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Regulation and e*ndowment funds*: the formation of a collaborative legal-institutional environment and triple helix modulation[1]

Regulação e fundos patrimoniais: a formação de ambiente jurídico-institucional colaborativo e a modulação em tríplice hélice

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Abstract:

The article aims to investigate how regulatory modulation in triple helix can contribute to the formation of a collaborative legal-institutional environment in the regulation of endowment funds. A hypothetical-deductive approach methodology and bibliographical and documentary research were used. It is concluded that the regulatory modulation in triple helix, as it is based on consensus and dialogue between public and private entities, is shown to be consonant with the construction of a collaborative legal-institutional environment conducive to endowment funds, by allowing the actors involved discuss the existing barriers and potential solutions through multiple forms of regulation that will depend on the regulated matter.

Keywords: Collaborative environment. Endowment funds. Triple helix modulation. Regulation.

Resumo:

O artigo objetiva investigar como a modulação regulatória em tríplice hélice pode contribuir para a formação de um ambiente jurídico-institucional colaborativo na regulação dos fundos patrimoniais. Utiliza-se metodologia de abordagem hipotético-dedutiva e pesquisa bibliográfica e documental. Conclui-se que a modulação regulatória em tríplice hélice, por ser pautada em consenso e no diálogo entre entes públicos e privados, demonstra-se como consonante à construção de um ambiente jurídico-institucional colaborativo propício aos fundos patrimoniais, ao permitir que os atores envolvidos discutam entraves existentes e soluções potencializadoras por meio de múltiplas formas de regulação que dependerão da matéria regulada.

Palavras-chave: *Ambiente colaborativo. Fundos patrimoniais. Modulação em tríplice hélice. Regulação.*

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1 Introduction

In a scenario of persistent demands related to fundraising alternatives to financing needs linked to social and cultural rights, the option for endowment funds stands out. This institute has its legal framework in Law No. 13,800, of January 4, 2019, despite the fact that, even before this regulation, the experience with endowment funds had already begun in Brazil[2].

However, the legislation did not exhaust the debate on the regulation of endowment funds, and discussions persisted, for example, on the forms and nature of the allocation of resources to the supported institutions; the legal responsibility of the actors involved in the legal relations with the endowment funds; and attention paid to the structure of the agencies involved in the management of the funds.

Due to the verification of omissions and legal failures, it is necessary to form a collaborative legal-institutional environment between the regulatory entities, the funds and the supported institutions, which considers the scope of the institute to support causes of public interest.

The construction of this environment requires modulations beyond the traditional non-collaborative pattern presented by regulation focused solely on the state entity, which gives rise to a constant dialogue between the multiple actors, since they are necessary correlatives. In this way, forming what is called triple helix modulation, that is, joint action of 3 sets of regulatory entities, the funds and the institutions supported (Pereira, 2021, p. 85 et seq.).

In this scenario, the question arises: how can triple-helix regulatory modulation contribute or not to the formation of a collaborative legal-institutional environment in the regulation of endowment funds? To carry out the research, a hypothetical-deductive approach methodology and bibliographic and documentary research are used.

The article is divided into three stages. In the first, the concept of endowment funds will be analyzed from the current regulatory scenario in the Brazilian legislation established with Law No. 13,800 of 2019. Next, the collaborative regulation model and triple helix modulation are presented. Finally, the third section investigates the formation of a triple helix modulation that can be applied in the regulation of endowment funds.

At the end of the work, it can be observed that the triple helix regulatory modulation is demonstrated as an online modulation with the aim of building a collaborative legal-

[2] Examples are: the FEA USP Endowment Fund, created in 2017; the GV *Law Endowment* Association, created in 2012; and the Friends of Poli Endowment Fund Association, created in 2011.

institutional environment conducive to endowment funds, an institute of private law that enshrines public interests. This modulation, by being based on consensus and dialogue between public and private entities, allows the actors involved to discuss the existing obstacles and solutions that enhance endowment funds, which can be done through multiple forms of regulation, depending on the topic.

2 Third Sector, Endowment Funds and the Regulations of Law No. 13,800/2019

The concept of the Third Sector has as its main origin the promotion of a rapprochement between the Public Administration and the administrated, with co-responsibility between the State, the market and citizens in activities of public interest, originally restricted to the State function. The Third Sector encompasses "private organizations with public adjectives", distinguishing itself from the First Sector (particularly in relation to the state bureaucracy) and the Second Sector (especially in terms of the profit purpose sought in the market) (Souza, 2010, p. 56-57). However, a unifying concept is missing.

Authors such as Tarso Cabral Violin (2006, p. 198) defend a comprehensive concept that encompasses "everything that is not part of either the market or the State in the strict sense", which includes voluntary individuals, social movements and cooperatives. On the other hand, María Tereza Fonseca Dias (2008, p. 114) argues that the Third Sector is restricted to institutionalized, non-profit private legal entities that pursue public interest purposes.

