The conventional mode of administrative adjustment in the Criminal Execution Law: private entities and the state in the implementation of public policies of education in prison establishments*

A modalidade convencional de ajuste administrativo na Lei de Execução Penal: entidades privadas e o Estado na implementação de políticas públicas de educação em estabelecimentos prisionais

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ABSTRACT

The Criminal Enforcement Act recognizes education as the right of persons deprived of liberty by the state. For its realization, article 20 stipulates the possibility for the public administration to enter into adjustments, named as covenant, with public or private entities, that set up schools or offer specialized courses. The Law 13,019/2014 establishes general rules on adjustments stipulated by management with non-profit private entities and disciplines certain points on the formalization of covenant. This rule may give the false impression of the revocation, or even a restrictive interpretation, of the provisions of criminal executive law, thus requiring an investigation to obtain the maximum effectiveness of the fundamental right to education.

KEYWORDS

criminal execution — education — covenant — private entities — fundamental right

RESUMO

A Lei de Execução Penal reconhece a educação como direito das pessoas privadas de liberdade pelo Estado. Para sua concretização estipula, em seu artigo 20, a possibilidade de a administração pública firmar ajustes, nomeados de convênios, com entidades públicas ou particulares, que instalem escolas ou ofereçam cursos especializados. A Lei nº 13.019/2014 estabelece normas gerais sobre os ajustes estipulados pela administração com entidades privadas sem fins lucrativos e disciplina alguns pontos sobre a formalização de convênios. Essa norma pode gerar a falsa impressão da revogação, ou mesmo de uma interpretação restritiva, do dispositivo da lei executiva penal, necessitando-se, assim, de uma averiguação para obtenção da máxima efetividade do direito fundamental à educação.

PALAVRAS-CHAVE

execução penal — educação — convênio — entidades privadas — direito fundamental

Introduction

The Constitution of the Federative Republic of Brazil of 1988 (CRFB/1988), while transforming the Brazilian State into a democratic state based on the rule of law, ensured the fundamental rights of the citizen and State action subject to the rules. Citizenship, human dignity and the social values of free labor and enterprise became the foundations of Brazilian Republic, which fundamentally aims to build a free and fair society, guarantee national development, eradicate poverty and marginalization and promote the good of all (articles 1 and 3 of the Constitution). To consolidate these foundations and achieve these objectives, the State is required to no longer simply act legally, but also implement legal measures.

Thus, the obligations of the state entity lie in the implementation of public policies, to foster fundamental rights, social issues, set out in article 6 of the 1988 Constitution of the Republic.

Education as a social right, in Brazil, was elevated to a fundamental right,[1] a right for all and a duty for the family and the State, which must provide the means of access, for the full development of the person, the exercise of citizenship and qualification for work, extended to all citizen.[2] In short, in the words of Uadi Lammêgo Bulos, "education is the path for man to evolve"; as a result, "it is a subjective public right, and, at the same time, a duty of the State and the family group".[3]

In view of the characterization of education as an essential public service, the State cannot fail to provide it for everyone,[4] which implies the involvement of the private sector,[5] in cases where public authorities fall short. The need to enforce this right in relation to individuals deprived of their freedom is particularly challenging, considering the complexities of the prison system and the current inability of public authorities to fill an educational gap which widens social inequalities and prevents personal development and resocialization.

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[1] SILVA, José Afonso. *Curso de direito constitucional positivo*. 24. ed. São Paulo: Malheiros, 2005. p. 312.

[2] CRFB/1988. Art. 205. Education, a right of all and a duty of the State and the family, will be promoted and encouraged in collaboration of society, aimed at the full development of the person, their preparation for exercise of citizenship and qualification for work.

[3] BULOS, Uadi Lammêgo. *Curso de direito constitucional*. 10. ed. São Paulo: Saraiva, 2017. p. 1611.

[4] José Afonso Silva, *Curso de direito constitucional positivo*, op. cit., p. 313.

[5] CRFB/1988. Art. 209. Teaching provision is open to the private sector, subject to the following conditions: I — compliance with the general standards of national education; II — authorization and quality assessment by Public Authorities.

Based on this situation, the *Lei de Execução Penal* recognizes the possibility of private entities providing educational services to the State, through partnerships.

In this context, it is necessary to analyze whether there lies a problem in partnerships with non-philanthropic or for-profit private entities, companies with economic imperatives. The doubt arises in light of the new configuration presented by Federal Law no. 13,019, of July 31, 2014, vis-a-vis administrative adjustments to relations with civil organizations and the lack of precise doctrinal and legal systematization of the agreement instrument.

The present study, then, reflects a desire to contribute to the development of the State, especially the effectiveness of educational provision to those deprived of liberty. To this end, it is important to understand the legal panorama of education in criminal execution, the tendency to apply consensual a principle to the actions of the public sector and the possibility of making agreements with private entities.

1. The right to education in criminal execution

Alexis Brito do Couto states that "criminal execution is not aimed at segregating the perpetrator of a crime, but, whenever possible, contribute to their growth and social integration".[6] In this sense, the author states that, "in this process, he must have access to educational opportunities, as a valuation of human dignity and an instrument to exercise activities on release".[7]

> There is an increasing understanding of the importance of studying in the prison environment. Besides work, education has occupied a key place in academic and professional debate, as an element for implementing the inclusion process.[8]

Certainly, international and national legislation understands the relevance of education and its consequences in society. In this respect, the *Minimum Regulation for the Treatment of Prisoners*, a resolution approved by of the *Economic and Social Council of the United Nations*,[9] determined the adoption of measures to

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[6] BRITO, Alexis Couto de. *Execução penal*. 5. ed. São Paulo: Saraiva, 2019. p. 151.

[7] Ibid. p 251.

[8] Ibid., p. 150.

[9] ONU. *Regras Mínimas para o Tratamento de Reclusos*. Adotadas pelo Primeiro Congresso das

improve the education of all prisoners, including religious instruction in countries where this is possible, with the education of the illiterate and young offenders deserving special attention. Furthermore, as much as possible, the education of prisoners must be integrated into the country's educational system, so that after their release they can continue their education without difficulties. These rules were not revised until, finally, on May 22, 2015, the United Nations made official a new framework for norms, incorporating human rights doctrines to create parameters for the restructuring of the current model of the penal system and perception of the role of incarceration in society.[10]

The new Statute, known as the Mandela Rules, took into account the international agreements in force in the country, such as the International Covenant on Civil and Political Rights the International Covenant on Economic, Social and Cultural Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol, culminating in rules that are extremely important for efficient resocialization, among which we highlight:

> Rule 4
> 1. The purposes of a sentence of imprisonment or similar measure restricting freedom are, primarily, to protect society against crime and to reduce recidivism. Such purposes can only be achieved if the period of incarceration is used to ensure, as far as possible, the reintegration of such individuals into society after their release, so that they can lead a self-sufficient life, respecting the laws.
> 2. To this end, prison administrations and other competent authorities must offer education, vocational training and work, as well as other

Nações Unidas sobre a Prevenção do Crime e o Tratamento dos Delinquentes, realizado em Genebra em 1955, e aprovadas pelo Conselho Econômico e Social das Nações Unidas através das suas resoluções 663 C (XXIV), de 31 de julho de 1957, e 2076 (LXII), de 13 de maio de 1977. Resolução 663 C (XXIV) do Conselho Econômico e Social. Available at: http://www.direitoshumanos.usp.br/index.php/Direitos-Humanos-na-Administra%C3%A7%C3%A3o-da-Justi%C3%A7a.-Prote%C3%A7%C3%A3o-dos-Prisioneiros-e-Detidos.-Prote%C3%A7%C3%A3o-contra-a-Tortura-Maus-tratos-e-Desaparecimento/regras-minimas-para-o-tratamento-dos-reclusos.html. Accessed on: 6 June 2019.

