



Challenges of Defining Public Services as the Object of State Administration Activity

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Abstract

One of the main goals of the existence of the state, and especially its operative arm, the public administration, is the provision of public services. Through them, it is intended to fulfill the basic needs of people, which are vital for their existence and well-being. Public services are essential for the sustainable economic development of any country and at the same time ensure social cohesion. From the point of view of the law, they are considered an essential mechanism that serves to implement the principles of the rule of law, especially the social state and basic human rights. Their ever-increasing role and dimension have made every jurisdiction pay great attention to the way they are provided to effectively serve the specific rights they aim to fulfill. In Albania, there is a legal framework for over 10 years, which regulates in detail the typology, principles, way of internal organization, nature of the activity, and delegation of functions of state administration. The law defines that the main object of its activity is the provision of public services, without giving us a definition of it. Precisely, this paper gives answers to questions such as how public services should be understood, as an object of the activity of the state administration, and what are the types, ways, and principles of their provision. The paper supports the hypothesis that there is no exhaustive legal definition of the notion of services public, as an object of activity of the state administration, due to the broad, complex, and dynamic nature of the public interest embodied in the notion of public services. Community law has encouraged member states to consider public services between competition mechanisms and the legal reserve of the state. The paper assesses the great impact of community law on domestic law in terms of the categorization of services of general economic interest, the determination of the principles of their exercise, and the inclusion of market mechanisms in the provision of these services. To prove the above hypothesis, the following research questions are raised in the paper: What attitude have other jurisdictions taken about this important legal concept? Given the fact that public services of special jurisdictions can have implications for the common market, what contribution has community law made in terms of defining public services and their categorization? The study uses the desk research method, i.e. theoretical consultation with a series of legal documents of domestic, international, and special jurisdictions, articles, and scientific works that deal with issues and aspects related to public services. Also, in this paper, historical and comparative methods were used to highlight the features, differences, and impact that the law of special jurisdictions or that of the EU has had in shaping a legal framework for public services in Albania. This paper is of interest to researchers, lecturers, and students, as well as to the community of legal professionals.

Keywords: Good governance, Public Service, Public Administration, Delivery of public service

1. Introduction

1.1 A historical perspective of public services. Typology and forms of exercise of public services.

Public services represent a difficult concept to define. This is due to the broad, complex, and dynamic nature of the notion of public interest embodied in the phrase "public services". To provide a meaningful approach, it is necessary to research the historical moment when the doctrine of public services was born to identify the ideological perspectives on it. It was precisely the French Revolution that fundamentally modified the objectives of politics and reshaped the principles of the legitimacy of state powers, placing at the center the axiom of "utilité générale". (Mestre, J.L, 1977, 145) The birth of the doctrine of public service is identified with the crisis of the conception of the state and the affirmation of the principles of solidarity that mark the transition to a growing public intervention in the economy, which was embodied in the French Constitution of 1971. In this framework, new areas of action were added to traditional administrative activities, including activities aimed at providing collective services. The theory of the state understood as an institution exclusively holding public powers, which it exercises through authoritarian acts, was gradually replaced by another more hermeneutic approach. (Pellicano, 2015, 23) This approach is based on the double action of the administration, on the one hand, its traditional authoritarian action, and on the other hand, a more pronounced social or even economic activities aimed at providing services to the community for general needs satisfied.

The notion of public services has a judicial origin. It was precisely the Civil Court of the city of Bordeaux, through the decision of 1873, which decided that: "the responsibility that can be charged to the state for damages caused to individuals by the actions of persons who are employed in the public service, cannot be regulated from the principles of the Civil Code for relations between individuals, but from special rules, which vary according to the nature of the service and the need to harmonize the rights of the state with private ones.". (Tribunal des Conflits, February 8, 1873) This judgment is important not only in clearly defining the difference between the competence of the administrative judge and the civil one but to highlight the characteristics and nature of the public service. The French doctrine of the 20th century, which also derives from this court decision, places public service at the center of the activity of public bodies, considering it the cornerstone of administrative law. (Jèze, 1904, 34) The French author Leon Duguit, the first founder of the French legal doctrine on public services, in his work, states that the concept of public service was born at the moment when the difference between the administration and citizens appeared, who realized that they could demand the realization of certain obligations from administration, the fulfillment of which is simultaneously also the reason for their existence. (Duguit, 1913) Duguit aims to separate from the concept of the state the elements of a liberal matrix that are reflected in the dogma of public power, and that are manifested in a configuration of this power as a public service. According to him, public service is any activity that is essential for the achievement and development of social interdependence and that is of such a nature that it can be fully ensured only with the intervention of the governing force. (Duguit, 1913) The Blanco decision influenced a broader conceptualization of public services, which increasingly included the range of activities that lacked the character of the exercise of authority by public bodies. Further, French researchers gave a conceptual approach to the notion of public service starting from the characteristics of the "particulier" service. They attributed to him the opposite features of this service, which meant services that should be offered equally and continuously provided to the citizens.