Leandro Marins de Souza (2010, p. 102) also postulates a comprehensive concept, considering in the scope of the Third Sector "any voluntary, non-profit action, practiced by a private natural or legal person, whose purpose is the 'provision' or 'guarantee' of a fundamental right, or the 'defense' of the constitutional content", but excluding cooperatives, because of the alleged distribution of results among the cooperative members. It therefore defends the possibility of adopting legal forms of association; private foundation; social cooperative; religious organization; and political party.

It is more relevant, for this study, to establish as central for Third Sector entities the achievement of purposes of public and/or social interest (in the sense of provision or not) and the absence of profit-making purposes. As for this last characteristic, it implies – for legal entities – the non-existence of distribution of (possible) positive results among the founders

(Souza, 2010, p. 91), which, following the position of Sabo Paes and Queiroz Filho (2014, p. 94), does not prevent the achievement of positive economic results as an average activity, as long as they revert to the purpose stipulated in the entity's bylaws.

The regulatory space[3] of the Third Sector and, in particular, of the alliances between the State and civil society organizations, has as its main characteristics the fragmentation and plurality of legal regimes, in a scenario of dispute between the actors with interests involved[4].

Even so, this scenario does not exhaust the possible alliances between the Third Sector and the State. In this sense, considering the growing need for financing for purposes of public and/or social interest, endowment funds are part of the regulatory space reported as a form of financing for Third Sector activities and, even more, as an additional option for partnership between the State and civil society, giving rise to specific regulations that add to the plurality of legal regimes presented.

Endowment funds – also known as *endowments* or philanthropic funds – are, according to the legal definition, pools of private assets, which are intended to constitute a source of funds in the long term by preserving the principal amount and applying the proceeds of investments made in favor of their ultimate mission[5].

This fundraising comes from donations from private individuals or legal entities, as well as own income projects and public notices or sponsorships. It is an institute whose characteristics are the collection of resources for public purposes, good governance, the presence of a non-profit institution, the return on the amount invested in the fund, in addition to the ability to be permanent and, consequently, generate financial sustainability for the institution or cause supported (Spalding, 2016, p. 05).

The legal regime of endowment funds was instituted in the Brazilian legal system through Law No. 13,800/2019, which allows the constitution of endowment funds with the aim of collecting, managing and allocating donations from private individuals and legal entities for

[3] According to Natasha Salinas (2019, p. 397), the expression "regulatory space" is used "to metaphorically represent the dynamic relationship between norms, institutions, and agents – regulators and regulated – in a given time and space" (in this case, the dynamic relationship that regulates the alliances between the State and civil society organizations).

[4] Through the Law on Support Foundations (Law No. 8,958 of 1994); the Law on Social Organizations (Law No. 9,637 of 1998); the Law on Civil Society Organizations of Public Interest (OSCIP) (Law No. 9,790 of 1999); Lei do Bem (Law No. 11.106/2005) and the Regulatory Framework for Civil Society Organizations – MROSC (Law No. 13.019, of 2014). (Salinas, 2019, p. 397-412).

[5] Article 2 of Law No. 13,800/2019. For the purposes of the provisions of this Law, the following are considered:
IV – Endowment fund: a set of private assets established, managed and administered by the organization administering the endowment fund with the purpose of constituting a source of long-term funds, based on the preservation of capital and the application of its income.

programs, projects and other purposes of public interest. Although they have similar systems[6], valuing the governance structure of the private entity that enters into partnership with the State, the endowment fund regime differs from those existing in the regulatory space of the Third Sector, especially because the origin of the funds involved is essentially private (Hirata; Grazzioli; Donnini, 2019, p. 117-118).

The research shows that the Brazilian legal regime is structured in five main themes in order to understand in a didactic way the legal structuring of the legal environment created for the development of philanthropic funds. They are: a) the requirement of the creation of bodies as characters endowed with legal competences; (b) accountability mechanisms, which are still fragile in the absence of delimitation and clarity, as they do not provide for penalties in the event of non-compliance with the law; (c) the management of the resources raised by the Fund and their possible application as a form of investment; d) the types of donations, in an opportunity to promote the culture of donation; e) Tax incentives, which were vetoed, weakening the participation of companies.

As for the bodies, Law No. 13,800/2019 determines who are the actors involved in the constitution and management of an endowment fund[7]: the supported institution, the executing organization and the managing organization. The supported institution may be public or private, and must always be non-profit and intended to achieve the public interest purpose that justifies endowment fund support. Beneficiaries of programmes, projects or activities financed with resources from the fund are classified as supported institutions.

The executing organizations are responsible for the execution of programs and projects linked to purposes of public interest. Likewise, they must also be non-profit institutions and there is no exhaustive provision for their internal bodies.

