Sustainability in Law No 13.019/2014 (Partnership Statute)*

Sustentabilidade na Lei nº 13.019/2014 (Estatuto das Parcerias)

*Jenifer Weber***
*Inácio Fabiano Lermen****
*Leonardo da Rocha de Souza*****

ABSTRACT

The Law No. 13.019/2014 (Partnership Statute) was created to regulate partnerships between the Public Administration and civil-society organizations. In the law 13.019/2014, sustainability is cited as one of the requirements that must be observed by entities that want to establish

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** Universidade de Caxias do Sul, Caxias do Sul, RS, Brazil. E-mail: weber.jenifer92@gmail.com. Bachelor of law from Universidade de Caxias do Sul (UCS).

*** Universidade de Caxias do Sul, Caxias do Sul, RS, Brazil. E-mail: iflermen@ucs.br. Bachelor of law and master of law from Universidade de Caxias do Sul (UCS).

**** Universidade Regional de Blumenau, Blumenau, SC, Brazil. E-mail: leorochasouza@gmail.com. Post-doctorate studies in Law (UFRGS). Doctor of law and master of law (UFRGS). Bachelor of law (Unisinos). Specialist in Ethics and Political Philosophy (UCS). Degree from Escola Superior da Magistratura (Ajuris). Incumbent professor at Universidade Regional de Blumenau (Furb) (2017-present). Deputy leader of CNPq/Furb group researching "Fundamental Rights, Citizenship and Justice". Prosecutor for the municipality of Caxias do Sul-RS (2009-17). Adjunct professor at Universidade de Caxias do Sul, lecturing in the undergraduate degree program in law, and in the Stricto Sensu graduate degree program as tenured staff member (2014-17).

partnerships with the public entity. However, the legal text is superficial, since it only mentions sustainability as a requirement for partnerships, failing to detail how it will be analyzed in the projects proposed by the entities, thus causing uncertainty both for the entities and the State to evaluate effectiveness. It is observed that sustainability, although widely discussed, is not always accompanied by effective results and actions. The objective of this article is to verify how the Partnership Statute contemplates the sustainability. The method used is the deductive one, based on interpretation of the norms about the partnerships between the public power and the private initiative and what is meant by sustainability and sustainable development.

KEYWORDS

Public services – Partnerships Statute – sustainability – environmental management

RESUMO

A Lei nº 13.019/2014 (Estatuto das Parcerias) surgiu para regular as parcerias entre a administração pública e organizações da sociedade civil. Nessa lei, a sustentabilidade é citada como um dos requisitos que devem ser observados pelas entidades que almejam firmar parcerias com o ente público. Todavia, o texto legal é superficial, deixando de detalhar a forma como será analisada a sustentabilidade nos projetos propostos pelas entidades. Com isso, as entidades e o Estado ficam sem parâmetros para avaliar sua efetividade. Observou-se que a sustentabilidade, apesar de amplamente discutida, nem sempre vem acompanhada de resultados e ações efetivas, mesmo diante do dever constitucional de proteção do meio ambiente por parte do poder público e da coletividade. O objetivo deste artigo é analisar essa problemática, utilizando o método de abordagem dedutivo, partindo da interpretação das normas acerca das parcerias entre o poder público e a iniciativa privada e o que se entende por sustentabilidade e desenvolvimento sustentável.

PALAVRAS-CHAVE

Serviços públicos – Estatuto das Parcerias – sustentabilidade – gestão ambiental

1. Introduction

The public administration has harnessed partnerships with civil-society organizations to pursue the public interest and rules have emerged to regulate these partnerships. One of the most recent is Law No. 13.019 of July 31, 2014, also known as the Statute of Partnerships, which determines legal arrangements for mutual cooperation to serve "public purposes of mutual interest through activities or projects previously determined in plans set forth in collaborative, promotional or cooperation agreements", as stated in its summary.

Given the State's responsibility to protect the environment jointly with civil society, this article examines Law No. 13.019/2014 (the Statute of Partnerships) to ask whether it covers social welfare needs and meets expectations held by the public entity and civil society in relation to sustainability and sustainable development.

This study has made use of deductive methods based on our interpretation of rules governing partnerships between the public power and private enterprise and the meaning of sustainability and sustainable development. Our research has been based on interpretative analysis of legal-doctrinal literature and legislation, in particular the Statute of Partnerships, in order to apprehend the problem posed and gauge conclusions reached in this respect.

The study has been divided into two chapters to facilitate comprehension. Chapter 1 covers partnerships between the public administration and civil society based on Law No. 13.019/2014. Initially, the third sector and the characteristics of voluntary contracts are addressed (2.1) and then public power oversight of contracts with third-sector entities (2.2).

This chapter discusses the emergence of the so-called third sector influenced by the social movements of the 1970s and 80s and partnerships signed with the State, as well as the characteristics of these relations and the classification of the numerous entities that comprise civil society. The social significance of services performed by private entities with public entity oversight is also examined. The chapter also analyzes different forms of voluntary agreements signed in the wake of Law No. 13.019/2014, which is considered a regulatory framework for the public administration and civil-society organizations. The chapter ends by addressing the State's duty of oversight for projects developed by private entities, as well as the Statute of Partnerships mechanisms established for the proposed services.

