Autonomous social services: identification and distinctions of entities providing public services*

Serviços sociais autônomos: identificação e distinções de entidades prestadoras de serviços públicos

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ABSTRACT

The text aims to distinguish autonomous social services with close figures or legal subjects, especially private entities that relate to the Public Administration, providing services of public interest. The methodology

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consists of analyzing the legal and jurisprudential doctrine of the Federal supreme Court and the Federal Court of Accounts related to the theme, using bibliographic and documentary methods, with emphasis on the sources of study of Constitutional Law and General Theory of Law. Along this path, the problem to be answered is the legal-constitutional regime of legal entities close to autonomous social services, to identify the characteristics of each one. It concludes by situating the space and the mode of action of autonomous social services and entities that do and that are also not part of the State structure, but that contribute to the provision of essential public services for the community.

KEYWORDS

Autonomous social services — public administration — State

RESUMO

O texto tem como objetivo distinguir os serviços sociais autônomos com figuras ou sujeitos jurídicos próximos, sobretudo as entidades privadas que se relacionam com a administração pública, prestando serviços de interesse público. A metodologia consiste na análise da doutrina jurídica e jurisprudencial do Supremo Tribunal Federal e do Tribunal de Contas da União relacionadas com o tema, utilizando-se os métodos bibliográfico e documental, com ênfase nas fontes de estudo do direito constitucional e teoria geral do direito. Nessa senda, o problema a ser respondido é o regime jurídico-constitucional de entidades jurídicas próximas aos serviços sociais autônomos, de modo a identificar as características de cada uma. Conclui-se situando o espaço e o modo de atuação dos serviços sociais autônomos e de entidades que fazem e que também não fazem parte da estrutura do Estado, mas que contribuem para a prestação de serviços públicos prestacionais fundamentais para a coletividade.

PALAVRAS-CHAVE

Serviços sociais autônomos — administração pública — Estado

1. Introduction

This text contextualizes autonomous social services in relation to similar, often confused legal entities or subjects, especially vis-a-vis public administration, which provide public services not exclusive to the State. In suggesting a diverse range of entities involved in activities which furnish public rights and services, it identifies, above all, the potential role of agents not necessarily part of the state apparatus, but which contribute to the provision of fundamental services. In this sense, the concept and legal-constitutional regime of entities similar, but different to, autonomous social services are considered, to identify the legal characteristics of each group.

As to the research and writing of the article, bibliographic, documental, and jurisprudential methods were applied, with an emphasis on sources related to constitutional law and general theory of law. A wide range of legal texts, bills, records, books, files, Internet resources, and jurisprudence were consulted; as well as editorials, dissertations, monographs, and authorized articles, critical and affirmative, which regulate and certify the construction of autonomous provision of public services in the legal, economic, and social spheres.

The insertion of autonomous social service provision in the legal entity context, state controlled or matched to private social services and professional training entities linked to the union system (art. 240 of the CF), has had negative consequences on the identification of the relevant legal regime and the constitutional understanding of the legally instituted autonomous social services (from the 1990s onwards) by federative entities with the objective of supplying or minimizing state deficiencies in the provision of social welfare rights. Thus, this text seeks to identify an appropriate, practical interpretation, in the 1988 constitutional text and its subsequent "Administrative Constitutional Reforms", of legal subjects such as state controlled or collaborating entities, third sector and administrative service providers, non-state and professional corporations, unions and associations, foundations, executive agencies, social and civil organizations, development agencies, schools, and social assistance and support bodies, removing almost all of them from the legal status of autonomous social services.

In this respect, for example, when the 1988 Federal Constitution determined (in art. 62 of the Temporary Constitutional Provisions Act) the creation, without prejudice to public bodies operating in the area, of

Senar, affirming the law would no longer subsist in the cases of Senai, Senac, Sesi and Sesc, there were signs of a new approach, and the need for constitutionally adequate interpretations of the current legal system. Taxonomies and understandings previously used would become indefensible in Brazilian law. Thus, involving legal entities subject to different rules and principles under the same *nomen juris*, classification of legal regimes is neither valid nor useful; placing juridical entities under the same umbrella or criterion presupposes that a set of very similar principles and rules apply, in accordance with the same constitutional foundations. Thus, in law, nomination matters and any investigation that claims to be legal-scientific must strive for the correct legal nomenclature. We fully agree with Barbosa Moreira, *in verbis*:

> It is clear the point will be of no interest to anyone who cares little about terminology — who supposes, say, that in geometry we may call a three-sided polygon both a triangle and pentagon, or that in anatomy the liver may equally be referred to as the brain. But—frankly speaking—it matters little what these people think or don't think.[1]

It is understood, then, that in law both the essence and term matter. The essence may have greater importance, but the wrong name or lack of terminological precision is harmful in the application of the law. Thus, in tax law, a binding rule was established in the sense that the name and other formal characteristics adopted in law are irrelevant when identifying the specific legal nature of the tax (art. 4, item I, CTN). Thus, it is not exaggerated formalism, but rather the need for correct institutional identification, matching the constitutional framework, so when the interpreter of the law describes a certain entity, everyone understands; we do not think of an institute with a legal reality profoundly different from the understanding of an autonomous public service provider in the constitutional sense.

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[1] MOREIRA, José Carlos Barbosa. Exceção de préexecutividade: uma denominação infeliz. *In:* MOREIRA, José Carlos Barbosa. *Temas de direito processual*. 7. Série. São Paulo: Saraiva, 2001. p. 121.

1.1State controlled entities, tertiary sector and collaborating entities

The word "para-state" consists of two ideas: "para" (of Greek origin), meaning "next to", and "state" (of Latin origin). Etymologically, Cretella Júnior points out that "para-state "[…] is not to be confused with the State, because it walks side by side, in parallel […]" with it.[2] The origin of the word does not suggest the establishment of a single doctrinal concept. On the contrary, Di Pietro observes that "[…] there is no uniformity of thought among authors in the definition of para-state entities […]".[3] Ruy de Souza,[4] in a text of maximum importance for scholars of Brazilian law, also highlights the terminological confusion regarding para-state entities in Brazilian legal understanding, but notwithstanding that doctrine on the subject is scarce and flawed in its propositions, puts forward the following concept:

> For us, terminology should retain the description "para-state" entities, within the limits of their quasi-public character, exercising services of collective interest, recognized, or even organized by the State, but delivered by a private administration, without assets constituted exclusively by the State or its coercive powers. Regardless of the organizational formula: semi-public enterprise, foundation or commercial or noncommercial corporations. The rules to which they would be subject would not be contained in a special regime peculiar to Public Law.[5]

On the other hand, Themístocles Cavalcanti starts with the comparison between concepts of para-state and autarchic entities, concluding that "the para-state term further distances the entity from the administrative structure of the state, presupposing fewer subordination ties, while the other — autonomous body — indicates only administrative autonomy, but does

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2 CRETELLA JÚNIOR, José. *Administração indireta brasileira*. Rio de Janeiro: Forense, 1980. p. 140.

