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Administrative Law and human dignity (on the post-pandemic reconstruction of Administrative Law)

Direito Administrativo e dignidade humana (sobre a reconstrução pós-pandemia do Direito Administrativo)

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Abstract: After the pandemic or, rather, still emerging from it, Administrative Law takes on a special significance as recently it has failed to fulfill the role entrusted to it— that of a public authorities law for the socially responsible freedom of the people, that of a law committed to human dignity. The article explores the role of Administrative Law in fulfillling human dignity.

Keywords: Administrative Law. Pandemic. Human dignity. Public Power. Welfare State.

Resumo: Após a pandemia, ou melhor, ainda emergindo dela, o Direito Administrativo assume um significado especial, pois, recentemente, deixou de cumprir o papel que lhe foi confiado – o de um Direito do poder público para a liberdade socialmente responsável do povo, o de um Direito comprometido com a dignidade humana. O artigo explora o papel do Direito Administrativo na realização da dignidade humana.

Palavras-chave: Direito Administrativo. Pandemia. Dignidade da pessoa humana. Poder Público. Estado de Bem-estar Social.

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1 Introduction

Administrative Law, as those of us who focus daily on studying and researching it are well aware, is constantly transforming. On one hand, because it is deeply rooted in reality, changing and dynamic by definition, and on the other, because it has to be constantly searching for the most appropriate categories and institutions for the rational regulation of the general interest in accordance with the requirements of justice. Today, after the pandemic or, rather, still emerging from it, this branch of law takes on a special significance as recently it has failed to fulfill the role entrusted to it— that of a public authorities law for the socially responsible freedom of the people, that of a law committed to human dignity. Rather, the situation of prevailing inequality highlights that our field has failed, as in general it has been unable to provide adequate methods for the effective protection, defence and promotion of the fundamental individual and social rights of the person.

Accordingly, Administrative Law is a branch of Public Law constantly evolving with, nevertheless, a common denominator that is its essential characteristic: the objective service of the general interest anchored in human dignity. Now, due to its insertion in a social and democratic state subject to the rule of law, it must defend, protect and promote such dignity and the fundamental rights that arise from it, whether individual or social.

Today, in times of serious general, political, economic, social and cultural crisis, exacerbated by the pandemic, Administrative Law stands at a crossroads. Some want to make it the case that justifies the outrages and arbitrariness of political, economic and financial powers, and others would like to subdue it to fulfill their aspirations of remaining at the top. Nevertheless, the road that must be taken by this magnificent instrument of *civiltà*, as Giannini called it, is quite different. Through its methods and categories, Administrative Law is called upon to articulate and design a space for the objective service of the general interest centred on human dignity through which the living conditions of the people, especially the disadvantaged, the excluded, those without voice, the global poor, will improve substantially. Today, in post-pandemic times, such functionality marks and guides its meaning and mission in a world as surprising as ours.

Precisely now Administrative Law is once again a highly topical issue because it is part of the destiny of those who seek progress in their societies, because it is a cultural product, because it is a branch of Public Law and, as such, hopes to build spaces of justice and deep human rationality. Whether we like it or not, public

intervention, especially today, can be oriented to improve the living conditions of citizens or to satisfy the craving for power and privilege of certain groups that aspire for social control, both today and in the past.

Today more than ever there is a need for the real projection of the social and democratic state subject to the rule of law on our field and, above all, there is a need for a new way of understanding Administrative Law, free of the prejudices and clichés of the past, one that is centred on a more human and rational concept of the general interest, in accordance with reality and in constant need of social justification and participation. Today Administrative Law emerges as a set of laws for the full and complete implementation of fundamental rights, in particular social rights.

Administrative Law, to the extent that it is the public authorities law for the socially responsible freedom of the people or, also, the law that rationally regulates issues of the general interest in accordance with justice, is presented to us in these turbulent times as a set of laws from which to better understand the scope of the traditional activities of the public authorities of limitation, planning, promotion and public service. Furthermore, the global dimension of the crisis advises building a global Administrative Law connected to the social and democratic state subject to the rule of law. Likewise, the dynamic perspective of the Welfare State, so closely connected to Administrative Law, today calls for new ways of understanding the traditional categories of our field. Similarly, the ethical aspect calls upon us to consider that this approach so closely linked to law cannot be excluded from legal matters as though Law and Morals were parallel phenomena.

Administrative Law and public administration are two closely connected realities. So much that one without the other has no meaning. Public administration needs the law to ensure that powers and authorities are at the objective service of the general interest. And Administrative Law regulates the exercise of public power that ordinarily arises from administrative proceedings. For this reason, public policies cannot be studied independently of the law, although, effectively, the law is not the only aspect to be considered, as it is necessary to analyse, given the plural and multidisciplinary consideration of the public administration, the economic, organizational, historical or sociological aspects.

Administrative Law is, in the times we are living in, a branch of Public Law that, based on the Basic Norm, aspires to effectively implement the model of a social and democratic state subject to the rule of law that today characterises the dominating state model worldwide. Since its origins, Administrative Law has been dependent on the general interest, on those supra-individual issues that affect everyone because they are common to the human condition, and that call for an equitable management and administration that meet collective needs within a framework of rationality and justice.

Administrative Law, strictly speaking, especially after the French Revolution, as we all know and have studied well, emerged as an authoritarian law based on administrative action and its main attributes: enforceability and execution, properties inherent to administrative proceedings that are understood, since then, and to a large extent to this day, in terms of privilege and prerogative.

They were times in which administrative legitimacy in the liberal state subject to the rule of law was the guiding light of administrative proceedings. The administration could only and exclusively do what was set out in the law or, later on, it could only carry out its activity as long as it was not prohibited by the law. In this context, fundamental human rights were freedom, and traditional civil and political rights, before which the only actions the state could take were abstention and non-interference. Incidentally, civil and political rights emerged, it must be said, anchored to a specific way of understanding the right to own property and, above all, a specific social class, the bourgeois— a class that needed instruments to preserve and maintain power in order to reinforce its position in life in society at that time, as could be vividly deduced by the sociological composition of the first parliamentary assemblies of the French Republic.