Chapter 2 examines the Statute of Partnerships' view of sustainability in more detail, starting with the public administration and its sustainability duties

(3.1), then the pursuit of sustainability through public-private partnerships (3.2). Finally, the sustainability-related duties of the public administration in partnership with private entities are identified (3.3).

This chapter is based on the assumption that the State has an obligation to pursue sustainable initiatives since the public entity must uphold fundamental rights, including the right to a healthy environment for present and future generations. Having looked at the issue of sustainability in public administration, we then address the legal concepts involved in agreements and partnerships signed between the State and the public administration.

2. Partnerships between public administration and civil society under Law No. 13.019/2014

This section addresses partnerships between the State and civil society by contextualizing the emergence of the third sector and its influence on the State's ways of managing and the characteristics of contracts between the public and private sectors. Finally, the duty of the public entity to oversee the execution of activities covered by partnerships is posed.

2.1 The third sector and the characteristics of voluntary contracts

The meaning of these terms – first-, second– and third-sector – must be contextualized to further analyze the latter and how it interacts with the public administration in administrative contracts in general.

The "State, or First Sector, consists of public agents acting in the public or collective interest and focusing their initiatives to meet collective interests." The first sector comprises the public administration and the State itself in its capacity as guarantor for the execution of the services that have been deemed 'public services' "whereas the second sector, or the 'Market', comprises private agents working to satisfy private or individual interests" as the expression of today's market-based or capitalist society.[1]

[1] STORTO, Paula Raccanello; REICHER, Stella Camlot. Elementos do direito do terceiro setor e o marco regulatório das organizações da sociedade civil. Revista Pensamento e Realidade, v. 29, No. 2, pg. 21, 2014.

The third sector bridges this public-private dichotomy by "combining private initiatives that, regardless of any collaboration from the State, cater for collective interests or for the public interest" in cases of omission on the part of the public entity. The third sector may also be an "instance of public pressure and social control over governmental activities. It consists of so-called Civil-Society Organizations."[2]

Therefore, the first sector refers to the State, the second to the market and the third to not-for-profit entities that do not belong to the State but collaborate with the State and the collective interest in order to meet public interest demands when the State alone is unable to do so. Third-sector entities will in some cases receive State assistance to carry out their activities if they "meet certain legal requirements that vary from one case to another; once these requirements are met, an entity is officially recognized as an organization of public utility, a certified philanthropic entity to qualify as a 'social organization'."[3]

The Second World War and its political, economic and social changes posed historical milestones in terms of the role of civil society complementing the State's activities. The post-war period's growing poverty and social conflict prompted society to develop activities that enhanced social welfare. Specifically in Latin America, the 1970s saw the emergence of these organizations "acting strongly to redemocratize countries, their actions focused on a social policy of community development while delivering social assistance and service activities in consumption, basic education and other fields."[4]

Surveys conducted in various regions around the world show that associative movements were getting stronger in the 1970s and 80s, particularly those driven by minorities such as indigenous peoples and the ethnic, ecological and consumer movements that subsequently became non-governmental organizations.[5] During this period, Brazil underwent a paradigm shift in the form of the State's management as non-governmental organizations began to emerge and later became part of the so-called third sector. "These entities were imbued with strongly identified ideals and guided by ties of solidarity

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2 Ibid., pg. 21.

3 DI PIETRO, Maria Sylvia Zanella. Direito administrativo. 27th ed. São Paulo: Atlas, 2014. pg. 566.

4 ALBUQUERQUE, Antonio Carlos Carneiro de. Terceiro setor: história e gestão de organizações. São Paulo: Summus, 2006. pg. 23.

5 FERNANDES, Rubem César. Privado porém público: o terceiro setor na América Latina. Rio de Janeiro: Relume-Dumará, 1994. pg. 16.

and volunteering; they brought forms of organization inherent to the spirit of the social movements."[6]

In the 1990s, the role of the State was reformulated in a process that culminated in the privatization of several public services. The period was marked by a large number of privatizations and government-private sector agreements that set new guidelines, "more specifically with Brazil's master plan for Reform of the State Apparatus published in 1995." In the wake of this reform, public services shed some of their bureaucratic character and took on a managerial role as private entities started delivering services previously provided by the State.[7]

So the new way of managing society led to non-governmental organizations getting stronger while the State's role was being weakened by its inability to manage services and its difficulties in terms of delivering solutions for its demands.

Therefore the State was investing in these non-profit entities to develop projects in their communities. Due to the key role of non-governmental organizations since the 1990s, the public entity saw the need to enhance these partnerships by legislating on the matter with a so-called "New Regulatory Framework" that was postponed several times before finally coming into effect in 2016 in the Federal District and at federal and state levels, followed by municipalities, on January 1, 2017. This innovative framework posed numerous challenges for local government since several partnerships that had been in place for years had to be reviewed and adapted to the new law.[8]

Legislative change was welcomed because it distinguished partnerships between state entities from others between a State entity and a private entity, as Mânica notes:

> Law 13.019/14 and hundreds of amendments made by Law No. 13.204/15 severely limited the possibility of agreements being reached

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6 QUITES, Henrique Lima. Terceiro setor. Revista do Tribunal de Contas do Estado de Minas Gerais, v. 34, No. 4, pg. 1, 2017.

