnectivity, specificity and responsiveness.

As for self-regulation, it does not require a top-down relationship to be established. Generally, from a sociological point of view, self-regulation has in its core *autopoiesis* attributes, according to Luhmann's (1990) systemic view.

This way, its impulse comes from movements from the bases that create commitments of normative self-regulation and conflict-resolution formulas. The ones who break the inertia so as to parameterize behaviors through self-regulation are professionals, technicians, investors, doctors, and communicators, as once the merchants who built the bases of commercial legislation did. In addition to creating norms, they effectively and efficiently define dispute resolution models, without any government delegation or charge. In view of this, Pardo (2005, p. 15) states that, both for its validity and its effectiveness, self-regulation has caught the eye of state agencies that want to absorb its contents.

In this sense, in the scope of *soft law*, the distinction that must be made between its legal characteristics and those that take on a political and/or social nature should be emphasized – even if they are (mistakenly) labeled as a mere mechanism of voluntary adherence. In the first case, norms arising from *soft law* set up cogency instruments aiming at ensuring compliance by the addressee parties to the formal and substantive provisions laid down therein. On the other hand, its cogency is derived from the pedagogical aspect of the reproduction of conducts treated as norms by society, thus establishing itself, in the shape of customs, as a source of regulation change no longer just *inter partes*, thus reestablishing ancestral prefects of rule of law.

Consequently, what emerges from the above argument is the appearance of a double legal importance of *soft law* that merges into the internal and the external aspect of the legality of the norm, so that both are able to influence the development of governmental and non-governmental normative mechanisms. As a result, the growing number of state laws and legislative or executives acts that incorporate normative precepts from *soft law* or self-regulation[12] (in this case, regulated self-regulation, as mentioned by Dernaculleta i Gardella (2005, pp. 388 ff)).

Mostacci (2008, p. 39) warns that, from the point of view of Legal Policy, the normative acts of *soft law* and self-regulation result in indispensable subsidies to actualize the dynamics and circulation of their own acts and their interaction as instruments ordinarily considered as *hard law*. Such mimicry goes beyond the divergence on the cogency aspect of both mechanisms to enable legal models in times of globalization (including legal globalization) for more effective and efficient responses.

In addition to that, the regulatory efficacy of *soft law* and self-regulation requires compliance with two other mandatory principles, namely: the presumption of lawfulness, according to which the conducts of regulated subjects must be considered as legally valid, unless presumption is disregarded; and the presumption of good faith, by which operates on both the formal and substantial level to ensure the satisfaction of true law and the internal and external compliance to the norm.

It is true that the condition of efficacy and effectiveness for *soft law* and self-regulation norms need to be filtered in regards to the legitimacy of the power used to turn certain factual situations into norms. We are not disregarding the likelihood of effective, but "illegal", *soft law* or self-regulation norms, something that also occurs in *hard law*. However, in order to minimize such instances, the bodies charged with issuing them must have preventive and repressive instruments of control or, in the words

12 Only as an example, it is possible to point out direct, randomly selected examples in the Brazilian situation of this optimization of the law-making activity from the joining together of *soft law* and self-regulation mechanisms in state norms in the past 15 years: Constitutional Amendment 45/2004 (Reform of the Judiciary Power), the inclusion of recommendations of Technical Document 319/1996 produced by the World Bank; Decree 6,583/2008 (Portuguese Language Orthographic Agreement), the internalization of an agreement signed by a transnational agency to standardize Portuguese language spelling; Complementary Law 131/2009 (Transparency Law), a direct influence of the rules of the Transparency International NGO; Law 12.663/2012 (General Law of World Cup), with wording given by an agreement signed with FIFA; Law 12,965/2014 (Civil Framework of the Internet), regarding the precepts laid down by ICANN; Law 13,260/2016 (Antiterrorism Law), a direct influence of FATF, by means of memoranda, to control financial transactions to support terrorist groups; Law 13,322/2016 (Anti-Doping Law), which adopted WADA regulations for controlling the use of banned substances in sports.

of Dernaculleta i Gardella (2005, p. 296), the responsibility for self-control.