The organization that administers the endowment fund - necessarily a private association or foundation - will always be a non-profit private law institution and must act in the collection and management of donations from private individuals and legal entities. The management organization was identified as the main structuring element in the management of endowment

[6] Notably in relation to support foundations, which, like endowment funds, may have the purpose of supporting teaching, research, extension, institutional, scientific and technological development projects and stimulate innovation; Support programs, projects, activities, and special operations of federal educational institutions and science and technology institutions, such as the granting of grants and research. The notable difference between the two institutes is the origin of the resources, which, in the case of endowment funds, must be exclusively private (Hirata; Grazzioli; Donnini, 2019, p. 117-118).

[7] Article 2, paragraphs I, II and III, of the aforementioned legal title.

funds, either because of its composition, structure or relevance in the administration of the funds raised.

There is a symbiotic relationship between the managing organisation and the endowment funds, as these funds do not have their own legal personality and their assets are segregated solely for accounting purposes[8], with the managing organisation being responsible for managing the fund's resources.

The composition of the management organisation is also provided for by the legislation in question, with a Board of Directors and a Fiscal Council. There is also an Investment Committee linked to the structure of the endowment fund itself. Members of all three bodies may be remunerated by the administering organization, in accordance with the income of the fund[9]. The Board of Directors has the power to resolve the issues listed in Article 9 of Law No. 13,800/2019[10], relating to the bylaws, management and transparency rules, amortization rules, the composition of other bodies and the execution, modification and suspension of company instruments. This Council must be composed of a maximum of seven paid members, and the admission of other members without remuneration is allowed[11].

The Supervisory Board is responsible for issuing opinions to the Governing Board on the supervision of the endowment fund administrators and the accounts of the administering organisation. The members of the Fiscal Council are elected by the Board of Directors and must be suitable persons with experience in administration, economics, accounting or actuarial sciences.[12]

The Investment Committee, which is mandatory for endowment funds whose assets exceed R$ 5,000,000.00, is competent to recommend to the Board of Directors the investment policy and the rules for the reimbursement and use of resources; to coordinate and supervise the performance of those responsible for the management of resources; and to prepare an annual

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[8] The assets of the founders, the supported institution, the managing organization and the fund are segregated. Therefore, the obligations assumed by each agent involved in this process – supported institution, managing organization and executing organization – correspond exclusively to him, without liability of the others for the breach of said obligations, as provided for in Article 4, paragraphs 2 and 3, of the aforementioned legal diploma.

[9] Article 12, caput, of the aforementioned legal title.

[10] Article 9 of the aforementioned Legal Diploma.- It is the responsibility of the Board of Directors to deliberate: I - the statutes, the internal rules related to the investment policy, the management rules and the rules for the redemption and use of resources, as well as for publicizing them; II - the financial statements and accountability of the organization administering the endowment fund, as well as their approval and publicity; III - the composition of the Investment Committee or the contracting referred to in paragraph 1 of Article 10 of this Law; IV - the composition of the Fiscal Council; and V - the execution of the association titles, their modifications and the hypotheses of their suspension.

[11] Article 8, caput, of the aforementioned legal diploma.

[12] Art. 11, incs. I and II, and paragraph 1, of the aforementioned legal diploma.

report on the rules of financial investments; redemption and use of resources, as well as management of endowment fund resources[13]. The members of this Committee are elected by the Board of Directors and must be in good standing and have knowledge and experience in the financial or capital markets, in addition to being registered with the National Securities Commission (CVM). The financial investment of the endowment fund may be made by a legal entity that administers resources registered with the CVM and authorized by the Board of Directors[14].

As Hirata, Grazzioli, and Donnini (2019, p. 20) point out, for an endowment fund, its purpose is more important than its structure. In other words, the objective of promoting causes of public interest based on a long-term sustainable governance structure is more important to endowment funds than a fixed structure assumed by internal bodies. However, as can be seen, the legislation under analysis focuses on the rigidity of the structure of the internal bodies of the managing organisation and of the endowment funds, which may entail excessive burdens on those who constitute an endowment fund.

Also with regard to the actors involved in the management of the funds, the legislation in question provided that support foundations accredited under the terms of Law No. 8,958 of 20 December 1994 may be equated with organizations administering endowment funds. Authors such as Izabela Goulart Algranti (2019, p. 53) criticized the measure due to the risks associated with the contingencies of support foundations, which do not correspond to the same purposes as the management organization. It is alleged that there is a greater likelihood of asset confusion and accounting complexity – and consequent less transparency – in view of the other activities carried out by a supporting foundation.

Hirata, Grazzioli, and Donnini (2019, p. 90) criticize this possibility of equivalence in the face of the apparent conflict of interest that may arise between the managing organization – as a support foundation – and the supported institution. It is postulated that the faculty of equivalence as an executing organization would be more appropriate, considering the proximity of the support foundations to the supported institutions (particularly, public universities) and the greater flexibility to materialize the destinations foreseen in programs or projects (Hirata; Grazzioli; Donnini, 2019, p. 90; Algranti, 2019, p. 53-58).