7 Ibid., pg. 1. "As a major change in the contemporary period, civil society has largely taken over the responsibilities required to fulfill fundamental rights. The State is clearly not in a position to meet all general needs. State action is being assisted or even replaced by private organizations and individual efforts. This set of entities and efforts is usually referred to as the third sector, and predominantly consists of non-governmental organizations (NGOs)." JUSTEN FILHO, Marçal. Curso de direito administrativo. São Paulo: Thomson Reuters, 2013. pg. 93.

8 Henrique Lima Quites, Terceiro setor, op. cit., pg. 2.

> between the public power and third-sector entities. Brazilian legislators had finally recognized the historical mistake of applying the same rules to agreements made between two state entities (which may be called "public covenants") and those between a state entity and a private entity (which may be called "public-private covenants").[9]

Before Law No. 13.019/2014, legislation governing cooperation between civil society and the State included Law No. 9.637/1998 which "was the first to list characteristics required for legal entities governed by private law to be officially recognized as 'Social Organizations' (OSs)." Then came Law No. 9.790/1999 "governing entities that were then referred to as Civil-Society Organizations of Public Interest (Oscips)."[10]

When the Statute of Partnerships was voted, its general approach to agreements between parties complemented existing legislation because it "did not annihilate them by setting up a new 'model' for legal entities governed by private law, which, on developing activities of public interest, are placed in a position of convergence with the Public Administration,"[11] thus simply serving as a guideline to enable joint work and require a certain level for public-private sector partnerships.

Law No. 13.019/2014 then regulated partnerships between civil society and public entities under mutual-cooperation agreements to develop, cooperate or collaborate,[12] which are very similar concepts in terms of their

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9 MÂNICA, Fernando Borges. Revendo os convênios com o terceiro setor: o que mudou a partir da Lei n. 13.019/14. Revista Jurídica da Escola Superior de Advocacia da OAB-PR, yr. 2, No. 2, pg. 5, August 2017.

10 RENZETTI, Bruno Polonio. Marco regulatório das Organizações da Sociedade Civil à luz do direito administrativo global. Revista Digital de Direito Administrativo, v. 4, No. 1, pg. 97-98, 2017. "There are similarities between "civil-society organizations of public interest" (Oscips) and "social organizations" (OSs) since both are private entities but once legal requirements have been met, they may have new qualification recognized by the Public Power" (Ibid., pg. 98) and thus be eligible to apply for funding from the State entity. Their main characteristics are addressed in REGULES, Luis Eduardo Patrone. Terceiro setor: Regime jurídico das Oscips. São Paulo: Método, 2006. pg. 149-150.

11 LEONARDO, Rodrigo Xavier. Associações sem fins econômicos. São Paulo: Thomson Reuters; Revista dos Tribunais, 2014. pg. 264.

12 A collaboration agreement is an instrument through which the public entity signs partnerships determined by the administration itself as per public policies that require transfers of public funds. In this case, however, partnerships are proposed by the administration itself, as provided for in the in the Statute of Partnerships' Article 2, VII. A development agreement shows similar characteristics to a collaboration agreement, except for the initiative of the projects, which, in this case, are innovative proposals that civil society organizations submit to the public entity. If the latter judges relevant and of public interest, it will enter into a

contents, since all involve signing partnerships to deliver public services of common interest. In addition, the Statute of Partnerships poses "a special bidding procedure for collaboration and development agreements known as a public call."[13]

A public call involves a procedure devised to select entities that intend to sign partnership agreements with a public entity. Its purpose to ensure isonomy and transparency in partnerships while providing opportunities for any entity that meets the criteria set forth in an invitation to bid while posing public funding to enable a larger number of applicants and help public administration select the best bid.

Article 18 of Law No. 13.019/2014 determines the Procedure for Expression of Social Interest as "an innovation enabling civil society organizations (OSCs) to submit projects for activities to be provided in partnership with the public power." This concept means that proposals are no longer created by government alone, thus strengthening civil-society involvement so that it may submit projects of public interest. The public power analyzes the feasibility of a proposal and if applicable announces a public call to then enter into a partnership to execute the project in question.[14]

When the Statute of Partnerships was voted, the State's management practices had to be improved since the new legal wording combines a public entity's specific bureaucratic ingredients with the managerial elements characteristic of private entities, "either by not requiring prior controls, or by prioritizing the pursuit of results and targets set forth in collaboration or development agreements."[15]

Note that in all three agreements – collaboration, development and cooperation – the State looks to civil society for the support required to ensure that services of public interest are delivered. These partnerships often involve support from associations, foundations and other non-governmental organizations. In any case, the entities with which the State enters into a partnership are supervised by the public entity, as we shall show below.

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partnership in order to develop the proposed activities as per Article 2-VIII. There are also cooperation agreements, which are entered into in partnerships that do not involve financial funds being transferred as provided for in Article 2, VIII-A.

13 Bruno Polonio Renzetti, Marco regulatório das Organizações da Sociedade Civil à luz do direito administrativo global, op. cit., pg. 101.

14 Ibid., pg. 101.

15 Henrique Lima Quites, Terceiro setor, op. cit., pg. 2.

2.2 Public power's oversight of third-sector contracts

When the State transfers an activity to the third sector, it is merely arranging for these public services to be run while retaining overall control and ownership. The public power (government) retains its power/duty of supervision/oversight, which cannot be delegated since the constitution's Article 174 provides that: "As a rulemaking agent and regulator of economic activity, the State will lawfully exercise supervisory, incentivizing and planning functions, the latter being determinant for the public sector and indicative for the private sector." Therefore, the State's inherent duty includes supervision and control.