Confirming the hypothesis raised by Snyder (1993, p. 80), *soft law* has been accepted in the core of several national legal systems. It entered them in the form of agreements for investments, formation of supranational blocks, development and sharing of new technologies, regulation of new goods and services, and adaptation of legal instruments in effect. In short, the movement for transnational and global mobilization of Law has found in *soft law* and self-regulation powerful sources for the establishment, change, flexibilization, complementation and articulation of legal norms previously dependent on the State.

In this sense, the existence of such links between the normative act originating from typical sources of law and *soft law* (as well as self-regulation) has a double meaning. Firstly, from a formal point of view, it makes the instrument in question a part of the overall regulatory system, which results in making it an integral part of national law. This way, positive law is the same law that determines the legality of the *soft law* instrument. On the other hand, the connection between these acts and a certain legal order favors a dialectical relationship with its judicial application. These tools have the ability to define rules in each legal system, thus enjoying the same general nature as *hard law*, despite their relative differences. In fact, Mostacci (2008, pp. 25-27) says that they were able to intervene in the legal system by innovating the rules.

Thus, for the players interested in transnational and global phenomena with legal effect and capable of building new normative models, the strength of *soft law* and self-regulation is clear, with law-making, validity, cogency, efficacy and effectiveness characteristics. *Soft law* and self-regulation occupy relevant normative spaces that cannot be left empty. To illustrate this view, it is important to highlight the movement of the United States Government under the Donald Trump administration who, in deciding to denounce the Paris Agreement on Climate Change (COP 21), immediately caused multiple sectoral public and private manifestations that, in a peremptory manner, confirmed their willingness to remain faithful to the precepts of the standards defined by the Summit. The departure of a state entity has caused local, transnational and global actors to taken to themselves the regulatory responsibility to achieve the same objectives.

As a consequence, *soft law* and self-regulation take on the normal condition of being associated as sources of Law. In the field of Global

Law, this condition is perennial. *Soft law* and self-regulation mechanisms are included as instruments used to introduce, modify and/or innovate the ordering of legal systems and regimes by prescribing substantive valuation of their stipulated contents. (ZAGREBELSKY, 1984).

According to Bin (2009, p. 35), it must be considered that the sources of Law are not just the prescriptive elements that produce norms, but, as Bin warns, the sources of Law can also include the actions that innovate the legal system itself, so that denying such a condition amounts not only to a theoretical problem, but has relevant factual consequences.

It so happens that deliberately choosing to deny or ignore *soft law* and self-regulation mechanisms go against the effectiveness of legal norms, such efficacy being understood as the ability of the norm to make abstract predictions and showing that it is necessary for a fact to reach a certain consequence so its effectiveness can become actual in the future. The amount of norms produced within the borders of States and International Law has now been surpassed by transnational and global networks, says Teubner (2012, p. 153).

In another sense, the insertion of *soft law* instruments into the system of sources of Law has stimulated the evaluation of the internal function that it has in legal systems. On this point, it is possible to see how two major themes posed difficulties to classic regulatory principles conceived within the Modern State; those are the rule of the authoritarian function and the imposition of sanctions by the sovereign powers that find their own and main application in the law (*hard law*)[13]. According to Catania (2010, p. 102), normativity is the assumption of obedience and acknowledgment that influences the act through its effectiveness; it therefore does not compulsorily need state bonds to be characterized as such.

It turns out that, this hegemonic *central legislating power* of the State is systematically weakened and eroded. The global connections between markets, institutions, goods, services, and people have ended up highlighting the insufficiency of a considerable part of the attributes of the State, as consigned elsewhere, either because of the specificities of demands, the concern with external factors, the power of institutions, or the "Law time" factor. At the same time, global claims that come up for

13 "Sul punto è possibile osservare come due tematiche principal mettano in difficoltà il modello regolatorio classico, costituito nel comando di stampo autoritativo e corredato di sanzione da parte del potere sovrano; modello che trova nella legge la propria principale applicazione. Dette difficoltà, nel momento in cui richiedono strumenti regolatori innovativi, costituiscono la ragion d'essere della progressiva diffusione conosciuta dagli strumenti di *soft law*." (MOSTACCI, 2008, p. 28).

legal treatment are increasingly specific and *ad-hoc*, and modern entities are powerless before them.