The passing years contributed (especially in light of industrialisation and the exodus of people from rural areas to the cities with the subsequent work difficulties and restrictions in that historic era) to the growth of the social conscience of the state, with the state considering that its duty was not only to defend and protect purely individual fundamental rights, but also, and centrally, it should promote the conditions that allowed for the free and socially responsible development of its citizens. The social state subject to the rule of law emerged, in which social responsibility was also a state function. Later on, social participation was introduced as an inexcusable condition for the design, implementation and assessment of public policies, and a democratic condition was added to the state's social characteristics.[1] Within this context, the Constitution substituted administrative legitimacy as the main source of law and tentatively started a process in which the public administration, above and beyond positive or negative administrative legitimacy, undertook to implement constitutional values and goals; especially the ordinary regulations of the social and democratic state subject to the rule of law through, primarily, the joint action of the public administration and the government.

The predominance of constitutional values and principles calls for the integration of administrative legality and its application based on these values and principles. Such a task, unfortunately still *in fieri*, is precisely revealed when the functionality

[1] CARVALHO, Osvaldo Ferreira de. As políticas públicas como concretização dos direitos sociais. *Revista de Investigações Constitucionais*, Curitiba, v. 6, n. 3, p. 773-794, set./dez. 2019.

of fundamental social rights is studied in Administrative Law. Therefore, as we try to show throughout these pages, we come up against some nearly unassailable barriers that prevent, effectively, the light of those values and principles from penetrating also the activity of the public administration more than two centuries after the renowned French Revolution.

The so-called constitutional Administrative Law is calling out for new studies and research more deeply connected to the constitutional values and principles, among which can be found, among others, the objective service of the general interest, the centrality of human dignity, the promotional function of public authorities and, of course, a more open conception of the fundamental rights of people, among which are also the so-called fundamental social rights.

The social state clause brings with it a deep transformation in the traditional understanding of Administrative Law. Indeed, the state should promote the conditions needed to ensure the freedom and equality of the people and of the groups they form part of are real and effective, taking away the obstacles that hinder their effectiveness and encouraging the participation of all citizens in political, economic, social and cultural life. Therefore, in Spain, this constitutional footprint, recognised in Article 9.2 of the Magna Carta, should govern the meaning and functionality of all categories and institutions of Administrative Law. An Administrative Law that will need a new texture and sensitivity, for which it will require institutions and methods suited to the new purposes imposed on it by the Constitution.

Public engagement is particularly important in the construction of the constitutional Administrative Law because, as the Spanish Constitutional Court already stated in a ruling of 7 February 1984, the general interest should be defined by social involvement. Gone are the closed and unilateral versions of the general interest, opening the doors to new perspectives that need public presence and participation. That is, unlike in the past, the general interest is no longer defined unilaterally and monopolistically by the public administration. Now there is a need to call for and embrace the true vitality that is emerging from social life, requiring increasingly more intense and profound social participation.

Accordingly, the concept of the general interest, now open to participation prompted by a state that claims to be a social and democratic state subject to the rule of law, has an unyielding basic nucleus shaped precisely by the effectiveness of fundamental social, individual and human rights. Furthermore, it would be incomprehensible that the administrative actions and operations promoted by the general interest would have not been accompanied at all times by a radical commitment to the defence, protection and promotion of fundamental human rights.

Fundamental human rights, originally conceived as rights of freedom— rights before which the state must decline any action, in keeping with the clause on the

social and democratic state subject to the rule of law— have spread into new areas, essential to a dignified standard of living. This is the case of fundamental social rights, including, for example, the following: the right to food, clothing, decent housing, social protection, and equal access to employment, education and healthcare. In these cases, society and state institutions must provide people with the necessary means to satisfy these rights, envisaging them as obligations in the interests of citizens. The fundamental right to a basic living allowance should be covered in our societies and, based on this minimum threshold, through the principles of progressiveness and the prohibition of regressing in social measures, steps must be taken to increase levels of dignity in the exercise of fundamental human rights.

Fundamental social rights should be included in the Constitution as the fundamental rights that they are. And until this happens, following in the wake of the German Constitutional Court, among others, our constitutional courts should, through rational argument, highlight these rights as immediate requirements of a state that is defined in its Constitution as a social and democratic state subject to the rule of law. The pandemic has led to the regulation in Spain,[2] in the Spain of 2020, of a right to a decent minimum standard of living, to ensure those people who have been plunged into extreme poverty receive an allocation from public budgets to be able to live decently.

Fundamental social rights are crucial for the advanced construction of the social and democratic state subject to the rule of law. In current times, intelligently making the most of the general, overall crisis that has been unleashed in these years, we should monitor this issue. The first step is recognising that our Administrative Law remains a prisoner of certain perspectives and approaches that prevent it from reaching its status as a set of laws for the defence, protection and promotion of fundamental rights through the different public tasks and policies that make up the constitutional joint action of the public administration and the government.

Social fundamental rights or fundamental social rights essentially mean that it is the State that should normally (by virtue of the higher criterion of subsidiarity) take on these obligations of making it possible to deploy these rights, and the fundamental right to good administration stands out as a basic right, one that guarantees these services are implemented correctly.[3] The characteristics of good administration— equality, objectiveness, rationality and reasonable time-limits— guarantee that the provision of these public benefits, in the absence of social action, can effectively

[2] CASADO CASADO, Lucía; FUENTES I GASÓ, Josep Ramon. La incidencia de la pandemia de la covid-19 sobre la jurisdicción contencioso-administrativa en España. *Revista de Investigações Constitucionais*, Curitiba, v. 8, n. 2, p. 347-386, maio/ago. 2021.