This control may be classified into two types, internal and external: the former being oversight by the public administration organs themselves; the latter referring to supervision of public services delivered by the private sector.[16]

In both forms of oversight or supervision, the State must check to ensure that public services are being provided efficaciously to cater for the interests of the collective and the common good while analyzing the feasibility of maintaining services and altering or even suspending services if applicable.

In overseeing or supervising services provided by third-sector entities, the public manager is to be held liable if it fails to monitor their activities thus incurring in administrative misconduct.[17] Therefore, negligence in relation to signing and overseeing contracts between the public power and private sector entities amounts to administrative misconduct. It is worth mentioning that the law on administrative misconduct (Law No. 8.429/1992) specifically addresses issues involving non-compliance with the general principles of public administration in relation to the rules for opening, supervising and approving accounts related to private entities involved in partnerships with a public entity. [18]

Since accountability for entities that enter into contracts with the public administration is a problem that may undermine the feasibility of contractual renewal, the legislator took care to define a specific section governing the matter in articles 63 to 68 of Law No. 13.019/2014.

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[16] CARVALHO FILHO, José dos Santos. Manual de direito administrativo. 26th ed. São Paulo: Atlas, 2013. pg. 334.

[17] Article 10, Law No. 8.429/1992.

[18] Article 11, Law No. 8.429/1992.

As Article 63 states, accountability must follow the procedures determined in the Statute of Partnerships itself and "the public administration will provide specific manuals for civil society organizations signing partnerships, while procedures will be simplified and rationalized" (§ 1). This legal provision shows the Statute of Partnerships' intention of combining administrative bureaucracy with private-sector management.

In order to verify progress made in executing services and reaching targets and results agreed in partnerships, there must be detailed accountability to monitor their progress (Article 64). Since many agreements depend on public funds being transferred, the law sets forth that "financial data will be analyzed in order to determine the causal nexus between revenues and expenses incurred, their conformity and compliance with relevant rules" (Article 64, paragraph 2). In addition, the entities must compile several legally required reports to support oversight of the work done or services provided (Article 66, I). Another key means of oversight is the possibility of on-site inspections in addition to technical monitoring and reports to help supervise actions developed by entities (Article 66, sole paragraph, I and II).

Therefore, the public manager must monitor and supervise partnerships signed with non-governmental entities and compile technical reports or opinions for accounts rendered by beneficiary entities. A public servant cognizant of any irregularity in the use of funds or targets to be reached must inform their hierarchical superior as provided for by the Statute of Partnerships' Article 61 and its subsections.

Law No. 13.019/2014 specifies means of overseeing and supervising partnerships. The public administration must compile technical opinions/reports describing the means by which the entity will be supervised as per Article 35, V-"e." Also, as a form of inspection, this law requires a monitoring committee set up to appraise partnership agreements signed by a public entity and a civil society entity, as provided for in Article 2-XI.

The State clearly saw a need to reinvent the ways in which public services would be delivered. In the traditional format for administration, bureaucracy is highly valued and formal procedures that are very good at ensuring control of public assets will prevail. However, this model is not very efficacious when used to provide public services, according to Almeida:

> In traditional bureaucratic administration, the means of using assets are controlled by adopting procedures with a high degree of formality

> for more control over the use of public assets and greater security and effectiveness regarding decisions taken. However, bureaucratic administration proved insufficient to promote quality and efficiency in public services offered by the State.[19]

Therefore, a different form of public management is required to de-bureaucratize the state apparatus and focus more on results proposed by agreements while in all cases serving the public interest. On the same lines, Nora and Arnoldi write:

> There is a need for a new form of relationship that is more horizontal and clearer contractually in the sense of specifying each entity's actions and responsibilities as well as more supervision of contracts based on a logic of focusing on results rather than letting processes – meaning bureaucracy– hinder pursuit of the main targets of each initiative in order to really serve the public interest.[20]

The purpose of the Statute of Partnerships is to ensure more autonomy for entities signing contracts with the public entity, thus posing a more managerial notion while following rules set by the public manager for the use of available funds. However, the institutions take on more responsibilities including an obligation to reach targets while delivering high quality services:

> Therefore, the managerial administration model poses a different situation: there is an emphasis on results to be obtained when providing public services by previously defining targets for the service provider to meet without skirting the rules that control use of public funds. As part of managerial administration, the service provider (which may or may not be a public administrator) is given more autonomy over their use of funds and they must pursue the established objectives in the

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[19] ALMEIDA, Camila Parente. A Lei nº 13.019/2014: destaques, controle e perspectivas. Revista Jurídica da Universidade de Cuiabá e Escola da Magistratura Mato-Grossense, v. 4, pg. 54, Jan./Dec. 2016. Available at: <http://revistaemam.kinghost.net/revista/index.php/unicemam/article/ view/288/259>. Accessed on: October 8, 2017.

[20] NORA, Luiz Fernando Zen; ARNOLDI, Paulo Roberto Colombo. O Estado e a atuação em parceria com a sociedade civil no desenvolvimento de ações de interesse público. Scientia Iuris, Londrina, v. 20, No. 2, pg. 55, July 2016.

