

The return to administrative law (further reflections on public and private)

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1. Introduction

Towards the end of the last century, especially in the 1980s, a term in doctrine which perfectly expressed a phenomenon which it is true to say had given rise to certain confusion and more than slight concern among those who are devoted to studying our discipline was being bandied about: flight from Administrative Law. An expression, it seems to me, the aim of which was, and still is today, to draw attention to the loss of influence of Administrative Law as the central legislation on the basis of which all action taken by the public administrations should be governed legally, whatever its regulatory nature. Basically, the position of Administrative Law as the Sole Law around which the legal regime of the public Administration must revolve is being sorely missed, forgetting, with greater or lesser intensity, the fact that a basic nucleus of constitutional principles which regulate administrative activities and public funds linked to the general interest, which with their mantle transcend the nature of the Law in question in each case.

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The lines that follow, written at different times, do, however, have a connecting theme: the characterisation of Administrative Law from the constitutional perspective, bringing with it a necessary rethinking of dogmas and criteria, which have provided great services to the cause and which, therefore, should be substituted in a collected and moderate way by the principles which prevail in the new social and democratic State of Law, different, certainly, in its shape and presentation to that of the birth of the State-Providence and the first notions on the conformation and direction of social tasks as the essential function of State competence. Today, in my opinion, guaranteeing the general interest is the State's main task and, thus, Administrative Law must bear this reality in mind and adapt itself, insitutionally, to the new times, as not to do so would mean losing the opportunity to fulfil the function which justifies it, that is, the improved planning and management of public activity in accordance with justice.

Traditionally, when we have had to deal with the arduous problem of choosing a central perspective on which to build Administrative Law as a whole, we have resorted to the subjective, objective or mixed approach. Today it seems to me that to maintain a single direction is perhaps a desire which makes it more difficult to understand a sector of Public Law which transcends its natural frontiers and acts on other realities, for years out of the reach of Administrative Law, precisely on account of the narrow-mindedness which comes with unique, closed or static thinking.

It would also seem indisputable that the Administrative Law of the 21st Century differs from that of the last Century in that the political and social substratum which serves as its base is distinctly different, as is the present State model too. "Constitutional Law goes away, Civil Law will stay" is a hackneyed and repeated phrase coined, it seems, by Otto MAYER which helps us understand that the typical institutions of the administrative function are, in one way or another, permanent, the intensity of the presence of public powers obviously being able to vary in accordance with the political State model of the moment. Of course, when I refer to the State I am also referring "mutatis mutandis" to the different territorial bodies which have the autonomy to manage their own interests.

As we will see, the understanding we have of the concept of general interest on the basis of the 1978 Constitution is going to be cardinal in order to characterise so-called Constitutional Administrative Law which, in two words, appears to be linked to objectively serving the general interest and to the promotion of man's fundamental rights. Perhaps the illuminist perspective of public interest, with a

strong revolutionary flavour and which, when all is said and done, came to establish the hegemony of the then emerging social class which ruled bureaucracy with an iron fist, is not compatible today with a substantially democratic system in which the public Administration, and those who comprise it, far from prompting greater or lesser battles to consolidate its “status quo”, should be fully and exclusively at the citizens’ disposal, as there really is no other constitutional justification for the existence of the entire public Administration. Along these lines, Constitutional Administrative Law establishes the need to reread and rethink dogmas and principles considered up until recently to be the distinguishing marks of a branch of Law which was shaped essentially on the basis of the exorbitant regime of the Administration’s legal position as the necessary correlate of its role as administrator, of nothing less than the public interest. Let me emphasise that it is not a question of discarding essential elements of Administrative Law, but of rethinking them in the light of the Constitution. This is the case, for example, insofar as the executorial nature of the act is concerned, which can no longer be understood to be an absolute category but within the framework of the principle of effective judicial protection, as a consequence of the postulates of compatible and complementary thinking which facilitates this task.

What is changing, I once again emphasise, is the role of public interest which, from the postulates of open, plural, dynamic and complementary thinking, calls for a continuation of the work begun among us some years ago to adapt our institutions to the constitutional reality. A task which ought to be undertaken with no prejudices and no nostalgic attempts to radically preserve concepts and categories which do not correspond to constitutional parameters. In no way is it a question of substituting “in toto” one body of institutions, concepts and categories for another; no, it is a question of being aware of the social and constitutional reality in order to detect the new tendencies which must illuminate the new concepts, categories and institutions with which Administrative Law, from this point of view, presents itself to us, in a new version now, more in keeping with the central elements of the social and democratic dynamic, also called second-generation, State of Law. This does not mean, as we will comment on in due course, that we are witnessing the end of Administrative Law’s classical institutions. Rather, we can affirm, not without radicality, that the new Administrative Law is demonstrating that the task entrusted to it, that of guaranteeing and ensuring citizens’ rights, requires public presence of a sort, more intensive than extensive, perhaps, which confirms that happy definition of Administrative Law as the Law of the Public Authorities to ensure freedom.

All in all, together with the methodology which brings us closer to the social sciences on the basis of the postulates of open, plural, dynamic and complementary thinking, it is necessary to work within the constitutional framework in order to extract all the force, which is considerable, that the basic Legislation holds, with a view to shaping a more democratic Administrative Law in which the objective service to the general interest helps redefine all the privileges and prerogatives which are not in keeping with the existence of a true public Administration ever more aware of its institutional position in the democratic system.

2. The general interest and administrative law

For some years now, we have been observing considerable changes insofar as an understanding of the general interest in the democratic system is concerned. Probably because the capacity of the then emerging bourgeoisie –end of the 18th Century- to capture this concept, finding in bureaucracy a place in the sun in which to exercise their power, logically gave rise to approaches which were new, more open, more plural and more in keeping with the sense of a public Administration which, as article 103 of our Constitution points out, “objectively serves general interests”. That is, if in a democracy the public agents are responsible for the functions of the group and said group is called to participate in determining, monitoring and assessing public affairs, the necessary sphere of autonomy the Administration itself should enjoy must be imbued with the logical permanent service to public interests. And these interests, in turn, and as the Constitutional Court established in 1984, must open up to the different social interlocutors in an on-going dialogue which, far from destroying the unilateral manifestations of administrative activity, poses the challenge of building the institutions, categories and concepts of our discipline on the basis of new approaches significantly distanced from the authoritarianism and control of the administrative machine on the part of those in charge at any given moment in time. It is not an easy task because history has shown us that the tension that political power brings to administrative workings at times undermines the necessary neutrality and impartiality of the Administration in general and the civil servants in particular.

