Reinventing public service between the autonomy of the market and the duty of public interest[1]

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> «... the great scientific changes can sometimes be seen as the consequence of a discovery, but they can also be seen as the appearance of new ways in the will of the truth...»
> Michel Foucault, *A Ordem do Discurso*

1. For systems of administrative law which have developed under French influence, the idea of *public service*, alongside the idea of *puissance publique*, is both central and structuring.

Having first appeared at the end of the nineteenth century and taken root throughout the twentieth century, the legal theory of *public service*, of which Gaston Jèze was the figurehead, came from the desire to use law to politically consolidate a specific relationship between the State and the Economy, which was then necessary.

2. In fact, restricted to organising the police, the justice system, the tax system and foreign trade, the *Liberal State* was in its death throes as it reached the last quarter of the nineteenth century.

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Limited to guaranteeing individual liberty, the State only intervened in the economy to ensure compliance with the law – acting as an economic policeman – and thus stood helplessly by as an ever-wider social divisions developed. Furthermore, individualistic liberal society, which lacked solidarity and was economically divided, was unable on its own to redress the imbalances which it had created and close the chasms that it had opened up.

The Liberal State became a tired formula that had no strength for social action and lacked any solutions. Thus, a new model of the State was required, although it did retain one fundamental idea from the old model: the connection to Law.

3. The State and the economy thus became involved in a project to reconstruct the social fabric, an achievement that was to be legally legitimised.

The provision of services to the community, either by the State or other public bodies, proved to be fundamental in this reconstruction process. The interventionist State was born and, with it, the public responsibility for services which were essential to the community – *the public service State* or *the social State*.

Political confidence in the social reconstruction undertaken by the State, and especially by its Government, required that limits to this activity be set, due to the desire to avoid abuses and prevent the misuse of discretionary powers. In fact, all State action needed to be included in a legal framework. In France, it was the theory of the *service public* that achieved this goal, and, shortly afterwards, *public service* developed into one of the key concepts of administrative law.

Public service was shaped by French administrative jurisprudence as a notion which, having become politically important, allows the area where administrative law is applicable to be defined and establishes the scope of the jurisdiction of the administrative courts, as opposed to the common courts. The Court of Arbitration, in the famous *arrêt Blanco* (1873), marks the start of this jurisprudence, which was commented on and theorised by the most highly esteemed judicial-administrative doctrine of the time.

3.1. The public nature of the service was simultaneously based on the close connection between the activity and the State or other collective public body – *organic criteria* – and the pursuit of the public interest of this activity – *material criteria*.

However, the fact that *public service* was subject to administrative law did not restrict the activity itself. The relationship between the service provider and users continued to be honoured, regardless of the method by which the service was managed. Indeed, there were several methods of management: the service could be directly undertaken by the public authority in *régie*, could be organised in *établissement public* with autonomous legal character and could also be *exploited through a concession* by an individual. Whatever the method of management, however, the relationship between the service provider and the users was defined objectively, by law or regulations, in terms of the position that each user held before the respective public bodies or concessionaires. Any subjective positions they might have with regard to the service provider, even if the relationship had a contractual base, were alien to the notion of *public service*.

This is the classical concept of public service, characterised by a strict relationship between the public nature of the service and the judicial-administrative regime which governs it.

However, this went even further. It was understood that the public provision inherent in public service should remain outside the marketplace, thus making its logic administrative rather than competitive or commercial. In other words, it can be said that the result of the exploitation of the public service came either from a regime of public monopoly or of a regime of an exclusive granted concession.

3.2. The political project for social reconstruction would, however, only be achieved if its legal legitimacy was clear. Thus, certain legal principles regulating the relationship between provider and users were defined: the *principle of universality*, the *principle of equality*, the *principle of continuity* and the *principle of adaptability*.