> manner they believe most appropriate. For managerial administration, control is focused on the results achieved – efficient high-quality public services – but requires a higher level of responsibility and commitment to meeting targets.[21]

The Statute of Partnerships calls for the State to reach an efficient level of management by delegating services that may be performed through partnerships with third-sector entities. The purpose of this alternative is to lower public spending and downsize the State's apparatus, which is at times judged costly and inefficient. The public administration would act as developer or sponsor by supporting entities and acting as a supervisory body in order to guarantee quality services:

> Therefore, the State must downsize its public apparatus, which is presently costly and inefficient. To do so, it will have to review its "executor" role to become a "promoter" while ensuring the proper functioning of various forms of partnerships through governance while also playing a supervisory role to ensure that contracts are performed, or in case of difficulties in this respect, that problems are discovered in advance to ensure contracts may be reviewed and their courses corrected.[22]

On the one hand, the entities clearly enjoy more autonomy to manage their activities: on the other, more State oversight is needed to check whether their activities are efficaciously serving the public interest.

Also in relation to supervision, mention must be made of the Statute of Partnerships' Article 67 which requires the public entity to issue a technical opinion appraising the efficacy of activities, which must mention: "I – results obtained and their benefits; II – economic or social impacts; III – the level of satisfaction of the target segment; IV – the possibility of sustainability for the initiatives once the agreed contractual purpose has been concluded."

The efficacy of public services is shown for the conclusion of partnerships and the impacts these contracts will have, as well as the chances of sustainability for the projects executed. Therefore, the Statute of Partnerships

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[21] Camila Parente Almeida, A Lei nº 13.019/2014, op. cit., pg. 54.

[22] Luiz Fernando Zen Nora e Paulo Roberto Colombo Arnoldi, O Estado e a atuação em parceria com a sociedade civil no desenvolvimento de ações de interesse público, op. cit., pg. 78.

highlighted sustainability, since both the State and civil society have a duty to protect the environment for present and future generations. The next section will examine the Statute of Partnerships' coverage of the sustainability issue to see how has been addressed.

3. Statute of Partnerships and sustainability

The abovementioned Law No. 13.019/2014 governs the State's voluntary contracts with the third sector (comprising private non-profit entities such as associations, foundations and religious organizations) to provide public services on behalf of the State, since the latter is unable to develop them efficaciously. The proposed activities include those of a social nature, such as recognition of cultural diversity and defense of human rights.

However, given its constitutional duty of protecting the environment, the public entity is responsible for fostering sustainable development, which also applies to partnerships with civil society entities (to be addressed below).

3.1 Public administration and the duty of sustainability

Public law governs administrative activities whereby public administration has an obligation to assure citizens have fundamental rights[23], including the right to a healthy environment. As a means of guaranteeing this, the public entity needs to put into practice the constitutional principle of sustainability to achieve good administration, as Juarez Freitas shows:

> The aim here is to describe and prescribe public administration simultaneously redesigned under the influence of the fundamental right to good public administration and the constitutional principle of sustainability, right from the architecture of the concepts and the existential principle, to make it efficient and efficacious over time as an inducer of sustainable development.[24]

[23] Marçal Justen Filho, Curso de direito administrativo, op. cit., pg. 90.

[24] FREITAS, Juarez. Sustentabilidade: direito ao futuro. Belo Horizonte: Fórum, 2011. pg. 234.

Therefore, administrative law must satisfy fundamental rights through administrative activities which, as mentioned above, may be delegated to private entities. "The relevant issue, therefore, is the nature of the activity and the purposes to which it is directed rather than the quality of the entity developing it." [25] Therefore, regardless of who is providing a public service, which may be the State or a non-state entity, both need to ensure sustainability for the activities involved, since the most important aspects are the objectives pursued by the proposed activity.

In relation to sustainability and sustainable development, note that the 1987 Bruntland Report for the World Commission on Environment and Development, "Our Common Future" mentioned that:

> [...] sustainable development is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development; and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspirations.[26]

Sustainability therefore means meeting the basic needs of present-day generations without compromising those of future generations:" ensuring today's physical, mental and spiritual well-being, without compromising the future's multidimensional well-being." For Juarez Freitas, the Bruntland Report was and is important, but new measures have to be taken since "it is essential [...] to enhance this concept, in order to make it clear that the needs met cannot be artificial or hyperinflated by cascading consumerism."[27]

Therefore, sustainability clearly means providing a decent environment for future generations without affecting the livelihood of the present generation as Rio 92 stated in its Principle 3: "The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations."[28]

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[25] Marçal Justen Filho, Curso de direito administrativo, op. cit., pg. 93.

[26] COMISSÃO MUNDIAL SOBRE MEIO AMBIENTE E DESENVOLVIMENTO. Nosso futuro comum. 2nd ed. Rio de Janeiro: Editora da Fundação Getulio Vargas, 1991. pg. 49.

[27] Juarez Freitas, Sustentabilidade, op. cit., pg. 41, 47.

[28] NAÇÕES UNIDAS. Declaração do Rio de Janeiro sobre meio ambiente e desenvolvimento (1992). Available at: <www.onu.org.br/rio20/img/2012/01/rio92.pdf>. Accessed on: June 10, 2017.