Unique Administrative Law institutions such as the authorities which the Administration has at its disposal in order to effectively fulfil its constitutional duty to objectively serve the general interest (the power to enforce, the power to impose sanctions...) require new *modi operandi*, as evidently they were born in different

historical contexts and in the frame of also very different political systems. And, as would seem obvious, the Administration's power of self-protection cannot work in the same way as it did in the 19th Century for the simple reason that the present democratic system would seem to want citizens, those administered, to play a central role. Therefore, the promotion and defence of their fundamental rights is not something the Administration simply has to tolerate but make possible and facilitate.

As opposed to the closed perspective of a general interest which is a matter of knowledge, and almost the dominion of the bureaucracy, we arrive, by applying open, plural, dynamic and complementary thinking, at another different means of approaching what is common, public, general, where we start from the assumption that as public institutions belong to the people, public affairs must be managed taking into account at each moment in time the vitality of the reality which transpires from citizens' contributions. Thus, we are living in an age of participation, perhaps more as a postulate than as a reality, judging by the consequences brought by a static Welfare State which wore itself out and left so many millions of people disconcerted when the fabulous scheme of total intervention in the lives of the general public reached crisis point.

Some years ago, more than I would wish, when I was faced with the problem of defining Administrative Law in the heat of the different and varied theories which time has afforded, far from entering into the debate on which of the two majority positions was the genuine one, it occurred to me that perhaps the key element with regard to the definition could be found within the framework of what should be understood at any given moment by the general interest. More than in the presence of a public Administration, for me the true determining factor of Administrative Law is the existence of a general interest to be regulated within the framework of the State model in force. Now, in the so-called dynamic social State, as I like to characterise the social State of the present day, the idea of general interest based on the postulates of open, plural, dynamic and compatible thinking is precisely the core from which to understand the profound changes which are at work in modern Administrative Law, such as the birth of the concept of serving the general interest or the reconsideration of administrative self-protection and self-enforcement.

Up until not so long ago, administrative sociology related with a great wealth of detail the different means of administrative appropriation which the centenarian attempt by bureaucracy to control the reins of power so often characterised.

Fortunately, the complaints and laments the novels of Pio Baroja betray with regard to the action of administration employees who enjoyed abusing their position to ill-treat and humiliate members of the public is water under the bridge today. Fortunately, things have changed, a lot, and in general terms for the better. Even so, I insist, there are many aspects that still need working on if citizens are to be able to confidently and without hesitation affirm that the Administration has assumed its organisational role to serve and be at their disposal. And for this to occur, those of us who have dedicated years of our professional lives to the Administration know all too well that we need to continue to work to increase the sensitivity of the public machine in general and that of each public employee in particular insofar as the rights and freedoms of citizens are concerned. Today, in my view, the general interest has to do with embedding a context of balance between power and freedom in the very soul of the institutions, categories and concepts of Administrative Law which begins to abandon the idea that the explanation for the entire Administrative Law revolves solely around the Administration's legal being and its powers, privileges and prerogatives.

In this sense, the study by Professor Garcia de Enterría in 1981 on the meaning of public liberties in Administrative Law in which he affirmed that the general interest was to be found precisely in the promotion of fundamental rights has always seemed clear-sighted and pioneering to me. This doctrinal approach, which enjoys the backing of Constitutional Court case law, is meaning, especially in European Community Law, that true conceptual contradictions such as public service and fundamental rights are being saved on the basis of a new Administrative Law, I would go so far as to say even more relevant than before, based on which this new understanding of the general interest is helping to overcome these dialectic confrontations with methodological balance, open thinking and the ramifications of the democratic idea, ever-more intense, on administrative authority. What is happening is quite simple and the logical consequence of new times which require a different mentality; it is some time since Ihering declared that the main problem with administrative reforms lay in the inertia and resistance to change that exists in people's minds. That is, the classic characterisation of public service (exclusive and public ownership) has adapted to reality to the point where the force of freedom and reality have in the end built a new concept with other characteristics, without abandoning anything, and less so with the intention of taking up the standard of the triumph of private over public, because the conceptual debate does not come close to being considered in these terms, nor is it true that Administrative Law has lost its reason for existing. Rather, what is happening is that a new Administrative Law is

emerging with its origins in other coordinates and postulates, different from those which went before. Administrative Law, though, when all is said and done.

3. Article 103 of the Spanish constitution

The frame within which Spanish Administrative Law ought to be explained lies in the 1978 Constitution. “Constitutional law goes away, Civil law will stay” declared Otto Mayer with his usual perspicacity, as I alluded to above. And, as Judge Werner would point out, along these lines, Administrative Law is Constitutional Law concretised.

Once the logical initial problems that arose among us between Administrative and Constitutional Law after the Constitution was approved have been overcome, it must be recognised that the chief lines along which today’s Administrative Law should run are to be found in the overall criteria, parameters, vectors and principles established in our Constitution.

In the case which concerns us, I believe it necessary to mention, not analyse (given the nature of this paper), articles 9, 10, 24, 31 and 103, as the precepts in which we find a conjunction of constitutional elements which help us rebuild the categories, concepts and institutions originating from other times and other political systems in the light of the present constitutional framework. Anyone who takes a look at the Spanish bibliography on Administrative Law will find an endless list of studies and research papers on the adaptation of the main institutions which have vertebrated our discipline to the Constitution, which clearly demonstrates how the relevant literature bears this task very much in mind.

Of these precepts, it is article 103 which is of special importance and which, in my opinion, should be interpreted in relation with all of the articles of our “Carta Magna” that establish certain functions common to the public authorities in a social and democratic, and as I usually add, dynamic, state of Law. The first paragraph of this Article, as we know, establishes that: “The Public Administration serves the general interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, deconcentration and coordination, being fully subject to justice and the law”.