According to the first, the provider must supply the service to all and may not legitimately refuse to supply the service that he normally supplies to any element of society that wishes to use it. In accordance with the principle of equality, the provider must supply the service to all, under equal conditions; any discrimination in the conditions of use must be justified according to objective and appropriate differences. In the case of concessions, the law establishes – sometimes expressly – rules guaranteeing access to the service and equal treatment. In these cases, the wording of contractual relationships between concessionaires and users is determined by the compulsory application of these provisions.

The principle of continuity states that the public service must operate without interruption and may not be discontinued, while finally, the principle of adaptability provides that the development of the service be undertaken in such a way as to permanently adapt to the ever-changing factors of public interest. In other words, when the logic of public interest so requires, the provision of the public service must accordingly be altered.

3.3. This was how public service was understood for many years and absorbed into the administrative law systems of the states influenced by French administrative law, as was the case of Portugal and Spain, and, as I understand it, Italy too. In contrast, German administrative law followed a different route, giving form to the legal development of the *Leistungsverwaltung* in the notion of *Anstalt* or institution.

3.4. The first blow to this way of legally conceiving and establishing the political reality of the public services State or social State came in the first quarter of the twentieth century, with the appearance of *services of an industrial or commercial nature* provided by the State or public bodies. This was immediately followed by a second blow, which coincided with the advent of *public companies*. Analysing these new situations, the Austrian Fritz Fleiner used an expression which corresponded, to my mind, to the underlying notion: «*a movement towards private law*» (*Flucht an das Privatrecht*). This expression has now been rediscovered and become famous as a means of labelling modern day phenomena, as will be examined below.

The expansion of services provided by the State and its Government to the industrial and commercial sectors meant that it became possible to distinguish clearly between the classic public services, which are wholly governed by administrative law, and industrial or commercial administrative services, which are partly subject to private law.

The blows caused by the emerging new situations weakened the theory of public service. Under a new form, the notion of public service hit a crisis and, with it, the demarcation of administrative law became clouded.

However, as a consequence of this development, the users of industrial and commercial services saw their relationships with the respective service providers defined contractually, these contracts being predominantly regulated by private law. No longer would it be easy to establish a division between public service activities, regulated by administrative law, and activities governed by civil or commercial law. No longer would

it be easy to establish a separation between the users' objective interests that resulted from the law, and subjective positions based on individual rights deriving from contracts or originating from the person himself. The number of unclear situations multiplied.

3.5. This became all the more evident when, from the 50s and 60s onwards, the State began to intervene in traditionally private economic areas such as banking and insurance, adopting the form of a public company with private law character – companies operating with public capital – and competing with other companies.

It is no surprise that the activity of these public companies was subject to private law and that the relationships between these companies and the users were not legally different from those between a private bank or insurance company and its clients.

In other economic sectors, the State intervened by adopting the form of *établissement public*. Here, it was subject to private law but, sometimes, also to administrative law – «Electricité et Gaz de France» is a prime example. It was granted wide-ranging powers, in both tariff and expropriation programmes, but was subject to private law in many aspects, especially in terms of labour relations.

Uniform control of public service activities by a law that is public and administrative in nature had definitively been shaken. The State monopolies and exclusive rights for concessions were reduced, as a consequence, and there was a tendency to consider the State not only as an actor on the social stage but also as a social partner. This was the result of increased State involvement in the economy, of the coexistence of public and private sectors in the economy, of a State that assumes social responsibility for the provision of several services, of a State that had become a company and competed with others.

It should be noted, however, that despite the apparent legal chaos accompanying the public services crisis, two situations remain untouched. On the one hand, the rules which governed the public services (whether they were of a public nature or not) came from the State, the body which is ultimately responsible for them. On the other hand, the nature of the services derived from the strict link between the activities and public interest, as it was understood at any given moment.

4. However, the greatest blow to the notion of public service, and to the corresponding legal theory, came in the second half of the 1970s with the criticism of the Social State and the Public and Welfare Services,

by the neo-liberal ideology. Anglo-Saxon in origin, this started the process of moulding a new model for the State, which was gradually introduced and given shape in the systems with continental roots through European Community law.

This criticism was made at various levels.