However, "to reach this level of sustainable development, in order to conserve natural resources for future generations, joint action of the public power, consumers entrepreneurs from all countries would be indispensable." [29] To comply with Article 225 of the Constitution of the Federative Republic of Brazil, the environment must be seen as an asset that belongs to everybody and ought to be preserved, "in the sense that there is dignity of the environment, and the present generations' right to a clean environment in every respect is recognized without prejudice to future generations.[30]

Juarez Freitas defines sustainability through several aspects. On the legal-political aspect, he argues that "pursuing sustainability is a right and finding it is a constitutional duty". Therefore citizens have a right to live in a sustainable society while the State has a duty to ensure this will be the case: "hence the Sustainable State, based on the law to materialize rights related to the lasting welfare of today's generations without prejudice to tomorrow's." The State's constitutional duty is to ensure a sustainable society in which both the public entity and the collective have a responsibility to preserve the environmental good and not merely broadcast advertisements in which flowery language in empty speeches is used to deceive citizens.[31]

Sustainable concepts must be fostered by the public entity in order to encourage civil society to pursue sustainable practices. A practical and effective way is to establish sustainability as a pre-condition required of companies bidding for State contracts. One of the ways in which government used this approach was in the 2010s, when Article 3 of the Bidding and Administrative Contracts Law was amended and now requires invitations to bid to make sustainability a criterion.[32]

Therefore, the public administration has a responsibility to encourage sustainable activities in bidding procedures. If it fails to do so "issuing irresponsible notices, [...] will incur injurious omission."[33] In this respect, "sustainability is added as the fundamental constitutional principle of the

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[29] MASTRODI, Josué; BRITO, Beatriz Duarte Correa de. Licitações públicas sustentáveis: vinculação ou discricionariedade do administrador? Revista de Direito Administrativo, Rio de Janeiro, v. 274, pg. 90, May/Aug. 2017.

[30] Juarez Freitas, Sustentabilidade, op. cit., pg. 60-61.

[31] Ibid., pg. 63-64, pg. 16. Therefore sustainability should be treated as a constitutional principle - legally prescribed or otherwise - thus ensuring social welfare on a preventive and precautionary basis, since this duty of solidarity transcends individual welfare (Ibid., pg. 40-41).

[32] Ibid., pg. 230-231.

[33] Ibid., pg. 303.

entire legal system, one that is necessary for society's continuity and progress in humanitarian terms." Therefore, "sustainability is an idea that is inserted in all legislation, as a principled notion that guides legal norms"[34] and should therefore be part of the relationship between public administration and civil society.

The sustainability principle goes well beyond language used by environmental groups: as a constitutional principle. It is closely related to the right to life. Therefore, administrative relations should move from abstract plan to concrete reality more quickly and new administrative law should be more efficient and practical in line with the principle of sustainability, as an inherent aspect of good administration.

> The aim is constitutionalizing progression of administrative relations. Constitutionalizing means conferring pronounced direct and immediate efficacious expansion of the right to sustainable public management. It means combatting the severe distortions associated with the huge gap between constitutional principles and the concrete world. In short, the new Administrative Law must constitutionalize administrative relations once and for all by forcing the transition to the new cycle of public management.[35]

Sustainability to ensure that present and future generations enjoy decent lives must be part of society's values and encompass the initiatives of the State and civil society, as shown by Law No. 8.666/1993 (bidding and administrative contracts law). However, sustainability must feature in relations reaching beyond this sphere, to involve other entities providing public services on behalf of the State, such as civil society organizations, as discussed below.

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[34] COELHO, Saulo de Oliveira Pinto; DE ARAÚJO, André Fabiano Guimarães. A sustentabilidade como princípio constitucional sistêmico e sua relevância na efetivação interdisciplinar da ordem constitucional econômica e social: para além do ambientalismo e do desenvolvimentismo. Revista da Faculdade de Direito — UFU, v. 39, No. 1, pg. 20, 2010.

[35] Juarez Freitas, Sustentabilidade, op. cit., pg. 235.

3.2 The pursuit of sustainability in partnership with private entities

Civil-society organizations have a wide range of purposes and those founded to protect the environment include WWF-Brazil[36] and Greenpeace[37]. There are also social entities such as Legião da Boa Vontade, or LBV[38] and Associação de Pais e Amigos dos Excepcionais, or Apae (the Association of Parents and Friends of Exceptional Children)[39], whose institutional mission is social protection for individuals who are excluded and often neglected by the State. Finally, there are others that are not social but merely associations or foundations working for interests of a group of people.

Not-for-profit private entities undertaking services or tasks on behalf of the public entity have grown stronger and set up partnerships to enhance the services delivered.

All types of entities signing partnerships with the administration, whatever their purpose (whether social, cultural, environmental, etc.), must comply with the constitutional principle of sustainability. Note that this principle must be followed regardless of political issues and the entities in question must find the best way of providing services in all cases.[40]

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[36] "WWF-Brasil is a Brazilian NGO affiliated with the World Wide Fund for Nature, an international network. It is committed to nature conservation in the Brazilian social and economic context and its mission is curbing environmental degradation to build a future in which humans live in harmony with nature by conserving the world's biological diversity, assuring the sustainability of renewable natural resources, and reducing pollution and waste." Available at: <www.wwf.org.br <http://www.wwf.org.br >. Accessed on: Oct. 29, 2017.

[37] "Greenpeace is an independent global organization that is working to protect the environment and promote peace by inspiring people to change their attitudes and behavior. As an independent non-profit institution, it does not accept donations from governments, corporations or political parties. Its work is funded entirely by millions of donors from all over the world. Due to its economic independence, Greenpeace acts transparently and can freely take positions and express its views, thus being able to take risks, confront targets and be committed exclusively to individuals and civil society." Accessed on: Oct. 29, 2017.

