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Article

Una reflexión crítica sobre el concepto de servicio público

Critical thoughts about the concept of public service

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RESUMEN

El concepto de servicio público es ambiguo. No obstante, si se examina desde el punto de vista histórico y con apego al respeto de los derechos fundamentales de los ciudadanos, es posible precisar su concepto. Por lo tanto, retomar el diálogo con altura de miras sobre el concepto de servicio público es imprescindible, al constituir un instrumento que incluso puede afectar libertades; por ejemplo, cuando, para justificar el monopolio de la revisión técnica vehicular se le asigna artificialmente ese carácter a la actividad. Por lo tanto, en este artículo planteamos si es posible, bajo el prisma de la ciencia jurídica, definir un concepto de servicio público.

Palabras clave: servicio público, regulación económica, libertad de empresa, iniciativa privada

ABSTRACT

The concept of public service is ambiguous. However, if it is examined from a historical point of view and concerning the fundamental rights of citizens, it is possible to specify its concept. Therefore, resuming the dialogue on the concept of public service is essential, as it constitutes an instrument that can even affect freedoms; for example, when, to justify the monopoly of vehicle technical inspection, that character is artificially assigned to the activity. Therefore, in this article we ask if it is possible, under the prism of legal science, to define a concept of public service.

Keywords: public service, economic regulation, free enterprise, private initiative

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1. Introduction

Unicorns are a symbol; they represent imagination, dreams, and illusions. Although after Romanticism few historians refer to them except to deny supposed apparitions, unicorns are still present in some way, because what they symbolize still exists: illusions and the desire to dream[2].

Well, something similar happens when we believe that the conversion of a specific activity into public service is the solution to all ills; the balm of Fierabrás[3] to overcome financial crises, or the Pomada Canaria[4] for the socioeconomic development of the people.

Anyone would think that continuing to talk about the concept of public service, well into the 21st century, is tiresome. However, experience, both academic and professional, show me every day that, as Villar, Palasí said, "Like Pirandello's *Matías Pascal*, public service, one of the few things, indeed, perhaps the only thing that is known is that it is called public service" (Palasí, 1968, XVI).Of course, what I will say hereinafter is fully influenced by the reality of my country, Costa Rica, where sometimes we behave as a mixed economy, sometimes as a social one - without the market - and in all cases, as a statist society. This makes that talking about the concept of public service not only current, but essential since the figure is used as a real Trojan Horse of freedoms; for example, when, to justify the monopoly of the technical vehicle inspection, the activity is artificially assigned that character, or when the Costa Rican Institute of Electricity misappropriates almost all the frequencies that can be used for 5G under the fallacious premise that it provides a public service. Therefore, it is worth asking whether it is possible, under the prism of legal science, to define a concept of public service. I believe it is. Let's see.

2. A theoretical background and development Common law

In England from the 12th to the 14th centuries, there were so-called *common callers*. These were providers of certain services outside the feudal structures that, as such, became unique or scarce. Among these were blacksmiths, tailors, and surgeons who were subject to the obligation to provide their services to anyone who requested them under reasonable circumstances, and, after the shortage of professionals generated by the Black Death of 1348, they were also required to charge a reasonable price.

With the disappearance of the feudal structures, *common calling* also disappeared, but then the *common carriers* arose, who were engaged in a trade necessary for the common good and, therefore, as established by the ruling of the English courts in *Lane v. Cotton* in 1701, were obliged to serve all the King's subjects.

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[2] This journal article links to a research program on the concept of Public Service that we began in 2020 and that has given rise to a series of shared reflections in the form of presentations and specialized dialogues in different international forums. However, in this work, through ideas articulated around the problem of the validity of the concept of Public Service, new conclusive considerations are integrated that, certainly, contribute to the state of the art and discussions of contemporary Administrative Law.