[3] VALENCIA-TELLO, Diana Carolina; HACHEM, Daniel Wunder. The good public administration in the XXI century: analysis of the Colombian case. *Veredas do Direito*, Belo Horizonte, v. 15, n. 33, p. 101-130, set./dez. 2018.

allow for, in due time and proper form, the exercise of rights that are crucial to guarantee citizens a dignified, adequate existence.

Indeed, the right to good administration, framed within the modern tendencies of an Administrative Law focusing less on privileges and more on the task of contributing towards improving the living conditions of the people, is crucial for the normal deployment of the fundamental social rights. In particular, in the case of minimum fundamental social rights, the public administration's responsibility to fulfill obligations within a reasonable time-limit, in the absence of social action, is of such a calibre that it is a factor that determines whether human dignity is respected or seriously violated. Examples can be found, some very explicit; hence, there is no need to say more on the subject.

Administrative Law has focused for a long time on guaranteeing and ensuring the exercise of the individual rights of citizens. Now, however, the tenets of the social and democratic state subject to the rule of law and the demands of the general interest challenge us to think about a new kind of Administrative Law that is also committed to fundamental social rights, as the human dignity refers to the person also in his or her social dimension.

Namely, the general interest, connected for so long to the promotion, defence and protection of civil and political rights, should also open up to the defence, protection and promotion now too, more than ever, of fundamental social rights. For a very obvious reason, because fundamental human rights, as confirmed and ratified *ad nauseam* by the main international charters and declarations on the subject, are universal and crucial, as they are and belong to people, and, for these reasons, form an indelible part of the very condition of being a member of the human race as they are integrated into the same dignity that characterises and recognises all people. The category of fundamental rights is unique and its corresponding legal system, also regarding legal protection, does not support different deployments or projections depending on situations of political opportunity or convenience.

If we agree that the dignity of the person is the touchstone of the legal framework of the social and democratic state subject to the rule of law,[4] we will need to start updating and rethinking all the legal categories and institutions in this direction. A direction, who could have imagined, that now is going against the flow due to the intense commercialisation of social, political and cultural life, including public activity.

For this reason, it is worth remembering that human dignity is of such legal calibre and condition that it resists, all-powerful and almighty, any onslaught by the political or financial powers to demolish it, or, even worse, ignore it. Therefore,

[4] NETTO, Luísa. Criteria to scrutinize new rights: protecting rights against artificial proliferation. *Revista de Investigações Constitucionais*, Curitiba, v. 8, n. 1, p. 11-75, jan./abr. 2021.

when this dignity is injured for some reason or another, in whatever degree, by act or omission of public entities, authorities or civil servants acting in their name, Public Law appears as the resource to immediately repair the violated dignity to provide people at all times with the best possible conditions to develop in a free and socially responsible manner.

Throughout history, Administrative Law, as we well know, has been the subject of many definitions and varying approaches, almost as many as authors who have written about it. From the idea of power, passing through public service or the notion of the balance between prerogative and assurance, there have been many ways of understanding this very important branch of Public Law. Among us, for a long time a subjective perspective prevailed that focused on the public administration as a central point of our subject area. Those were the times of prioritising the liberal state subject to the rule of law; times in which the power of the revolutionary light imposed its *dictum* and, with greater or lesser intensity, it was thought that Administrative Law fulfillled its duty by offering an arsenal of institutions and categories capable of repairing the pernicious effects of a public administration accustomed to privilege and prerogative.

Well, despite the time that has elapsed since the formulation of a social and democratic state subject to the rule of law, few scholars of Administrative Law have realised that this field is more than just a set of laws prepared to react legally against the excess of power, against the misuse of power. Meilán Gil, we only have to read his monograph from 1967, *El proceso de la definición del Derecho Administrativo*, is a pioneer in defining Administrative Law based on prioritising collective interests by underlining the centrality of said interests as *punctum dolens* for the definition of Administrative Law,[5] helping us to understand the scope of the concept of the general interest in a social and democratic state subject to the rule of law as a touchstone of modern Administrative Law.[6]

Indeed, the general interest in the social and democratic state subject to the rule of law, apart from being a concept that is indispensably incorporated into tangible administrative reality and has to be expressed rationally, has an inalienable core that answers precisely to the defence, protection and promotion of fundamental human rights, the so-called rights to freedom and, of course, social rights. Accordingly, Administrative Law appears to be committed to the clause of the social and democratic state subject to the rule of law, promoting conditions that guarantee that the freedom and equality of people and of the groups they form part

[5] Vid. MEILÁN GIL, José Luis. *El proceso de la definición del derecho administrativo*. Madrid: Escuela Nacional de Administración Pública, 1967.

[6] Vid. RODRÍGUEZ-ARANA, Jaime. *Interés general, derecho administrativo y estado de bienestar*. Madrid: Iustel, 2013.

of are genuine and effective, removing the obstacles that prevent their fulfillment and encouraging the participation of everybody in political, economic, social, and cultural life.

From this perspective, particularly timely is the thesis of the Argentine professor Balbín, when he highlights that, precisely within the framework of the social and democratic state subject to the rule of law, Administrative Law is a right to social inclusion, a right that, beyond legally repairing the damage inflicted on citizens by the public authorities, is a preventative law precisely committed to the task of creating egalitarian conditions that allow for the free and socially responsible development of the people.[7]

Indeed, Administrative Law from this period, more if we study it from the resounding crisis of the static version of the Welfare State in a post-pandemic world, needs to readdress many of its categories and concepts, borrowing too much from Administrative Laws anchored in the 19th century, today surpassed by the same definition of the state as social and democratic subject to the rule of law. This study uses this consideration as a starting point: the supremacy of the Constitution and the form of state it gave rise to, a reflection that must transcend and reinterpret a system conceived and designed for another era. Simply put, today the key is human dignity, which is the root and the core of the state, and from there, using this as a starting point, we should approach each and every one of the categories that make up Administrative Law. From the sources, rules, administrative actions, regulations, limiting activities, public or promotion services, sanctioning powers, public assets, and, of course, the different sectoral expressions of administrative activity.