Firstly, the relative rigidity and ineffectiveness of the public management of services; secondly, the excessive price of publicly provided services, which increased public debt to levels considered unsustainable; thirdly, the management was charged with being inefficient since it did not usually consider the means used in relation to the ends to be achieved. This reason became even more evident when, once monopolies were abolished, comparisons began to be made between public management and the methods of operation, quality and lower performance costs of private management.

Yet perhaps the greatest pressure for change in the model for the State came from outside, more precisely, from the globalisation of the market and the increased competition in an area that is expanding without control.

In fact, globalisation of the market revealed the weight of State bureaucracy and led to a strategic understanding of economic activities based on the ends achieved. Moreover, globalisation brought the American concept of «public utilities», introduced into Europe by the British government. This concept establishes that the public service appears as a product that may enjoy a special status but is still a product, implying that it must necessarily be analysed in the light of economic rationality.

The legal regime to which these services should be subject has specific features linked to the *essential nature* of the respective provisions. These specific features are the obligation that the provisions be *available to all* and at *an accessible price* – i.e. universal services – without any reduction in quality.

4.1. Appeals for the State to stop intervening in the economy thus become a constant, and in practice adopt three different forms: the *privatisation* of public services and the consequent transfer of ownership of the respective organisational structure from the State to private individuals; the *liberalisation* of public service activities until then run as monopolies or under systems of exclusivity, with the resulting opening to the market in that sector; and the *deregulation* of activities previously

subject to public norms drawn up by the State, with the consequent decrease in administrative rules.

The result is a different model of the State shaped from a new relationship between the State and the Economy, which, in turn, means a different understanding of the Law – *the post-social State*.

4.2. The privatisation of the public sector and the adaptation of public service to the market and competition are interconnected with a wide and varied range of fundamental rights. The *rights of freedom* from the liberal State were joined by social rights, such as the right to health, education, housing, etc., and *rights of participation*, all recognised by the social State. The post-social State has added the *rights of quality* – right to the environment, consumer rights, right to cultural heritage, and so on.

The fundamental rights to provisions, the new rights to quality of life – which are simultaneously regarded as rights and duties – and the constitutional consecration of the principles of *universality*, *equality* and *non-discrimination*, form an emerging reality. They demand in a more compelling way than before, the maintenance of the strict triangular link between the State, the Economy and the Law.

Within this context of evolution and as the relationship between service providers and users becomes private, it is normal for the public service provider to become increasingly like a private company until they become the same, and the user also becomes ever more like a consumer.

This raises a pertinent question: what is the sense of speaking about public service in the post-social State? Would it not be better to regard the term as redundant? Or, in contrast – if the legal concept of public service has the potential to guarantee either the provision itself or the respective quality – should it be preserved and therefore reinvented?

4.3. Before answering that question, we must understand that the classical legal theory of public service is not able to absorb the situation described. The reason is simple: the judicial-administrative references have been lost.

In fact, even the previous intervention of private individuals in exploiting public services through the legal system of the *concession* and consequent management of the activity by delegation, ceased to have autonomy before the figure of *authorisation*, which was understood as an act which determines rights. The guarantee of the principle of com-

petition prevented the State and its Government from favouring one power or authority in the relationships between the grantor and the concessionaire, and, in the area of relationships between concessionaire and users, made it impossible to form special relationships of power. On the other hand, by diversifying the means used by individuals to carry out the economic activities – authorisation or simple notification to the authority – which may later be restricted for reasons of public interest, using the concession for public services activities stopped making sense.

The *concession* is replaced by *authorisation*, a situation that happened, for example, in Portugal, with the production, transportation and distribution of electrical energy.

5. Based on the guarantee of the principle of competition, it is understood that community law is the ideal vehicle to transmit the concepts of privatisation, liberalisation and deregulation that form the new model of the State. This also explains why there is no express mention of the concept of public service in the Treaty of Rome.