[3] The balm of Fierabrás is a magic potion capable of curing all ailments of the human body and is part of the legend of the Carolingian cycle. According to the epic legend, when King Balan and his son Fierabrás conquered Rome, they stole in two barrels the remains of the balsam with which the body of Jesus Christ was embalmed, which had the power to heal the wounds of those who drank it. In Chapter X of the first volume of Don Quixote de la Mancha by Miguel Cervantes, after one of his numerous beatings, Don Quixote mentions to Sancho Panza that he knows the recipe of the balsam. In chapter XVII, Don Quixote shows Sancho that the ingredients are oil, wine, salt, and rosemary. The knight boils them and blesses them with eighty Our Fathers, eighty Hail Marys, eighty Hail Marys, and eighty Creeds. Drinking it, Don Quixote suffers from vomiting and sweating and feels cured after sleeping. However, for Sancho, it has a laxative effect, justified by Don Quixote for not being a knight-errant. Cfr:http://elhidalgodonquixote.blogspot.com/2011/04/el-balsamo-de-fierabras.html

[4] The expression used in Costa Rica refers to something that is the ideal solution to a certain problem.

Thus, for example, if on the road a shoe fell off a horse, the blacksmith was obliged to put it back on; if a traveler asked to stay at an inn that was not full, the innkeeper had to accommodate him; and a carrier whose horse was not loaded was also obliged to carry the requested package (Montero, 2014).As time went by and based on this same *common carrier* institution, American jurists would build, especially after the *Munn v. Illinois* decision handed down by the Supreme Court in 1876, what we know today as economic regulation. Thus, price, performance, and other obligations would be imposed on transportation, electricity, gas, and later telecommunications activities under the premise that when the property "is affected by a public interest, it ceases to be only *ius privati*". This concept would later evolve, especially after the *USA v. Terminal Road Association* ruling in 1912 in what we know today as the essential facilities doctrine (Burdick, june 1911, pp. 514-531). **The public service "school"**

The theoretical construction of public service took place, strictly speaking, in France in the early years of the 20th century, especially by the Bordeaux School, with Leon Duguit and Gaston Jèze at its head. It would also be from this school, above all, that the concept of public service would be built in Latin America, rooted in solidarity and equity, as its causes and ends.

Indeed, for Duguit, the formidable changes in the economy that took place from the second half of the 19th century had left the rigid and metaphysical juridical constructions of the French Revolution, which were based on a system of the domestic economy that had been replaced by the great national economy based on scientific discoveries and industrial progress, without foundation. Considering such changes, the presence of the collective became necessary to assist the individual's shortcomings and attend to the great mass of his elementary needs, through the provision of public services.

Thus, the original conception of public services was based on nothing other than the purest solidarity and social interdependence that generated functional duties for the rulers. Consequently, the purpose of any activity of the rulers could not be other than to create, direct, organize and operate uninterruptedly public services.

The State would no longer be a sovereign power that commands, but a group of individuals with a force to be employed in creating and directing public services. The concept of sovereignty had thus been replaced by that of public service, since, to the objective and palpable, verifiable fact of collective needs, a real response corresponded, and this could only come from the materialization of the solidarity and equity implied by public service.

Consequently, the agents of the State were no longer powerful superior lords with commanding authority or embedded masters, nor were the governed simple subordinates destined to obey; no, now these roles changed absolutely, as the conceptual content of the State itself was substantially transformed, in which the rulers became true servants of the community and the individuals they served, the recipients of the action and activities of those to whom the public services were owed. Governments were no longer the representatives of a commanding social power: they were the managers of public services. Men could say that the rulers were their servants and not their masters (Santofimio Gamboa, 2011, pp. 43-86; Rodríguez Arana, 2013, pp. 61-100).

2.1. Daseinsvorsorge

Meanwhile, in Germany, Professor Forsthoff would explain for the first time the doctrine of *Daseinsvorsorge in* 1938 with a book called "The Administration as a support of benefits".

The German professor argued - with evident similarity of criteria to Duguit and Jéze - that the individual was no longer sufficient on his own to procure the means to fulfill his existence. His independence had become dependent. What were once individual problems were now social issues that demanded, therefore, a supra-individual solution. We were thus faced with a fundamental change in the content of the State's tasks, for it could no longer remain a mere guarantor of order but must now behave as a distributing and sharing State to satisfy the vital needs of individuals.