In addition, there are legal provisions on mechanisms to hold accountable persons involved in the process of managing endowment funds. The assets of the founders, the

[13] Article 10, paragraphs I, II and III, and paragraph 4, of the aforementioned Legal Diploma.
[14] Article 10, paragraphs 1 and 3, of the aforementioned legal title.

supported institution, the managing organization and the fund are segregated. Therefore, the obligations assumed by each agent involved in this process – supported institution, managing organization and executing organization – correspond solely to them, without liability of the others for non-compliance with these obligations[15]. However, it is unclear whether there are sanctions attributable to these bodies from the legislation in question.

In addition, it provides that the liability of the management organization for its obligations only occurs up to the limit of the assets and rights that are part of the endowment fund[16] and that the managers of the management organization shall be civilly liable only for losses caused by them when there is the practice of management acts with intent or by serious error. or acts that violate the law or statute[17]. It is therefore possible to identify the absence of more robust accountability mechanisms – which are limited to the managing organisation – and the penalties for non-compliance with the provisions of the legislation.

With regard to the management of resources, special attention should be paid to the way in which revenues are used, as there is a prohibition on allocating resources from endowment funds to pay for the current expenditures of supported public institutions[18]. It is relevant to note that there is no possibility of financial return for donors in all types of donations[19].

The regulation does not limit the types of investment that can be made, which will ultimately depend on the internal rules of the endowment fund itself, within the institutional order established by law in terms of the powers of deliberation and inspection of investment policy.

This investment policy must aim to achieve the highest profitability considering the long-term sustainability of the supported entity, in balance with The Rate Of Expenses And Possible Amortization Established From The Amortization Policy (HIRATA; GRAZZIOLI; DONNINI, 2019, p. 32; Fabiani; Da Cruz, 2017, p. 190-191).

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[15] Article 4, paragraphs 2 and 3, of the aforementioned legal title.
[16] Article 17, paragraph 2, of the aforementioned legal title.
[17] Article 12, paragraph 4, incs. I and II, of the aforementioned legal diploma.
[18] Article 22 of the aforementioned legal title, except for what is intended for the hypotheses of items I, II, III and IV of this provision: works, including for the adaptation and conservation of real estate, equipment, materials, services, studies necessary for the promotion, development, innovation and sustainability of the supported public institution; scholarships and awards for excelling in the areas of research, innovation, development, technology and other areas of interest of the supported public institution; the training and qualification necessary for the improvement of the intellectual capital of the supported institution; and financial aid for the execution and maintenance of projects derived from donations or from the Fund's assets, research, development and innovation programmes and networks, directly or in association, or for scientific and technological dissemination actions for the holding of scientific events, for the participation of students and researchers in congresses and scientific events and for the publication of scientific journals.
[19] Article 14(4) of the above-mentioned legal title.

As for the culture of donation, following the line of reasoning, three modalities are foreseen: permanent donation without restriction, permanent donation restricted for a specific purpose and donation for a specific purpose. It should be noted that these donations, in any of their forms, cannot come from public law institutions, because there is an express prohibition in this regard in the specific legislation[20].

A permanent unrestricted donation is one included in the permanent assets of the fund, which cannot be redeemed, with the possibility of using its income in programmes and projects related to the purpose pursued by the endowment fund. Another type of gift is the restricted special-purpose permanent gift, which is also in addition to the permanent assets of the endowment fund and cannot be redeemed, but whose income is restricted to projects related to the purpose defined in the grant instrument itself.

In addition to these types, the donation of a specific purpose is foreseen, which is intended for a project defined in the donation instrument and cannot be used immediately. This donation is in addition to the permanent assets of the fund and the amount equivalent to the principal donated can be redeemed by the administering organization from the provisions of the donation instrument[21].

In the context of the presidential sanction, the creation of tax incentives was vetoed, which, even in the text approved by the National Congress, were limited to support for public institutions (Hirata; Grazzioli; Donnini, 2019, p. 114). Many authors argue that the impact of the Transfer *and Donation Tax Causa Mortis* – ITCMD on donation ends up being a disincentive for this practice, since those who donate, even to an endowment fund, would have to assume the tax cost, in addition to the amount destined for the social purpose (Martins, 2013, p. 2; Paulsen; Melo, 2006, p. 200).

Thus, in the regulation of endowment funds, there is a lack of greater incentives for the donor and the third sector, as well as more robust accountability mechanisms and specific sanctions for non-compliance with the provisions of the legislation. These elements, combined with the focus on the rigidity of the structure of the agencies, tend to discourage regularization or the creation of new funds along the lines of the Law, without contributing decisively to the development of the institute and to the culture of donation in Brazil.