On this aspect, *soft law* and self-regulation instruments are particularly receptive to the new expectations resulting from the flows of globalization. Their ductility, associated with binding effects, as well as the cogency provided by indirect effects, assure to the agents and recipients of the norm a greater degree of autonomy and effective regulation without imposing a summary order of exclusion from the precepts of *hard law*.

Due to this situation, a change emerged from modern regulatory models, which are no longer gathered under the rigid norm that is imposed on everyone, but rather complies with the requirement of making the norm into an instrument capable of adapting to constantly-evolving social, political, economic, institutional and legal dynamics.

Even though legal power (Law) is traditionally linked to its enforcing power (through formal sanctions), Zerilli (2010, p. 7) stresses that the force of global (transnational or non-Law) law resides in its capacity of adapting to different circumstances, that is, its malleability and ductility. Under this outlook, it is practical to refer to *soft law* as a specific (global) law-making technology, not in the sense of its ability to become "*hard law*" in the future, as argued by several law scholars, but rather as a specific way to boost compliance by using different, often self-regulatory, means. This is consistent with the dominant rationale of neoliberal governance, which has currently been debating on the "culture of auditing", as Shore (2008, p. 284) reminds us.

It is no coincidence that what we are seeing is the replacement of the uniform concept of law/norm for the establishment of complex models of legal pluralism, true global legal pluralism. By virtue of such a state-of-art, *soft law* and self-regulation gain prominent legal significance as sources of norms. Both of them go beyond the stratification at the core of Global Law and become part the agenda of legal professionals, study subject matter of National or International Law, as their effects somehow cling to and/or alter the local, regional, national, international, supranational, transnational and global legal phenomenon.

In what directly concerns Global Environmental Law, this background is encouraging, as can be seen, for example, in the ISO 14,000 standard, which is voluntary and widely diffused in the transnational scenario; it was published by the International Organization for Standardization, the largest non-governmental organization that develops voluntary international standards.

Besides that, hybrid constructions combining public policies and private corporate strategies also reveal the multicentric relationships that have developed and permeate Global Environmental Law.

The Brazilian case involving the growing of palm trees in the Amazon is quite representative of this situation. Reported in a case study by Veiga and Rodrigues (2016, pp. 01-22), the expertise firstly highlights the influence of the transnational arena in international relations, and, secondly, underlines the influence of the private sector on domestic policies based on the corporate strategy of a company in the Sector Chamber of Oil Palm, established under the supervision of the Ministry of Agriculture, Livestock and Supply.

There is a synergy between the corporate strategy of the Brazilian company producing palm oil and the public policy that encourages it. The class action around the palm tree is provided by the government and non-state players that created the bargaining and discussion space, the bargaining arena called Sector Chamber, established in 2010 in the Ministry of Agriculture, Livestock and Supply (MAPA). From a government perspective, public policy for the palm tree is an incentive to sustainable production based on environmental regulation (and a ban on deforestation) and social development, with the inclusion of small family farming growers. Government agencies - the Brazilian Agricultural Research Corporation (Embrapa) and National Institute of Space Research (INPE) - provided the scientific knowledge in which the public policy was based. From business perspective, the performance of the company(ies) in the Sector Chamber was vital for the establishment of minimum socio-environmental parameters for production and sale parameters negotiated with government agencies and other stakeholders. (VEIGA e RODRIGUES, 2016, p. 02).

The relevant aspect of this cooperation lies undoubtedly in the regulation of plant growing in Brazilian native forests, despite the commonly held global argument (EURACTIV, 2017) that palm growing causes deforestation, biodiversity deficits, and conversion of marshlands into planting areas. It was precisely based on this assumption that the WWF non-governmental organization, together with transnational corporations, began discussions for the stipulation and adherence to minimum standards.