Thus, if the object of the State in Sparta consisted in war; in Rome, it was its extension; for the Jewish people it was, fundamentally, religion; commerce for Marseilles; navigation for Rhodes and freedom for England, today - said Forsthoff - the *Daseinsvorsorge* must constitute the object of contemporary Administration; that is to say, the existential procurement (Martín-Retortillo, 1962, pp. 35-65; Bullinger, 2005, pp.29-49).

3. The concept of public service Growth and crisis

The concept of public service is an ambiguous term that has as many definitions as there are conceptions of the State. Therefore, as Ariño Ortiz points out, "its servitude has been that, as so often happens in Public Law, it's very linkage to political purposes, has made the concept something difficult to specify, enormously labile, inapprehensible from a single perspective; in short, a concept in crisis" (Ariño Ortiz,1993. p. 277). However, like many other institutes of public law, the concept of public service can only be understood from a historical perspective, divided chronologically into three basic phases or stages.

During the period of the construction of the constitutional State - precisely because of the concern to guarantee individual liberties - the participation of the State translated into great abstentionism, reducing its activity to a minimum. Based on the doctrine of *laissez-faire et laissez passer, le monde va de lui même,* its competence was conceived as limited to ensuring public order through the exercise of its police power. However, faced with the need - never dispensable - to build major public works and establish important public services, the idea of the concessionaire or interposed contractor came to reconcile its role of a mere gendarme.

Later, in the seventeenth and eighteenth centuries, the State would activate policies to promote the entrepreneurial activity of individuals, in response to the economic doctrines of mercantilism. In this way, as a middle way between State inhibition and interventionism, the aim was to reconcile freedom with the common good through direct influence on the will of the individual (Araujo-Juárez, 2003, p. 30).A third phase would develop after World War II, with the rise to power of the Labor Party in Great Britain and the Socialist Party in France. As a result, the State, in addition to its essential functions of maintaining public order (police power), would become an apparatus for providing public services, both welfare and economic. We know this transformation as the welfare state.

Based on this brief historical review, it is easy to understand why the notion of public service is so ambiguous and difficult to bring together in a single concept. This attempt to unify such dissimilar activities - according to time and place - has been the main difficulty in its construction.

However, a first attempt to objectify its meaning can be found in France, starting with the well-known *arrêt* Blanc and the central idea of the Court of Disputes that, in the management of public services, the State always acted as a *puissance publique.* This automatically entailed a jurisdiction of attraction to the competence of the administrative jurisdiction. The criterion of the public service as the exclusive

competence of the administrative jurisdiction was thus introduced, and, therefore, without the possibility of private management.

Later, these ideas and concepts would be taken up by Leon Duguit and later by authors such as Jèze, Bonnard, and Rolland to make the notion of public service the central axis of administrative law (Farrando, 1994, p. 23). Thus, his School of Bordeaux or School of Public Service sought to build the entire theory of the State based on public service as a central concept. In his conception, as Santamaría Pastor explains, "the State is not so much a sovereign organization as an organization providing public services" (Santamaría Pastor, 2000). Consequently, all state or administrative activity was synonymous with public service.

However, the first crisis of the concept was not long in coming. Indeed, the *arrêt Comérciale de L'Ouest Africain/Bac D'Elora* issued by the Court of Disputes recognized industrial and commercial public utilities as being governed by the rules of private law and, therefore, subject to ordinary jurisdiction. Likewise, in the 1930s, the Council of State, in its *arrêt Caisse Primaire Aide et Protection*, would admit as viable the private management of public utilities.

However, it was the wave of nationalizations after World War II and the consequent emergence of state activities devoid of direct connection with the public interest itself, which ended up overflowing the public service as a unitary and unique concept. In this way, the concept of public service became, once again, only a way of legitimizing the actions of the State in terms of service to citizens and social solidarity. (Chevallier, 1987).

A second attempt to rationalize the concept was made with the emergence of the State's economic and industrial activity. Faced with this reality, it was decided to conceive administrative activity no longer as synonymous with public service, but as consisting of three activities, with public service being only one of them.