3 DI PIETRO, Maria Sylvia; MOTTA, Fabrício. *Tratado de direito administrativo*. São Paulo: RT, 2019. p. 300.

4 SOUZA, Ruy. Serviços do Estado e seu regime jurídico. *Administrative Law Review*, Rio de Janeiro, v. 285, p. 10-37, 1952

5 Ibid., p. 29.

not exclude hierarchical and organizational subordination".[6] Hely Lopes Meirelles, in turn, conceptualizes para-state entities as legal entities under private law, whose creation is authorized by a specific law "[…] with public or mixed assets, to carry out activities, works or services of collective interest, under rules and State control […]";[7] and includes state-owned companies, public foundations and autonomous social services in this concept. Di Pietro criticizes the framing of autonomous public service providers within the concept of para-state entities of Hely Lopes Meirelles:

> […] in the first place, according to the etymological sense of the expression, and secondly, because it brackets entities of a different legal nature in the same category, i.e., legal entities which fall under indirect public administration and private entities outside the state scope, as is the case with autonomous public services [...].[8]

A suitable legal parameter for the conceptualization of a para-state entity is expressly found in article 84, item 1, of Law No. 8666/1993, where the law on bidding and administrative contracts defines the term "public servant" for the purposes of framing the administrative and judicial sanctions established in the standard. This norm classes as a public servant those who hold a position, employment, or function in a para-state entity, "[...] including, in addition to foundations, public companies and semi-public enterprises, other entities under the control, directly or indirectly, of public authority". On the one hand, the norm distances municipal entities from the concept of para-state entity, since municipalities, although subject to indirect administration, fall under public law and maintain all the characteristics of direct administration. On the other hand, article 84, § 1, of Law No. 8.666/1993, rightly distances autonomous public service providers from the concept of para-state entity, as such entities do not fall under direct or indirect administration, being legal entities governed by private law. It is also noted that this legal concept covers only entities governed by private law which fall under indirect administration, i.e., public companies, semi-public enterprises and public foundations governed by private law; and, in addition, is fully compatible with the sole paragraph

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6 CAVAlCANTI, Themístocles. *Tratado de direito administrativo*. Rio de Janeiro: Freitas Bastos, 1956. p. 106107.
7 MEIRELLES, Hely Lopes. *Direito administrativo brasileiro*. São Paulo: Malheiros, 2003. p. 362.
8 Maria Sylvia Di Pietro e Fabrício Motta, *Tratado de direito administrativo*, op. cit., p. 307.

of art. 1 of Law No. 8.666/1993, which directly excludes autonomous social services from its material scope.

This concept of para-state entity, therefore, is also distinct from that of "third sector", as it admits the presence of entities covered by the administrative structure of the State (public companies, semi-public enterprises, and public foundations under private law). The third sector, meanwhile, does not relate to legal entities with business purposes, i.e., it is made up of non-profit legal entities created autonomously and independently without state participation. In this respect, the third sector, is conceptualized, doctrinally, as an imprecise, residual designation, covering all social organizations that, although private, are none— profit, and, at the same time animated by social, public or community objectives. [9] The study of the third sector in Brazil was boosted in the early 1990s, when the Fernando Henrique Cardoso government moved to promote a reform of the State. (The "Plano Diretor da Reforma do Aparelho do Estado", 1995). This involved changing the excessively bureaucratic model of public administration then in force to a model focused on results, to generate efficiency in public spending. In view of the fiscal crisis at the time, one of the solutions envisioned was the strengthening of the third sector, through the publication of legal instruments that favored promotion of these activities, to increase the provision of public services not exclusive to the State by non-profit entities.

The activities developed in the third sector are guided by the principle of subsidiarity, according to which "the larger entity should not supply the interests of the smaller one that can supply them by itself more effectively", [10] i.e., the State must only engage in a particular activity if an entity cannot do so within by its own means. Thus, although it performs an activity of general interest, often constitutionally imposed as a duty — not exclusive — of the State, for the realization of individual and social rights, the third sector is made up of non-profit private entities, supported but not created by the government.

From this definition of the third sector, composed of private non-profit entities that perform services of general interest not exclusive to the State, excluding, on the one hand, public entities and, on the other, private for-profit organizations, we may conclude that autonomous public

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9 BRESSER-PEREIRA, Luiz (Org.). *Sociedade e Estado em transformação*. Brasília: Enap, 1999. p. 250-251.

10 ROCHA, Sílvio Cuís Ferreira da. *Terceiro setor*. São Paulo: Malheiros, 2006. p. 17.

services are not part of the third sector, as they are created by law with active state participation. Furthermore, the doctrine[11] prescribes the need for volunteerism for an entity to be integrated in the third sector, distancing autonomous public services from this category. This work does not ignore the views of authors with alternative interpretations.[12] However, given the lack of volunteerism of autonomous public services and the strong link they have with the State, from their creation by law to the strong presence of public sector management, it is evident autonomous social services are not part of the third sector.

Finally, another concept related to quasi-governmental entities and the third sector is "collaborating entities" or "collaborating associated entities". These expressions designate the association, through an atypical administrative delegation, between the government and entities that do not have a primarily economic purpose, i.e., the most diverse legal collaboration arrangements between private non-profit entities and the State for the performance of non-exclusive public interest activity.[13] Thus, collaboration entities are extra-state entities that work in conjunction with the State to carry out public service activities. Among these, the following may be highlighted: social and civic organizations, foundations supporting official institutions of higher education, private pension foundations, professional associations, federations and confederations and welfare provision entities.[14] In view of this conceptual framework, this article adopts the understanding that autonomous public service providers are not included in the group of para-state entities. They do not form part of the third sector; nor are they collaborating entities.

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[11] LINS, Bernardo Wildi. *Organizações sociais e contratos de gestão*. 2. ed. Rio de Janeiro: lumen Juris, 2018. p. 129; IOSCHPE, Evelyn Berg (Org.). *3º setor*: desenvolvimento social sustentado. São Paulo: Paz e Terra, 2005; TEIXEIRA, Josenir. *O terceiro setor em perspectiva*: da estrutura à função social. Belo Horizonte: Fórum, 2011.