Regarding the obligation to adhere to the legislation in question, there is ambiguity in the legal text as to whether it is mandatory for all endowment funds or only in relation to funds

[20] Article 17, caput, of the aforementioned legal diploma.
[21] Article 14, §§ 1, 2 and 3 of the above-mentioned legal title.

linked to public institutions and entities that want to constitute funds under the terms of Law No. 13,800/2019 (Hirata; Grazzioli; Donnini, 2019, p. 122-123).

With respect to the application of the law in the legal and economic reality of the country, it is possible to observe that the approval of a specific legal regime accelerated the process of creating endowment funds in Brazil, especially by helping to disseminate the topic. Despite this, the increase in funds has not corresponded to the adoption and adaptation to the model proposed by Law No. 13,800.

In this regard, Paula Jancso Fabiani and Andréa Wolffenbüttel (2022, p. 72-74) conducted a survey in which 52 (fifty-two) endowment funds were identified in Brazil. The creation of 12 (twelve) funds was observed after the publication of the legal diploma analyzed, representing 23% of the total active funds identified, although with a great concentration in the state of São Paulo and in support of higher education. At the same time, 41 (forty-one) funds do not conform to the legal regime, illustrating how the obstacles identified in the proposed structure model and the absence of tax incentives can interfere with compliance with the legislation under study.

The position adopted by the Federal Revenue in Consultation Solution No. 178 - Cosit, of September 29, 2021, is another aspect that measures the existing difficulty in relation to the practical application of the regime of Law No. 13,800. At the time, the Federal Revenue accredited that the organization that administers the endowment fund – having its own legal personality – is not entitled to the immunity or tax exemption of the supported institution, even if its exclusive purpose is to finance it (Brasil, 2021, p. 7).

3 Synergistic regulation: from the formation of collaborative legal-institutional environments of multiple actors to triple helix modulation

The word regulation has ambiguity and semantic breadth, having the power to be applied in various fields of knowledge. With respect to public-private interactions and law in the socioeconomic context, regulation is a technology (Aranha, 2019, p. 33). In other words, it constitutes a *socio-technological system* that reconciles devices and people, without which some tasks could not be performed. In this way, the intercession between economics, science, administration, politics, and law is perceived (Lopes, 2018, p. 161). In this sense, Othon Lopes (2018, p. 161) writes that:

> Regulation is therefore a technology of state intervention in the economy [...], in which economic decisions are predominantly made in the sphere of the market, and the action of authority in the economy lacks not only justification, but also a special technical configuration.

However, the accelerated process of *creative destruction*[22] causes a new socio-economic reality, generating a constant environment of uncertainties, changes and complexities, which requires synergies and changes in traditional standards of regulation. In this context, Professor Elena Parioti (2017, p. 14 et seq.) states that a synergistic game between *light* and *strong* regulations will be necessary, in the search for compliance and efficiency. This new scenario goes beyond the direct relations between regulator and regulated, and requires interested third parties to contribute to a more dynamic and efficient regulation. In other words, regulation, because it involves public-private interactions, needs *republican features*, since the constant dialogue between the State, the market and society will contribute to better results.

Exposing this need for dialogue is the objective of the theory of Regulatory Republican Tripartism (Ayres; Braithwaite, 1992, p. 54-100), which states that the regulatory process has much to gain when Public Interest Groups (GIPs) participate in regulation, always with the focus of fulfilling constitutional objectives. These GIPs are configured as universities and their research groups, consumer protection associations, class entities, etc.

The aim is to avoid regulatory capture[23] and to escape the dichotomy between regulator and regulated, as well as to favour desirable, efficient or *efficient* capture, in which the regulator is led to consider the public-private interests necessary for efficient regulation due to its proximity to other actors in society and the market (Ayres; Braithwaite, 1992, p. 67-90). This new regulatory dynamic has the power to foster collaborative legal-institutional environments in which the State, the market and society act together in the roles of regulators, regulated and IPMs to achieve the same end. In these environments, efficiency comes from the cooperation of the various actors, since the performance of an agent affects the dynamics of the whole. In other words, the dysfunctionality of an agent can compromise regulatory quality, since they are all necessary correlatives of regulation.

This logic is close to that of the ecosystem, initially treated in biology by the English ecologist Arthur G. Tansley in mid-1935 (Odum; Barret, 2007, p. 18), which means, in a simple

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[22] An innovative process in which the old is destroyed by the new. In the words of Schumpeter (1983, p. 102) "as a general rule, the new is not born from the old, but appears alongside it and eliminates it in competition".

[23] Regulatory capture in the ordinary sense refers to the possibility that the regulatory entity is captured by an interest group or a regulated party or group of them in particular, giving rise to deficient and dysfunctional regulation, aimed at satisfying the commercial and/or political interests of those who capture it, when it should reconcile public and private interests (Gonçalves, 2014).

way, a basic functional unit composed of several actors that depend on each other. Although this term was borrowed in the 1990s for fields such as entrepreneurship, especially by Moore (1993), it was only in 2010, with the studies of Isenberg (2010), that the concept of ecosystem began to take due form and relevance in regulation (Santos, 2017).