In this sense, Jordana de Pozas, seconded by Garrido Falla, proposed the thesis that the State performs three activities, namely: police, promotion, and public service, including within the latter the purely economic and industrial activity of the State. However, Villar Palasí, García de Enterría, and Ariño Ortiz, among others, considered it necessary to make the purely economic and industrial activity independent, framing it as the provision of goods and services to the market, an activity subject to private law and provided in competition with private parties. Thus, the concept of public service, according to their thesis, encompasses strictly public activities provided under a monopoly regime by administrative entities.

As we have seen, the notion of public service is historical. Therefore, its concept, changing as it is, must be sought within the framework of the general purposes of the State, at each time and place. Thus, each of the three historical phases or stages of the evolution of public service already analyzed will coincide with a different administrative activity. Thus, the police state phase is understood today as a public function, i.e. those activities of the State without which it does not exist, and which, therefore, can in no case be left to private initiative; the second, which consisted of stimulating or pressuring social forces from outside, is currently identified with the function of promotion; while the phase in which the State assumed a leading role in the direct provision of public service, coincides with its public service activity and/or, where appropriate, with its activity of economic management or provision of goods and services to the market. It is useful, therefore, to examine each of the administrative activities, since there is a tendency to call any of them public service, indistinctly, in what I have called the broad concept of public service when the truth is that public service, properly conceptualized and delimited, is only one of these activities. It is not

correct, as is so often understood, that administrative activity and public service are equivalent, but rather that the former is the genus and public service the species.

3.1. Typology of the administrative activity: public service Civil Service

Since its formulation by Bodin, the sovereignty of the state has been configured as an "original quality of state power insofar as above it there is no other. This supposes, on the one hand, the affirmation of its independence from the outside and, on the other, that of its supremacy within" (Lucas and Lucas, 1990, p. 167). The concept constructed by Bodin consisted, therefore, in attributing to the State quality of supremacy characterized by being absolute, perpetual, intrinsic to State power, as well as original and independent in the international sphere. Although Bodin considered that the right to legislate by itself synthesizes all the characteristics of sovereignty, he established eight specific characteristics to identify it, namely:

a) The right to legislate.

b) The law of peace and war.

c) The right to appoint high dignitaries.

d) The supreme right of justice.

e) The right to demand fidelity and obedience from his subjects.

f) The right of grace.

g) The right to coin money.

h) The right to collect taxes.

Currently, the function performed by the State in the pursuit of its essential or inherent purposes is called public function and is that which consists, precisely, in the exercise of those sovereign powers, which are not conceived as being exercised by individuals and whose ownership - as it could not be otherwise - corresponds exclusively and perennially to the State.

As Troncoso Reigada explains, on the growing phenomenon of the flight from Administrative Law, the administrative doctrine and jurisprudence have reacted by constructing the concept of institutional guarantee of the Public Administration as a requirement to maintain an organization and functions governed by and necessarily subject to Administrative Law which constitutes, precisely, that non-delegable, non-transferable and imprescriptible public function. In this respect it states:

> *The constitutional reserve of Administration - in its broad sense of reserve of the Executive Power - is formed by the activity of political direction and the activity of police and promotion. These activities, which are public functions of sovereignty, must necessarily be carried out by an Administration as regulated by the Constitution, i.e., with the features of its institutional guarantee. There is an identification between the reservation of the Administration and the prohibition of formal privatization - recourse to the private legal system. It is the material object of the reservation that justifies the constitutional singularity of the public administration. There is no freedom of choice of form or legal regime to develop these activities that belong to the public administration reserve. The flight to Private Law of these Administrations exercising*

sovereign public functions is unconstitutional (Troncoso Reigada, 1997, pp. 458-459).Following its nature, therefore, the public function implies an authoritarian regime that is exercised through legal acts of the empire such as sentences, certifications, orders, licenses, permits, authorizations, approvals, sanctions, executions, police activity, legislative, judicial, defense, fiscal and tax activity; all of them coercively imposed on the individual. Following the old distinction of the theory of Public Finance, these are absolute public needs, since they are essential activities, constant, existentially linked to the State and of exclusive satisfaction by it; in essence "the raison d'être of the State itself (within what is considered the rule of law), for which reason it would disappear as such if it ceased to fulfill these essential tasks" (Villegas, 1994. pp. 4-5). What are these activities? Well, as Professor Valdés Costa points out, this will depend on the notion of sovereignty that governs each place and time. However, both the Constitutional Chamber and the Office of the Attorney General of the Republic have had the opportunity to anticipate some examples.