2 Human dignity and Administrative Law

The current crisis Administrative Law is emerged in, fraught with several complex issues, calls for, in these times of deep crisis (made worse by the pandemic we are suffering all over the world), its reinvention based on the clause of a social and democratic state subject to the rule of law rooted in human dignity.[8]

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[7] BALBÍN, Carlos Federico. Un derecho administrativo para la inclusión social. *A&C – Revista de Direito Administrativo & Constitucional*, Belo Horizonte, ano 14, n. 58, p. 33-59, out./dez. 2014.

[8] On the impacts of the pandemic on Administrative Law, see: PAZ MACIAS, Jenssy Carolina. Vulnerabilidad administrativa del estado hondureño en situaciones de emergencia con la habilitación de las contrataciones directas durante la pandemia del covid-19. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 7, n. 1, p. 193-205, ene./jun. 2020; SÁNCHEZ DIAZ, Maria Fernanda; ROMERO TELLO, Ana Guadalupe. Covid-19, derechos humanos y estado frente a manejo de la pandemia. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 8, n. 1, p. 233-254, ene./jun. 2021; GONÇALVES, Oksandro Osdival; LUCIANI, Danna Catharina Mascarello. Serviços públicos digitais de seguridade social na pandemia de covid-19: eficiência e inclusão. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 7, n. 2, p. 207-226, jul./dic. 2020; CASTILLO ARJONA, Mónica. El fenómeno de la covid-19 y sus efectos sociales en el derecho administrativo del siglo XXI. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 8, n. 1, p. 173-187, ene./jun. 2021; DOMÍNGUEZ ÁLVAREZ, José Luis. Public administration's

The lack of satisfactory answers to the collective problems of our time calls for a deep and radical reflection on the part of Administrative Law, an in-depth test of its contradictions and impasses, a stop on the way and a reconstruction of its foundations, a new structure and new developments. Precisely, a new methodology, more inductive, in strategic alliance with other social sciences, more closely connected to the real reality. We need categories and institutions through which constitutional values flow with the aim of protecting, defending and promoting fundamental individual social rights of people.

Administrative Law, as is well-known and can be seen presently, has failed in becoming a set of laws for the defence, protection and promotion of the fundamental human rights arising from the dignity of the human being. Data from the real reality gives reliable proof of this. Inequality and poverty continue growing in the face of the impotence of a law conceived from the prerogative and privilege of the public administration incapable of offering effective solutions. The values and constitutional parameters have not permeated sufficiently in its core due to resistances of all types that today must be overcome from the impetus and power of human dignity projected onto the categories and institutions of Administrative Law.

Indeed, today, in 2020, in the framework of a humanitarian emergency of incalculable consequences, the examination to which Administrative Law is submitted reflects its inability to offer solutions in keeping with human dignity. That this is so, it seems, has resulted in decades and decades of Administrative Law becoming disconnected from the clause of the social and democratic state subject to the rule of law. The health emergency of 2020 has once again highlighted, like the financial crisis of 2007-2008, the shortcomings of this branch of Public Law to regulate matters of the general interest in accordance with the law. We need an Administrative Law with a human face, with methods and institutions to ensure that the objective service to the general interest takes precedence.

For quite a long time, the structure of Administrative Law has shown flaws in its foundations, flaws in its structure and, of course, there are also defects in its final touches and finishes. Furthermore, Administrative Law is not, and in its current state has no hope of being, a driving force of the values of dignity, freedom or justice. It has strayed so far from its intended course that there is no choice but to come to its aid to reinvent it, rebuild it, rethink it, and why not, reconstitute it, using as a base the real reality and a new, more inductive methodology that facilitates this approach, from top to bottom and side to side, in which its conception starts and ends with human dignity.

challenges in order to guarantee the fundamental right of personal data protection in the post-covid-19 era. *Revista Eurolatinoamericana de Derecho Administrativo*, Santa Fe, v. 7, n. 1, p. 167-191, ene./jun. 2020.

The misguided course is comprehensive, proverbial: we have a 19th century legal-administrative structure to resolve issues of a nation-state that has been subject to pressure from above and below. Public administration is equipped with obsolete means for its activity to provide an objective service of the general interest. Its structures are out of sync with reality, its workforce at times is out of sync with its mission to serve the community. The central categories— administrative act, administrative provisions, contracts, promotion, policies, public service, control, goods— do not meet the collective needs of the people, nor, even more serious, are they oriented in their design towards providing people with better living conditions.

And if that were not enough, the misguided course is followed, logically, by disrepute. Indeed, why today does the mere mention of the expression Administrative Law or public administration or, in general, a reference to the public sphere, cause so much rejection and be identified so often with irrationality, procrastination, favouritism or inequality? Probably because despite the time passed since the advent of a social and democratic state subject to the rule of law, Administrative Law and its key players have not connected deeply with its values and central vectors or with the effective responses it proposes. The causes seem to be varied, but they need comparing; thus, we should debate the need to renew the foundations of an Administrative Law in which the expression human dignity, it is true, does not usually appear in the manuals and courses of the field. For this reason, when in 2012 I was given the task by the Latin American Centre for Development Administration (CLAD) to draft the "Carta Iberoamericana de los derechos y deberes de los ciudadanos en relación con la Administración Pública" (Iberoamerican Charter for the Rights and Duties of Citizens with regards to the Administration), signed by all the Ministers of Public Administration of the region on 10 October 2013 in Panama, I included the words human dignity in several passages, as well as in the very definition of the fundamental right of every citizen to a good public administration.