[12] FERNANDES, luciana de Medeiros. Reforma do Estado e terceiro setor. Curitiba: Juruá, 2009. p. 336; CHAHAIRA, Bruno Valverde. *Terceiro setor, direitos fundamentais e as políticas públicas no Brasil em crise*. Rio de Janeiro: lumen Juris, 2018. p. 100; BARBIERI, Carla Bertucci. *Terceiro setor*. Curitiba: Juruá, 2011. p. 70-71.

[13] MOREIRA NETO, Diogo. *Curso de direito administrativo*. Rio de Janeiro: Forense, 2014. p. 311.

[14] Ibid., p. 311-316.

1.2 Professional corporations or autonomous entities, unions and associations

Here, some entities related to professional regulation and the representation of certain organized groups are conceptualized, to distinguish them clearly from autonomous social services. First, the professional corporation or autonomous entity is presented as a legal entity under public law, created to regulate, inspect, exercise legal power and issue declarations, certificates and authorization related to a given profession. As one of its attributions is the exercise of regulatory power, the STF declared unconstitutional the provisions of Law No. 9.649/1998, which conferred to professional autonomous entities the characteristics of private law and established that the inspection of regulated professions would be exercised in a private capacity, by delegated a public authority, through legislative authorization.

The STF determined that it is not possible to delegate a state activity to a private entity, which "even includes regulatory powers, to tax and to punish, with regard to the exercise of professional activities".[15] It should also be noted that corporate or professional autonomous entities obey a legal regime that differentiates them from other autonomous entities, as they are not subordinated or linked directly or indirectly to any political entity, i.e. the public administration has no tutelage or control, given the need for independence, autonomy and freedom to exercise supervisory power over the respective regulated profession. There is, therefore, no approximation of these entities in relation to autonomous social services, as they are legal entities governed by public law and exercise the constitutionally guaranteed regulatory power.

Another entity related to the exercise of a profession is the union. Unlike professional autonomous entities, which, as a rule, fall under indirect administration and are created by law, unions are private organizations created by workers and employers (or legal entities) in a certain professional category, without need for prior state authorization or interference in their functioning (art. 8, item I, of the Constitution), for the organized representation of group interests in collective labor relations (art. 8, item III), including in legal proceedings. Union membership is free to the worker or employer (art. 8, header, of the Constitution). Collective labor negotiations, it should be

[15] STF. ADI 1717, relator(a): min. Sydney Sanches, Tribunal Pleno, *DJ* 28/3/2003.

noted, must be handled by unions (art. 8, item VI). Another characteristic of unions in Brazil is unification, which prohibits the "creation of more than one union organization, in any degree, to represent a professional or economic category, in the same territorial base".[16] This rule imposes registration of union organizations with the Ministry of Labor so the agency can verify compliance with this constitutional requirement. In summary, unions have these characteristics: legal entity governed by private law, permanent, autonomous, free, non-profit, with legitimacy to represent in court or extra-judicially members of an economic or professional sector. The union organization is regulated in art. 511 of the CLT.

Finally, such associations are legal entities governed by private law, characterized by the union of people organized for non-economic purposes, i.e., without the purpose of developing economic activity for profit (art. 53). There is no association without the union of associates. With the formation of the association, the status of the associate and the legal entity called the association are created. In the words of Maria Helena Diniz, "each member will constitute an individuality, and the association another",[17] thus the relationship between members and between them and the association are of fundamental importance for the development of activities throughout its existence. The regulation of this relationship will be included in the association statute. This legal instrument provides, among other elements, the name, purposes, requirements for admission and exclusion, member rights and duties, resources for its maintenance, deliberative bodies, form of management and approval of accounts. It is possible for a particular group of workers or entrepreneurs to unite to form an association to defend their interests, collectively; after all, freedom of association is a fundamental constitutional right. However, associations formed for this purpose do not have union status. Unions enjoy prerogatives that differentiate them from other professional or economic associations.

In addition to the lack of union prerogatives, the STF limited the scope of procedural legitimacy of associations to promote judicial defense of matters of interest. The STF defined as a matter of general repercussion (Theme 499) that the final decision in a collective action proposed by an association only benefits "members falling within the jurisdiction of the judging body, who were previously, or up to the date of the demand mentioned in the report,

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[16] Art. 8º, II, da Constituição da República.

[17] *Código civil anotado*. São Paulo: Saraiva, 2003. p. 72.

added to the knowledge process complaint […]".[18] Thus, from the standpoint of protecting interests of professions, workers or employers, associations have a lesser relevance than unions; but in terms of carrying out activities of general interest not exclusive to the State, associations have considerable relevance, making up the third sector — configuring civil or non-governmental organizations — as seen below. In this context, there is also no approximation between autonomous public services and unions and associations, as such entities do not represent professional categories, nor are they created through the will of private entities or persons without any state participation.

1.3 Foundations

In the 1988 Constitution of the Republic there are several references to foundations instituted by public power — among them, arts foundations. 22, 37, section XI, and 38 ("foundation administration"), articles. 37, items XIX and XX, 39, § 1, 40, head paragraph, and 163 ("foundation" or "foundations") and arts. 150, § 2º, 157, 158 and 165, § 5, items I and III ("foundation established and maintained"). However, the most relevant constitutional provision regarding foundations is the change promoted by Constitutional Amendment No. 19/1998 in art. 37, item XIX, of the Constitution. The original wording of the item was as follows: "Only by specific law may a public company, government-controlled company, autonomous entity or public foundation be created". With EC No. 19/1998, the creation of foundations became "authorized" by a specific law, with the complementary law responsible for "defining the areas of their performance". This law has not yet been enacted but has proceeded to the chamber of Deputies (PLP No. 92/2007), which seeks to regulate the areas of action of foundations established by the government. In the absence of this complementary law, art. 5, item IV, of DI No. 200/1967 defines the field of action of public foundations: "development of activities that do not require execution by public law bodies or entities". It respects, in turn, the following characteristics of Italian doctrine: (i) with its institution and donation inscription, the necessary assets are allocated so activities may be started; (ii) an organizational structure composed, as organs, of administrators controlled and supervised by a government authority; (iii)

[18] STF. RE 612.043, rel.: min. Marco Aurélio, public. October 6, 2017.

the existence of adequate resources fit for the achievement of an objective established in the statutes; (iv) social utility goals.[19] Certainly, foundations are a personalized entity dedicated to a specific purpose. The genus respects the species: private foundation and public foundation.[20]

Thus, the private foundation is developed by private equity for the exercise of nonprofit activities of general interest not exclusive to the State (art. 62 of the CC). Foundations established by the State, referred to previously by Cretella Júnior, in turn, are subdivided in two types: public foundations (or municipal foundations, or autonomous entity foundations, or state foundations under public law), with legal status in public law and private state foundations (or public foundations or state foundations under private law), with legal status in private law. The distinction in nature of these two foundations created by the State is of fundamental importance, since the legal regime applicable to each change, whether it is under public law or under private law. According to Andréa Ferreira, the legal nature of the entity influences "the requirements and form of creation, with regard, for example, to legal relationships with the public service provider, and with third parties, as well as the legal nature of the activities practiced, and the fundamentals of civil responsibility".[21]