Orlando in 1905 has evidenced the fact that the activity of the administration is manifested in three dimensions, "juridical", "economic" and "social". (Orlando, 1900) According to him, legal activity is a natural and necessary expression of the state's sovereignty, without which it would fall into anarchy. It is carried out without being configurable as a competitive private activity, through the basic model of legal superiority derived from the right of public authorities. Meanwhile, the activity with a "social" character is defined as a function exercised by the state that aims at the economic, social, and cultural development, etc. in the function of the members of the society. (Orlando, 1900, 58) The activity of a "social" character is also distinguished from that of an economic character, since, although both are exercised with partially analogous methods and mechanisms, mostly similar to those regulated by civil law, that of a social character embodies another purpose, that of "a public interest (...) to benefit a certain social relationship". (Orlando, 1900, 44) Orlando takes the position that the idea of public service does not precede but follows public administration, therefore it must be built around the state as a legal entity (Orlando, 1900, 46)

According to De Valles, the legal activity of the administration is governed exclusively by "the norms of law, which create legal situations or relationships, with certain legal effects and which are always means for the realization of a final goal." (De Valles, 1930, 398). From the perspective of De Valles, the main characteristic of the social activity carried out by the administration is mainly identified in the "non-judicial nature" of deeply material activity. From the point of view of

the form of exercise of these activities, different authors think that the activity with character the legal that the administration carries out is mainly carried out in the form of authoritative administrative acts, with a unilateral character. While the activity with a social character is exercised through different typologies of management, contracting, or any other form that better suits the nature of the social service. Finally, the economic activity performed by the administration relies on the main instrument of private law, the commercial contract. (Pellicano, 2015, 16)

According to Cammeo, "Public service in a broad and subjective sense is the satisfaction of collective needs through the performance of state activities. (Cammeo, 1911, 204) Based on the historical context, it is accepted that the notion of public service has been deduced relying on that of the function public. The concept of public function was that of a set of activities, the main purpose, and often the only one, of which was the care of the public interest. (Pellicano, 2015, 18) This view perceives the state as the exclusive owner of public power and, at the same time, as an object of administrative action. The notion of public service in the historical and political context has been strongly influenced by the theory of the rule of law and by the concept of the state-person, from which the main importance is attributed to the administrative function. (Pellicano, 2015, 30)

The most important step regarding public services is the birth and development in the 50s and 60s of the last century of the doctrine of human rights and freedoms. The inclusion in the regime of the legal protection of rights with an economic, social, and cultural characteristic such as the right to sufficient food, adequate housing, education, health care, work, social security, and cultural life was accompanied by the expansion of the responsibility of the role of the state. This typology of rights imposed positive obligations on the state to organize the administrative system as a mechanism to make effective in the most appropriate way provision of social and economic services.

Public service as the main object of the administration's daily work can have a social, economic nature or the traditional form of exercising power with authoritarian acts. In this spirit, the need for the creation of special types of public legal entities was formalized in the law, which, in addition to state institutions, should also have state enterprises, as a more flexible mechanism to provide economic or social services. The notion of public service took another dogmatic elaboration when the state as a subject, the only source of public interest and the exclusive holder of the attributes of power, transferred these responsibilities to other subjects of the legal system. (Ranelletti, 1905, 330) In response to the demands for better quality services, new ways and forms of public service management were born and formalized, relying on market mechanisms. In this context, special attention was paid to the role and contribution of private operators in the provision of public services.