The public Administration (State, Autonomous or Local because the singular is deliberately used in order to refer to them all), serves the general interest with objectivity. It seems to me that it would be difficult to choose the characterisation of the administrative function in a social and democratic State of Law any better. Firstly, because the word “service” accurately indicates the sense and scope of the role of the Administration insofar as citizens are concerned. In the opposite direction, it can rightly be affirmed that the Administration in a democracy is in no way either the master of proceedings or of the public institutions. It is there to provide a better management of what belongs to all of us. Secondly, because the establishment of the constitutional system in a democracy is a relevant step with a view to the necessary process of objectivising power that the victory of the liberal State over the Ancien Régime implies. Therefore, the reference to objectivity is paramount. It has two dimensions depending on how we apply it to administrative organisation in general or to public employees and civil servants in particular. In any case, what I am interested in underlining at this point and under these circumstances is that the aim is to eliminate any reminiscence of arbitrariness, of abuse, that is, of the unlimited and absolute exercising of power, in the discharge of public authority. Thus, power must be a public function at the service of the community, to which there are clear limits. Obviously as ordinarily the holders of this power are ordinary men and women, the greatnesses and weaknesses of the human condition in terms of the moral stance of he/she who exercises it will yield different possibilities. This said, objectivity entails, as a fundamental habit, the motivation of administrative action, preventing the existence of obscure areas, areas of impunity, in which normally arbitrariness abounds, surprisingly “in crescendo” judging by the statistics on administrative action described as such by the Courts of Justice.

And, thirdly, the central reference to the general interest I believe offers a very clear clue as to what the key element necessary to characterise the public Administration today and, in the same sense, Administrative Law, must be. I understand that the task of serving general interests with objectivity is precisely the justification wielded to understand the changes that are occurring, as the constitutional function par excellence of the present public Administration does not seem compatible with the privileges and prerogatives of an authoritarian Administration which existed in a context of unilateralism and, -in the traditional Spanish term, “orden y mando”-, dictatorialness. Therefore, as I pointed out above, the open, plural, dynamic and compatible understanding of the general

interest is very much helping towards the building of new more balanced areas where this new Administrative Law can reside.

On the other hand, given article 103 of our Constitution, we cannot fail to consider that the Administration is subject to Justice and the Law. The arrival of the liberal State, as we know, implies the victory of the principle of legality and the burial of whim and no limits as fundamentals of pure market power. Power is not absolute, it is limited and whatever the version of the principle of legality we follow might be, what is true is that the Administration has to act within the framework of the Law. Further to this, with sound criteria the principle of the total subjection of administrative activity and, also, the reach of the entire legal system in the broad sense of the term over such activity is established. This, in my opinion, means that together with Laws judges too can look to other sources of Law which, like the general principles, have played an important role in their own right in the history of Administrative Law itself when analysing the adaptation of administrative activity to the Law or otherwise.

Moreover, we have to interpret the allusion to the Law in the sense that the legal system the Administration can be subject to be public or private. In fact, and in principle, it does not matter if the Administration acts in each case in accordance with the legal system which best allows it to meet its constitutional aims. In some cases this will be Administrative, Labour, Civil or Mercantile, Law. Having said this, there is a limit which must not be exceeded whatever the Law chosen is, which is none other than that of absolute respect for the basic nucleus of all things public and which is always inherent in the use of funds of such a nature for any activities of general interest. Therefore, although we find ourselves in the realm of private Law, the public institution or instrumental body involved must comply with the principles of merit and capacity for choosing and promoting its staff, as well as with the principles of publicity and fair competition when it comes to taking on such staff.

Thus, the intended flight of Administrative Law to Private Law has not happened as such and, in any case, the need to serve general interests with objectivity can also take place in other contexts as long as the Administration rationally justifies why in certain cases it resorts to private Law.

By way of finishing this point, article 103 must be the chief precept for the reformers of the public Administration. A question this which, in Spain, still requires fresh impetuses as, in spite of the fact that every government has tried to improve the working of the administrative machine, the reality, whether we like it or not, shows us that the view of the public with regard to the public Administration is a far cry from what is to be expected in a constitutional framework and given the years that have passed since 1978.

The idea of service, I feel, has a lot to do with the phenomenological crisis of this concept in a world in which ordinarily economic success, the visualisation of power and impulsive consumption is rewarded, all of which brings with it this type of capitalism totally lacking in solidarity and which aspires to treat people as if they were puppets. Today, serving the public often seems a bit naïve, something which yields nothing of use and which is, therefore, a misfortune you just have to put up with the best you can. The reverse of the problem is a cultural question which is not studied enough, as it requires long-term, unattractive work for the here and now in which a political class that normally rejects long-term projects lives. Promoting the value of public service as something positive, incardinated in the progress of a country as something well worthwhile, something which ennobles those who put it into practice... are reflections which should be transmitted through education in all its fields. If these ideas are not shared, not only in theory, no matter how many norms, structures and public employees we put into play, we will be wasting time throwing away public money. This is why the constitutional criteria which defines the institutional position of the public Administration is central to its permanent reform and modernisation.

The characterisation of this service as objective is another far-reaching constitutional feature which helps us to find a parameter we can rely on to assess the constitutional temperature of the reforms undertaken. Objectivity implies, to a certain extent, the execution of power in accordance with certain criteria aimed at ensuring that the general interest, not the interest of a person, group or faction, always prevails. Which, in spite of the years that have gone by since 1978, we cannot say is in an optimum situation at present, as every government has tried, some more than others, to open up the areas of discretion and reduce the areas of control, for the simple reason that it is so often wrongly thought that for government action to be more efficient it should be freed from controls, and the more controls it is freed from the better. Furthermore, there exists a general tendency in different countries that governments are gradually creating structures

and institutions parallel to those that belong to the Administration proper with the aim of ensuring control over the decisions they adopt. Basically, in these stances there lies a principle of distrust in a public Administration which, in countries which enjoy professional bodies of public servants, is totally lacking in logic and justification.