In fact, only Article 77, concerning the common policy on transport, briefly mentions public service. Article 90 (2) started what has been called a true «secularisation of the concept of public service» (Robert Kover) a reference to the orthodoxy of the French administrative doctrine, since it simply mentions «*companies entrusted with the management of services of general economic interest*». It should be borne in mind that, after the Treaty of Amsterdam (1997), article 90 corresponds to the current article 86 and that article 77 corresponds to the current article 73.

5.1. The elements included in the Community's concept of «services of general economic interest» are the following. In first place, it must be a *service*, which here covers activities that result in some kind of provision, whether in the area of goods or of capital. Secondly, it must be a service which, from the material or objective point of view, is *public*. As a result of Declaration 13, annexed to the Treaty of Amsterdam and concerning Article 16 of the Treaty of Rome, the concepts of service in the collective interest and service in the public interest are brought together. Thirdly, it is an *economic* service, thus excluding cultural, educational and other services, as well as those which are strictly administrative. Fourthly, it is a *universal* service, in the sense that it is for citizens in general. Finally, it is an *essential* service.

The following have been considered as services of general economic interest by the European Union: the postal service, including post and telegraphs, electrical energy, the distribution of natural gas and the distribution of water, communications and transport.

When the Amsterdam Summit reviewed the Treaty of the European Union and the Treaty of Rome, it strengthened the services of general economic interest, making them part not only of what are called *«shared values» of the Union* but also promoting them to *engines of «social cohesion»* (Article 16 of the Treaty of the EC). The provisions of this ruling state: «... given the place occupied by services of general economic interest in the *shared values* of the Union as well as their role in *promoting social cohesion*, the Community and the Member States (...) shall ensure that such services operate on the basis of principles and conditions which enable them to fulfil their missions.»

This norm is understood in the light of Declaration 13, annexed to the Treaty of Amsterdam, which states that «the provisions of Article 16 of the Treaty establishing the European Community relative to public services shall be implemented with full respect for the jurisprudence of the Court of Justice, inter alia as regards the *principles of equality of treatment, quality and continuity of such services.*»

5.2. The integration of public services into the scope of the internal market and their consequent liberalisation in a framework of competition and free circulation are, thus, determinative elements of the Community policy.

Great efforts have been made by the member states, particularly Portugal, to liberalise sectors which were traditionally monopolised or opposed to competition due to their strict link to the public service activity. This has required particular care, determining the gradual application of the mechanisms of competition with a view to avoiding rupture or the discontinuation in the provision of services to the community. In some services, such as telecommunications, the existence of networks where the circulation of goods or products is carried out, combined with the mission of public interest that they serve, has meant that the rules of competition have not been applied. This is in accordance with a provision in Article 86 (2) of the Treaty of the EC, whereby whenever the rules of competition «obstruct the performance, in law or in fact, of the particular tasks» of the service in question, they should be rejected.

6. It is within this framework of a State that privatises public companies, replacing most of the public capital by private capital, a State in which private companies appear and perform identical tasks, in competition with the privatised companies, searching for a better relationship with the economy and the law, that the previous question on the importance of the legal concept of public service makes sense.

A return to the Liberal State, which does not know of public service, since it was economically limited to acting as an economic policeman, is today unthinkable. Greater understanding of public interest and the inherent legal responsibility, as well as the constitutional safeguards guaranteeing a wide range of provisions and the recognition of a generation of rights which demand high standards of quality of life from the State, impose special duties on the State while simultaneously imposing fundamental duties on the citizens. Moreover, it implies the definition of particular «*obligations of public service*» for the respective providers, those who run essential services. These obligations contradict the principle of private autonomy and introduce a true public nature into private law, which we may perhaps call a «movement towards public law».

Equally, experience has already shown that the market does have limits as well as functional flaws that derive from the natural or artificial appearance of monopolies and from distortions in the rules of competition. The latter have gained in strength as companies have faced the environment in a new light and accepted the costs of conserving and protecting it – what might be considered external factors.