State foundations under public law are a kind of autonomous entity. They fall under indirect administration, as established in art. 4, II, sub item "d", of Decree 200/1967. Due to its autonomous nature, a state foundation under public law is created by law and the assets intended for the execution of the purposes of this foundation are public. It enjoys inalienability and immunity from seizure and usucaption. In addition, its agents are public servants employed in competitive or commissioned posts, and the activities performed by this foundation are administrative acts. Civil liability follows the strict liability regime of art. 37, item 6, of the Constitution. Furthermore, a state foundation under public law enjoys the privileges of the Public Treasury when acting in court and is subject to external control by the Audit Court. This was the understanding adopted by the STF when it determined that the Fundação de Amparo à Pesquisa do Rio de Janeiro (Faperj) was a public foundation under public law and not a state foundation under

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19 lOPIlATO, Vicenzo. *Manuale di diritto amministrativo*. Turim: G. Giappichelli, 2019. p. 241.

20 CRETElIA JÚNIOR, José. *Fundações de direito público*. Rio de Janeiro: Forense, 2002. p. 2.

21 FERREIRA, Sergio. *As fundações de direito privado instituídas pelo estado*. Rio de Janeiro: Editora Rio, 1973. p. 19-20.

private law. On the occasion, Minister Moreira Alves stated that these foundations fall under indirect administration, being autonomous entities, and that Faperj is "subordinate to the precepts of the law that determined their institution, and not subject to the rules of the CC".[22]

On the other hand, the creation of a state foundation under private law is authorized by a specific law (art. 37, item XIX, of the Constitution). This law should outline the purpose of the foundation, how its assets will be constituted and the basic parameters for its statute. With the legal provision contained in art. 5, item 3, of Decree-Law 200/1967, which rejects the provisions of the Civil Code of public foundations, and those of a private nature, a doctrinal divergence was created as to interference, or otherwise, with the norms of public law in these foundations, mainly those of constitutional origin and under direct and indirect administration. Rocha Furtado[23] understands that state foundations under private law fall under indirect administration and that rules of public law provided for in the Federal Constitution related to the obligation to carry out public tenders (art. 37, item II), the prohibition on accumulating public posts (art. 37, item XVII), the obligation to bid (art. 22, item XXVII), execution by means of judiciary bonds (art. 100) and control exercised by the Audit Court of the Union (art. 71, items II and IV) apply to these foundations. Calil Simão[24] shares this understanding, pointing out, however, that only the state-owned private foundation that performs an activity under exclusive ownership of the State falls under indirect administration. Fabricio Motta, in turn, writes that state foundations under private law "are governed primarily by private law, with constitutionally and legally imposed derogations of public law."[25] Thus, he explains, state foundations, under public and private law, are subject to the rules of art. 37 of the Constitution, to public bidding regulations and inspection by the Audit Court, enjoying tax immunity, provided for in art. 150, 2,VI, point "c", of the Constitution.

However, the author understands that the assets of state foundations governed by private law are indeed private; that only activities performed in the exercise of delegated public functions constitute administrative acts

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22 STF. RE 101126, rel.: min. Moreira Alves, Tribunal Pleno, DJ 1º/3/1985. PP-02098.
23 *Curso de direito administrativo.* Belo Horizonte, MG: Fórum, 2016. p. 162-163.
24 *Fundações governamentais*. São Paulo: Revista dos Tribunais, 2014. E-book.
25 *Tratado de direito administrativo*. São Paulo: Revista dos Tribunais, 2019. v. 2, p. 203.

(others are private acts); that there is no procedural privilege; that civil liability applies objectively only in the provision of public service. Thus, despite submission to the legal regime of private law, public foundations under private law suffer interferences from the legal regime of public law — in particular, constitutional impositions related to bidding, public tender and control exercised by the Audit Court.

Furthermore, it is necessary to discuss specifically the so-called support foundations, which are private foundations created under the regime established in art. 62 of the CC, usually by a group of people linked to public universities. Their purpose is to support activities related to teaching, research, outreach, innovation, and institutional, scientific, and technological development of the university. Such foundations boost the provision of public higher education in all areas determined by the Constitution: teaching, research and outreach. Furthermore, they also meet the constitutional demand for the promotion of innovation in universities (art. 213). The legal status of supporting foundations is that of a private-law foundation. Thus, to establish a legal relationship with public universities, they must sign contracts or agreements. At the same time, to foster implementation of the right to education, the legislation facilitates links with public education institutions, allowing these foundations to be contracted without a bidding process (art. 24, XIII, of Law no. 8.666/1993).

At any rate, when receiving public funds or providing services on behalf of public institutions, supporting foundations submit to the control of the public sector and the Audit Court. Finally, it should be noted that, in some judgments, the STF has adopted the understanding that the legal regime of public foundations under private law is effectively different from that of autonomous foundations. In the judgment of ADI No. 191/RS,[26] the STF assessed the constitutionality of art. 28 of the Constitution of Rio Grande do Sul, which gave employees of foundations instituted by the state the same rights as the employees of public foundations. On that occasion, the STF declared the rule unconstitutional on the grounds that there are two distinct types of foundation created by public authority: those subject to the legal regime of public law and those subject to that of private law. Thus, depending on "the way they were created, the legal option for the regime to which they are subject, the ownership of powers and also

[26] STF. Tribunal Pleno. Rel.: min. Cármen Lúcia, published in *DJE* on Mar. 6, 2008.

the nature of the services they provide",[27] the legal regime of the types of foundation instituted by public authority is altered. More recently, the STF ruled on RE No. 716378 and defined the following statement for Theme 545 of general repercussion:

> The qualification of a State instituted foundation as being subject to a public or private regime depends on (i) the statute of its creation or authorization and (ii) the activities provided by it. Economic activities and those subject to delegation, when defined as objects of a given foundation, even if it is instituted or maintained by the Government, may be subject to the legal regime of private law.[28]

This judgment reveals that state foundations under private law are subject to a specific legal regime, preserving aspects of private law — in this case, the lack of employment stability. In view of the scenario above, it appears that both types of public foundation fall under indirect administration.