2. The Concept of Public Services in Different Jurisdictions

To provide a meaningful approach to public services as an object of administrative action, it is necessary to research the legal systems of specific jurisdictions. In the countries that apply the common law system, there is no legal framework for public services, but certain aspects of them are regulated by a series of legal acts that establish obligations for the realization of public services in specific sectors. (Clifton, Comin, and Diaz Fuentes 2003, 126; 313). In this legal system, the concept of public services is related to the medieval theory of "common callings", which refers to specific responsibilities and obligations that must be submitted to certain natural or legal persons. (Amato 1998, 153). This theory extends over the concept of "common carrier" or "any business entity that carries out activities related to the public interest" that is applied in the USA (Scott 2000, 313). The concept of "common callings" is used to impose certain obligations on "business subjects whose activities have, either as a process or a product, an important "public interest" (Kopp and Landry 2000, 36). These subjects according to this theory had an obligation to serve all customers (Arterburn 1927), not arbitrarily refusing to serve certain individuals or to pay certain fees. (Kopp and Landry 2000, 37). Interest in the doctrine resurfaced, especially in the USA, being used as a solution to regulate monopolies. (Wyman 1904) However, it must be said that there has never been a fixed list of services subject to the "common calling" doctrine and it has been applied to a wide range of services. Even English legislation does not have a framework law on public services. The common callings theory is important in this analysis because it shows that any form of business can have dimensions of public interest, and socio-economic circumstances are those that have a significant impact on how public interest can be understood in the context of public services.

The European legal system, starting from Roman law, does not recognize the "common callings" theory, but many similarities are evident with the church doctrine of "fair price", which prohibits excessive profit. (Van de Walle, 2008) Public service represents a European legal concept, born at the end of the 19th century in France, as a basic notion of administrative law. (EIPA and Présidence Luxembourgeoise 2005, 53) French administrative law is built and revolves around the notion of public service, so much so that it is considered the only justifying tool, in the light of which the

specific rules defining public administration as guaranteeing the common interest are interpreted. The main purpose of the regulation of public services in French law was and remains to legitimize the intervention of the state in certain areas, which have a substantial impact on the life and rights of individuals in society. Whereas, the main function of public services is to guarantee basic rights and freedoms, considering the state as a mechanism to serve the public.

In France, the Preamble to the 1946 Constitution included a provision that "all properties and enterprises, the management of which has, or acquires, the character of a national public service or a de facto monopoly, shall become public property." (French, Constitution, 1946, Preamble, page 9) Whereas, the current French Constitution allows the President of the Republic, after the proposal of the government or both houses of the parliament, to submit for approval in a referendum any act of the government that has to do with the organization of public bodies, or with reforms related to national economic, social or environmental policies and the public services that contribute to them..." (French, Constitution, 1958, art. 11) The French constitutionalists outlined a notion of public service related, not only to the general good and to the analytical responsibility of the state elites in the adoption of national economic, social, or environmental policies that concretize it, but they saw it as an instrument for their realization. As such, a public service regime consists of three elements: a) *a set of values and principles that justify the design of public policies on a given public service;* b) *the creation of the necessary institutional mechanisms that have macro and micro-management of the public service as their object;* as well as c) *a normative framework of formal rules and practices, which includes the administrative way, style, and logic with which the state regulates society in general and the economic aspect in particular.* (Clark, 2000, 163)

Although the notion of public services in France is found in the Constitution, the French legal model does not define public services. According to Prosser, even though "the definition of public service is extremely difficult and elusive", it provides policymakers with a set of general principles that still leave ample room for the exercise of discretion in this area. (Prosser 2005, 97). The reason why there is no definition is related to the fact that it remains a concept in continuous evolution (Obermannet 2005). Following the same model as the French one, Article 43 of the Italian Constitution refers to essential public services, allowing the state the possibility to expropriate companies engaged in the provision of essential services. (Italian Constitution, art 43) However, within the Italian legal system, there is no definition of public service. Italian doctrine and jurisprudence have filled such a gap. Also, in Belgium, Austria, and Southern Europe, there is the concept of public service, but its role is less prominent. (Van de Walle, 2008) In other countries, such as Germany, the Netherlands, and the Scandinavian countries, "public service" is not a sanctioned concept. However, the French version represents the most developed legal model at the level of jurisdictions, but similar models exist in several other countries, such as Italy. (Prosser 2005)