On the other hand, it must not be forgotten that administrative reforms must fall within a context in which public perception and, more importantly, reality, reveal the observation of the general interest as the essential undertaking of the public Administration, in general, and its public servants, in particular. Not general interest understood in the unilateral and narrow versions of times gone by, but based on the consideration that the main general interest in a dynamic democratic and social State lies in the effectiveness with which the fundamental rights are exercised on the part of the public, especially those most in need. Assurance and the guarantee that such rights are going to be accomplished within this framework more than helps gauge the sense and scope of the concept of general interest in the new Administrative Law.

4. The flight from administrative law

Almost certainly, since the doors of the public Administration have been opened to Private Law in order to indirectly provide certain public services, the so-called flight from Administrative Law hovers over the different explanations that we can find in the history of our field of knowledge.

For some, that Private Law, or “law of merchants” as it is sometimes branded in our literature, can even be mentioned within the scope of public Administration constitutes a serious betrayal of the origins and tradition of a Law which has been, is and ought to continue to be the distinctive, exclusive and specific Code of the public Administration as a legal entity. For others, the efficiency and effectiveness required of the public Administration and practically missing from an Administrative Law of an authoritarian nature which turns solely on privileges and prerogatives is not consistent with what society expects and demands from its public Administration.

As a contrast to both of these extreme positions a new perspective emerges, in my opinion with a sufficient base in article 103 of the Constitution, in accordance

with which the determining factor is not the nature of the legal Code applicable but the improved means of attending to the general interest and, therefore, guaranteeing citizens' rights. Article 103 refers to subjection to the Law. Logically, it does not mention to which Law, because you cannot ask a Constitution no less to take sides in a question such as this in which the winds of the presently so-widely practiced unique thinking do not augur well, simply because this way of looking at the social Sciences, with all due respect, has gone out of fashion. So, the public Administration can choose Private Law. Although, when the Administration resorts to Private Law it must explain why, because, evidently, the common Law continues to be Administrative Law.

It is well known that in the 1960s, 70s and 80s the discovery of the efficiency, effectiveness, of "management" found in the Administration a breeding ground for the growth of the study and practice of the then modern methods of management towards objectives and a similar number of ways, both legitimate and positive, of introducing into the public machine healthy competition and a reasonable reflection on the evaluation of the results. This, which objectively could have been a very relevant step with a view to carrying out the regulatory reforms that might be necessary culminated, however, to a certain extent the result of unique thinking, in a relative absolutisation of the aims to be achieved, dispensing, so often, with procedure. Logically, in this context, this gave rise to corruption, as unfortunately reality proved in so many countries in the years in which the idea that the market equalled efficiency and effectiveness and what was public was synonymous with inefficiency and ineffectiveness reigned.

As usually occurs, phenomena are never provoked by one single cause. Thus, perhaps it could be affirmed that, in effect, this could be part of the reason behind the radical seduction that the virtues of the market provoked in no too few public managers and administrators during this time: the exile of Administrative Law, a preference for Private Law, the constitution of a whole network of public bodies and public corporations created precisely to operate in the new world of efficiency and effectiveness. In short, during those years, a flight en masse from Administrative Law with, in turn, the corresponding stop at Private Law.

The phenomenon became apparent, then, in a preference for managing what was public through the flexibility and efficiency of Private Law, either by relaxing State intervention control systems or by creating all kinds of public corporations and

bodies subject to Private Law, or by assuming “in toto” the paradigms of private management for managing what was public.

Insofar as the relativisation of the internal control systems of administrative activity is concerned, the results do not leave too many doubts on this matter. It is true that intervention ought to be kept within its own scope, which is certainly not a legal or political scope, not even opportunist, as in the reports of some administrators you can still find traces of this outdated way of understanding what is public. In my personal case, after fourteen years of experience in public management, I must say that, in spite of everything, the administrators that I have known have always set out the reasons behind their reports and, if there has been any financial, accounting or budgetary error have always, and this is the most important thing insofar as I am concerned, sought the means of offering management alternatives. In any case, the dilemma which is so often presented to public managers within the framework of the tension between legality and efficiency is resolved not on the basis of unique thinking but on the basis of complementariness, which requires more than just a little talent.

The proliferation of instrumental bodies for managing public activities subject to Private Law should not only be understood as a notable increase in the influence of Private Law on public life, which is, rather, and above all, something profoundly paradoxical to the extent that through this channel an outstanding increase in the presence of public authorities in society has been created. That is, a greater level of intervention on the part of public authorities in social life with the intervention of Private Law. In this sense, it is easy to understand the affirmation of some social analysts when they point out that it has been precisely the welfare State, in its classical conception, which has had the most to do with the unfortunate invasion of public by private. Of course many economic activities in public hands ought to be passed to the private sector. Of course a reasonable process of regulatory simplification and reworking and, if thought necessary, a process to review existing regulations in many aspects is necessary. This, of course, without forgetting that what matters is that the services of general interest are better provided and that, in turn, citizens' rights are upheld.

The introduction of private management systems in the public sector, as long as this takes place coherently and with the essence and nature characteristic of public management, does not pose any major problems. In fact, I would go so far as to affirm that a basic nucleus of organisation and institution management exists

common to private and public dimensions. What, however, is not always borne in mind is that citizens are not a client in the private business sense, that competition and transparency has a singular characterisation in the public sector and, above all, that staff selection should take place within a context of merit and capacity.

Therefore, we have to register a process of flight from Administrative Law through different channels especially prominent in the 1980s and 90s. In the present day, it would seem that a new Administrative Law is coming back, to some extent a reaction to the mess left behind from this mad escape and also the consequence of a new means of tackling the problems posed in the social Sciences today.

5. New trends in social sciences

Some years ago Michael Crozier pointed out that, in his opinion, all the failed public Administration modernisation and reform processes had a common denominator: the scant concern for the central role of the citizen in the system. In fact, those of us who have had certain experience in steering administrative reform can verify the truth of this assertion and, also, the practical difficulties involved. The general public must be at the centre of administrative reform and must also be at the centre of an Administrative Law based on a balanced and reasonable understanding of the general interest in the terms already set out above.