The Chamber also understands that the concession of public works and services referred to in this bill, except for everything related to **national security, customs control, migration, and everything that has to do with functions of the State, which cannot be delegated and cannot be waived and, in any way, can be left in private hands**. *Thus, for example, even when an airport is given in concession, so that the public service provided therein is carried out by a private entity,* **port security, immigration, and customs, among others, is reserved exclusively to the State, and these functions cannot be exercised either directly or indirectly by private parties** *[Emphasis added]. (Decision # 2319-98 of 17:51 hrs. of March 31, 1998. Constitutional Chamber of the Supreme Court of Justice)."On the other hand, under the regulatory framework, the Administration would be authorized to promote and grant in concession any public service, except for those expressly excepted by law: telecommunications and the paid transportation service of persons by buses or cabs, which would be regulated by specific laws. It is clear, however, that due to the system of remuneration of the concessionaire, not every public service is susceptible to be granted in concession.* **In addition, there are public services that, due to their particularities as an expression of the sovereign power of the State, must be operated directly by the Administration. Such is the case of the defense and security services of the State, tax services, immigration services, the direction and surveillance of the penitentiary service, and those involving the exercise of police power.** *The Attorney General's Office considers that it is necessary and convenient for the public interest to maintain the exception that today can be considered implicit in Article 74 of the Administrative Contracting Law. Certainly, the concession does not make the public ownership in the provision of the service disappear, nor does the Administration delegate the direction and supervision, but we judge that it should not involve a third party in the direct exercise of its sovereign powers [Emphasis added] (Office of the Attorney General of the Republic. O.J.-068-97 of November 18, 1997).*

3.1.1. The activity of promotion

The exercise of the activity of promotion implies economic stimuli of the State on the social forces to achieve a certain sense of its action. It is exercised from the outside and in a non-coercive manner.

Jordana de Pozas' clarity in this respect complements us in defining promotion as "the action of the Administration aimed at protecting or promoting those activities, establishments or wealth owed to private individuals and which satisfy public needs or are considered to be of general utility, without using coercion or creating public services"(1949). Examples of this can be found in subsidies and grants, tax exemptions, credits, and in short, in all those activities that the State does not order, but offers, for

whose validation the consent and collaboration of the individual are required to comply with the burdens imposed by the Administration that confers it to achieve public purposes.

3.1.2. Public service (in the strict sense)

We follow Ariño Ortiz (1993) in his definition, for whom: "Public service is that activity of the State or another Public Administration, of positive provision, with which, using a procedure of Public Law, the regular and continuous execution is assured, by the public organization or by delegation, of a technical service indispensable for social life". It is, therefore, "to assume on an exclusive basis, setting aside others, a certain activity which, due to requirements of general interest, is removed from its performance by the private sector" (Martín-Retortillo, 1988, p. 251).

At least seven characteristics of public service can be extracted from this definition to recognize its presence, namely:

i) The public service activity is subsumed in a provision activity, which is necessarily assumed by the Public Administration, either directly or by delegation, using a concession.

ii) The activity of public service is manifested through the positive provision, whose ownership originally corresponded to private individuals, but which, transformed into indispensable for social life, is assumed by the State. Hence, the ownership of the Administration, even if provided by a third party through delegation (concession), is a *sine qua non*-requirement for its classification (*publicatio*).

iii) The function or activity in question must be provided under public law.

iv) Public service activities are not necessary, inherent, essential, consubstantial, or immanent to the State, but indispensable for life in society at any given time.

v) It is provided on a continuous and regular basis.

vi) It must be a benefit to the public, aimed at its general utility. From this, then, derives the subjective public right of the user to demand its provision.

vii) Public service activity does not involve the exercise of sovereign powers but is exercised through technical services. Therefore, public service is not imposed on the individual but is offered to him. It is not, therefore, a coercively imposed activity.