3. Public Services in EU Law

In community law, chronologically, the issue of services of general (public) interest has had an evolution, which has been adapted to the stages and nature of the integration processes. In the beginning, in the Treaty of Rome, signed in 1957, we find the term "services of general economic interest" expressed for the first time, which was applied at that time in a limited way only to the communication, transport, and energy sectors. (Treaty of Rome, Art 90) During the 30 years following the Treaty of Rome, the issue of services of general interest remained outside the integration processes, where each member state had the right to determine the categories of public services and the way of organizing and financing them. (CESI, 2012, 4)

The Treaty of Lisbon represents the most important legal act regarding the categorization of public services in general, and those of general economic interest in particular. With the Treaty of Lisbon, the European Charter of Fundamental Rights and Freedoms entered into force, where services of general economic interest represent one of the fundamental rights and freedoms at the European level. Article 14 was added to this treaty, which aims to redefine that services of general economic interest represent a common competence between EU institutions and member states. This provision allows the European Parliament and the Council, without prejudice to the competence of the Member States about the provision, commissioning, and financing of such services, to exercise their right to issue secondary legislation, to ensure that such services are exercised based on principles and conditions, especially economic and financial conditions, which enable them to fulfill their missions. (COM (2011) 900, 5) This provision should be seen as closely related to Article 106 point 2 of the treaty, which allows member states to avoid competition rules in conditions where they prevent the performance, de jure or de facto, of specific tasks assigned to public enterprises that provide services of general economic interest. (Treaty of Lisbon, art. 106)

The other act represents a special protocol, Protocol 26 of the Treaty of Lisbon. This act deals not only with services of general economic interest but with all types of public services (of general interest), whether economic or non-

economic. According to this Protocol, if the national authorities categorize a service as "non-economic", Article 2 of this protocol makes it clear that the Treaties do not affect in any way the exclusive competence of Member States to provide, order, and organize them. Whereas, if a service is categorized as "economic", Article 1 makes it mandatory for EU institutions to recognize, at the same time, "the essential role and wide discretion of national and local authorities in providing, ordering and organizing the service, as well as respecting the "diversity between different services and the differences that may result from different geographical, social or cultural situations". This protocol is of particular importance because it for the first-time sanctions at the treaty level the principles of providing services of general economic interest, such as guaranteeing quality, safety and economic opportunity, equal treatment, and promotion of use by all users and their rights. (Treaty of Lisbon, prot. 26)

In conclusion, we can say that the Treaty of Lisbon recognizes the member states the right to choose the way of providing services of general interest, using all possible management styles, ensuring that the chosen form necessarily guarantees the standards of "quality, safety and affordability, equal treatment and the promotion of universal access and user rights". The Treaty makes it clear that the rules of the internal market and competition are applied to services of general economic interest only in cases where they do not hinder *de jure* or *de facto*, formally or effectively the fulfillment of their specific mission. The member states have the right to choose the way of organization and the form of providing services of general economic interest, public or private. But, in the conditions where a member state can abuse its right to categorize and provide services of general economic interest, then the Treaty recognizes the right of the Commission to turn to the ECJ to ascertain this position of the state as a "manifest error".

The Treaty of Lisbon does not define the notion of services of general interest, or services of general economic or non-economic interest, and does not make it clear what kind of special services are included in these categories. Thus, we can say that there is no harmonizing legal framework in Community law regarding the meaning of services of general interest. This is because the vertical regulation of this matter by community law infringes on the competencies of the member states. Due to the differences in the legal systems of the EU member states, the EC has often highlighted the fact that harmonization may not be feasible or even desirable by the member states. Countries, such as Germany, have clearly stated that the drafting of a legal model at the European level providing a definition of SGI and their performance standards is undesirable because such a thing would violate the principle of subsidiarity. This has not diminished the role of the ECJ and EC in providing views on what is considered public services.