Up until now, as we well know and have experienced in past years, the leading role was played by the Administration itself and its phenomenal privileges contemplated so often from a unilateral viewpoint and a particular manner of understanding the general interest. Thus, not infrequently did the interpretation in each case of what the general interest should be close in around the bureaucratic structure, dismissing any possibility of opening up to the vitality of what was real. With things as such, today modern trends for studying and analysing the social Sciences would seem to fall within the postulates of open, plural, dynamic and complementary thinking, which for the matter in hand is, also, of great relevance to the extent that it helps us to approach Administrative Law with no prejudices.

Open thinking is diametrically opposed to unique thinking, in essence closed, typical of the petrified versions of Administrative Law which are promoted on the

basis of the resistance to change which reality, stubborn reality, time and time again sees to it is placed before our eyes. It seems to me that open thinking has a lot to do with a methodological attitude of generosity to accept reality as it is, with no intention of interpreting it in the light of different theories which look for reality to adapt to them. That is why an excessive attachment to the theories which have traditionally explained the sense and scope of many institutions probably make it more difficult to understand changes and presentation today. Perhaps, also in Spanish Administrative Law, as in so many other expressions of legal Science, a certain freedom from prejudices or stereotypes characteristic of other times and moments gone by is necessary, times in which, I repeat, its direction lay on models of State and society very different to those of today.

Logically, open thinking is plural thinking in which the exercise of freedom on the part of the researcher, his analyses, took him down the road necessary, without the existence of dogmas mutilating his scientific undertaking, always within the framework of the techniques characteristic of Administrative Law. Pluralism is the result of exercising the freedom of research and an expression of the vitality and dynamism of reality. Dynamism which, today, is not only a true characterisation of the world in which we live, but which also, and logically, impregnates the atmosphere of the institutions, categories and concepts of the social Sciences, Administrative Law among them. Perhaps on occasions this dynamism is somewhat disproportionate and, on others, puts paid to reasonable approaches to the sense and scope of certain concepts. That is, dynamism does not justify in itself the change in direction and course of the functionality of numerous Administrative Law institutions, given that the changes and reforms that we contemplate almost on a daily basis are neither quality certificates nor cartes blanches of academic legitimacy. In fact, often they are no more than the expression of a radical manner of understanding changes which, far from postulating, where appropriate, certain aspects with room for improvement, favour radical transformations, meaningless today. In any case, it is appropriate, in my opinion, to transmit that unique thinking can provide good grounds for understanding the scope of Administrative Law over the world in which we live. Furthermore, we cannot forget that so-called static thinking must be called into question as, in some way, institutions operate on reality, not on abstraction, and the Administrative Law researcher must move in the real world, while at the same time not allowing that same reality to condition him in such a way as to make him lose the critical sense necessary to point out the faults which, so often, the BOE (Official State Gazette) expresses are a consequence of the haste with which the Administration produces its regulations.

In Spain we have a compound State model, colloquially called State of Autonomies or Autonomous Communities), in which effectively a plurality of Administrations with their own powers over the management of their respective interests exists. The bases of the legal regime of the public Administrations and those of the statutory regime of its civil servants are the competence of the State, and as article 149.1.18 of our Constitution establishes, this will guarantee citizens, those administered, that they will be commonly treated. In the same way, common administrative procedure is of State competence, not precluding the singularities deriving from the organisation of the Autonomous Communities, as well as the legislation on expropriation, the basic legislation on administrative contracts and concessions and system of responsibility of all the public Administrations. Therefore, when studying institutions, which has been on-going since 1978, it is necessary to bear very much in mind the constitutional context in such a way that the common treatment which should be offered to citizens, whose regulation, for obvious reasons, is in the hands of the State, is preserved, in the context of the organisational singularities of each Autonomous Community.

Another characteristic of the new trends observed in the social Sciences, in my view, relevant, is that of compatible or complementary thinking, which, it is true, is diametrically opposed to what we have called unique thinking. A system which, in the case in hand, demands the existence of classic Administrative Law as the sole legal Code applicable to every legal relationship in which the public Administration takes part as such or in an instrumental perspective. In order to contemplate the administrative reality in this way, the Administration, insofar as it watches over the general interest, requires a Law formulated to design the privileges and prerogatives which accompany the existence of the public Administration and allow it to manage general interests. From this point of view, the unilateral nature of privilege and prerogative extends out over the wide world of administrative action, giving rise to an array of particular legal relationships the most characteristic note of which has lain in exorbitance. That is, the most important and relevant part of Administrative Law under this conception is the Administration and its privileges. However, the arrival of the Constitution and the democratic system in Spain in 1978 opened up very large cracks in this whole structure, in such a way that, understanding general interests to include the public, we find that, indeed, the nerve that ought to run through all the concepts, categories and institutions of Administrative Law passes from prerogative to a guarantee of the rights of the public, private or administered individuals. It is not, of course, that the powers –not prerogatives or privileges- of the Administration are rescinded, rather that precisely these powers will be justified insofar as they guarantee or ensure the rights and freedoms of individuals.

Therefore, Administrative Law, as González Navarro has keenly pointed out, is the Law of the public authorities to assure freedom, accurately synthesising the sense of Administrative Law in the constitutional frame and bearing in mind the system of compatible or complementary thinking.

On the basis of this methodology of modern thinking, it is not hard to understand that between concepts, which in its day ideologised thinking, a variant of unique thinking, such as public and private, brought face to face, today rather than impassable divides we find bridges which help us understand such realities in a complementary tone. In fact, I would go so far as to say that even the modern concept of freedom brings inherently, in its very essence, the idea of solidarity.

In the postulates of the modern trends of the social Sciences we find new ways of finding the places of balance between power and freedom on which to build Constitutional Administrative Law's modern institutions. We have been working on such a task for some years now. It is neither easy nor simple, because the weight of the past and the necessary sense of the principle of institutional conservation and continuity requires open, plural, dynamic and complementary approaches in the framework of serving the general interest with objectivity, the main task that the Constitution entrusts to the Administration and which is so closely linked to Administrative Law.

6. The function of public powers to assure and guarantee fundamental rights

The general interest being, as it is, the key element to the understanding of the functionality of the public Administration in the social and democratic State of Law, it is interesting at this point to turn our attention to the projection the Constitution itself attributes to public powers.