In this field, it is understood, in fact, that an ecosystem is formed by the interdependent interaction of several actors, in which the dysfunction of one compromises the whole because they are necessary correlatives in the synergistic game (Scaff; Pereira, 2021, p. 663-664), in this case, a *synergistic regulatory game* in a complex, uncertain and constantly changing society and market.

However, the formation of collaborative environments requires regulatory modulation in order to materialize. It is important to note that, by regulatory modulation, we mean the act of modulating, according to a certain modality, the regulation. It requires an understanding of the functioning of the regulatory mechanism or mechanism, leading to a choice about the nature of the controlled system (Aranha, 2019, p. 70).

A given modulation will be directly related to the planned regulatory strategy. The latter, being linked to the functionality of the integration of regulatory instruments and techniques, seeks to influence social behavior, since the instruments and techniques do not have systemic direction and the strategy presents a modeling effort and can use several theories (Aranha, 2019, p. 68).

Thus, the definition of a regulatory strategy requires the choice of a model, which, in turn, requires the choice of ways of regulating and, consequently, the school of regulatory instruments and/or techniques to comply with the defined scope. Therefore, a regulatory strategy for the creation of collaborative environments will require favorable modulation.

The modulation of the triple helix, which emerged in the process of innovation, can be extended to other fields in order to foster a collaborative culture. With the emergence of the systemic conception of the innovative process[24], began, based on the studies of H. Etzkowitz (2000) in the triple helix, to modulate that the innovation process would be developed in the interaction between the State, companies and universities on the basis of consensus.

[24] An approach that understands innovation as a social process of numerous factors of an institutional, legal, economic and organizational nature. Thus, the innovation process is continuous and relational, although sometimes indirect, and involves teaching and research institutions, companies, the State, coordination of public policies, public subsidies, research on market demands and needs, institutional legal arrangements, regulatory design, etc. (Viotti, 2003).

In this model, there is no predominance of a single agent, but all coexist in an ecosystem environment as necessary correlates, since, in order to obtain socioeconomic and technological development and meet the needs of the market and society, it will be necessary for the actors involved to act together (Etzkowitz; Leydesdorff, 2000, p. 91). It is perceived that socioeconomic sectors that require public-private interaction will be more likely to use triple helix modulation to achieve their objectives. It should be noted that adopting such modulation does not mean abandoning or closing the hypotheses of other models and/or ways of regulating, but it does give rise to a predisposition to collaboration, since in more sensitive issues the State can define rules based on command and control.

Thus, it moves away from a traditional regulation focused on the figure of the State, with the destabilization of dogmatic truths about the regulatory process, which the doctrine calls *decentralized or decentralized regulation* (Black, 2002, p. 14 et seq.), which, despite attributing more complexity to the regulatory process, makes it more productive and efficient.

The conjuncture presented here predisposes to the formation of a regulatory pyramid with various regulatory forms. The idea of a regulatory pyramid[25] is one of the central ideas of the theory of responsive regulation[26]. It consists of a pyramidal scale with a forecast of increasing measures of state intervention, depending on the behaviour of the regulated, the subjects and the regulated sectors.

In this regulatory pyramid, there are several regulatory forms: self-regulation, forced self-regulation or regulated self-regulation, co-regulation, network regulation, assisted regulation, and command-and-control regulation. Self-regulation is based on the possibility and freedom of agents to self-regulate in some matters, establishing rules for themselves or making the best decisions according to their reality, in true voluntary consensus of the community involved (Lopes, 2018, p. 192).

Forced self-regulation or self-regulation with government regulatory restriction (Aranha, 2019, p. 135) is the act of the regulatory entity that establishes or, in many cases, requires the

[25] In general terms, there are 11 pyramids, however, dozens more may emerge according to the reality that is intended to be regulated and the strategy used by the regulator. (ARANHA, 2019, p. 126-134)

[26] The theory of responsive regulation is a procedural theory of regulation, a response to the total regulation or deregulation of economic activities, whose proposal is that – due to the complexity of society and the market – it would no longer make sense to regulate only from mechanisms of control, command and punishment. Alternatively, we must think of methods to achieve the conformity of what is regulated and in this sense lead them to help regulation through dialogue, in addition to treating the most diverse types of regulated parties in a different and gradual way, from the most virtuous to the least collaborative. Responsive regulation means regulation that responds to changes in sectors and markets, and to the behaviour of those regulated, thus moving away from rigid and traditional models of regulation that do not allow for a dynamic regulatory game (Ayres; Braithwaite, 1992).

regulated to define rules that must be followed by everyone in the sector in question. This set of rules is then evaluated by the regulatory entity and converted into an industry-wide standard (Grabosky; Braithwaite, 1986, p. 14-17). In Brazil, professional councils are institutionalized models of self-regulation.