3.1 Public Services Given EU Institutions

The need to build a harmonized legal framework on services of general interest, based on their importance in the European model, has been on the political agenda of the EU institutions. (Barroso Political Guidelines, 2009) European Commission through a large number of Communications (COM 1996, 2000, COM Report 2001, Green Paper (2003), White Paper (2004), COM (2007, 2011, 2012), EESC Opinion 2022) has considered it as a responsibility stemming from the primary law of the EU and the jurisprudence of the ECJ to contribute to the definition of a conceptual framework for services of general interest, those of general economic or social interest. (COM (2011) 900 final.3) For the first time in EC positions, we find the term services of general interest in the 1996 Communication on Services of general interest in Europe. According to it, services of general interest are market and non-market services which public authorities classify as of general interest and which are subject to specific public service obligations. (COM (96) 443 final, p.2) Whereas, we find the notion of universal service in 2002 (Directive 2002/22/EC, 2002), which defines that: "The concept of universal service refers to a series of interest requirements general that ensure that certain services are made available with a certain quality to all consumers and users throughout the territory of a Member State, regardless of geographical location, and in the light of specific national conditions, at an affordable price." (Ibid, art 3, par.1)

Because there is no harmonization both in the terminology and in the categorization of public services, EC through COM/900/2011 it is emphasized that services of general interest are those services that the public authorities of the Member States classify as of general interest and, therefore, they are subject to specific public service obligations. The term covers both economic activities and non-economic services. The latter are not subject to specific EU legislation and are not covered by internal market and competition rules. Some aspects of the organization of these services may be subject to other general rules of the Treaty, such as the principle of non-discrimination. (COM 2011, art 3)

According to the decisions of the ECJ (Case C-364/92, ECR I-43, Case C-343/95, ECR I-1547), summarized in the positions of the EC, activities that are not considered economic are related to the exercise of the prerogatives of the state and with the fulfillment of the state's responsibility towards the population in certain areas. (COM (2011), 146 final, 3) The Commission recognizes that these concepts are dynamic and evolve. Due to political decisions or economic

developments, the classification of a particular service may change over time. What is not a market activity today may become so in the future, and vice versa. According to the Commission, the need to distinguish between economic and non-economic activities is an analysis that must be done case by case as the nature of these activities is constantly evolving.

According to the ECJ, activities that are not considered economic are related to activities when the state acts by exercising public power in: a) the field of defense, public safety, safety and control of air navigation, control and safety of maritime traffic, anti-pollution supervision, institutions dealing with the organization, financing and implementation of prison sentences, b) social services if the social security scheme on which these services are supported is based on the principle of solidarity (referring to the factors: if membership in the scheme is mandatory, if the scheme pursues an exclusively social purpose, if the scheme is non-profit, if the benefits are independent of the contributions made, if the benefits paid are not necessarily proportional to the earnings of the insured person and if the scheme is supervised by the state), c) public health service (service specialized medical/polyclinics and public hospitals are an integral part of the national health service and are based almost entirely on the principle of solidarity), d) public education service at all levels (public education organized within the national education system financed and supervised by the state is considered an activity uneconomical).

Services of general economic interest are economic activities that bring results to the general public good that would not be offered or would be offered under different conditions in terms of quality, safety, affordability, equal treatment, or universal access by the market without intervention public. The Court of Justice has held that the concept of services of general economic interest is an evolving notion that depends, among other things, on the needs of citizens, technological and market developments, and social and political preferences in a member state. In the absence of specific EU rules, Member States have wide discretion in defining a particular service as an SGEI and in awarding compensation to the service provider. The Commission's competence is limited to checking whether the Member State has made a manifest error when defining the service as SGEI and to assessing any State aid included in the compensation. Where specific Union rules exist, Member States' discretion is further limited by those rules, without prejudice to the Commission's duty to assess whether the SGEI is correctly determined for State aid control.

According to EC positions, public service obligations are imposed on the provider using a mandate and based on a general interest criterion, which ensures that the service is provided under conditions that allow it to fulfill its mission. The public service mandate means the provision of services which, if it took into account its commercial interest, an enterprise would not receive or receive to the same extent or under the same conditions. The public service task must be established using an act which, depending on the legislation in the Member States, may take the form of a legislative or regulatory instrument or a contract. It can also be provided in some acts. Based on the approach taken by the Commission in such cases, the act or series of acts must at least specify: a) the content and duration of public service obligations; (b) the undertaking and, where applicable, the territory concerned; (c) the nature of any exclusive or special right granted to the undertaking by the said authority; (d) parameters for calculation, control, and review of compensation; and (e) measures to avoid and recover any overcompensation.

Social services of general interest include social insurance schemes that cover the main risks of life and several other essential services provided directly to the person that plays a preventive and cohesive/socially inclusive role. While some social services (such as statutory social security schemes) are not considered by the European Court to be economic activities, the Court's jurisprudence makes it clear that the social nature of a service is not sufficient in itself to classify it as non-economic. The term social service of general interest, therefore, covers both economic and non-economic activities.