1.4 Executive agencies

During the period of re-democratization, between 1987 and 1991, Brazil experienced a severe economic crisis, with exponential inflation, a moratorium on the external debt, low production capacity and enlarged state bureaucracy. Given this situation and after numerous unsuccessful attempts to reverse it in the early 1990s, the government of President Fernando Henrique Cardoso published the "Master Plan for the Reform of the State Apparatus" in 1995. This was inspired by administrative reform which took place in the United Kingdom, influenced by neo-liberal ideas, with the purpose of implementing a managerial style public administration in Brazil. Management administration, in the words of Bresser-Pereira, "is focused on the efficient performance of tasks, i.e., on reducing costs and increasing the quality of services, regardless of the rules and routines, which are still necessary but are made more flexible".[29]

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[27] STF. ADI 191/RS, rel.: min. Cármen Lúcia, published in *DJE* on Mar. 6, 2008.
[28] ATA no 26, de 07/08/2019. *DJE* n. 176, released on Aug. 13, 2019.
[29] Luiz Bresser-Pereira, *Sociedade e Estado em transformação*, op. cit., p. 27.

In the context of management reform, executive agencies were implanted in the sector of exclusive State activities, conferring on public bodies and entities standards of performance in the execution of laws and public management, increasing governance. Thus, in parallel with EC 19/1998, which promoted efficiency as a principle of Brazilian public administration, Law No 9649/1998 was enacted, providing for the organization of the Presidency of the Republic and of the Ministries.

In articles 51 and 52, the law provides that the executive agencies are autonomous bodies or foundations qualified by the Executive Branch and defines the necessary requirements for their creation and for the execution of a management contract.

The qualification of a public entity as an executive agency is carried out by the President of the Republic. The two necessary requirements are to have a strategic restructuring and institutional development plan in progress and to have signed a management contract with the respective supervising Ministry. With qualification, the entity receives the title of executive agency and is empowered to enter into a management contract with the government. In this way, the entity's administrative autonomy is extended, pursuant to art. 37, § 8, of the Federal Constitution. The Executive Branch edits specific administrative measures of the organization to ensure the management autonomy of the executive agencies; and also edits the availability of budgetary and financial resources for the execution of objectives foreseen in the management contract. These contracts are for a minimum of a year, establishing the objectives, targets, and performance indicators of the qualified entity, in addition to the necessary resources and criteria and instruments for evaluating compliance.

The signing of management contracts with executive agencies aims at execution of strategic plans for restructuring and institutional development of qualified public bodies. These plans define guidelines, policies and measures aimed at rationalizing structures and staffing, reviewing work processes, developing human resources, and strengthening institutional identity. The execution of the management contracts is monitored by the Executive Branch, to ensure fulfillment of goals, strategic restructuring, and institutional development programs. Thus, the enactment of a law qualifying public bodies as executive agencies occurred in the context of the implementation of the administrative State reform, to enhance efficiency in public administration, encouraging qualified bodies to set goals and control results.

1.5 Social Organizations

Social organizations were also considered in the context of the State Apparatus Reform of 1995. But, already, with the Civil Constitution of 1998, prioritizing joint actions between State and citizen, the creation of the Programa Nacional de Publicização meant that mixed or private social services were regulated more closely by ordinary legislation. This allowed interaction between the public and private sectors, aimed at increased cooperation and realization of fundamental rights. Thus, the Federal Constitution enshrined the principles of subsidiarity and free enterprise (art. 1, item IV), according to which, the monopoly of state activity occurs by exception and only in cases of (i) constitutional services exclusive to the State, (ii) unviability or (iii) maximum inconvenience in the performance of a particular activity. Thus, for example, the constitutional text respected the performance of legal entities governed by private law as well as interaction with the public sector in the areas of health care (arts. 194, 197, 198, item III, and 199), education (arts. 205, 209 and 213), culture (arts. 215, 216, § 1, and 216A, § 1, item IV), science and technology (arts. 218, §§ 4 and 5, 219, sole paragraph, 219-A and 219-B and environmental preservation (art. 225). Given this framework, the status of Social Organization (OS) is a qualification granted by the Executive Branch to private, non-profit legal entities whose activities are directed towards teaching, scientific research, technological development, preservation of the environment, culture, and health.

Thus, legal qualification is by decree of the President of the Republic, and private associations or foundations provided for in art. 44 of the CC, may thus be qualified, observing the public manner of conducting procedures, with emphasis on serving the citizen, qualitative and quantitative results, agreed deadlines and the control of actions in a transparent way. Therefore, according to Law No. 9.637/1998, Decree No. 9.190/2017, and ADI No. 1,923/DF,[30] qualification to execute exclusive activities of the State, technical and administrative support to the federal public administration and to furnish installations, goods, equipment, or public works in favor of the federal public administration is prohibited. This in turn grants rights to the association or private, non-profit foundation, which enters into a partnership with the

[30] STF. Relator para Acórdão: min. Luiz Fux, published in *DJE* on Dec. 16, 2015.

government and receives support to carry out long-term services related to essential provisions.

Thus, by granting this qualification to private entities, the government encourages the public interest activities not exclusive to the State by non-profit civil entities. Qualification allows transfer of public material and financial resources to promote this end. It should be noted that the nature of social organizations and relationship with the State were broadly delineated by the STF in the judgment ADI No. 1.923. Here, it was rightly concluded that the areas of health, education, culture, sport, leisure, science and technology and environment are public services open to performance by private enterprise, allowing for their rights as private entities, exempt from delegation by public power, by tender, under the regime of concession or permission of public services — without, therefore, applying art. 175, header, of the Constitution.

In this judgment, the STF also explained that involvement of public authorities in the economic and social sphere may occur through incentives and promotion of voluntary action, from the application of rewards, in compliance with the principles of consensus and participation in public administration. Thus, the administration promotes private initiative economically, socially and institutionally, granting resources, materials and personnel to the entities for the provision of essential services, provided for in the management contract, which stipulates the objectives and results to be achieved to meet public needs. The scope of action of social organizations, then, is the provision of services, not exclusive to the State, but which the latter encourages through the transfer of resources, materials, or personnel, establishing objectives, responsibilities, and parameters through the management contract.

The qualification of a non-governmental organization such as OS is by presidential decree and the requirements for selection are explained in law or regulation, observing the constitutional principles of legality, impartiality, morality, equal access, and efficiency (art. 37, header).

In turn, the minister responsible for the area concerned must decide on the convenience and opportunity to grant qualification; and, for the entity to participate in discretionary qualification, the non-profit purpose and mandatory investment of surplus financial resources must be provided for in their regulations. The transfer of public resources and execution of activities by the OS are implemented through the management contract, which is legally binding. Pursuant to Law No. 9.637/1998, the management contract is the legal instrument entered into between the government and entity qualified as

a Social Organization, forming a partnership between the parties to promote and carry out activities related to public services, identifying the obligations and responsibilities of the parties.