[10] BRASIL. Conselho Nacional de Justiça. *Regras de Mandela*: Regras mínimas das Nações Unidas para o tratamento de presos/Conselho Nacional de Justiça, Departamento de Monitoramento e Fiscalização do Sistema Carcerário e do Sistema de Execução de Medidas Socioeducativas, Conselho Nacional de Justiça, Brasília: Conselho Nacional de Justiça, 2016. p. 9-10. Available at: http://www.cnj.jus.br/files/conteudo/arquivo/2016/05/39ae8bd2085fdbc4a1b02fa6e3944ba2.pdf. Accessed on: 6 June 2019.

> forms of appropriate and available assistance, including reparative, moral, spiritual, social, sports and health provisions. Such programs, activities and services must be offered in line with the individual needs of prisoners.
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> Education and leisure
> Rule 104
> 1. Instruments must be created to promote the education of all prisoners who may benefit from this, including religious instruction, in countries where this is possible. The education of illiterate and young offenders must be compulsory, and the prison administration must devote special attention to this.
> 2. As far as possible, the education of prisoners should be integrated into the prison educational system of the country, so that after their release they can continue their studies without further difficulties.
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> Rule 105
> All prison units must offer recreational and cultural activities for the physical and mental health of prisoners.[11]

In the area of internal legislation, considering the duty of the State to guarantee basic education, including for those who did not have access at the appropriate age — as a subjective public right (CRFB/1988, art. 208, item I, c/c arts. 4 and 5 of Law no. 9,394, of 20 December 1996 — LDB), the Penal Execution Law (LEP) (no. 7,210, of July 11, 1984), aimed at providing conditions for harmonious social reintegration, preventing further crime and furthering social coexistence (arts. 1 and 10), establishes educational assistance to the prisoner as an obligation (art. 11, item IV).

This educational provision includes school instruction and professional training, with first grade education mandatory. With regard to secondary education, whether regular or supplementary, general training or professional education will be implemented in prisons, in line with the constitutional

[11] UN. Commission on Crime Prevention and Criminal Justice, Twenty-fourth session. Vienna, 18-22 May 2015. Agenda Item 6. Attachment. United Nations minimum rules for the treatment of prisoners (Mandela Rules).

precept of "universilization" (arts. 17 and ss. of the Penal Execution Law), as the prisoner's right (art. 41, item VII).

Here, we should mention a growing movement towards insertion of education in the Brazilian prison system. The *Lei de Execução Penal*, on the implementation of secondary education, regular or supplementary, including general training or medium-level professional instruction in prisons, is determined by the Union, states, municipalities and Federal District for inclusion in distance learning programs and the use of new teaching technologies and care (§ 3 of article 18-A). The measure arises from the need to implement efficient public policies, socially and economically, and an educational guideline stipulated in Law no. 9,394/1996, according to which the public authorities will encourage the development and delivery of teaching programs, vis-a-vis all levels and modalities of teaching, and continuing education (art. 80), and federated entities must promote in person or distance learning for young offenders and low-educated adults (§ 3, item II, of article 87). Thus, distance learning with technological resources that do not violate the security of prison units seems the quickest way to increase the school enrolment rate.

In this sense, Resolution CNE/CEB no. 2, of May 19, 2010, of the National Education Council, provides in its article 5 that the states, the Federal District and the Union, taking into account the specificity of education in institutions of confinement, should encourage the promotion of new pedagogical strategies, production of teaching materials and the implementation of new educational methodologies and technologies, as well as educational programs in the Distance Education modality, to be employed within the prison system schools. Furthermore, CNPCP Resolution no. 3, March 11, 2009, from the *Conselho Nacional de Política Criminal e Penitenciária*, in relation to national guidelines for the provision of education in prisons, establishes (in article 10) that the planning of education in prisons should contemplate the inclusion of distance learning.

Although the Brazilian government has actively participated in the negotiations for the preparation and approval of the Mandela Rules, in addition to all provisions on education contained in the LEP, so far these regulations have not been reflected in public policies, and are clearly in need of promotion.

According to data from *Rede Brasil Atual*, of the more than 700 thousand prisoners across the country, 8% are illiterate, 70% did not complete primary education and 92% did not complete high school. Less than 1% have a

higher education diploma. Despite the low education profile, directly associated with social exclusion, less than 13% have access to educational activities in prisons.[12]

According to a survey carried out by the *Departamento Nacional Penitenciário*, only 12% of the prison population in Brazil is involved in some type of educational activity, including learning and supplementary activities. Among people involved in some type of learning activity within the prison system, 50% are at elementary school level, characterized as mandatory by the *Lei de Execução Penal*. Only 23% are attending high school and 1% involved in technical education.[13] These numbers demonstrate a glaring need for implementation of public policies, to boost qualifications and, consequently, their social integration.

Considering these numbers, certainly, in fulfilling its role of providing services of social relevance and promote public policies, the State cannot fail to collaborate with the private sector, given the lack of resources and the need to service the entire society. Thus, we see incorporation of such agents, even when driven by profit, to achieve maximum efficacy.

We should note that article 205 of the Constitution calls on all of society to participate and Article 209 states that the private sector is free to provide education. The idea of partnership follows logically, possibly under the regime of public law, towards an agreement of wills governed by administrative law, adopting a contractual or conventional form.

Given this, the participation of the private sector in education provided in the prison system deserves, to reaffirm the legal position, greater reflection, to materialize the adjustment, clarifying possible points of divergence in the application of current regulations as to the relationship between public and private entities.