If we read our “Carta Magna” carefully from beginning to end, we will find a series of tasks it entrusts to the public authorities and which are perfectly expressed in the preamble when it is pointed out that the Spanish nation proclaims its will to “protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions, and of their languages and institutions”. Article 9.2

establishes that the public authorities remove the obstacles which prevent the exercise of freedom and equality, promoting such constitutional values. With regard to fundamental rights, the Constitution, as the logical consequence of what is established in article 10 of the “Carta Magna”, also holds the public authorities responsible for assuring, recognising, guaranteeing and protecting such rights. In the same sense, insofar as the governing principles of social and economic policy is concerned, the Constitution uses practically the same expressions.

This information provided by the Constitution allows us to think that, indeed, the spinal column of Administrative Law, insofar as it is the legal Code regulating the regime of the public authorities, is the legal contemplation of the power to assure freedom.

This function of guaranteeing rights and freedoms accurately defines the constitutional sense of Administrative Law and implies a special way of understanding the exercise of powers in a social and democratic State of Law. Guaranteeing rights, far from encouraging reductionist versions of the general interest, has the virtuality of situating power and freedom on the same level, or, if you like, freedom and solidarity as two sides of the same coin. It is not, of course, that they are identical concepts. No. They are quite different, but at the same time complementary. In fact, in the social and democratic State of Law they are concepts which must be expressed through the essence and shape of each and every one of the institutions, concepts and categories of Administrative Law.

With regard to fundamental rights, article 27.3 establishes that “the public authorities guarantee the right of parents to ensure that their children receive religious and moral instruction that is in accordance with their own convictions”. A precept which expresses the dimension of the educational freedom applied to parents. Guaranteeing the exercise of a fundamental right, following article 9.2 of the “Carta Magna”, implies an active disposition on the part of the public authorities to provide freedom. That is, the Administration must establish the conditions necessary to ensure that the freedom of parents can be carried out with the greatest scope possible, which is in no small contrast to the activity of a certain techno-structure which still believes that the general interest belongs to it, entrusting the exercise of such a freedom to administrative organs. Promoting, protecting, facilitating, guaranteeing or assuring freedoms constitutes, therefore, the essence of the task of the public authorities in a social and democratic State of Law.

For this reason, the administrative behaviour of the public authorities must be governed by these criteria.

Even more intense is the task of guaranteeing and assuring the governing principles of social and economic policy. In this sense, paragraph 1 of article 39 of the Constitution establishes that the public authorities assure the social, economic and legal protection of the family. That is, the range of values and principles which govern economic and social policy, among which is the family, must be guaranteed by the public authorities, ordinarily by means of legislative, and, above all, administrative activity, as the law is there to do its job, and we cannot expect the legislator to contemplate every single assumption there has been and will be. Protection of the family, promotion of the conditions which favour social and economic progress and for a more equitable distribution of personal and regional income (article 40). The guarantee of a public Social Security system (article 41), protection of health (article 43), the right to a suitable environment (article 45), the right to adequate housing (article 47)... In all of these assumptions, we can discern the not inconsiderable task of the public authorities to assure, guarantee, protect and promote such principles, which, thinking of Administrative Law, makes our discipline essential from the perspective of the Law of the public authorities to assure freedom, un-thought of years ago.

In this chapter it is interesting to draw attention to the content of the third paragraph of article 53 of the Constitution, with regard to fundamental rights and liberties: "The substantive legislation, judicial practice and actions of the public authorities will be based on the acknowledgement, respect and protection of the principles recognised in Chapter 3." I think that it must not go unnoticed to an Administrative Law professor that such a precept comes under the rubric of the protection of fundamental rights, which allows us to underline that in the task of promoting, assuring and guaranteeing the governing principles of social and economic policy, fundamental rights have a special functionality. That is, the action of the public authorities in these matters must be oriented towards the exercise of all the fundamental rights by all Spaniards in the best possible conditions.

This reflection combines perfectly with the sense and scope of the general interest in the social and democratic State of Law, insofar as the general interest today, as I pointed out above, is closely linked to the fundamental rights of citizens.

As we know, fundamental rights “constitute the very essence of the constitutional regime” (Constitutional Court Decision of 21 February 1986) and are “essential elements of the objective Code of the national community, insofar as such community is shaped as the framework of a just and peaceful human co-existence” (Constitutional Court decision of 14 July 1981). Fundamental rights being the central nerve of the Constitution, the Constitutional Court has no doubts in recognising “the outstanding general interest that concurs in the protection of fundamental rights” (decision of 16 October 1984), implying, logically, that the clearly administrative action of the public authorities must be aimed precisely towards ensuring that fundamental rights shine in the reality, in the routine character, of administrative work. In this sense, a considerable part of Administrative Law that I call Constitutional Law must be open to extending all the legal power of fundamental rights to the entire system of Administrative Law: to each and every one of the concepts, institutions and categories of which it is comprised. Obviously, the task began the moment the Constitution was enacted, but there is still a fair way to go for the public authorities to truly function with this perspective in mind. Legal regulations are indeed very important if we are to fight for an Administrative Law which is on a par with the times, but regulations are not everything: in the ordinary exercise of powers, those entrusted with such powers will need to be imbued with this constitutional logic as, to the contrary, we will be living in a formal system in which habits and customs typical of unique and unilateral thinking applied to the general interest linger.

Fundamental rights, as we know, have played a prime role in shaping constitutionalism. Originally, they fulfilled their role as spaces exempt from the intervention of power, which has been relevant for building a new functionality on this formulation since its insertion in the social and democratic State of Law understood from a dynamic perspective. Thus, as well as barriers to the action of the public authorities, they also began to be understood as values or ends by means of which to manage the action of the public authorities, as Pérez Luño accurately pointed out among us. Perhaps, as I mentioned above, this is the consequence of the interpretation of article 53 of the Constitution in its dynamic application on administrative action.

Having said this, the Administration, when acting, must always bear in mind that constitutional sensitivity forms a part of its professional heritage. Therefore, it must become accustomed to assuming its role of power implicated in the

effectiveness of constitutional parameters, among which fundamental rights plays a prominent role.