Moreover, the principles of economic freedom and private autonomy do not – in general terms – cover all aspects of public service. The market may be an efficient means to satisfy needs, but that only applies to those who have the purchasing power to acquire the services on offer. When vital human needs are not satisfied by the market, the State must ensure that they are met.

The State's scope of action may be reduced, but its social responsibility remains intact. In other words, the State may have been streamlined, but it is more muscular. The legal and constitutional regime covering fundamental rights demands this, and in Portugal, these fundamental rights are imposed – in some cases – directly on the public administration (Article 18 of the Constitution).

It is in this area that reinventing *public service* becomes important, not to say absolutely vital.

7. There is growing awareness that of the two pillars on which the classical theory of *public service* was based – the link between the activity and a public institution and the link between the activity and public interest – only one is still standing: the close link to public interest.

It must be recalled that the extension of fundamental rights – allied to a constitutional establishment of a specific regime of guarantees that even dispenses with *interpositio legislatoris* – must be reflected in the provision of essential goods and services that satisfy or exercise fundamental rights which are essential to develop the dignity of the human being (Article 1 of the Constitution).

Thus, these activities must continue to have a *universal* nature and be *open to all people* under *equal conditions*, guaranteeing *continuity* in accordance with *high levels of quality*, and with *gradual adaptation* to technical developments and social change.

It is the political and legal responsibility of the State – or in broader terms, the public authorities, including local authorities – to satisfy these demands through *legislative* and *regulatory means* and by creating *mechanisms* that will guarantee them. This must all be governed by the *principles of constitutionality, legality and subsidiarity*.

However, the above does not mean support for public control over services, which would in fact be incompatible with the freedom of the market where these services are provided. Rather, within the framework of the community's openness to specific legal regimes for essential economic services or services of general interest (thereby respecting individual nation's legal traditions), it simply means that obligations «*inherent to the notion of public service*», in the words of Article 73 of the Community Court, can be identified. In the sense that «*public service obligations*» contradict the «*principle of the free market*», the two must be balanced according to separate regulation which should be of a public nature.

The new normative area is the result of the convergence of the privatisation of the public administration – a false privatisation as public interest will always be a factor – and making the market publicly responsible. This is the area where the legal concept of *public service* is reinvented and gains strength, resulting directly from the constitutional establishment of the new fundamental rights. Specifically, this involves the right to quality, and the authorities' inherent acquisition of responsibility for the democratic development of a State based on the dignity of

the human being. This is another area where the legal concept of public service allows for a new understanding of administrative law. Finally, the new model of the State – the *post-social State or regulatory State* – also makes its presence felt in this area.

7.1. We should now pause to consider the complex problem of economic regulation and the guarantee of public control over the market so as to guarantee essential services.

The evolution described in the *privatisation* of the public administration – the «*movement towards private law*» that Fritz Fleiner spoke of – and the *liberalisation* of the market is accompanied by *public deregulation* of activities on the one hand and by *sectorial economic regulation* of those same activities on the other.

What exactly does this economic regulation involve?

Fundamentally, it means defining an order within the respective economic sector, resulting from the need for supervision so as to safeguard the service's universality, quality, continuity and adaptability. The matter in question is the sector's general efficiency and the fairness of prices, the proper correlation between supply and demand. Thus, regulation means defining prices, establishing quantities, attributing rights, banning certain contracts and restricting others, making information transparent, encouraging arbitration..., all without destroying competition. It is important to act on specific market elements, maintaining companies – which are under pressure to produce profits and also from technological advances – under some control.

Evidently, this regulation is very different from the policing activities of the liberal state. In fact, in complete contrast to the liberal state, the aim here is to intervene in economic decision-making, to affect the economic freedom of the parties so as to protect public interest against the activity carried out. However, it does share one characteristic with the old-style policing: the dynamic use of sanctions to punish breaches. Yet even so, it goes further, using the mechanism of *cautionary measures* to prevent the breach from happening.