Notwithstanding the calamitous situation in which the Brazilian prison system found itself, there was already a keen awareness of the difficulties for

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[12] OLIVEIRA, Cida de. Direito negado. *Rede Brasil* Atual, jul. 2017. Available at: https://www.redebrasilatual.com.br/educacao/2017/07/menos-de-13-da-populacao-carceraria-tem-acesso-aeducacao/. Accessed on: 6 June 2019. It should be said that such data are compatible with the National Survey of Penitentiary Information (Infopen), Jun. 2016 (BRASIL. Ministério da Justiça. Levantamento nacional de informações penitenciárias: Infopen. Atualização — jun. 2016. Organização de Thandara Santos; colaboração de Marlene Inês da Rosa et al. Brasília: Ministério da Justiça e Segurança Pública; Departamento Penitenciário Nacional, 2017. Available at: http://depen.gov.br/DEPEN/noticias-1/noticias/infopen-levantamento-nacional-de-informacoes-penitenciarias-2016/relatorio_2016_22111.pdf. Accessed on: 6 June 2019).

[13] Brasil, Ministério da Justiça, *Levantamento nacional de informações penitenciárias*, op. cit.

public administration in implementing certain projects and public policies. Thus, the *Lei de Execução Penal* in its original text (art. 20) allowed for educational activities involving public or private entities (importantly, without restricting the nature of the entity, whether for-profit or non-profit), to establish schools or offer specialist courses.

This possibility was articulated in other recent regulations, such as Federal Decree no. 7,626, of November 24, 2011, which established the Plano Estratégico de Educação within the ambit of the prison system (Peesp).

> Art. 8 PEESP will be executed by the Union in collaboration with the States and the Federal District, which may involve Municipalities, bodies or entities of direct or indirect public administration and **educational institutions**.

> Art. 10. For the execution of PEESP, **agreements**, **cooperation**, **adjustments** or **similar instruments** may be celebrated, between administration bodies or federal public sector entities, at state, Federal District and municipal level, and public consortia or private entities.

Another infralegal norm that adopted the same model was the *Regimento Interno da Escola Penitenciária Nacional* (Espen), approved through Resolution No. 1, 5 February 2001, of the *Conselho Nacional de Política Criminal e Penitenciária*.

> Art. 5. It is the responsibility of ESPEN is responsible to:
> […]
> IV — promote decentralized activities in the form of programs, courses, seminars, conferences and internships, including through agreements and partnerships with similar entities, public or private.

This action is in line with the precept of the freedom of the private sector to offer teaching, which meets legal conditions, and the possibility of promoting and encouraging education in collaboration with the broader society, established in the Constitution of the Republic of 1988 (arts. 205 and 209) and the trend observed in the movement to apply consensual principles in public administration.

2. Consensus in public administration and opening up to the private sector

Parallel to the evolution of public administration, administrative law[14] has developed through an intense period of transition, resulting in the renewal of public management models and their influence on positive law and doctrine. Thus, there is a conflict of ideologies and conceptions, with lack of clarity as to which will prevail. Both directions can be highlighted, following specific movements or trends.

According to the evolution of public administration and its modes of action, within the managerial model and the democratic State the tendency for administrative interventions in the productive gained strength.[15] On the other hand, at the end of the 20th century, due to greater democratic openness, broad spaces emerged for social participation, largely due to the inability of the State to meet the needs of the community, recognizing that it must act in partnership, thus giving rise to increased consensus.[16]

The tendency towards consensus, then, entails dialogue between interested parties, to find a balance in government decisions, through guidance and articulation of objectives and preferences, leaving aside a more directive and prescriptive stance, thus providing flexibility to attend public interest more efficiently.

The role of the State changes, from authoritative power to that of mediator and guarantor, with ample space for consensus, one of its main characteristics, aimed at fulfilling fundamental rights.[17] Thus, consensus in relations between society and the State is an essential ingredient in a democratic state of law,

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[14] According to Eduardo García de Enterría and Tomás-Ramón Fernández, administrative law is one of the most important aspects of public law, whose nature is statutory, as it is focused on the "regulation of singular species of subjects that are grouped under the name of Public Administrations, removing topics of the sphere of common law". Administrative law would then be the common law of public administration, for the authors. They further state that administrative law "is not just made up of norms or impositions, but also of general principles, which serve to formulate, interpret and complete such norms, which they accompany, forming an inseparable aura around them." (GARCÍA DE ENTERRÍA, Eduardo; FERNÁNDEZ, Tomás-Ramón. *Curso de direito administrativo*. Tomo I. Tradução de José Alberto Froes Cal.; revisão técnica de Carlos Ari Sundfeld. São Paulo: Revista dos Tribunais, 2014. p. 59-61).

[15] MOREIRA, João Batista Gomes. *Direito Administrativo*: da rigidez autoritária à flexibilidade democrática. Belo Horizonte: Fórum, 2016. p. 164.

[16] MEDAUAR, Odete. *O direito administrativo em evolução*. 3. ed. Brasília: Gazeta Jurídica, 2017. p. 126-127.

[17] PEREIRA JUNIOR, Jessé Torres; DOTTI, Marinês Restelatto. *Políticas públicas nas licitações e contratações administrativas*. Belo Horizonte: Fórum, 2017. p. 399.

emerging as a "technique for coordinating actions and interests, honoring, simultaneously, autonomy of will and a partnership that enhances actions of the state and society".[18] In this way, public agreements and contracts are based on negotiation and dialogue, making the relationship more efficient.

Thus, consensus in contractual relationships with individuals, of great relevance for the instrumentalization of public policies and national development, enables compliance with adjustments, promoting the expansion of the "State and Marketplace".[19]

Regarding the legality of the measure, we should highlight that the basis of validity of administrative action, according to Jessé Torres and collaborators, "is not exclusive to formal law, but meets a set of constitutional ordinances and regulations, treaties, uses and customs, jurisprudence and general principles of law", expressing the modern idea of legality. Thus, the authors explain, "the absence of formal law, expressly allowing the conclusion of contracts between the state and the community, is not an impediment, given the application of other principles, such as efficiency, due process and proportionality". And they continue, "only in cases where there is express provision to the contrary will public authorities be prevented from entering into agreements for the exercise of administrative functions".[20]

This administrative function materializes, with regard to consensual actions, in a range of administrative agreements involving the public and private sectors. According to Diogo de Figueiredo Moreira Neto, these agreements or "contractual forms of partnership tend to multiply in Brazilian Administrative Law, due to the extreme diversity of situations found in the economic area".[21]

Moreira Neto points out that in the new State of the 21st century, interaction between public bodies and entities and between them and society is essential, through collaboration, and instruments that materialize consensus.[22]

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18 MOREIRA NETO, Diogo de Figueiredo. *Mutações de direito administrativo*. Rio de Janeiro: Renovar, 2007. p. 26.

19 GARCIA, Flávio Amaral. *Licitações e contratos administrativos*: casos e polêmicas. 5. ed. São Paulo: Malheiros, 2018. p. 454.

20 Jessé Torres Pereira Junior e Marinês Restelatto Dotti, *Políticas públicas nas licitações e contratações administrativas*, op. cit., p. 402.

21 MOREIRA NETO, Diogo de Figueiredo. Novas tendências da democracia: consenso e direito público na virada do século — o caso brasileiro. *Revista Eletrônica sobre a Reforma do Estado* (Rere), Salvador, p. 14, n. 13, mar./abr./maio 2008. Available at: http://www.direitodoestado.com.br/rere.asp. Accessed on: 11 Jun. 2019.