Why has Administrative Law failed as a legal system for social transformation, in which its categories and institutions are designed precisely to improve the living conditions of the people, to ensure a dignified life? The answer, with all the risks entailed, which are not inconsiderable, affects the foundations, the resources, the modalities of administrative proceedings, the control— in a nutshell, the whole system of Administrative Law, currently terminally-ill and listless, incapable and without moral resources to duly attend the obvious and currently pressing collective needs in so many parts of the world. The vehicle, Administrative Law, is traveling aimlessly and bewilderedly on a misguided course because it is incapable of understanding its potential. The driver and the passengers, traveling in a car from a different era along a road that at times changes its physiognomy, seem to be lost in their own worlds probably because they do not want to, or perhaps cannot, contemplate the

real reality. Therefore, it is time to stop, to take a break and question everything, absolutely everything: the suitability of the vehicle, the expertise of the driver, the role of the passengers, the conditions of the route, the road signs and, of course, the end of the road. This is where the novelty and the originality of the idea and its entry into the frontiers of knowledge stem from.

Accordingly, we should consider the construction of a new paradigm to reinvent, from a more profoundly human and social perspective, all the categories and institutions that belong to this field of law. In this task, the general interest applied to social administrative activity needs to be seriously rethought, with the goal of this reconstruction *in toto* leading to what is, has been and should be, now more than ever, Administrative Law in a social and democratic state subject to the rule of law: The public authorities law to guarantee the equal and socially responsible freedom of citizens, to ensure decent living conditions.

Indeed, from the administrative acts, the regulations, passing through the administrative activity of policing, promotion and public service, and following the rest of the subjects, it is necessary to reconstruct and redesign the social dimension of Administrative Law, today at a low due to a worrying privatisation of the general interest and the systematic neglect of its raison d'être, of its origins. The originality of this reflection lies with relevance of recovering today, during this time, the starting point: the vocation of social commitment with which Administrative Law was founded and that seems to have become diluted gradually by the influence of economic and political factors that have slowly subject the law to exclusively economic criteria, factors of an efficiency and effectiveness on the fringes of ethics and, above all, moving increasingly further away from this equality engraved in the soul of this branch of Public Law that needs to do so much to combat the inequalities, fragility and vulnerability that affects so many millions of people worldwide.

In this regard, we need to reconstitute Administrative Law from the centrality of human dignity, rebuilding and redesigning the main categories and institutions of this branch of Public Law, which have long needed to be understood from the clause of the social and democratic state subject to the rule of law, thus enabling our field to recover the social footprint engraved since its origins in its essential conformation.

In addition, if Administrative Law is, essentially, a substantiated version of constitutional law, it is necessary, from complementary thinking, to carry out an analysis on what I have called in my work Constitutional Administrative Law, as the very structure of the constitutional values of the social and democratic state subject to the rule of law inexorably leads to its acceptance by the entire system of Administrative Law, of each and every one of its categories and institutions illuminated by the meaning and consequences of the clause of the social and

democratic state subject to the rule of law, a clause that is based on the highest levels of human dignity.

Unfortunately, for too long, reality confirms that an Administrative Law of a techno-structural nature has been designed, permeated with bureaucracy and verticality, both for economic-financial agents and for politicians, forgetting that the fight against the immunities of power is in the DNA of this branch of Public Law, on the one hand, and, on the other, in a positive sense, the legal defence of the general interest in a state subject to the rule of law. Likewise, a Copernican investment in the structural approach of legal-administrative science is necessary in a field that lost its direction too long ago, as this pandemic crisis has starkly proven. We must recover that space of civility innate to the origins of Administrative Law, today forgotten by the din of the techno-systemic drifting and the slavery of closed ideologies. From the bottom up, from side to side, from the social reality we will verify the solidity of the foundations and from there we will redesign the set of categories and institutions.

This construction of Administrative Law based on human dignity seeks to address current controversial issues such as, among others; the effectiveness, justiciability and enforceability of fundamental social rights; the need to build a new global Administrative Law from the centrality of human dignity; the demand for independent controls of administrative activity; and new ways of tackling permanent training in the Schools of Public Administration, in the institutions for the preparation and training of judges and prosecutors and, of course, in the law degree curriculum.

The impact of human dignity on the Administrative Law system not only puts forward a new rationale for the Administrative Law as a consequence of the full acceptance of the constitutional values of the social and democratic state subject to the rule of law over the entire Administrative Law system. It also has an impact, and a considerable one, on the reconstruction of the notion of general interest embedded in the soul of all categories of Administrative Law, which will have to be rethought from this perspective. The different modalities of administrative proceedings, policing, development, public service, and now preventative or precautionary, must be reformulated. As should accordingly the logic of the administrative procedures, the drafting of acts, norms and all the contracting, now understood from the centrality of the position of the rights of the citizen derived from the fundamental to a good public administration. The theoretical framework of public intervention, as well as the justification for the deployment of powers and authority, not privileges or prerogatives of the administration, must be reviewed, as well as all forms of control of administrative activity. Likewise, the judicial process of control of administrative actions should undergo drastic changes and transformations, as well as the exercise of sanctioning powers. The different sectors of administrative activity, with special

reference to health, education and social services must also be rethought in terms of their meaning and functionality. And, of course, budgetary law, which should adhere to more realistic methods more in line with the collective needs of citizens, especially the most fragile and vulnerable. Finally, a comprehensive complete reform of the institutions and procedures of global Administrative Law, today on the sidelines, in many of its areas, of the principles of a state subject to the rule of law.

In accordance with some methodological assumptions of the social sciences, especially open, plural, dynamic and complementary thinking, which I have been applying to research in Administrative Law for years, we note that the changes and transformations in our field are posed rhetorically, but without practical results because in many cases it is necessary to resist many inertias and the weight of a tradition that condemns us to a "Lampedusan" kind of stasis. Nevertheless, Administrative Law should relentlessly prepare itself to host categories and institutions, deeply rethought and rebuilt from the centrality of human dignity, that deploy their efficacy with urgency, since the totalitarian drift glimpsed on the horizon is a pressing matter.