In conclusion, in the same line with the determination made by the Commission, we can say that service in the general (public) interest is understood as the exercise of a series of activities of general interest with an economic, non-economic, or social nature, which is defined, created and are controlled by public authorities and subject to varying degrees, a special legal regime, regardless of whether they can be carried out by a public or private body.

4. Public Services are Given Albanian Legislation

4.1 Public Services in the constitutional dimension

In the constitutional dimension, the notion of public services, in the broadest sense, is rooted in the purpose of the state's existence, materialized in the function of governance. According to the Oxford Law Dictionary, to govern means "to legally control a state and its population, as well as having the responsibility of drafting new laws, providing public

services, etc." (Oxford Law Dictionary). While the Merriam-Webster dictionary considers government as "the continuous exercise of sovereign authority and above all to control and direct the making and administration of policies". (Merriam-Webster Dictionary) The Republic of Albania considers governance as a system of powers, clearly separated from each other in roles and functions, but also built and exercised in practice in a balanced way, (Albanian Constitution, art 7) to realize the general social interest and the basic rights and freedoms of citizens. Despite the main role played by the legislative power through the legislative process in the drafting, approval, and control of policies in various fields, related to the provision of public services, the basic responsibility in their administration rests with the executive power. (Albanian Constitution, art. 100, 102) This is not because he appears mainly as their proposer in the Assembly (Albanian Constitution, art 81), and at the same time has the responsibility of their administration. In addition to the principle of horizontal division of power, the Constitution also sanctions its vertical division, through the system of local government bodies. (Albanian Constitution, art 13) The latter sanctions that the municipality, as the basic unit of local government, through its executive and representative bodies, performs all self-governing tasks, except those that are given by law to other units of local government. (Albanian Constitution, art 108) So, from the formal point of view, the main power of the state charged by the Constitution as the instrument of administration of public services is the executive power, both at the central and local levels. This in no way diminishes the main influence that the legislature or local councils have on the adoption and implementation of public policies in the field of public services.

From a material point of view, public services, as a dimension of governance, are also imposed by a series of basic principles of state formation that are expressed in the preamble of the Constitution and elaborated specifically in the text of the constitution such as basic human rights and freedoms, the rule of law, the social state, social justice, etc. In Article 3 of the Constitution, the sovereign has charged the state with two basic obligations. First, with the obligation to respect fundamental rights and freedoms, as obligations mainly of a negative nature, which requires the state not to hinder or limit the exercise of rights through legal acts or administrative actions. Secondly, with the obligation to protect these fundamental principles, as a constitutional imposition that the state, through its organs, undertakes all necessary actions to enable all subjects under its jurisdiction to effectively exercise and enjoy their rights and fundamental freedoms. Recognition in the constitutional text of basic human rights and freedoms constitutes a prerequisite for their implementation through various policies and practices in daily life. To be effective, fundamental rights and freedoms must be operationalized, that is, applied to all sectors of public life to bring about the desired effects. Otherwise, they can remain empty statements and do not serve their purpose of democracy and social harmony. How can e.g. everyone's right to physical security, health care, or education be translated into action? And conversely, how do established practices related to physical security, health care, and education correspond to the responsibilities of public authorities? Therefore, the responsibility to fulfill human rights includes the obligation of the state to create and finance the systems and services necessary to make them effective.

The doctrine of fundamental human rights and freedoms recognizes the state a broad discretion to make effective the rights of a social, economic, and cultural nature. The constitutional text connects the realization of social objectives with the opportunities and means available to the state. The social objectives reflect the positive activity of the state in the social framework and the realization of these objectives is closely related to the conditions, means, and available budgetary opportunities of the state. (Albanian Constitutional Court Decision, 33/2010) Despite their relative nature, it must be said that the latter cannot be guaranteed by the inaction of the state. (Guler, 2017, 360) Completion of the right to housing cannot be achieved only by imposing negative obligations, as well as by the inaction of the state, but by its obligation to build housing programs. For this reason, social-economic rights have a more demanding character towards the state and public bodies. They consider the creation of opportunities and means to exercise the right to work, the choice of profession, social protection, health care, education, housing, environmental protection, food, etc. as public responsibilities and functions. (Report of UNHCHR, A/HRC/25/27, 2013, 25)