22 Ibid., p. 14.

3. From recognition to the signing of accords with private entities in the area of education

The Constitution, with regard to health services, states that their provision can be served through the supplementary participation of private institutions, on the basis of agreements or public law contracts. The norm indicates a preference for private philanthropic and non-profit entities; however, it does not prohibit collaboration with other entities, of a primarily profitable nature, since preference is not exclusivity.

> Art. 199. Health care is open to the private sector.
> § 1 — **Private institutions may participate in a supplementary way** in the health system, according to its guidelines, through a public law contract or agreement, with **preference** given to philanthropic and non-profit entities.

The Federal Court of Auditors articulates the following:

> 5.25. Thus, in health activities and services, public or private entities may participate, delineated according to public social services but not exclusively, cited in the doctrine of Maria Sylvia Zanella Di Pietro (*Direito administrativo*. 24. ed. São Paulo: Atlas, 2011, p. 112). Celso Antônio Bandeira de Mello conceptualizes these activities as non-private public services of the State (*Curso de direito administrativo*. 33. ed. São Paulo: Malheiros Editores, p. 715).
> […] §1 of article 199 of the text authorizes the participation of private institutions in the Health System in a supplementary manner, through a public law contract or agreement, with preference given to philanthropic and non-profit entities.
> 5.28. It is clear from the provision that the <u>Constitution allows the possibility of transferring certain supplementary services to the private sector, paid from government coffers</u>. These actions, however, cannot replace the public authority, as they are restricted to supplementing the execution of State services.[23]

[23] BRASIL. Tribunal de Contas da União. *Processo* 020.514/2014-0. Acórdão 602/2019-Plenário. RelatorRaimundo Carreiro. Data da sessão: 20/3/2019.

Regarding the right to education and how public resources are used, the Constitution, in article 213, stipulates they will be allocated to public institutions, but makes exceptions in some situations such as community, confessional or philanthropic establishments and cases of allocation of scholarships to those who demonstrate insufficient resources, where there is no regular provision in the public network (§ 1 of art. 213). Priority of provision by public authorities is established.

> Art. 213. Public resources will be allocated to public institutions, and may be directed to community, confessional or philanthropic establishments, defined by law, which:
> I — demonstrate non-profit purposes and invest their financial surpluses in education;
> II — ensure allocation of their assets to another entity, philanthropic or confessional, or to the Public Authority, in the event of closure of activities.
> **§ 1 The resources referred to in this article may be allocated to scholarships for elementary and secondary education, in accordance with the law, for those who demonstrate insufficient resources, where there is a lack of places and regular courses in the public system in the locality of residence, the Public Authority obliged to invest primarily in expanding its network in the locality.**
> § 2 The research, extension, stimulation and promotion of innovative activities undertaken by universities and/or professional and technological education institutions may receive financial support from the Public Authority. (Wording from Constitutional Amendment no. 85, 2015).

This regulation, as in the case with health, demonstrates priority of the power authority, but highlights the possibility of the private sector participating in public policies related to education. This finds support in the need to interpret all constitutional norms, on education and teaching, with respect to the declaration contained in article 205, wherein education is a right for all and a duty of the State and the family, promoted and encouraged in collaboration with all of society.[24]

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[24] José Afonso Silva, *Curso de direito constitucional positivo*, op. cit., p. 313.

Despite the existing prescription in the legal provision, "in accordance with the law" — in Law no. 12,513, October 26, 2011, which created the *Programa Nacional de Acesso ao Ensino Técnico e Emprego* (Pronatec) to expand professional and technological education, through programs, projects and actions through technical and financial assistance —, the interpretation must be applied broadly, taking into account the new idea of legality that permeates the actions of the public administration, enabling other implementations of the activity.

Such statements follow from the hermeneutic postulate of the maximum effectiveness of fundamental rights and the unity of the Constitution, optimizing these rights, excluding contradictions and preserving meaning in their respective prescriptions.

Establishing a democratic regime based on the protection and provision of rights and recognition of values intrinsic to the social order, the 1988 Constitution seems to place the rights to health and education at the same level of importance (art. 6), as a duty of the State (art. 196 c/c 205), elevating them to the category of essential public services. Moreover, for the effectiveness of both, the Constitution ascribed a minimum of financial resources to be applied in these areas. Thus, Paulo Bonavides states, "fundamental rights, strictly speaking, are not to be interpreted; but, to come to fruition."[25]

By analogy (*juris*), we understand that education, as set out in § 1 of article 199 of the CRFB/1988 is applicable and compatible with provision in a complementary manner by the private sector, through a public contract or agreement, with the aim of promoting access for all. However, this is clearly applicable in a subsidiary manner, with preference given to philanthropic or non-profit entities.

4. Public administration accords: contracts and agreements

Public administration, in the development of its function, alongside unilateral, or administrative acts, declares its will through accords which are concomitant with the declaration of another will. According to Eduardo García de Enterría and Tomás-Ramón Fernández, these accords be inter-administrative, between administrative bodies; or, originate from a relationship between administration and administered, the so-called administered-administration. The first may have a purpose similar to that carried out between administrative

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[25] BONAVIDES, Paulo. *Curso de direito constitucional*. 32. ed. São Paulo: Malheiros, 2017. p. 624.

entities (e.g.: concession expropriation, tax agreement), however the other adjustments of that modality will be specific to the organization's law.[26]

On the subject, regulating item XXI of article 37 of CRFB/1988,[27] which provides for public procurement, Law no. 8,666, June 21, 1993, establishes general rules on bids and administrative contracts pertinent to work and services, including advertising, purchases, disposals and rentals within the scope of the Powers of the Union, the states, Federal District and municipalities. It considers a contract, for its purposes, any engagement between public administration bodies or entities and private individuals, in which there is a desire for the formation of a bond and the stipulation of reciprocal obligations, of whatever type (art. 2, p. ú.). It adds, in article 116, provisions on agreements, agreements, accords and other similar instruments signed by bodies and entities of the administration.

Such separation is justified due to the organization of administration agreements in "conventional modules",[28] as follows: a) "conventional modules of cooperation", in which the idea of joint action and a single purpose prevails (e.g., agreements, public consortiums, management contracts, partnership terms); b) "conventional concession modules" (e.g., public service concession and permission, sponsored and administrative concessions and concession of use or exploitation of public property); c) "conventional instrumental modules", highlighting the instrumental aspect of public purposes (e.g., contracts for work, services, purchases, rentals and insurance).

Due to the provision contained in article 20 of the Criminal Execution Law, we are interested here in the agreements.