The task consists of redesigning, reconstructing, reinventing, from the ground up, the categories and institutions central to Administrative Law based on an approach centred on the dignity of the individual, and less on administrative powers and competences. The main goal is to fill in a gap pending for decades in the field of Administrative Law and that has been on my mind for a long time: Why do we still not, in 2020, have an Administrative Law in which the clause of the social state subject to the rule of law has deployed all and every one of its consequences or effects? Why are we still prisoners of this executive self-governance and absolute unilateralism that makes citizens so helpless? Why has the ethical dimension of the objective service of the general interest failed to fully penetrate the modus operandi of the public administration and management?

Now, in 2020, it is time to put the idea forward, clearly and emphatically, that human dignity, in addition to being the main thrust of philosophy and ethics, is the be-all and end-all of law. A statement reflecting that human dignity is so important and far-reaching, not only in ethical or philosophical terms but also legal, that, as previously mentioned, it rises up and stands tall, all-powerful, almighty and sovereign, against any attempt whatsoever by the authorities to eradicate it or, even worse maybe, ignore it along the way. Hence, we are convinced that by basing our legal thought and construction on dignity, we will face truly revolutionary challenges and proposals, both in its proactive application and development and its corollaries.

Now in 2020, the failure of Administrative Law as an instrument to guarantee and preserve dignified living conditions is a reality on which legal sciences, in synergy with the rest of social sciences, must focus in the future. Discovering the causes of this failure and the paths to take to reverse the current state is one of the main

challenges that must be faced by the global legal scientific community, currently on standby due to the lack of a holistic approach to understand the magnitude of the problem and the lack of reflection on the causes of such failures and impasses, in particular on the need for a clearly multidisciplinary methodology.

From the Administrative Law perspective, probably due to functionalism and the different types of urgencies and emergencies, aspects that deal with its meaning and mission in these times, recovering its social footprint rooted in human dignity, have not been addressed radically, in sufficient depth. The document of the Council of Europe *Living in dignity in the 21st century – Poverty and inequality in societies of human rights: the paradox of democracies (2013)*. Accordingly, the need to free people from the current reification, as the Council of Europe proposes, should govern new and disruptive forms of understanding the meaning of the Welfare State, rooted in stasis, and enlighten new ways of carrying out public policies, especially in the social sphere.

There are some significant studies on human dignity as a constitutional value, such as the monograph by Aharon Barak, *Human dignity. The constitutional value and the constitutional right* (2015); and from a more philosophical perspective, the work of Stephen Riley Routledge, *Human dignity and Law: legal and philosophical investigations* (2017), and Andrea Sangiovanni's *Humanity without dignity. Moral equality, respect, and human rights* (2017). In the order of global law, noteworthy is the collective work *Globalization of law. The role of human dignity* (2018). And in the field of social rights, we must cite the works of Luis Jimena Quesada, *Social rights and policies in the European Union: new challenges in a context of economic crisis* (2016) and Thomas M. Antkowiak, *A dignified life and the resurgence of social rights* (2020), as well as the collective works *Addressing inequality from a human rights perspective: Social and economic justice in the Global South* […], and *Property and human rights in a global context* (2019).

Among the recognised symptoms of the deep crisis in which Administrative Law finds itself are the failure of the Welfare State, the crisis of administrative justice, technocracy, over-regulation and vetocracy. The Welfare State model, rooted in static or techno-systemic versions, has failed to develop and deploy its full dynamism and potential, and public policies have not improved the living conditions of people. Administrative justice, for various circumstances that can be glimpsed on the horizon, has not completed its essential task of assigning to each their due— *ius sum cuique tribuendi*. In many latitudes, public policies start out hampered by their technocratic dependency and fail to successfully manage the defence, protection and promotion of fundamental rights. At times, not infrequently, civil servants fail to overcome the temptation to show dominance and lord over the procedures, showing at times worrying shortcomings in their basic training and, above all, a

noticeable lack of democratic habits and qualities. The protection and defence of freedoms by the public administration, dominated by over-regulation or asphyxiating re-regulation, have brought about the interventionism that reduces human beings in many latitudes to inert beings, condemned to expect public authorities to fulfill absolutely all their needs. Ultimately, global Administrative Law, despite the time that has passed, is still *in fieri*, with institutions where an unjustifiable vetocracy still reigns, where partial interests prevail and true justice is merely a pipe dream. Efficiency and efficacy serving functionalism have over time dominated the ethics integrated into the very core of Administrative Law with well-known consequences.

Among the unsuccessful tried and tested remedies is the current system of budgetary Public Law, incapable of addressing the real reality shown in the fragility and vulnerability of millions of people. Shackled to traditions of the past, it should adapt to reality and find a way to make the contents of the public budgets, above all in social areas, effectively focus on diligently serving the pressing collective needs that today harm the dignity of millions of people all over the world using indicators capable of scientific measurement. The quantitative dimension of solidarity, growing exponentially through subsidies, aid and benefits to the vulnerable, has not had a positive outcome, from a qualitative perspective, on a real improvement in the living conditions of people.

There are a growing number of authoritative voices that advocate building Administrative Law based on the clear understanding that we are not necessarily referring to economic poverty, as inequality and its capacity to destroy the dignity of so many people is not automatically associated with a certain level of financially appreciated income or spending. It is cultural and social and, therefore, Administrative Law should, as the cultural product it is and as an instrument of civilisation and humanity, which are the reasons for its birth and development, be present in these serious dilemmas and offer positive contributions.

Now, in 2022, the Welfare State needs to overcome its present static state, and regain a dynamic and inclusive path, which is the one needed to wake up and support valuable social initiatives that can work together with public authorities to improve the most fragile and vulnerable sectors, today more neglected and in full exponential growth. Aid, public grants and subsidies can, and should, with a proper redesign of their legal treatment and new dynamism, contribute to building effective and practical solutions to these relevant deficiencies within the framework of the principles of solidarity and subsidiarity.