Co-regulation is characterized by the joint regulation between the regulator and the regulated party of a given matter. Therefore, this dynamic can be broader if regulatory action is based on interaction with interested third parties who can help.

Network regulation, or nodal governance strategy, is a decentralized regulation architecture or *decentralized regulatory architectures* (Black, 2002, p. 27). It translates into the coupling of structures of related systems in a reflexive way. In other words, private partners are used to overcome the regulatory capacity gap, especially in developing countries (Braithwaite, 2006, p. 885), by creating *governance nodes*. In this way, non-state actors are added to the governance network, which can be both regulated third parties and stakeholders who can contribute to more efficient regulation.

Assisted regulation, as its name indicates, is the form of regulation centred on the State, but with the assistance of third parties, such as regulated subjects, universities, research institutes or consumer protection associations, which act, for example, in the issuance of opinions and in discussion forums.

Finally, regulation by mandate is the traditional form of regulation, centred on the figure of the State, in which the regulatory entity defines the rules by establishing mandates and market controls and, if necessary, applies punishment to those who deviate.

There are multiple ways of regulating, some more collaborative than others, and it is in the synergistic regulatory game that we must think about the harmonious combination of multiple paths for the formation of a *synergistic regulation* that can provide efficient responses to a complex society and a market in constant transformation.

4 Synergistic regulation of endowment funds: the contributions of triple helix modulation

Based on the omissions and failures found in the context of Law No. 13,800/2019, triple helix modulation can be applied to the regulation of endowment funds, considering the State,

endowment funds[27] and supported institutions as the three main groups of actors involved in a synergistic regulation. in which they act jointly and collaboratively based on dialogue and consensus, each one contributing their main qualities to this dynamic. In the structure designed, it is the responsibility of the State to maintain the collaborative environment, to the extent that this is only possible through the action of the State and its regulatory entities open to dialogue and consensus with the other actors that are necessary correlatives, in particular, the endowment funds and the benefited institutions. For example, a state action aimed at maintaining a collaborative environment tends to avoid command-and-control policies (*top-down*).

The State can also act through public policies that aim to strengthen the institution of endowment funds, which can be expressed in a broad sense, such as in fiscal policy and incentive policies, or in a narrow sense, as in government programs specifically aimed at these funds.

In addition, in a triple-helix modulation, it is important for the State to provide intrinsic and extrinsic incentives to endowment funds. Intrinsic incentives are understood to be those present in the regulatory design itself or in the legal regime of the institute, such as simplicity in the institute's regime and the clear definition of concepts and rules that will contribute to its development. Extrinsic incentives are those that come from abroad and serve as an additional contribution to the institute, with fiscal incentives – fiscal, financial or credit – being the best example (Pereira, 2021, p. 23, 109 and 190).

In the case of the regulation of endowment funds based on Law No. 13,800/2019, there is a lack of greater incentives for the donor and the third sector. First, with regard to intrinsic incentives, the focus on the rigidity of the structure of the fund's internal bodies and management organisation tends to impose excessive burdens on those who constitute an endowment fund.

Nor are there robust mechanisms for accountability and sanctions for non-compliance with the provisions of the legislation, which should be present in any regulatory decree, which, however, has not yet been drafted, generating legal uncertainty. With regard to extrinsic incentives, the presidential veto in relation to the tax incentives originally provided for by law is noteworthy.

[27] As endowment funds do not have their own legal personality, in this respect the management organizations are considered to be responsible for the management and collection of funds by the fund, in a symbiotic relationship. Thus, when it is established that endowment funds can constitute one of the actors involved in a triple-helix regulation, the acts of the organizations that administer these funds are included.

In turn, endowment funds – and management organizations – can act through opportunities and capital. In other words, it plays a decisive role in the regulation of the triple helix with internal rules and policies regarding the reception of donations – and in what modalities – and the allocation of resources in investments.

In particular, there is an expression of this performance of endowment funds in the perception of new changes in the market, through, for example, new forms of investment, new payment market instruments to receive grants, identification of changes in value transfer policies to beneficiary institutions. Managers are required to be proactive in identifying such changes and in their dialogue with the supported institutions and, if necessary, with the State.

The example of the growth of major *endowments* in the United States of America through investments in the financial market illustrates how this perception of changes in the market by endowment funds works. In this case, these *endowments* stopped focusing on fixed income and equities and began to make investments in alternative financial assets, with innovation and diversity in the categorization of these investments and giving great importance to the asset categories in which the strongest managers are found (Lerner; School; Wang, 2008, pp. 11-12; Mulvey; Holen, 2016, p. 48-49).