Agreements, as well as the other instruments encompassed generically in the module of conventional cooperation, are essentially finalities, or mutually accepted ends. However, the characterization is not so simple due to the deficient legislative systematization, owing to the lack of zeal on the part of the legislator in interpreting article 116 of Law no. 8,666/1993, listing several instruments in a random manner.[29]

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[26] Eduardo García de Enterría e Tomás-Ramón Fernández, *Curso de direito administrativo*, op. cit., p. 669.

[27] Art. 37 […]. XXI — except in cases specified in legislation, works, services, purchases and disposals will be hired through a public bidding process that ensures equal conditions for all competitors, with clauses that establish payment obligations, maintaining the effective conditions of the proposal, under the terms of the law, which will only allow technical and economic qualification requirements essential to guarantee compliance with obligations.

[28] Elaborated by Fernando Dias Menezes de Almeida (Contrato administrativo. São Paulo: Quartier Latin, 2012).

[29] Fernando Dias Menezes de Almeida, *Contrato administrativo*, op.cit., p. 241.

As a rule, the agreement is presented based on a distinction between contracts. According to Hely Lopes Meirelles,[30] as well as Maria Sylvia Zanella Di Pietro,[31] as a "form of engagement between the Public Authority and public or private entities", it is considered that the "compact is an agreement, but not a contract", often, since the former does not generate contradictory intentions to achieve its objective, but rather the meeting of participants with objectives directed towards a common end (reciprocal interests), that is, there are common institutional objectives.

In this sense, note the precedents of the *Superior Tribunal de Justiça* (STJ) and *Tribunal de Contas da União* (TCU), namely:

> ADMINISTRATIVE. HEALTH INSURANCE. DISTINCTION. CONTRACTS. UNILATERAL COMPLAINT. POSSIBILITY. BROAD AND CONTRADICTORY DEFENCE. PRESCINDIBILITY. MATERIAL DAMAGE. POSSIBILITY OF APPLICATION OF SANCTIONS ESTABLISHED IN THE COLLABORATION INSTRUMENT. APPEAL NOT PROVIDED.
> […]
> 2. Administrative agreements are signed between administrative entities, or between those and private ones, whose objective is to obtain certain common interests. They differ from administrative contracts, basically, due to the absence of opposing interests, since the main element of the union between the parties is cooperation and not profit, generally addressed in contracts.
> 3. The legal bond existing in agreements does not have the same rigidity inherent to contractual relationships, hence why art. 116, head paragraph, of Law 8.666/93 establishes that its standards apply to agreements only "where applicable". Hence, the possibility of each party freely waiving the agreement, withdrawing from it. However, if this causes material losses to other parties, it is appropriate to apply sanctions, to be established, as a rule, in the instrument of collaboration itself.[32]

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30 MEIRELLES, Hely Lopes; BURLE FILHO, José Emmanuel. *Direito administrativo brasileiro*. 43. ed. São Paulo: Malheiros, 2018. p. 535-536.

31 DI PIETRO, Maria Sylvia Zanella. *Direito administrativo*. 27. ed. São Paulo: Atlas, 2014. p. 352-353.

32 BRASIL. Superior Tribunal de Justiça. Recurso em mandado de segurança nº 30.634-SP (2009/0194709-0). Relator min. Castro Meira. DJe, 28 jun. 2010.

> […] In a contract, the interests of the parties are divergent and opposed, whereas in agreements the participants have common and coinciding interests. In contracts there is a mutuality of obligations as a result of reciprocity in the application of utilities; in the agreements there is reciprocity of interests between the participants, even if they can vary in intensity, depending on the character of each.
> 46. In short, agreements and contract are covenants, but, as the Supreme Court decided, an agreement is not a contract (Revista Trimestral de Jurisprudência, bol. 141, p. 619). It is distinguished in the jurisprudence of the TCU, as can be seen from the various deliberations of the Plenary, such as Rulings 1.369/2008, 936/2007, 1.663/2006, 1.607/2003 and Decision No. 118/2000.[33]

Note that common purpose, through harmonious activity with reciprocal interests, oriented towards the realization of fundamentally similar objectives, is the hallmark of agreements, otherwise culminating in violation of the legal system.

> […] the form of agreement is visibly inappropriate to accommodate the relationship that prevailed among parties, which basically aimed to develop a computerized system for management and monitoring of the *Plano Nacional de Turismo*. In the first place, as a general rule, the instrument is applicable in cases of **support where the administration undertakes actions developed by the parties within its own ambit, for its relevance and usefulness**. It does not lend itself to the creation of a "managerial tool", in the appellant's words, for exclusive use of MTur. (*Tribunal de Contas da União*. Process 016.581/2006-6. Judgment 3074/2010-Plenary. Rapporteur Augusto Nardes. Date of session 11/17/2010).

Odete Medauar, on this topic, explains that "agreement can be conceptualized as the arrangement between a public authority body and other such entities or between these and private entities, aimed at implementing projects or activities of common interest, in a regime of mutual cooperation".[34] Regarding the

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[33] BRASIL. Tribunal de Contas da União. *Processo* 012.839/2009-5. Acórdão 1457/2009-Plenário. Relator Valmir Campelo. Data da sessão: 1/7/2009.

[34] MEDAUAR, Odete. *Direito administrativo moderno*. 20. ed. São Paulo: Revista dos Tribunais, 2016. p. 282.

configuration of this mutual cooperation, the TCU, analyzing the legal nature of an agreement, affirmed this consideration, as a requirement.

> 45. The legal nature of this arrangement does not conform to the technical concept of an agreement, as in this case, reciprocal interests must prevail in a regime of mutual cooperation. To this end, for example, the mutual cooperation regime highlights the existence of a counterpart, a fact not identified under the terms of the aforementioned agreement.[35]

In this way, according to Marçal Justen Filho's lesson, through the combination of efforts and/or resources, "it is perfectly possible to have an agreement involving a state entity and entities governed by private law, as long as there is mutual cooperation, with compensation. The distinction lies not in the quality of the parts, but in the purpose sought."[36]

Medauar points out several arguments contrary to the differences listed by classical theory that oppose agreements to contracts. For her, regarding the interests involved, in the case of agreements concluded with a private entity, this does not necessarily accord with public interest; with regard to remuneration, one of the parties does not always pay the other, as with a broadcasting concession contract. The author concludes that:

> the difficulty of establishing differences between a contract, on the one hand, and an agreement and consortium, on the other, lead us to conclude they are instruments of the same nature, belonging to the same contractual category. The characteristic of agreements and consortia lies in their specificity, relating to two or more state entities or the type of result they intended.[37]

Following Medauar, Fernando Dias Menezes de Almeida elucidates:

> Bringing together the arguments that Brazilian doctrine uses to distinguish agreements from contracts, Medauar (1995a:75/81) refutes

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35 BRASIL. Tribunal de Contas da União. *Processo* 013.862/2003-9. Acórdão 4615/2013-Primeira Câmara. Relator Augusto Sherman. Data da sessão: 9/7/2013.