The Constitutional Court has insisted from the beginning that fundamental rights are “the basic structural elements, both of the objective legal order as well as each of the areas of which it is comprised, on the grounds that they are the legal expression of a system of values which, on the decision of the constituent, must shape political and legal organisation as a whole” (decision of 11 April 1985). That is, they shape Public Law as a whole and, therefore, the construction of the new Administrative Law must be based on their consideration, which brings with it, as we know, the need to reread and take a new approach to so many institutions which, among ourselves, has been understood from a perspective which has, at times, been much too close to prerogatives and privileges.

In this context it is perfectly easy to understand that the abovementioned article 9.2 of the Constitution implies not only the recognition of the freedom and equality of the citizens or groups in which they are integrated but, and this is hugely relevant at this time, it demands the public authorities carry out the task of facilitating the exercise of liberties, which has little to do with an Administration which is allowed to interfere in the exercise of certain public liberties and fundamental rights.

Perhaps some readers might think that we are maintaining here an absolute position on fundamental rights. In no way is this the case. Fundamental rights, except the right to life, can be subjected in certain cases to limits deriving from public order, because although they are very important they cannot, obviously, be the expedient for committing a crime. They can also be restricted for reasons of general interest: this is the, doubtful, case of property and the urban development plan. Similarly, it could be that the exercise of expropriation should give in to the relevant demands of the so-called public use or social interest. In this context it can be said that neither the general interest nor fundamental rights are absolute. Immediately following this, it is necessary to explain that what is absolute, in the best Kantian tradition, is the human being, who can never be branded as average quite simply because he is not; this is a reality to which Public Law must pay attention, so that administrative action as a whole be directed precisely at facilitating the effective exercise of all fundamental rights on the part of all citizens, especially the most underprivileged.

7. The new constitutional administrative law

The frame of Administrative Law, as we have pointed out, can be no other than the Constitution, in such a way that the institutions, categories and concepts which shape our discipline finds its mainstays and foundations in the 1978 Constitution. Mainstays and foundations which, in my opinion, are to be found in the preamble and articles 1, 2, 9, 10, 24, 31, 53 and 103.

From the preamble I think we can extract some undetermined legal concepts which national sovereignty has wanted to remain for posterity, such as “just social and economic order”, “rule of Law as an expression of the popular will”, “protect all Spaniards and peoples of Spain in the exercise of human rights, of their cultures and traditions and of their languages and institutions”, or “ensure a worthy quality of life”. The intention must be to develop a modern Administrative Law which bears very much in mind that the economy is modulated by justice, that the principle of legality is the backbone of the system, without, on account of this, the assumptions of delegalisation or the proliferation of independent regulations producing a denaturalisation of the constitutional substance of Administrative Law. Similarly, the faculty to dictate Decree-Laws must be operated extraordinarily, the urgency in expropriations must also be exceptional and, in general, subjection of the Administration to the ordinary procedures established in the Laws must be the normal assumption, preventing urgency from disrupting the ordinary regime of some institutions (expropriation). Protection of human rights, a central element of the legal Code, is also recognised in the preamble. The same precept foresees the protection of the peoples of Spain in the exercise of their collective identity expressed in the differentiating aspects deriving from their languages, cultures or institutions. Our attention is drawn to the fact that the paragraph which deals with human rights is the same paragraph which contains the recognition of the singularities of the autonomous Bodies, as if the constituent wished to note the need for open and plural thinking which makes the fundamental right of the person compatible with the rights deriving from collective identities. Finally, insofar as the preamble is concerned, we must refer to this great task which the Constitution entrusts to the public authorities, that of ensuring everyone a worthy quality of life.

With regard to article 1, we must underline that it includes the clause on the social and democratic State of Law which, as we have pointed out previously, must, in my opinion, be understood in accordance with the postulates of open, plural, dynamic and complementary thinking. Hence, in this perspective, the tendency of

the State to appropriate society via a unilateral and techno-structural interpretation of the general interest must be overcome to come to rest at positions where the function of the public authorities assume standpoints of a combined search for the general interest, taking into account all the social institutions which are committed to citizens' integral welfare. The times of authoritarian versions of the general interest have gone, thus the clause regarding the social and democratic State of Law, understood on the basis of these parameters, finds its logical evolution, insofar as the matter in hand is concerned, in some of the precepts which I will now go on to outline, such as 9.2 or 53 of the Constitution.

With regard to article 9, we must point out that paragraph one establishes the total and full subjection of the activity of the public authorities to the Law and all other legal provisions, eliminating any vestiges that might remain of the pre-constitutional period in relation with the existence of areas opaque to judicial control or even exempt from it, as was occurring until the enactment of the Law on jurisdiction for suits under administrative law, in relation with so-called political acts. However, the most relevant part, insofar as this paper is concerned, is to be found in the second paragraph, as it establishes the so-called promotional principle of the public authorities. A principle which has a positive side but a negative one too. The negative part refers to the removal of obstacles prevent citizens from exercising individually or as part of a group freedom and equality. And the positive side alludes to "promoting the conditions which ensure that the freedom and equality of individuals and of the groups to which they belong may be real and effective".

Both sides, the positive and the negative, are so important that, to some extent, it could be said that they help us understand the sense of the new Administrative Law that reality shows us daily. Firstly, because the precept entrusts Administrative Law with establishing the conditions which make liberty and freedom possible, undertaking to promote these constitutional values. And, on the other hand, the precept establishes a limit to the action of the public authorities insofar as it forbids the Administration, and, consequently, Administrative Law, from putting obstacles in the way of persons and groups exercising freedom and equality. In other words, Constitutional Administrative Law must, through its sources, facilitate the exercise of fundamental rights, particularly liberty and equality. We will reach the same conclusion from article 53.3 of the Constitution as I have commented on in some sense above.

In article 10.1 we find a solemn declaration in which the constituent points out, with great solemnity, what the foundations of the political order and social peace are, concepts obviously closely linked to what could be understood by general constitutional interest: human dignity, man's inviolable and inherent rights, the free development of his personality, respect for the law and the rights of others. Therefore, from another perspective, we find that, indeed, human dignity, the free development of man's personality and his fundamental rights, are presented to us within the frame of what could be understood by general interest and, as such, as essential elements of an Administrative Law conceived as the Law of the public authorities to assure freedom. Perhaps the scope of the mentioned constitutional jurisprudence can thus be better understood, as well as some affirmations of scientific doctrine which have not hesitated to highlight the general interest in the promotion and defence of man's fundamental rights.