The performance of endowment funds in a triple-helix modulation can also be expressed by the requirement of transparency and financial sustainability, associated, among other things, with perceptions of changes and opportunities in the market. Similarly, major universities in the United States of America publish reports on the financial activities of their *endowments*, even if they are not required to make them public, seeking to strengthen donor confidence, even if they do not disclose strategic investment issues (Mulvey; Holen, 2016, p. 49).

In the visualized application of the proposed regulatory modulation, the entities supported by the development of endowment funds are relevant mainly because they establish the demands, needs, and projects that require the support of the funds. It is the presentation by groups, individuals or institutions of civil society of demands, needs and projects – depending on the sector in which they are located, for example, culture, education and health – that will lead to the constitution and creation of endowment funds or the contribution of existing endowment funds to meet them.

In the proposed regulatory framework, it is possible to observe a symbiotic and direct relationship between the demands of the supported entities and the support of the funds, which, in order to be developed, will need not only to identify opportunities and changes in the market, but also for the State to act in favor of maintaining a collaborative legal-institutional environment without major intrinsic and extrinsic disincentives.

The figure below shows an outline of how this triple-helix structure would be applied to the regulation of endowment funds:

Prepared by: authors

This collaborative environment should be a space conducive to dialogue and consensus, in which these three groups of actors involved discuss the obstacles and problems of the current regulation of endowment funds and seek instruments that strengthen this institute.

Based on the dynamics of collaboration in triple helix modulation, a possible regulatory pyramid of the State in relation to endowment funds is proposed. It turns out that the different forms of regulation presented may or may not apply depending on the subject matter regulated, such as structure or control, and the sector supported by the endowment fund. Therefore, they are not fixed and uniformly applicable in any context.

In this sense, the self-regulation of funds is applicable with regard to interactions with supported entities, especially those under private law. There is also the possibility of forced self-regulation in matters relevant to legal certainty purposes, which may include, for example, possible transparency criteria and items that should be part of the reports of endowment funds. These issues can also be discussed through co-regulation between the State, endowment funds and supported entities.

In turn, network regulation can be used in terms of control, insofar as endowment funds and supported entities can contribute to supervising the legal-institutional environment of these funds, avoiding dysfunctional practices. Assisted regulation can be applied to sensitive issues, such as the means of payment of donations, which require the command of the State and the participation of various actors.

The regulation of command and control is already presented in Law No. 13,800/2019, especially with regard to the rules for the structure of internal bodies. In a collaborative environment, this should be the last way, since, as all actors are necessary correlatives, top-

down regulation that does not observe the dynamics of the regulated institute should be avoided. In the case above, such structure rules could have been set out in a more summarized manner in the legislation, with details defined by the responsible ministries and regulatory entities, in a public-private dialogue.

Thus, through the application of the regulatory modulation of the triple helix to endowment funds, the following regulatory pyramid can be observed, in which the base represents forms of regulation that contribute to a more collaborative environment and the upper part, forms of regulation that favor a less collaborative environment:

Prepared by: authors

According to the form chosen in the specific case, depending on the subject matter regulated and the sector supported by the fund, collaboration between the actors involved in the regulation is reduced or intensified, from self-regulation to regulation by command and control, the latter, as an exceptional measure, since it is not consistent with a collaborative environment. This structure, insofar as it requires different forms for different matters, requires the State – as the central regulatory entity – to act with the capacity to respond, insofar as it needs to respond intelligently to the different scenarios concretely presented.

5 Conclusion

Triple-helix regulatory modulation, as it is based on consensual and well-established dialogue instruments between public and private entities, implies a modulation in line with the aim of contributing to the formation of a collaborative legal-institutional environment in the regulation of endowment funds, an institution of private law that seeks to enshrine public interests.

This regulation must occur in the interaction between the three actors presented: the State, the endowment funds and the supported entities. However, such interaction is something that must be constructed, and not previously defined, according to the relationship between these actors, since each one offers its main qualities to the dynamics of regulation.

By forming a collaborative legal-institutional environment based on a triple helix regulatory modulation, it is possible to use regulatory pyramids, with multiple forms of regulation, ranging from self-regulation to regulation by command and control, depending on the interaction concretely established between the actors involved, the regulated matter and the sector supported by the endowment fund.

The formation of this collaborative environment based on triple helix modulation is only possible with the collaborative action of the regulatory State, that is, one that is willing to listen to the other actors and provide intrinsic and extrinsic incentives for the development of the institute. Therefore, in the regulatory structure constructed in this paper, the State is responsible for maintaining the collaborative legal-institutional environment.

Many of the omissions and shortcomings involved in the regulation of Law No. 13,800/2019 could be corrected through a subsequent regulatory decree, issued in a timely manner, such as the accountability of the actors. However, since the passage of this law, there has been no decree – not even resolutions and ordinances – that specified the issues raised around the current regulation of endowment funds.

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