36 JUSTEN FILHO, Marçal. *Comentários à lei de licitações e contratos administrativos*. 15. ed. São Paulo: Dialética, 2012. p. 1086.

37 Odete Medauar, *Direito administrativo moderno*, op. cit., p. 283-284.

> them: gives examples of situations in which convergent interests are the subject of a contract and in which opposing interests are the focus of agreements; shows that the identification of a common objective does not always lead to harmony; dispels the idea that an agreement implies the exercise of common powers, which would not apply to agreements with private entities; demonstrates that often, even though price is not discussed, the transfer of funds has a remunerative import; observes, along with André de LAUBADÈRE, that collaboration is inherent to every contract; identifies the sense of reciprocity of obligations in agreements — to conclude, given the amplification of "contractual or conventional modules", that "it is relevant to apply a broad treatment to contractual instruments, to accommodate new formulas, adapted to a new dynamism and modes of administrative action. In this context, agreements and consortia are established administratively."[38]

We should note that, considering that an agreement, "in Brazil, most of the time, is an instrument for the creation of a subjective situation", Fernando Dias Menezes de Almeida affirms that it must receive the same legal treatment as the contract, "in the strict sense given to it traditionally in the doctrine." This stance arises from his understanding of the agreement as a species of contract. Thus, for the author, it would not be a misuse of the instrument, but a facet of Brazilian positive law.[39]

In this way — without losing sight of the lessons of Odete Medauar, for whom: not even the identification of a common result always leads to an agreement; there is a meaningful remuneration in transfers; there is a possibility of identifying the reciprocity of obligations in agreements; and that in them the individual does not act for the purpose of public interest —, as there an activity of relevance and usefulness to society, it is possible to establish an adjustment in the agreement modality to support development by private entities, considering interest in a regime of mutual cooperation, evidenced, for example, by reciprocity, according to the TCU in the aforementioned precedent, but not only that.

We shared social values and purpose of public and private entities in promoting the foundations of the Republic are seen, for example, in work

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[38] Fernando Dias Menezes de Almeida, *Contrato administrativo*, op.cit., p. 244.
[39] Ibid. p. 243.

involving people with disabilities or prisoner welfare, through learning a trade, which benefits the individual and society and generates economic returns. Human dignity and national development, regional or local, are reciprocal concerns, through provision of care. At the same time, companies in a vulnerable situation may profit from the creation or participation in solutions at a time of crises, which would otherwise cause greater economic disruption. Businesses may simply be interested in contributing to the State, being part of the solution to societal problems.

Hence, the formalization of a conventions relative to diverse situations. Undoubtedly, for a long time, the instruments of agreements and contracts have been used interchangeably, without technical rigor. This arises from the recognition that collaboration is inherent to agreements, and that every contract is based on the duty of reciprocity; and the identification of covenants as a species of the contract. In this regard, we should not assume a violation of the legal order, in a valid agreement, due to a defect originating in the law or in the action itself.

5. The inapplicability of Law no. 13,019/2014 to the hypothesis

The relationship between the State and private entities has evolved over time. Thus, there is a need to address any doubts in relation to agreements.

The main issue centres on the application of Law no. 13,019, July 31, 2014 (*Marco Regulatório das Organizações da Sociedade Civil* — MROSC), which, in summary, is intended to establish general standards for partnerships between public administration and civil entities, through terms of collaboration, promotion or in cooperation agreements, defining guidelines.

Although there is no express authorizing rule in the 1988 Constitution, the Federal legislature, to provide for general rules for agreements across direct and indirect public administration, the aforementioned infra-constitutional norm is applicable. Furthermore, even if such competence were granted, the Union could not be so scrupulous in the matter, leaving no space for other entities in the to exercise freedom of political-administrative organization.[40]

[40] It is worth remembering, in a similar situation, the STF recognized the existence of a non-general rule in the Public Contracting Law (8,666/1993), applying article 17 only within the scope of the Federal Union (BRASIL. Supremo Tribunal Federal. ADI 927/RS — Medida Cautelar, Rel. min. Carlos Velloso, julgamento em 3/11/1993, Tribunal Pleno).

Regarding agreements, the legal text has little to say, or, worse, does not provide a concept for the purposes of the law:

> Art. 3 The requirements of this Law do not apply:
> I — to transfers of resources approved by the National Congress or authorized by the Federal Senate where the specific provisions of international treaties, agreements and conventions conflict with this Law; (Wording in Law no. 13,204, 2015).
> II — (revoked); (Law no. 13,204, 2015).
> III — to management contracts signed with private organizations, vis-a-vis requirements provided for in Law no. 9,637, May 15, 1998; (Amended by Law no. 13,204, 2015).
> IV — to agreements and contracts signed with philanthropic and non-profit entities in accordance with § 1 of art. 199 of the Federal Constitution; (Law no. 13,204, 2015).
> V — in the terms of cultural commitments referred to in § 1 of art. 9 of Law no. 13,018, 22 July 2014; (Law no. 13.204, 2015).
> VI — where the terms of partnership signed with civil organizations of public interest, vis-a-vis requirements set out in Law no. 9.790, of March 23, 1999, are met; (Law no. 13,204, 2015).
> VII — to the transfers referred to in art. 2 of Law no. 10,845, March 5, 2004, and in arts. 5 and 22 of Law no. 11,947, June 16, 2009; (Law no. 13,204, 2015).
> VIII — (VETOED); (Law no. 13.204, 2015).
> IX — to payments made as annuities, contributions or association fees to international organizations or entities constituted of: (Law no. 13,204, 2015).
> a) Public Ministry and Authority personnel; (Law no. 13,204, 2015).
> b) directors of a public administration body or entity; (Law no. 13,204, 2015).
> c) legal entities governed by domestic public law; (Law no. 13,204, 2015).
> d) legal entities that are part of the public administration; (Law no. 13,204, 2015).
> X — to partnerships between public administration and autonomous social services. (Law no. 13,204, 2015)

> Art. 84. The provisions of Law no. 8,666, 21 June 1993, do not apply to partnerships governed by this Law. (Wording in Law no. 13,204, 2015).
> Sole paragraph. Agreements governed by art. 116 of Law no. 8,666, June 21, 1993, are those: (in Law no. 13,204, of 2015)
> I — between federated entities or legal entities linked to them; (Law no. 13,204, 2015)
> II — resulting from the application of the provisions of item IV of art. 3. (Law no. 13,204, 2015)
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> Art. 84-A. On enforcement of this Law, agreements will only be signed in the circumstances of the sole paragraph of art. 84. (Law no. 13,204, 2015).

Considering Law no. 13,019/20014 is applicable to public administration and civil organization partnerships, with a clearly limited scope, as provided for in article 1, the situations provided for in article 3 is just one among several circumstances of partnership between the administration and entities not covered by the text.

Regarding article 84 and its sole paragraph, the head paragraph appears to recognize the possibility of other partnerships not governed by that law, but by Law no. 8,666/1993 (*Lei Geral de Contratações*— LGC), as the first would be limited to non-profit private entities.