Now, in 2022, it is crucial to eradicate the ways of working and functioning of the public administration typical of times past, which need to change for the sensitivity of the civil servants of the three state authorities to grow exponentially regarding the justiciability and effectiveness of human rights at all governmental

levels. A new administration is needed, a good administration of public assets based on the effective defence, protection and promotion of human dignity.

Now, in 2022, the general interest is, frequently, managed by the civil service as a space reserved for its knowledge and specialisation, and should open up to an open, plural, vital, dynamic and complementary vision that must materialise, be motivated and linked to the effective achievement of human dignity encouraged by social participation. If we do not take an in-depth look at the democratic footprint in the general interest, as advocated from the social and democratic state subject to the rule of law, it will be impossible to tackle the changes and transformations needed to make the social commitment of the new paradigm of Administrative Law real and effective. Without an effective social participation built on techniques arising from real reality based on the contributions of those who know and experience the functioning of public services, for example, it would be very difficult, or impossible, to establish an authentic social Administrative Law based on *in re*.

Now, in 2022, we cannot, and should not, miss the chance of detecting in good time the social risks, with an Administrative Law better prepared for the prevention, foresight and proposal of efficient action courses with global dimensions and that understand the complexities we have to face due to crises, such as the one suffered since 2007 and the recent and ongoing health crisis.

Now, in 2022, Administrative Law should restore lost spaces, address overlooked destinations and underestimated factors. The field work and the diagnosis will reveal these deficiencies in the traditional concept of Administrative Law and the new itinerary should challenge them.

Now, in 2022, according to current indices, we are immersed in an understanding and development of Administrative Law that needs to relinquish the economy as the sole platform of analysis and to renew its foundations and its theoretical framework, as it is clear that the degree of social development that was expected is far from achieved, especially if we take into account the potential of the clause of the social and democratic state subject to the rule of law— a fundamental pillar of the European legal system. Administrative Law cannot wait, as it has on many occasions, for the economy to resolve the problems of dignity and of its roots in matters of equality, as they are not among its specific goals or tasks. It has been proven that an excellent GDP does not in any way mean or guarantee distribution or support for the most vulnerable social sectors. It is pressing, urgent, that once and for all the projection of the open and dynamic model of a social and democratic state subject to the rule of law sheds its light with all its intensity on the entire Administrative Law system, today still enclosed in techno-structural perspectives and in narrow interpretations of the general interest.

3 Final observations: an Administrative Law for human dignity

Fundamental human rights are those rights that grant their owners a varied set of legal positions that are equipped with enhanced protection and that impose a range of obligations on the public authorities corresponding to the various functions arising from each of these legal positions.[9] From this perspective, we must state that immediate applicability is the same in the case of fundamental individual rights as in social ones; although the methods to be employed may vary, they arise from the diversity of functions included in each right. It is not the case that in one example we are in the presence of defence rights and in the other benefit rights, the problem is that fundamental rights are a single category that allows for multifunctional expression. In other words, there is a need to understand fundamental rights, all of them, from the perspective of a whole, in such a way that each fundamental right is a set of fundamental legal positions from which functions of compliance, protection and benefits arise.[10]

The fact that the immediate applicability of fundamental social rights, recognised *ad hoc*, by connection, by rational argument of the supreme interpreter of the Constitution, or by reception of the International Treaties on Human Rights (the case of the International Covenant on Economic, Social and Cultural Rights), costs more does not mean that they are not fundamental. It is incidental, and does not affect the substance. And as incidental or formal issues must follow substantial or material ones, the logical thing is to guide structures towards facilitating these rights by placing the public budget at their service and not the other way around.

The problem of the immediate applicability of fundamental social rights, of the costs to implement it, are not found in fundamental human rights, but in the many obstacles and impediments to the functions of protection and provision inherent in all fundamental rights, whatever their nature.

Fundamental rights are one same category with one system that arises from human dignity itself and this has the same conditions of enforceability regardless of the right in question.[11] The structures and procedures are designed and act at the service of the people, not the other way round. In a public budget many needs and concepts have to be met, but clearly the amount to be budgeted for these

[9] HACHEM, Daniel Wunder. *Tutela administrativa efetiva dos direitos fundamentais sociais*: por uma implementação espontânea, integral e igualitária. 2014. Doctoral Thesis – Universidade Federal do Paraná, Curitiba, 2014. p. 132.

[10] HACHEM, Daniel Wunder, *Ibidem*.

[11] HACHEM, Daniel Wunder. São os direitos sociais "direitos públicos subjetivos"? Mitos e confusões na teoria dos direitos fundamentais. *Revista de Estudos Constitucionais, Hermenêutica e Teoria do Direito*, v. 11, n. 3, p. 404-436, set./dez. 2019.

purposes must be a function of the situation of fundamental social rights in the country and the means available, because otherwise it would be impossible. But from there to what happens in reality, in which in many systems these rights are not fundamental and their enforceability is in question, there is a long way to go. The issue is to confirm the fundamental character of these rights and set off on the journey in this terrain. From there on, the progress would be significant. It is not a question of denying reality; the budgetary resources are what they are and they form the framework for discovering the rationality of lawsuits on the subject. It is a question, simply and plainly, of confirming that those fundamental social rights belong to the single category of fundamental human rights.

A matter that, in times of pandemic, affects, and greatly so, human dignity, refers to the scope and functionality of a right to a vital minimum, a fundamental right to minimum standards that ensures the human condition is not broken, that safeguards human dignity.

In this regard we must remember that there are some minimum fundamental social rights that the state, or society, depending on the cases and possibilities, should ensure and guarantee to avoid dehumanising the individual. In this point, nevertheless, it should be made clear that, indeed, the immediate applicability of fundamental social rights is not reduced to the recognition of minimum standards needed for living or existence. All fundamental social rights, all, as fundamental human rights, are directly effective simply because they enjoy the same status and legal system as fundamental rights.