As for the internal organization, the OS must have a Board of Directors with mandatory participation of government and civil society, to oversee compliance with the purposes and objectives of the management contract. This control is also external, through the supervisory entity of the Executive Power of the area corresponding to the activity promoted and by the Audit Court. As they are allocated public resources, materials, manpower, purchases, and contracts must be subject to the principles of public administration, especially impartiality and ethical standards; internal regulations must respect parameters, objectives, and impartiality.[31]

1.6 Public interest civil society organization

As mentioned, the promotion of greater efficiency in the State's relationship with civil society entities and individuals was also included in the "Master Plan for the Reform of the State Apparatus", which sought to encourage the provision of non-exclusive public interest services through private entities, providing partnerships with the State, so that the latter could contribute to the financing of services. Furthermore, it sought to enable social participation in the formulation of partnerships and promote control of results in the provision of services. After several rounds of political dialog between the federal government and representatives of the third sector, a bill was formulated that would facilitate the relationship between the public administration and civil society organizations that provide nonprofit public services not exclusive to the State. With the enactment of Law No. 9.790/1999, an attempt was made to adopt more incisively the principle of subsidiarity, reinforcing that the State does not have a monopoly on the provision of public services. On the contrary, by creating collaboration mechanisms between government and non-profit entities, the State provides a more efficient service, as it promotes entities created for the specific purpose of providing such services. In this context, OSCIP was created to define a non-profit legal entity governed by private law, to establish a partnership between the State

[31] TCU. Segunda Câmara. Acórdão nº 5.236/2015. Relator: Raimundo Carreiro.

and the private sector, enabling the state to stimulate public interest activities performed by the entity. The main objective of OSCIP is to establish a legal instrument to promote the third sector, to increase the number of entities with an institutionalized relationship with the government, strengthening the non-profit civil entities established by private initiative and promoting relevant projects of public interest. As it is a qualification given by the State and confers various incentives to the qualified entity, Diogo de Figueiredo Moreira Neto includes both OSCIP and OS in the so-called institutional promotion of the administration of associated public services.[32]

From a constitutional perspective, Law No. 9.790/1999, by encouraging the relationship between the State and entities providing non-exclusive services, promoted the principles of citizenship and human dignity established in art. 1, items II and III, of the Constitution. In addition, the objectives of building a free, fair and participatory society, national development and eradication of poverty, marginalization and reduction of social inequality were pursued (art. 3, items I, II and III, of the CF). Law no. 9.790/1999 authorized the State to qualify various entities as OSCIP, providing incentives for varied social activities in broad sectors, among which the Federal Constitution highlights: social assistance (art. 203), culture (art. 215), health (art. 196) food and nutrition (art. 6, header), environmental protection (art. 225), the promotion of sustainable economic and social development and human rights (art. 5).

The qualification of OSCIPS is ratified by the Minister of Justice and complies with statutory requirements, but the initiative comes from the private entity. Other entities, with qualifications based on different legal certifications can acquire the qualification of OSCIPS, if the legal requirements are met. Simultaneous maintenance of qualifications is ensured effectively for five years from the date of Law No 9.790/1999. The instrument of cooperation between the entity and the government is a term of partnership. According to this adjustment, we can foresee the transfer of movable and immovable property by the State and of resources in line with the stipulated goals. The main elements of OSCIPS are as follows: (i) obligations are established according to the partnership terms and are not subject to public law, except for principles of administration; (ii) there is no provision for government participation on the Board of Directors, but employees who participate cannot receive remuneration or subsidy, i.e. the participation of the State

[32] Ibid., p. 609.

on the Board of Directors is optional; (iii) the personnel regime; (iv) non-requirement of a tender to contract with the government as it is based on a term of partnership, which, as a rule, is subject to project competition of a non-bidding nature, under Law No. 8.666/1993; (v) free education and health care are included. Accountability and control of results by public administration are characteristic elements of OSCIP. Both the Executive Branch and Audit Court exercise control over the activities carried out and the use of public resources transferred. Thus, it may be noted, OSCIP is a private, non-profit entity, qualified by public authority, entitling it to receive incentives to execute public service activities not exclusive to the State.

1.7 Public interest or non-governmental organizations

Non-governmental organizations, commonly designated NGOs, are non-profit entities constituted as an association or foundation for the exercise of non-economic activity, i.e., activities not intended for profit, but to provide public services, such as social assistance, education, health, culture, research, and religious services. Thus, civil organizations are defined by art. 2, item I, point "a", of Law No. 13.019/2014, as private entities that do not distribute, in any way, profits among their partners, associates, directors, employees or third parties. Any surplus resources arising from activities carried out by these entities must be reverted to the execution of activities related to their corporate purpose.

Public interest organizations also considered by Law No. 13.019/2014 include social cooperatives, associations for people at risk, poverty and job creation societies, rural workers and training groups and others focused on activities or projects of public interest. The same law includes religious organizations that engage in activities or social projects of public interest other than those intended for exclusively religious purposes. Thus, Brazilian legislation stresses two elements of civil society organizations: (a) non-profit purpose, i.e., prohibition of the distribution of material gains (b) social purpose. According to Fonseca Dias and Souza Bechara, this definition is close to the Anglo-Saxon and Canadian-European definitions of the third sector.

In addition to defining the concepts previously outlined, Law No 13.019/2014 establishes the legal framework for partnerships between public administration and public interest non-governmental organizations. The ruling facilitates cooperation between the government and these entities, to

increase reciprocal public interest activities through financial transfers to these private entities. As well as the aforementioned Laws No. 9.637/1998 and 9.790/1999, Law No. 13.019/2014 fosters the establishment of yet another model of social collaboration between the State and non-profit entities for the provision of non-exclusive public services. These instruments encourage the provision of services in the health sector (arts. 197 and 198, III, of the Constitution), social assistance (art. 204, I), education (arts. 205 and 206), culture (art. 216, § 1), the environment (art. 225), for children and adolescents (art. 227, § 1, of the Constitution), among other areas.

Law No. 13.019/2014 led to increased transparency in the signing of agreements with the State, greater social participation, and the establishment of impartial procedures for choosing beneficiary entities, increasing the efficiency of public spending and the parameters for controlling these costs. Under these terms, partnerships are formalized through the signing of a collaboration, development, or cooperation agreement. These adjustments must be accompanied by work plans, which detail the reality entailed by the signed terms, indicate objectives to be met, the revenues that will fund the services provided and the parameters for fulfillment of goals. Transparency in the selection of the entity to enter into agreement with the public authority is ensured through public tendering. Selection should be based on objective criteria based on clear objectives, targets, costs and qualitative and quantitative indicators for evaluating results. Social participation is fostered through the expression of public interest as the government advertise a general tender, to meet the demands of the community. The control of this partnership with public interest organizations is, essentially, control of fulfillment of established goals based on pre-established indicators. In this way, the normative framework that formalizes collaboration between non-governmental or public interest organizations and public authorities expresses the principle of subsidiarity; public interest activities not exclusive to the State should be provided by it when the social environment, made up of private entities and the community, lacks the means to do so. Thus, while the State moves away from direct provision of non-exclusive services and makes room for non-governmental organizations, it may still, if it deems necessary, encourage the provision of these services of public interest and effect the result. On the other hand, public interest organizations have the freedom to conduct their activities, while having legislation at their disposal that provides for entering into partnerships with the government, if they wish to receive public resources.