It is also worth mentioning that the aforementioned article 84 states that Law no. 8,666/1993 is inapplicable to partnerships under that law; the discipline on covenant and other adjustments, contained in article 116, remains in force and applicable to other situations other than those provided for in the *Marco Regulatório das Organizações da Sociedade Civil*. It is also possible to verify that the non-exhaustive legal treatment, indicating application of the aforementioned article 116 to cases of relationship with a private entity opens up space prescribed in § 1 of article 199 (including those not preferred), governed by Law No. 8,666/1993.

In the sole paragraph, where there is no express limitation on the application of article 116 of the LGC, the Law, in part, states the obvious in section I, as an agreement between legal entities under public law may be governed by it, since its scope of incidence does not affect them. On the other hand, the instrument says is rather vague in section II, when making reference to item IV of article 3. The reservation contained in item IV of article 3 is careful to detail its impact on the non-application of the Law to partnerships with non-profit entities in the health area, as the constitutional text (§ 1 of article 199) recognizes partnerships

in the health sector with private entities of varying purposes, which may agree with the administration and be governed by other regulations. This situation arises from the restricted scope of Law no. 13,019/2014. Similarly, an agreement between a Higher Education Institution and a public body, for the purposes of granting professional internships, cannot be governed by Law no. 13,019/2014 — regardless that such exception was not included in the sole paragraph of art. 84 of the same Law. Whether private or public, such Institutions cannot align with the concept of "Organization of Civil Society". Thus, and in accordance with art. 8 of Law no. 11,788/2005,[41] the agreement continues to be the appropriate instrument to legally formalize the partnership between the higher education establishment and public or private entity, in the area of professional internship for students. This case in point is just an example.

Finally, article 84-A of the MROSC — considering the restriction to non-profit entities — should be interpreted in the sense that, in two hypotheses of the sole paragraph, especially that of item II, there is a need to use the nomen juris agreement in these cases. To understand otherwise would cause great disruption to legal practice and tarnish the nature of other practices. In the same sense, Flávio Amaral Garcia offers the following criticism:

> On the point in question, Law 13,019/2014 was remiss in excluding the adoption of agreements for situations other than those provided for in the sole paragraph of art. 84, since the expression "agreement", long-standing, is widely used in administrative parlance, representing the sum of efforts of the participants in achieving a common objective. In effect, even if another name is formally given to agreements that reflect convergence of wills between the participants, in essence it continues to be an agreement, in nature.[42]

Corroborating this, note the possibility of making agreements between political entities and indirect administrations or entities was constitutionally affirmed in the promulgation of Constitutional Amendment nº 19, June 4, 1998, which brought new wording to article 241, allowing for the associated

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[41] Art. 8 Educational institutions are entitled to enter into an agreement with public and private entities to grant internship, in which the educational process included in the activities planned for their students is explained to students, and the conditions referred to in arts. 6 to 14 of this Law.

[42] Flávio Amaral Garcia, *Licitações e contratos administrativos*, op. cit., p. 477.

management of public services.[43] However, nothing previously prevented the creation of agreements as an instrument of cooperation, including with private entities.[44]

Following Constitutional Amendment nº 85, February 26, 2015, which added article 219-A to the constitutional text, the Union, states, Federal District and municipalities have express permission to sign cooperation accords with public bodies and entities and with private entities, including for sharing of specialized human resources and for research, scientific and technological development and innovation, with financial or non-financial responsibility assumed by the beneficiary entity, in accordance with the law. Clearly, agreements are among such instruments.

As for infra-constitutional legislation, in Decree-Law No. 200, February 25, 1967, the Union already considered signing agreements with other public and private entities.

> Art. 10. The execution of Federal Administration activities must be broadly decentralized.
> § 1 Decentralization will be implemented in three main ways:
> a) within the framework of the Federal Administration, clearly distinguishing the level of management of execution;
> b) from the Federal Administration to that of the federated units, when they are sufficiently equipped and through agreement;
> c) from the Federal Administration to the private sphere, through contracts or concessions.
> […]
> § 5 Except in cases of manifest impracticability or inconvenience, Federal programs of a clearly local nature must be delegated, in whole or in part, through an agreement, to state or municipal bodies responsible for corresponding services.
> […]
> Art. 156. The formulation and Coordination of health policy, at national and regional level, is the responsibility of the Ministry of Health.
> § 1 To make better use of available resources and means and achieve

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43 BRASIL. Constituição da República Federativa de 1988. Art. 241. The Union, the States, the Federal District and the Municipalities will regulate public consortia and cooperation agreements between entities by Federated Law, authorizing the associated management of public services, as well as the total or partial transfer of charges, services, personnel and goods essential to the continuity of the transferred services. (Re. Constitutional Amendment No. 19, 1998).

44 Hely Lopes Meirelles e José Emmanuel Burle Filho, *Direito administrativo brasileiro*, op. cit., p. 536.

greater productivity, to provide effective medical and social assistance to the community, the Ministry of Health will promote coordination, at the regional level, of medical-social assistance, combining the work of federal agencies, state, municipal, Federal District and private sector entities.
§ 2 When providing medical assistance, preference will be given to the signing of agreements with public and private entities existing in the community. Furthermore, Law no. 13,303, of June 30, 2016, when establishing the legal status of the public company, mixed capital company and its subsidiaries, prescribes (§ 3 of article 27) that they may enter into an agreement with an organization or legal entity to promote cultural, social, sporting, educational and technological innovation activities, where they are demonstrably linked to the strengthening of the brand, observing applicable bidding rules and contracts.

Finally, the wording of § 11 of article 36 of *Lei de Diretrizes e Bases de Educação* (LDB)[45] — in Law no. 13,415, February 16, 2017, subsequent to MROSC — enables education systems to recognize expertise and "sign agreements with well-recognized distance learning institutions", to elaborate the secondary school curriculum.

In this way, the possibility of other adjustments, by agreement, to carry out administrative activities, enables collaboration with private sector entities. In this light, we now turn our attention to the *Lei de Execução Penal*.

6. The special nature of the Lei de Execução Penal.

As stated, Law no. 13,019/2014 (MROSC) expressly establishes standards and guidelines for partnerships between public administration and private

[45] Art. 36 […] § 11. For the purpose of fulfilling the curricular requirements of secondary education, the education systems will be able to recognize skills and sign agreements with distance learning institutions of notable recognition, through the following forms of proof: (Included in Law no. 13,415, of 2017) I — practical demonstration; (Included in Law no. 13.415, of 2017) II — supervised work experience or other experience acquired outside the school environment; (Included in Law no. 13,415, of 2017) III — activities of technical education offered at other accredited educational institutions; (Included in Law no. 13,415, of 2017) IV — courses offered by occupational centers or programs; (Included in Law no. 13,415, of 2017) V — studies carried out in national or foreign educational institutions; (Included in Law no. 13,415, of 2017) VI — courses via distance education or face-to-face education using technology.

entities, in a regime of mutual cooperation, which satisfies public interest through collaborative activities and projects previously established, fostering and implementing further agreements.