Given the above, several conclusions can be reached:

• Economic regulation is *sectorial*, according to the specific nature of each sector. For example, the transport sector has problems that telecommunications does not, while the latter has problems that are unknown to the energy and banking sectors, etc.;

• Economic regulation involves *great technical complexity*, depending on ongoing scientific progress, closeness to the moment in question and the specific situation, such as price-fixing, whose conditioning factors are extremely difficult to deal with;

• Economic regulation requires the *use of a set of instruments that is not always formally pre-established* – informal action such as recommendations and public promises – that is legalised, albeit by an appeal to the main general principles of law, such as the principle of prohibiting free-will, the principle of the system, the principle of proportionality, etc.;

• Economic regulation is *transitory* as it is linked the ongoing evolution of the balance of interests;

• Economic regulation covers a set of rules that bears no relationship with the classical definition of law, but which coincide with the *ethical or behavioural* norms of professionals working in that sector;

• Economic regulation introduces *positive action in the market by the regulator* to defend third parties, challenging the freedom to contract – the theory of *essential facilities* that came from across the Atlantic;

• Economic regulation requires *power to intervene incisively, authority*, without which the aims cannot be achieved;

• Economic regulation needs flexible forms to *put an end to conflicts* that arise from its application, bodies that can consider and decide in real time, an aspect that administrative courts do not currently have the capacity to do, frequently leading to the need for arbitration;

• Finally, economic regulation requires intervention from *independent regulatory organs*. This means institutional and functional independence from the government, i.e. members cannot be removed from these bodies and they are not subject to orders or instructions. They must also be impartial, i.e. independent from the regulated interests, which implies defining incompatibilities.

The aforementioned characteristics of economic regulation have one immediate consequence: they reveal the urgent need to rethink administrative law, whose structures have been severely shaken. They have been shaken in three senses: the *loss of governmental control* and *party control* of this regulation (Vital Moreira), which raises problems of legitimising law; the *transitory nature* of the regulation, which increases the law's degree of uncertainty; and finally, the *great technicality* of the regulation, which not only distorts the law by making it comprehensible only to a few experts, but also seals in into a hermetic cycle that can lead to anti-democratic solutions.

7.2. To my mind, this is the framework – whose stress is well known to experts in administrative law – in which the reinvention of the legal notion of public service is important.

This reinvention should be based on community law, which itself allows *public service* to be the permanent motor controlling the balance between a free market and the obligations imposed by public service. This balance tends to differ according to economic sectors: *energy law, telecommunication law, etc.*

Furthermore, this reinvention should recall the concept from the past – an activity subject to an aim in the public interest – and take advantage of the demanding constitutional regime of fundamental rights. Given the *despublicatio* of activities and the consequent liberalisation of the respective sectors, this reinvention should shape the future through the unbending safeguard governing the connection between economics and law through fundamental legal principles. This means *the principle of pursuing public interest through individual rights* (Article 266, paragraph 1 of the Constitution) and *the principle of justice, equality, proportionality...* (Article 266, paragraph 2 of the Constitution).

All this should take place within a State that has to balance the guarantee of representative democracy with greater participative democracy (Article 2 of the Constitution), which has to meet the challenge of efficiency (Article 268 of the Constitution) and acknowledge technology without rejecting justice and its maxims (Article 266, paragraph 2 of the Constitution). The State has to make a priority of guaranteeing fundamental rights (Article 9 of the Constitution) while corresponding to the principle of subsidiarity (Article 6 of the Constitution).

8. This extremely brief synthesis of two hundred years has shown how our area has evolved. As Cervantes said, «the path is always better than the inn», which is why this journey into the interior has been guided by the search for a place for *public service*, something that is simply one piece in understanding the place of the law within the State.

This undertaking has no deadline and is, by nature, an incomplete task. Only the underlying spirit of questioning is repeated time and time again in the ears of the jurist, just like the constant beating of the waves on the sand is a constant in the ears of the poet.

Let us hope that the poet never tires of hearing the sea, and that the jurists here today never tire of searching for an answer to the question that has brought us together. Both poetry and justice are essential values for mankind's balance.