Thus, although both the public function and the public service are owned by the State, the latter differs from the former because it consists of positive technical services that the former performs directly or indirectly in pursuit of the achievement of welfare goals for social life and not for the benefit of the State. For this very reason, they are not imposed on the individual, but are offered to him; they do not constitute, therefore, intervention using coercion, but through provision.

In Costa Rica, on the other hand, Article 3, paragraph a) of the Law of the Public Services Regulatory Authority defines public service as "that which, due to its importance for the sustainable development of the country, is qualified as such by the Legislative Assembly, to subject it to the regulations of this law. "Even though the norm and the definition contained therein give great discretion to the legislator to create a public service, the Public Services Regulatory Authority has specified that:

> (...) although the Legislator indeed has the full power to classify a service as public (concerning articles 121 of the Constitution, 11 and 12 of the General Law of Public Administration and 3 paragraph a) of Law No. 7593 of the Public Services Regulatory Authority), it must be considered that such service must at least have those elements or requirements that make it public and under which it is subject to a special regulatory regime.
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> This is so because "an adequate concept facilitates the legislative sanction of the basic legal regime of public services" (Sarmiento García, 1994, p.2).Within these elements that make up the notion of "public service", the doctrine is consistent in pointing out that the generality of the service constitutes an essential requirement in its determination. This means that "the concept of collective need must refer to a need felt by an appreciable portion of the respective conglomerate of persons" (Marienhoff, Miguel cited by Sarmiento García, 1994, p. 16).
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> In this sense, and accordance with the most authoritative doctrine and the examples provided by comparative law, it can be stated that activity will constitute a "public service" as long as it involves the provision of industrial or commercial services (Public Utilities Regulatory Authority. OFFICIAL N° 063-RG-2000 of January 18, 2001).From the above although the legislator has political discretion when deciding to convert an activity into public service, it is also clear that it has a limit, which is respect for the law of the Constitution. Therefore, as Alejandro Nieto (1992, p. 2251) has said) the legitimacy of political power, and therefore of the law as its most important product, only operates when there are such general interests; otherwise, the action becomes illegitimate. This means, then, that the possibility of declaring a private activity that is within the commerce of men as a public service and, therefore, removing it from private initiative, can only be admitted insofar as the real need for such a measure to satisfy a collective need is justified and demonstrated, and does not imply, by its extension or lack of delimitation, an emptying of the essential content of the freedom of enterprise.

To what extent can the Constitutional Chamber exercise its constitutional control with the assessments considered by the legislator to declare an activity as a public service?

Well, the examples and the doctrine produced to this effect date back to 1962, when in Italy the production and distribution of electric energy were nationalized, expropriating almost all the electric companies and transferring them to ENEL. In its judgment No. 14 of March 7, 1964, the Constitutional Court developed a refined analysis of the nuance between the political judgment that corresponds to the legislative power and that of the control of the constitutional jurisdiction which, to prove that the law that declares a certain activity as a public service does not respond to the purposes of the general utility, must demonstrate that the legislative power did not evaluate the purposes and means to achieve it or that this evaluation was made by illogical, arbitrary or contradictory means, or that they are in contradiction with the factual assumptions. The law, therefore, would be unconstitutional if it establishes means that are unsuitable or in contrast with the ends pursued, or if the legislative bodies use the law for a purpose other than the attainment of the general utility (Bassols, 1988, pp. 199-201).

The same question arose in the French nationalizations of banks and financial companies on strict economic policy grounds, where the French Constitutional Council, in its decision of January 16, 1982, concluded that, in the face of a manifest error on the part of the legislator, it was competent to exercise constitutional control in this respect.

3.1.3. Provision of goods and Economic Management

This classification includes the activities of production and provision of goods and services to the market that the State performs through public enterprises, whose activity is regulated by private law, e.g., State banks or the National Insurance Institute (see Article 3 of the General Law of Public Administration).

In addition, it is a requirement that these activities lack the exclusive royalty or monopoly of the activity by the State, since, in addition to the latter, private individuals may also exercise it without the need for a concession, a simple authorization being sufficient for such purposes (e.g., private financial intermediaries, see Article 116 of the Organic Law of the Central Bank of Costa Rica, No. 7558).