The framework of what is indispensable for a human existence responds to the right to the minimum living standards, but in addition to this guarantee of minimum levels there are other ordinary fundamental social rights, such as the right to decent social protection, the right to a decent education, etc. In other words, one thing is the indispensable minimum level for a person to exist or live, and another thing is to guarantee a framework of rationality and progressiveness in the exercise of these rights that aims beyond the essential, beyond the minimum.

If we understand the minimum standard to exist as a minimum threshold, the minimum boundary of fundamental social rights, we will understand that from that minimum threshold fundamental social rights can be raised or built. Based on this sphere of a minimally decent existence, applying the principle of progressiveness, we can confirm the existence of fundamental social rights that consist of guarantees and benefits, together with protections and defences, of dignified legal positions, of more than minimum dignity. The appeals made by the constitutions of our legal culture for a better quality of life for people or a decent existence or life should not be interpreted in any other way.

In the framework of the duties to protect and promote positive factual benefits, it should be confirmed that the content of the benefits that integrate the minimum standards needed to exist are always and in any case legally demandable before any judge or court by means of any procedural instrument, regardless of the existence of budgetary resources or a public organizational structure, as they affect the content of the minimum dignity possible, that which differentiates humans from irrational animals or mere objects or things.

Fundamental social rights may be provided for in the Constitution as such, though this is uncommon, or can be drawn from the relationship with other fundamental rights or from a rational argument based on the very foundations of the Constitution with regard to the tenets of the social and democratic state subject to the rule of law and the centrality of human dignity.

The fundamental right to an adequate standard of living (Article 25.1 of the Universal Declaration of Human Rights), to a decent standard of living, as stated in the preamble to the Spanish Constitution of 1978, is, following the American Declaration of the Rights and Duties of Man, Article XI, that which public resources and those of the community permit, or, as stated in Article 26 of the American Convention on Human Rights, to the extent of available resources, through legislation or other appropriate means. Such provisions place human dignity at the centre of the social, political and economic order, which implies, plainly and clearly, that the budgetary resources of the state, society and the community must be directed and managed in such a way as to guarantee a decent standard of living for all men and women.

Article 130.1 of the Spanish Constitution calls for public authorities to raise the standard of living of the Spanish people on the basis of an appropriate economic policy to this end. Such a standard of living, as claimed by Pérez Hualde, is that which involves and requires, in order to be so, the satisfaction of certain needs of an economic nature which, in turn, guarantee access to other also human and fundamental rights, also of great importance.[12] Pérez Hualde places the epicentre of fundamental social rights in the collective needs of the people, needs that, like drinking water, sanitation, electricity, gas supply, public transport, road corridors, mail, are all activities that are usually guaranteed, at least many of them, through the methods of public intervention.

As much intervention as needed and as much socially responsible freedom as possible is a famous maxim that became renowned among the teachers of the Freiburg School in the middle of the last century. Essentially, the purpose of the state lies in everyone being able to develop freely and in a socially responsible

[12] PEREZ HUALDE, Alejandro. El sistema de derechos humanos y el servicio universal como técnica para una respuesta global. *In*: EMBID IRUJO, A. (dir.). *Derechos económicos y sociales*. Madrid: Iustel, 2009. p. 93-94.

way. And to do so the state must adopt this commitment when the institutions and social initiatives are unable to help individuals in their free and socially responsible development.

The problem of the methods of the public services for these tasks resides, as Devolvé already accurately warned not long ago, in that the public service activities are publicly owned, something that cannot be said, for example, for education or health, that are fundamental human rights and, therefore, should not be classified as areas of public ownership. In contrast, under the technique of the *ordenatio* of authorisations, licences or permits, things are going in a different direction as in these cases it is a question of regulating private activities of the people that are of the general interest.

Indeed, the state, under subsidiarity, has, due to its own structure and essence, the superior task of guaranteeing the full, free and socially responsible exercise of rights; the supreme duty of the state authority, as highlighted by Bidart Campos, does not end with the existence of a regulatory order aimed at enabling this obligation to be fulfillled, but it entails the need for a government conduct that ensures the existence, in reality, of an efficient guarantee of the free and full exercise, I would note socially responsible, of human rights.[13]

Nevertheless, as mentioned by Pérez Hualde, since the conception of universal service— which is not a privative characteristic of the public service strictly speaking, but rather of the private activities of general interest— it is possible to alleviate in some way, due to public intervention, aimed at serving the general interest, the situation of objective injustice, due to material inequality, in which the people in need of these economic goods that are fundamental for an adequate standard of living, are to be found, in accordance with the community in which they live.[14]

Little by little, in these times of turmoil and change, we hope the effectiveness and enforceability of fundamental social rights will have their own place in the minds and agendas of the main decisions taken by the political, economic, social and cultural authorities. A lot is at stake here, so much so that both the dignity of the person and their inalienable rights merge, again, now stronger than ever, in a renewed legal, economic and social order that can no longer wait.

If the dignity of the individual and their free and socially responsible development, which amounts to the same, is the basic yardstick for measuring temperature and intensity of a social and democratic state subject to the rule of law, then the time has come once and for all for the methods of Administrative Law to be designed in a

[13] BIDART CAMPOS, Germán José. La responsabilidad en los tratados de jerarquía constitucional. *In*: BUERES, J. A.; KEMELMAJER DE CARLUCCI, A. (dir.). *Responsabilidad por daños en el tercer milenio*: homenaje al profesor doctor Atilio Aníbal Alterini. Buenos Aires: Abeledo-Perrot, 1997. p. 427.

[14] PEREZ HUALDE, Alejandro. Op. cit. p. 105.

different manner. In a manner that enables the constitutional values and parameters to become a reality in everyday life.

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