[38] "Legião da Boa Vontade (LBV) is a non-profit charitable, beneficent, philanthropic, educational, cultural, philosophical, ecumenical, altruistic and non-business civil association recognized in Brazil and elsewhere for its work in the fields of education and social assistance." Accessed on: Oct. 29, 2017.

[39] "This association advocates for the rights of people with disabilities and articulates initiatives in this respect. Its acts as the movement's liaison with other local and international organizations to enhance services provided by APAES for social inclusion of users while advocating the rights of people with disabilities and their inclusion in all public policies." Accessed on: Oct. 29, 2017.

[40] "Whereas, following the constitutional principle of sustainability, administrative contracts should be signed with a new logic, inconsistent with the electoral calendar and inducing

Administrative law edges toward long-term public policies, meaning proposals that outlast mandates, since activities provided by the public entity must continue regardless of their management's termination.[41]

Although knowing that there are paradigm shifts in relation to the practice of sustainability, note that the State and private companies are more advanced than civil society organizations, which have yet to devise organizational plans for their operation and more innovative proposals for sustainability. One of the consequences of this problem is that these entities are mainly voluntary and rely on donations to continue their work, although these entities often have well-structured technical staff.

> The main field of activity in terms of the evolution of planning is applied directly to private companies and the State, while OSCs have been on the sidelines in relation to this practical approach. There is no extensive literature on Organizational Planning, but we know they have peculiarities that lead to adaptations of technical aspects that are crucial for their application.[42]

Social entities also have some difficulty in management and organization, often depending on administrative support provided by the public entity. The public power provides this support to ensure continuity of services delivered or work done due to the importance of continuity, given the high-level commitment of these entities and the excellent level of their technical staff (which, for illustrative purposes, often consists of professionals such as psychologists, speech therapists, nurses, engineers, in short, many specialists wishing to build a fairer, more egalitarian and sustainable society). However, they show a certain tendency to remain within their comfort zones in terms of administrative management and sustainability:

> Based on improvisation and amateurism, the OSCs' managements have historically consolidated the comfort-zone process, which has made for a culture in which these organizations hold back from planning their

continuity and quality in the provision of public services and the maintenance of essential goods." (Juarez Freitas, Sustentabilidade, op. cit., pg. 236).

41 Ibid., pg. 257.

42 ABLAS, Claudia Regina et al. Lei 13.019 e a gestão sustentável. Caleidoscópio, v. 1, No. 7, pg. 200, 2016.

> administrative management. Despite some progress that has been made, they still lack professionalized instruments and processes to ensure the reach of their sustainable management.[43]

Only environmentalists as such see the environmental question as a value to be followed. However, sustainability goes well beyond using recycled paper in their offices; it "relates to an attitude or strategy that is both right and feasible in economic terms," which involves "being able to manage resources in the best possible way", so sustainability "applies to everything but especially instances where resources are scarcer."[44]

Therefore, sustainability means having the know-how to manage all the resources that are available, including donations from individuals and the State that needs the services of the entities. In this respect, Law No. 13.019/2014 is an instrument that ought to be highlighted, although there may have some lacunae in the ways in which these partnerships are implemented and in some cases it may be vague in regard to some matters.

To ensure sustainability in the public entity's relations with entities, the Statute of Partnerships provides for an invitation to bid that is the subject matter of a public call to require these entities to devise Resource Mobilization plans to ensure sustainability in their management.

> Based on Law No. 13.019/2014, OSCs must have a Resource Mobilization Plan (PMR) that includes strategies for building and implementing work plans as provided for in Public Calls, as well as strategies for sustainability and related processes, irrespective of access to earmarked public funds. The overall objective of a Resource Mobilization Plan is to foster sustainability through organizational processes, build and strengthen funding mechanisms, build networks of individual employees or collaborators, and support existing initiatives.[45]

In any case, sustainability goes far beyond the issue of designing projects that involve protection for forests, flora or water resources. Conscious resource management is itself a sustainable approach that collaborates with

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43 Ibid.

44 Ibid., pg. 201.

45 Ibid., pg. 203-204.

the environment. Therefore, the State and the entities have a duty of using resources consciously and not wasting them because public goods are seen as belonging to nobody, meaning that individuals do not realize that a public good belongs to body, and this is so for environmental protection too, since it is a shared-use good.

3.3 The public administration's sustainability duties in partnerships with private entities

As mentioned above, the State has a duty to foster sustainability, because the public entity is ahead of civil society entities in terms of organizational plan. Nevertheless, in relation to provision of social services, the entities conduct commendable social– interest activities that the public entity needs to help provide services on its behalf.

Administrative law has a challenge to tackle here because there is a wide range of different entities and interests involved. Mechanisms and invitations to bid have to be devised that will enable all sorts of entities to compete for public resources or funds. There is a "diffusion of non-state organizations oriented towards the satisfaction of collective interests [which] broadens the limits of administrative law to reach entities outside the purely state-controlled context",[46] since life goes on in civil society far from the bureaucratic obstacles of services governed by the public apparatus alone.