Moreover, in its management, there is no public service purpose, but rather an economic planning, social conformation, or economic-social promotion purpose. Therefore, the activity lacks the equality, obligatory nature, and continuity of service that are inherent to public service. Based on the foregoing, neither the consumer - nor the user - have a subjective public right to demand its provision.

4. Polemic guideline

Currently, the controversy as to the concept of public service is divided into two opposing currents: the broad one, which considers that the existence of public interest in the activity is sufficient for it to be considered a public service; that is, a sort of tacit *publicatio* that includes any of the various activities that the Administration has exercised throughout history; and the restrictive one, which considers not only that an express *publicatio* by the legislator is necessary, but also that the activity declared to be a public service must be indispensable for life in society at a given moment, but not inseparable from the State.

We are particularly inclined to the second one since we agree with Professor Cassagne (1996) when he explains that, in the field of economic regulation, it is necessary to distinguish public services from the so-called private activities of public interest. With the first thesis, both concepts, which produce different legal regimes, could not be differentiated. For this reason, I am inclined to the restrictive concept of public service, that is, the activity that the State has expressly published and of which, therefore, it is the owner, to the exclusion of the freedom of private initiative of the economic agents.

However, the concept of public service that we assume and apply is not a minor issue, far from it, since it is enough to understand the legal implications of one or the other (restrictive and broad) to realize the enormous impact that the determination of activity as such has on the fundamental rights of reserve of law, the autonomy of will, private initiative, enterprise, competition, and choice.

And the fact is that, as soon as it is declared a public service, the economic freedoms of the private individual are simply nullified, which is why one of France's best jurists has rightly pointed out that: "The public service, in itself, constitutes a threat to public freedoms, that is, to the ability of citizens to exercise those spheres of activity that belong to them as their own" (Devolvé, 1985, pp. 1 ff.). It is precisely for this reason that, when the State delegates the provision of public service to a private party using a concession, the powers of the public administration no longer derive only from the rule, but from the concession declaration itself, which confers on the granting authority a general and continuing power to model the activity.

On the contrary, with the protection of private activities, no matter how much public interest may be imbued in them, the Administration is only vested with the powers provided for in regulation, so that in

no case does it have an internal configuring power; in other words, it cannot intervene individually in the exercise of the activity to change something of its legal content, insofar as all modifications must always be made from the outside, that is, by general and therefore normative means.

Thus, the great difference between both concepts lies in the fact that, when one is a mere manager, one dances to the beat of the tune dictated by the delegating Administration; whereas, when it comes to private activities, in which there is a pre-existing subjective right of the economic agent to exercise the activity - certainly under the regulatory parameters established by the legal system -, all this must be analyzed under the perspective of the regulation of fundamental rights of the economic agent that do not properly exist when one is a concessionaire of a public service to which one has no pre-existing right whatsoever.

5. Conclusions

The concept of public service is undoubtedly an ambiguous term. However, for those of us who firmly believe in the existence of an essential content of freedom of enterprise, which includes among its postulates the freedom to undertake economic activities (Ariño Ortiz, 1995, p. 85), the declaration of certain activities as a public service cannot be limited to the mere discretion of the legislator, but, on the contrary, it must be required that such service has at least the elements or requirements that configure it as a public service (Sarmiento García, 1994, p. 2.).It should be recalled that today it is a sign of the times that the traditional or classic public service no longer enjoys favor, precisely because it calls into question the space of private activities and threatens the existence of public freedoms so that declaring as public a service that is substantially not so is unconstitutional because it violates the regime of freedom, and more specifically the freedoms of private initiative, contracting and enterprise, in line with the fundamental rights to competition and choice.

Legal institutions have their individuality, because, just as divorce cannot be assimilated to marriage, purchase, and sale to leasing, or a trust to a mortgage, neither can one declare a public service that is substantially not a public service. If the miracle has no place in the field of administrative law (García de Enterría,1983, p.32.), then neither does it have a place to declare a public service an economic activity that neither legally nor technically is such. Hence the importance of delimiting the concept of public service, since the legal operator's vision of the State and freedoms will depend on it.

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