Article 24. of the Spanish Constitution is, probably, one of the precepts which has had an impact in the past and continues to have an impact on the transformation of Administrative Law to the Constitution. This is because an Administrative Law established upon self-protection necessarily clashes, sometimes head-on, with a provision which states: "every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his legitimate rights and interests, and in no case may he go undefended". The terms of the article are quite clear and require the review of some of Administrative Law's dogmas where the public Administration is granted the simultaneous role of judge and plaintiff. Having said this, the most important protection lies in the Courts and, on the other hand, the prohibiting of defencelessness poses numerous problems, with unilateral interpretations of administrative *ejecutividad* y *ejecutoriedad*. Hence, for example, the impact this precept has had on the construction of a preventive measures which situates these principles in a balanced context.

Article 31.2 establishes that "public expenditure shall be incurred in such a way that an equitable allocation of public resources may be achieved and its planning and execution shall comply with criteria of efficiency and economy". I bring this up because from a legal point of view it establishes constitutional criteria closely related to the functioning of the public Administration and, therefore, Administrative Law. Equitable allocation of public expenditure implies important considerations in the entire planning theory. In the same sense, criteria of efficiency and economy help us understand the meaning of certain public policies

implemented through Administrative Law which are unaware of the general content of these constitutional principles or parameters.

For its part, article 53.3, which we mentioned above, as a necessary corollary of the social State of Law clause, establishes, on the matter of guarantees of fundamental rights and liberties, no less that “the substantive legislation, judicial practice and actions of the public authorities shall be based on the acknowledgement, respect and protection of the [governing principles of economic and social policy]”. That is, the public authorities, as not only bound by fundamental rights (article 53.1), must bear in mind the governing principles pointed out in articles 39-52 of the Constitution when acting.

And, finally, article 103.1 states, as we well know, that “the public Administration serves the general interest with objectivity and acts in accordance with the principles of efficiency, hierarchy, decentralisation, deconcentration and coordination, being fully subject to Justice and the Law”. It is in this precept, in my view, that we find the central elements of which the matrices of Constitutional Administrative Law must be comprised: instrumentality, objectivity and general interest. Insofar as being subject to Justice and the Law is concerned, that is, to the entire legal system, it is necessary to mention what is established in article 106.1 of the Constitution: “The Courts control the power to issue regulations and to ensure that the rule of law prevails in administrative action as well as to ensure that the latter is subordinated to the ends that justify it”. Thus it can be said that Administrative Law does indeed balance on the concept of the general interest which, as well as defining essentially what administrative action should be, constitutes a relevant standard of review of the judicial function insofar as administrative activity is concerned. The fact that the general interest acquires this level of prominence is certainly not trivial, because, as we will see, European Community Law has just drawn up some new concepts endorsed with this methodology which, to some extent, have their origin in a new interpretation and understanding of what the New Administrative Law is beginning to be.

8. The return to administrative law

Indeed, reality is showing us the extent to which a new Administrative Law is forcing its way to the surface as the Law of the public authorities to assure freedom.

We only have to put ourselves at the centre of the so-called public service to witness the scope and dimension of the eclosion of a new regulation which emerges on account of the need to preserve and ensure the general interest in surroundings open to freedom, previously the object of monopoly.

I stress again that the consequence of the changes are accompanied by the reality and the strength of responsible freedom in the context of open, plural, dynamic and complementary thinking. For this reason, within the framework of the European Union the traditional concept of public service accompanied by the dogmas of public ownership and exclusivity had no where left to go because Europe today is a space which has no time for monopolies or a unilateral consideration of what the general interest is. Probably for this reason, when the concept of serving the general interest to characterise the new European public services susceptible to economic exploitation sees the light, a significant part of scientific doctrine thought that the sky was falling in on us, that it was time to bury Administrative Law with honour and that we would have to defend ourselves ferociously against the invader ready to dismantle, one by one, all the concepts, categories and institutions of our discipline. However, much to the surprise of all and sundry, we find ourselves with a greater administrative regulation, the consequence of the need to guarantee the so-called “obligations of public service”, that is, service to the general interest.

What is occurring in this sector shows, in my opinion, that we are in possession of a new Administrative Law which is more sensitive to reality and committed to ensuring freedom. In the case of Europe, it is well known that when a suitable name or term to enshrine the concept of the new public services in a world of free competition was being sought, it did not seem appropriate either to adopt the French expression, which no longer belonged to the reality, or the English term “public utilities”, in that it was not in favour of minimum regulation either. A concept was found which included the best part of the French tradition and the best part of the Anglo-Saxon tradition and, thus, on the basis of a perspective of integration, the new concept appeared.

It is true that initially Community jurisprudence let itself be guided by too economicist an interpretation, to later embark on a journey, I hope one-way, in which the balance between economic freedom and general interest is the fundamental line of interpretation.

In Spanish Administrative Law, we find ourselves, insofar as regulated sectors are concerned, as well as with the existence of independent Administrations responsible for safeguarding competition in the sector, with administrative norms which establish public service obligations. That is to say, Administrative Law to preserve the general interest.

Insofar as areas previously dominated by monopoly are being opened up to freedom, Administrative Law is called to play an important role. Insofar as the Administration now, and all the public authorities, have the constitutional mission of making freedom and equality possible, a new Administrative Law appears. Insofar as administrative self-protection must be compatible with tutela judicial cautelar, a new Administrative Law. Insofar as autonomy and unity, together with integration and solidarity characterise our State model, a new Administrative Law. In short, insofar as public action must be impregnated with the promotion of fundamental rights and the governing principles of social and economic policy, a new Administrative Law.

Administrative Law is back, albeit with new outlines and profiles, with a new colour which derives from the Spanish and European Constitutions. The flight from Administrative Law of decades past is history because, even when Private Law appeared as the Code the Administration adhered to, there are matters which continue to depend on the basic principles of what is public, such as staff selection and contracting.

Yes, a new Administrative Law, but one based on the postulates of open, plural, dynamic and complementary thinking.