1.8 Development entities

From the perspective of public administration, the State performs two broad functions — satisfying public interests, the demands of society (core activity), and institutional interests, the functioning of public administration itself (intermediary activity). The exercise of the first set of activities is known as "extroverse administration" and the second, "introverse administration".[33] "Extroverse" administration is subdivided into five categories: policing, provision of public services, economic activities, social activities and public development.[34]

Developmental activity refers to actions of the State aimed at encouraging, guiding or coordinating efforts for the development of a specific economic or social activity of public interest. The State instigates entities to conduct activities to meet public needs or those considered to be of collective utility. There is no direct provision of public services by the State or specific obligations imposed by it — only incentives, whereby the entity freely submits itself to legal requirements to gain benefits and perform the activity of public interest under conditions presented by the State. The arrangement is, therefore, a further state action arising from the principle of subsidiarity; falling under the constitutional provision of art. 174, as an instrument for economic development, i.e., the Constitution directly addresses the concept of development in its economic framework. In this sense, Moreira Neto observes that the arrangement has numerous attributes, as it ultimately promotes the dignity of the individual (art. 1, inc. III) and is an engine for fulfilling fundamental objectives of the Republic, provided for in art. 3 of the Constitution — the building of a free, fair, and unified society, national development, eradication of poverty and promoting the wellbeing of all.

In addition to economic development, the State promotes social development, focused on meeting basic needs. The Constitution itself provides for various forms of social development, with regard, for example to free marriage (art. 226, § 1), family assistance (art. 226, § 8o), and support for the elderly (art. 230). This extends to education. The Constitution, for example, prohibits taxation of non-profit educational entities (art. 150, item VI, point "c"), grants technical assistance at state, Federal District, and municipality

[33] Ibid., p. 128.
[34] Ibid., p. 129.

level for the development of education systems, teaching (art. 211, point 1) and the Fundeb institute (art. 60 of the ADCT).

The Constitution also provides for activities geared to the generation of employment, as the economic order is based on the value of labor (art. 170, header). Hence, the principle of full employment (art. 170, item VIII) and institution of the social value of work as foundations of the Republic (art. 1, item IV). The Constitution also promotes the development of culture (arts. 23, items III, IV and V, 30, item IX, 215 and 216), leisure (art. 217, point 3o), sports (art. 217), tourism (art. 180), the environment (art. 225) and rural areas (arts. 184 through 191). It also fosters the need to promote economic development, evidenced in state incentives to companies (art. 170) and small businesses (arts. 170, item IX, and 179), to co-operativism (art. 174, point 2), agriculture (arts. 23, item VIII, and 187), fishing (art. 187, point 1) and mineral production (art. 155, point 3). Support for scientific and technological programs is also stimulated, a constitutional imposition provided for in art. 218, as well as financial and credit promotion, provided for in arts. 172 and 192. Finally, institutional support is furthered through collaboration between the State and private non-profit entities, either through cooperation between the State and entities created by the State to carry out non-exclusive activities, or the qualification of private non-profit entities (administration of public interest organizations).[35] The OS and OSCIP are examples of institutional development through associated administration. As a state activity, development is subject to the administrative legal regime, i.e., to principles of public administration. Thus, support may not be granted without authorizing legislation (principle of legality), nor can it discriminate against any entity or company (principle of impartiality). The choice of beneficiary and activity it proposes to carry out must be morally accountable. Promotional actions must be public (principle of transparency), aimed at the best possible result with the minimum expense required (principle of efficiency). In addition to general tenets of public administration, development is also subject to the principle of risk sharing, i.e., the state incentive is not a mere administrative liberality. The beneficiary entity also allocates its own resources to develop the public interest activity. As Sílvio Rocha rightly states, "fostering is not financing — and, therefore, the public administration is prohibited from 'supporting' private entities, even where they carry out activities considered socially relevant".[36]

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[35] Ibid., p. 604-608.
[36] Ibid., p. 584.

The stimulus provided is usually given through an economic subsidy, which translates into direct or indirect economic assistance to the entity that performs activities in the public interest. It can also occur through grants, management contracts, partnerships, agreements, and the granting of concessions. The forms of development used in Brazil can be seen in major existing institutions. Banco do Brasil, created in 1808, for example, grants agricultural and business credit and supports exports; Caixa Econômica Federal (CEF), founded in 1886, finances the housing sector; and BNDES, created in 1952, encourages industrial development. There are also state financial institutions with the same function, such as Banco do Nordeste SA, Banco da Amazônia SA and Banco de Brasília (BRB). *Superintendência de Desenvolvimento do Nordeste* (Sudene), a special authority provided for in Complementary Law 125/2007, *Superintendência do Plano de Valorização Econômica da Amazônia* (Sudam), provided for in Complementary Law 124/2007, *Companhia de Desenvolvimento do Vale do São Francisco* (Codevasf), provided for in Law No. 6.088/1974, are economic development entities created to promote regional development (arts. 21, item IX, and 43 of the Constitution).

Empresa Brasileira de Pesquisa Agropecuária(Embrapa) is a public company, created by Law No. 5.851/1972, which supports rural activities, technically and scientifically, and *Companhia de Pesquisa de Recursos Minerais* (CPRM), a publicly regulated company under Law No 8.970/1994, which promotes mining research. Thus, development is a state activity with a constitutional basis, encouraging key sectors of the economy and social interest organizations. The main development objective is to encourage companies, organizations, and private entities to perform services of general interest not exclusive to the State, to consolidate fundamental social rights established in the Constitution.