In the words of Büthe and Mattli (2011), we have the establishment of transnational arenas through decision-making processes involving the creation of rules and norms and the implementation of agents that are not submitted to the control and influence of the State and of international

organizations, a clear production of *soft law*. In the case mentioned above, the transnational space is defined by a process that Hale and Held (2011, pp. 01-36) called multistakeholder, with market stimulus for the enforcement of rules adopted and verification of compliance to them, which takes place, according to Perosa (2012) through auditing and social-environmental certification schemes.

The so-called multistakeholder initiatives are negotiation spaces designed to organize production and commercialization between stakeholders in major producing and consumer countries (HALE e HELD, 2011, p. 15) - Better Cotton Initiative for cotton, Bonsucro for sugar and ethanol, Round Table on Responsible Soy (RTRS) for soybean and RSPO for palm oil. A similar reasoning may be extended to the attempts sponsored by the Sector Chamber of the Yerba Mate Productive Chain to qualify the product as organic before the European Union (Bio Seal).

In light of this, realization of Brazilian soft power is both clear and important. This is understood in the sense attributed to by Nye[14] of soliciting power or the ability of shaping what others want through the attractiveness of their culture and values or even of the capacity to propose an agenda; and it must also be able to produce at once social changes and sustainability.

CONCLUSION

The process - triggered by economic and legal globalization and the transnationalization of the legal phenomenon - which breaks down the Law into Law and non-Law spaces - is the background that also frames Global Environmental Law.

The shaping of Law as a legal system based on the theory of the legal norms (set or system) is a Positivist legacy and has the clear intention of defining Law through self-legitimation: Law is that which is produced according to specific rules of the system itself by an authority considered as with power or attributes to do so and following a rigid procedure of elaboration, which framework has changed in a significant and irrevocable way.

14 "Soft power is not merely the same as influence. After all, influence can also rest on the hard power of threats or payments. And soft power is more than just persuasion or the ability to move people by argument, though that is an important part of it. It is also the ability to attract, and attraction often leads to acquiescence. Simply put, in behavioral terms soft power is attractive power. In terms of resources, soft-power resources are the assets that produce such attraction". (NYE, 2004, p. 6).

Non-Law, defined as a regulation arising - by coercive or consensual means - from entities without political centrality and exclusive ownership of law-making power and that are broadly speaking private or without links to the government - that regulate concrete and even personal relations of a clear private nature, formerly imagined as merely filling up a gap or limbo of Law (official legal regulation coming from a centralizing political entity that is the sole holder of the law-making power), is currently produced and developed on the fringes of the latter, and autonomously .

In this regard, *soft law* norms and self-regulation stand out as instruments for the realization of consensual, technical and effective production of norms, increasingly advancing into new territories, new powers, new institutions and new rights. They are thus particularly receptive to new desires arising from the flows of globalization. Their ductility, associated with binding effects, as well as the cogency provided by indirect effects, assure to the agents and recipients of the norm a greater degree of autonomy and effective regulation without imposing a summary order of exclusion from the precepts of *hard law*.

Due to this situation, a change emerged from modern regulatory models, which are no longer gathered under the rigid norm that is imposed on everyone, but rather complies with the requirement of making the norm into an instrument capable of adapting to constantly-evolving social, political, economic, institutional and legal dynamics, characters that match the requirements and the arising of a Global Environmental Law.

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Article received on: 03/04/2019.

Article accepted on: 20/04/2019.

How to mention this article (ABNT):

CALETTI, L.; STAFFEN, M. R. A fragmentação jurídica e o direito ambiental global. *Veredas do Direito*, Belo Horizonte, v. 16, n. 34, p. 279-310, jan./abr. 2019. Available at: <http://www.domhelder.edu.br/revista/index.php/veredas/article/view/1455>. Access on: day month. year.