In short, the State is constitutionally obliged to develop sustainable activities in its partnerships with civil society organizations. However, they must be autonomous, meaning they "must not be subordinated to political pressures and exercise such a primary function under special arrangements for management relations, necessarily over a long-term horizon"[47] and must not be bound to a political mandate.

Article 5 of Law No. 13.019/2014 lays the foundation for public-private partnerships, developing social participation that strengthens civil society and renders the use of public funds more transparent while always respecting the principles of public administration in order to foster sustainable development, preserving and protecting the environment.

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[46] Marçal Justen Filho, Curso de direito administrativo, op. cit., pg. 94.

[47] Juarez Freitas, Sustentabilidade, op. cit., pg. 262.

As a means of fostering sustainable development through the Statute of Partnerships, lawmakers sought to set certain conditions for the transfers of benefits mentioned in Article 84-B,[48] only for entities whose core activities and purposes are listed in Article 84-C, such as social assistance, culture, education, health, alleviating poverty, etc.

In this text, the highlight is sub-item VI of the abovementioned article, which states that its purposes include protecting the environment and fostering sustainable development:

> Article 84-C. The benefits provided for in Article 84B shall be conferred on civil society organizations whose objectives include at least one of the following purposes:
> [...]
> VI – Environmental preservation and conservation fostering sustainable development.

This requirement connects sustainability to good management, meaning efficaciously and effectively inducing well-being.[49] The new public management paradigm focuses sustainable development through partnerships with private entities, so the State respects the autonomy of civil society, which becomes a protagonist rather than just a customer of public services.[50] Under the Statute of Partnerships' Article 84-C, civil society entities bidding for public partnerships must show sustainability as one of the requirements for the classification of their projects.

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48 Article 84-B. Civil-society organizations will be entitled to the following benefits regardless of certification: I - receive corporate donations up to two percent (2%) of their gross revenues; II - receive movable assets deemed irrecoverable, seized, abandoned or available, administered by Brazil's Federal Tax Authority; III - distribute or promise to distribute prizes through sweepstakes, gift cards, competitions or similar operations, in order to raise additional funds for their maintenance or costs.

49 "The aim is to describe and prescribe a redesigned public administration under the influence of the fundamental right to good public administration and the constitutional principle of sustainability (both theoretically and in operational practice), in order to make it efficient and effective for inducing well-being." (Juarez Freitas, Sustentabilidade, op. cit., pg. 199.)

50 "In relations between citizens and the State-Administration, Administrative Law will gradually cease to be that which reduces citizens to mere customers or is concerned only with efficiency. It will become the Administrative Law of participatory and transparent public management concretizing the principle of sustainability that governs the administration's relations in their entirety. "(Ibid., pg. 280.)

However, there is still uncertainty as to how sustainability will be assessed, thus creating difficulties for the project assessment committee. One of the ways in which the public entity could assess sustainability would be the multidimensional view posed by Juarez Freitas,[51] which means analyzing ethical, legal-political, environmental, social and economic aspects of the projects submitted. Nevertheless, the public power may at its own discretion apply its own criteria to determine how projects will be ranked on these aspects.

Moreover, after the publication of public notices including requirements for sustainable activities, the public entity must exercise oversight to the point that sustainability is no longer merely a theoretical concept that is still impractical.

There is no question that sustainability is a principle that is here to stay. It is "multidimensional: an ethical, social, legal-political, economic and environmental principle"[52] that should be part of public policies in order to encourage private society to develop sustainable activities that will ensure an ecologically balanced environment and decent lives for present and future generations.

4. Conclusion

Having examined sustainability requirements under Law No. 13.019/2014, the so-called Statute of Partnerships, we found that the role of the entities in providing public services is essential, given the State's inefficacy in relation to numerous social demands. Therefore, the State needs support from civil society through the third sector. The emergence of social movements in the 1970s has led to a paradigm shift in public administration, through which society, in an organized manner, takes over tasks that would be the responsibility of the state.

By delegating certain services, the State sets up partnerships with third sector entities. As a means of regulating these partnerships, Law No. 13.019/2014 establishes numerous legal instruments to ensure transparency and fairness for entities bidding for government contracts. However, it was found that these activities must be constantly monitored in order to cater for the State's interests and ensure sustainability.

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[51] Ibid., pg. 283-284.

[52] Ibid., pg. 331.

Although the theme of sustainability is increasingly widespread, effective results and actions to ensure sustainable development are still lacking. Law No. 13.019/2014 mentions sustainability as one of the requirements for entities seeking partnerships with the public entity. The State is tasked with overseeing the results that are proven through legally established arrangements to analyze the feasibility of maintaining a partnership or otherwise.

However, in the course of the study it was found that the Statute of Partnerships addresses the issue of sustainability but does so superficially, since it only mentions sustainability as a requirement for partnerships but fails to provide details of how it will be analyzed in projects proposed by the entities, thus causing uncertainty for both entities and the State when ranking the best bid.

Therefore, regulation of the State's partnerships with civil society through Law No. 13.019/2014 is clearly valuable since this law governs contractual arrangements with entities that are essential to ensure social welfare. However, for present and future generations to be afforded social welfare, sustainability must be foregrounded, including in partnerships.

There is a need for a discussion on how sustainability may be applied. Depending on how the matter is addressed, there is a risk of sustainability being merely an adornment absent clear and practical requirements as to which measures must be taken to ensure the ecologically balanced environment required by the Constitution of the Federative Republic of Brazil.

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