The *Lei de Execução Penal* (LEP), on the other hand, regarding sentences and the applicability of punishment by the State, following a combination of administrative and jurisdictional phases, constitutes an autonomous discipline, with its own special principles.

Having thus discussed the nature of the agreements in the first Law, we may observe the coexistence of MROSC provisions in article 20 of the LEP, which stipulates how public administration may formalize agreements with public and private entities to provide educational activities. There is, in fact, an apparent antinomy: "Art. 20. Educational activities may be subject to an agreement with public or private entities, in the establishment of schools or offering specialized courses".

To resolve conflicts between standards, three basic criteria are used: hierarchical, chronological and special, based on article 2 of *Lei de Introdução* às *normas do Direito Brasileiro* (LINDB) (Decree-Law no. 4,657, September 4, 1942).[46]

> Art. 2. Not intended to have temporary validity, the law will be in force until another modifies it or it is revoked.
> § 1 The subsequent law revokes the previous one when expressly declared, when the first is incompatible or when it entirely regulates the matter covered by the former law.
> § 2 The new law, which establishes general or special provisions alongside those that already exist, does not revoke or modify the previous law.
> § 3 Unless otherwise provided, the repealed law is not restored because the repealing law has lost its validity.

Applying these premises to a specific case, according to the criterion of hierarchy it is not possible to say that one standard is superior to another, both having the same status in law.

Applying the chronology criterion, we observe that Law no. 13,019/2014 is subsequent to the Law no. 7,210/1984, with consideration given to its repeal. However, in practice, this does not happen. As established in § 1 of art. 2 of LINDB, for the revocation of a regulation vis-a-vis chronology there are three alternatives, none of which are subsumed to the present question. The first alternative is to

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[46] DINIZ, Maria Helena. *Código civil anotado*. 14. ed. São Paulo: Saraiva, 2009.

that a subsequent law revokes the previous one when it expressly states so. Certainly, this situation is not contained in the text of Law no. 13,019/2014. The second revocation alternative relates to incompatibility, non-existent in this case, as the possibility of coexistence was demonstrated. The third alternative is in the event that the new rule deals entirely with the matter previously covered, a situation that, as demonstrated, is not in line with the discipline.

Finally, according to the specialty criterion (§ 3 of article 2 of LINDB), Law no. 13,019/2014, when establishing general provisions, does not have the power to revoke, nor modify, a special law, in this case, the *Lei de Execução Penal*.

Thus, in a logical-systematic interpretation, the coexistence of the new law and the old law is possible, vis-à-vis the provisions of Law no. 13,019/2014 and article 20 of Law no. 7,210/1984 on agreements, as it may "well happen that the special principle introduces an exception to the general principle, which must coexist alongside it".[47]

This compatibility is extremely relevant, as it admits the possibility of private sector collaboration with the administration, on educational activities during the execution of the penalty, an important factor for social reintegration, according to Alexis do Couto, who states:

> [...] Hence, the concern about allowing sentenced individuals to attend courses in private establishments, gradually reintegrating them back into the social and professional world, without losing contact with the techniques and means to operate with when returning to society.[48]

It is in this sense that Resolution CNE/CEB no. 2, May 19, 2010, of the National Education Council provides in its article 6 that the management of education in the prison context should promote partnerships with different spheres and areas of government, as well as with universities, professional education institutions and civil organizations, aimed at the formulation, execution, monitoring and evaluation of the education of those deprived of liberty. These partnerships are complementary to the education policy implemented by the organs responsible for the education of the Union, the states and the Federal District.

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[47] GONÇALVES, Carlos Roberto. *Direito civil brasileiro*. Vol. 1: Parte geral. 15. ed. São Paulo: Saraiva, 2017. p. 68.

[48] Alexis Couto de Brito, *Execução penal*, op. cit., p. 152.

For this reason, the prison administration is permitted to "celebrate agreements with public and private entities to carry out this activity or offer intramural specialized courses", including allowing the convict to follow a semi-open regime and attend supplementary and professional courses at external institutions.[49]

7. Procedures to be adopted

Law no. 8,666/1993, in article 116, established the general parameters whereby agreements could be signed by the public administration, with application "where appropriate" of the provisions of that law to agreements, covenants and other related instruments.

If there is an interest in signing an agreement to achieve a suitable result and purpose, undertaken by a number of entities, their choice may be considered, avoiding privileges by implementing principles of morality and transparency. However, agreements may be signed directly, "guided by the element of trust, which is not identified by formal and objective criteria",[50] generating peculiarities addressed in the head paragraph of article 25 of Law no. 8.666/1993.[51]

In this way, once the hypothesis of the impossibility of competition is fulfilled, "either since only a supplier or service provider could serve the public interest, or because it encountered peculiarities in the contractual object intended by the Administration",[52] unenforceability is imposed and is perfectly accepted. Furthermore, Lúcia Valle Figueiredo and Sérgio Ferraz[53] remind us that the specific nature of the business or the social objectives pursued by the administration can also lead to unenforceability.

Thus, despite the general hiring rule allowing direct engagement, without the need for a tender, the administration cannot act arbitrarily; on the contrary, it must adopt an appropriate administrative procedure aimed at the best possible contract, justifying the choice of the contractor in order to satisfy public interest. In short, an absence of tender does not mean preferential

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49 Ibid., p. 152.

50 Flávio Amaral Garcia, *Licitações e contratos administrativos*, op. cit., p. 480-481.

51 See also, Fernando Dias Menezes de Almeida (*Contrato administrativo*, op. cit., p. 245).

52 FERNANDES, J. U. Jacoby. *Contratação direta sem licitação*. Belo Horizonte: Fórum, 2011. p. 537.

53 FIGUEIREDO, Lúcia Valle; FERRAZ, Sérgio. *Dispensa e inexigibilidade de licitação*. São Paulo: Malheiros, 1994. p. 102.

treatment. These are circumstances that must be soundly motivated and justified in the administrative process.

Final considerations

Given the legal framework discussed, through interpretation of the *Lei de Execução Penal* in accordance with the Constitution of the Republic, 1988, a private entity, in this case a company, may operate in the field education, by way of an agreement to undertake, together with the Federation, public education focused on the education of prisoners, through distance learning, with transfer of resources in a mutual cooperation regime.

Such action, supported by a consensus movement in public administration, in collaboration with entities, is in line with the precept of free initiative for teaching provision and the constitutional premise of social participation in fostering education for all citizens.

However, it is important to emphasize this must be supplementary and subsidiary, through an agreement, or even a public contract, with preference given to philanthropic or non-profit entities.

Finally, the possibility of signing the accord must comply with the *Lei Geral de Contratações* (nº 8,666/1993), and may even be carried out directly, as long as the requirements are met.

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