1.9 Charitable Social Assistance Entities

Social assistance consists of actions and initiatives provided by people and public or private entities "with the object of attending or remedying, through their own means, the deficiencies and needs of individuals or

groups, as regards survival, coexistence and social autonomy".[37] The 1988 Constitution stipulated within the area of social security (VIII, chapter II) a tripartite protection system: health, social assistance, and social security. The constitutional provision expressed in arts. 203 and 204 imposes the provision of social assistance "[…] to those who need it, regardless of contribution to social security […]" (art. 203, header). The needs to be met by social assistance are set out in art. 2 of Law No. 8.742/1993, related to the protection of the family, support for needy children and adolescents, integration into the labor market, rehabilitation and integration into community life for people with disabilities and the guarantee of a minimum monthly benefit to such people and to the elderly who prove that they do not have means of support. Social assistance is, therefore, a state policy that seeks to provide "the social minimum", i.e., to give citizens in need minimum material support for their survival. The Constitution organizes social assistance based on political-administrative decentralization, conferring on the Union the responsibility of coordinating and issuing general norms, and on the states and municipalities the implementation of assistance programs (art. 204, item I). Further, the Constitution designates charitable and social assistance organizations to execute this policy.

To encourage private participation in social assistance, the Constitution (art. 195, § 7) grants exemption from social security contributions to charitable social assistance entities that meet the requirements established in Law No. 12.101/2009. This law regulates the certification of charitable social assistance entities (Cebas). Once legal requirements have been met, the entity receives certification and benefits from exemption from contribution to social security provided for in the Constitution. The entities concerned are independent private legal entities created autonomously, in accordance with individual freedoms, none-profit, recognized as charitable social assistance entities, whose purpose is to provide services in the areas of social assistance, health or education. Depending on the respective area, the law imposes additional requirements. According to this framework, the State encourages private non-profit entities, created without state intervention to perform services of public interest, granting tax immunity from social contribution to those that meet certification requirements. Distinct from autonomous social services, charitable social assistance entities are private third sector bodies established

[37] MESTRINER, Maria. *O estado entre a filantropia e a assistência social*. São Paulo: Cortez, 2001. p. 16.

autonomously, without state participation. Conducting activities of general interest not exclusive to the State, in compliance with legal requirements, they can receive certification or attestation from the public authority, with the status of an administrative act that grants them the specified tax benefit. The situation is analogous to the certification granted by the State to OS and OSCIPS.

2. Conclusions

This article contextualizes autonomous social services and similar related legal entities or subjects, detailing the scope of action of organizations not part of the structure of the State, but which contribute to the provision of essential public services.

Thus, we find an adequate legal parameter for the conceptualization of a "para-state" entity, namely, article 84, paragraph 1, of Law No. 8.666/1993, which defines only legal entities governed by private law that fall under indirect administration, i.e., public companies, semi-public entities and public foundations under private law.

The concept of para-state entity, therefore, also departs from the concept of third sector, admitting the presence of entities that make up the administrative structure of the State, while the latter does not cover legal entities with business purposes. In other words, the third sector comprises legal entities governed by private law created autonomously, regardless of state participation and not for profit.

Thus, autonomous social services are not part of the third sector, as they are created by law with active state participation. Furthermore, these entities do not have the necessary voluntarism to be part of the third sector, which distances autonomous social service from this group of entities. Therefore, given the framework in which legal entities commonly confused or equated with autonomous social services were conceptualized, we must conclude that the "S" System does not match the third-sector concept, lacking voluntarism, created by law and linked to the State since inception, directly or indirectly in its administrative and management structures. In turn, social and public interest organizations and those certified as social assistance entities fall more within the third sector, given their independence from the State. They are private and non-profitable, created voluntarily by non-governmental actors

who carry out general interest activities and who, at most, are certified by the State to receive incentives.

In this way, equally, there is no approximation between corporations or professional autonomous bodies and autonomous social services, as they are legal entities governed by public law and exercise constitutionally guaranteed regulatory power over a given profession. Similarly, there is no kinship between autonomous social services and unions or associations, as these do not represent professional categories and are not created through the will of private entities or persons without state participation. In turn, "S" system entities are distinguished from foundations, for the simple fact that they are not constituted from assets assigned to a specific purpose. Neither public foundations under private law, nor private foundations, nor support foundations are subject to legal regimes compatible with that of autonomous social services. Public foundations are furthest from the "S" system, as they have a self-sufficient nature, integrating the structure of the State and subject fully to a regime of public law.

Thus, we may conclude that there is no approximation between autonomous social services and executive agencies or self-regulating foundations, since these entities are public in nature, integrating the structure of indirect administration. Further, we cannot speak of approximation between the legal status of autonomous social services and professional corporations, unions, and associations, as they are not constituted to represent employees of a private company. In addition, professional corporations are self-regulating. unions constitute a representative structure of a particular profession or entrepreneurs in a certain sector, and the fundamental characteristic of associations is their composition through a union of members. None of these characteristics belong to autonomous public services. As for foundations, autonomous public services are removed, as they are not constituted from assets assigned to a specific purpose.

Elsewhere, in the 1990s, as already seen, the "Master Plan for the Reform of the State Apparatus" influenced the institution of other legal categories of state entities, with the purpose of implementing managerial processes. In this context, Law No. 9.649/1998 was enacted, which created the qualification "executive agency" for public bodies, self-governing bodies and foundations. Law No. 9.637/98, meanwhile, established the qualification "social organization", granted by the Executive Branch to private, non-profit legal entities whose activities are directed at teaching, scientific research, technological development, the environment, culture and health; and Law

No. 9,790/1999, prescribed the defined the qualification given to a non-profit legal entity governed by private law, in order to provide for the establishment of a partnership between the State and the private sector, to encourage public interest activities.

Executive agencies distance themselves from autonomous social services as they are public entities and bodies. OS and OSCIP are private entities that receive qualification from the State as a means of granting benefits to those who provide services in the interest of the collective, not exclusive to the State. In terms of functions performed, OS and OSCIP entities are similar to the "S" system but depart from it in the sense that there is no State presence in their managerial and organizational structure — or in their creation. Non-governmental organizations, commonly referred to by the acronym NGOs, are also distinct from autonomous social services for the same reason: there is no State presence in their managerial and organizational structure or their creation. This stimulus arises from the principle of subsidiarity, with a constitutional provision in art. 174, as it is instrumental for the development of the economic order. In the social arena, such stimulus has the essential function of encouraging companies, organizations, and private entities to carry out services of general interest, not exclusive to the State, contributing to the realization of the fundamental rights established in the Constitution. The State encourages activities carried out by autonomous public service providers, mainly through the transfer of public resources, namely, tax contributions and transfers established in management contracts.

The Constitution prescribes charitable and social assistance entities for the implementation of social assistance policy. In order to foster private participation in social assistance, exemption from social security contributions is granted to entities that meet the legal requirements. On meeting these requirements, entities receive Cebas status, distinguished from autonomous social services, as they are private entities of the third sector, autonomously instituted, which perform activities of general interest not exclusive to the State and, by complying with certain legal requirements, and receive certification from the public authority through an administrative act that confers the specified tax benefit.

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