While the doctrine of the social state embodied in the preamble of the Constitution and in the chapter on fundamental rights with an economic and social character, and implemented in special laws, considers as the responsibility of the state the obligation of the state to become active and to guarantee citizens the provision of adequate means for life needs in certain cases. (Albanian Constitutional Court Decision, 9/2007) The Constitutional Court has affirmed that the principle of the welfare state provides the legislator with a wide and undefined space for regulating the benefit of social goods to a certain extent and quantity. (Albanian Constitutional Court Decision, 11/2007) Therefore, within the concretization of this principle, it is a positive obligation of the legislator to ensure the provision of (public) services for free or at an affordable price for the public or certain social categories in sectors that relate to essential needs.

According to the jurisprudence of the Constitutional Court and especially that of the ECtHR, the activity of the

public bodies of the state, in addition to the activity of the Assembly, as a legislative activity to guarantee and protect fundamental rights in the framework of the drafting of legislative measures, is of particular importance. fulfill the positive obligations that states have to implement in practice and the rule of law. The obligations carried by Article 3 of the Constitution are closely related to the role and function of the public authorities, which in the exercise of their specific activity, must not only respect fundamental rights and freedoms but also play a proactive role to effectively guarantee them. (Albanian Constitution, art 15) The manner and standards of their provision are indicative of the level of their realization. It is not without purpose that the Constitution in its Article 107 sanctions that: "Public servants follow the law and are at the service of the people". This constitutional norm defines the general framework of the activity object of public servants, which is public service or service to the community. Therefore, public service as a set of activities authorized by the Constitution and the law, carried out by various bodies, is essential for the general interest of society and aims to implement basic rights and freedoms, the rule of law, the social or other legal rights.

Therefore, it is quite clear that there is an overlap between the provision of social economic rights and the regulation of access to essential public services. (Hesselman, 2017, 113) Both are necessary to realize thriving, inclusive societies with adequate living standards for all, based on human dignity. The provision of public services according to the nature of fundamental rights represents and serves as an instrument, not only to guarantee the fulfillment of specific rights but also to evaluate legal solutions and social economic policies. The challenge for policymakers is to ensure that the drafting of policies at the low level, and further, the implementation of legislation through the provision of public service programs make effective the basic rights and freedoms of citizens.

4.2 Public Services as the Object of the State administration activity

In the legal dimension, public services are confirmed to be the main object of the state administration activity (Law 90/2012, art. 2) and that of the local government. (Law 139/2015, art. 2) But, in the law on state administration, we will put note that despite being a framework law on the meaning, typology, and organization of state administration, it does not provide any definition of what public services are, nor does it define their principles and types. The situation is different when it comes to defining the meaning and types of public services offered by local government bodies. Being a power of a constitutional nature, with functions delegated by the will of the legislator, it serves not only the public interest but legal certainty and clarity in defining responsibilities and duties so that the law is as clear as possible in the nature and type of powers that are charged to the latter. Even though there is no definition of the meaning of public services in the framework of law for state administration, we must refer to other laws that regulate different aspects of them.

In the Albanian legal framework, the notion of public services is expressed in law no. 13/2016 "On the way of providing public services over the counter in the Republic of Albania". According to this law, "public service" is the product that is offered by the institutions of state administration, independent and local government, within their jurisdiction, to natural and legal persons, based on their request and that results in a response of the forms of various, such as certificate, license, permit, certification, etc., from the responsible institution, provided for in the law. ((Law 13/2016, art 4) As it follows from this definition, which is given by this special law, it does not cover the wide spectrum of public services that are performed by public and private entities but only deals with some public services that are offered in counters from state, independent and local administration institutions. So, this definition includes only some services of an administrative nature, which are performed within the framework of specific administrative procedures and which result in an exercise of the responsibility of the public authority of the state based on the request of the interested subjects. It does not take into account the wide range of administrative procedures carried out by public bodies. It leaves out of the spectrum of coverage all those public services that are presented as a public need, either as an activity initiated mainly due to the nature of the public function that forces the intervention of the public body or even at the request of interested parties and that represent in the most meaningful sense to expand the scope of activity of the state administration. (Law no. 44/2015, art. 41)

If we analyze further the services that are considered public and their types, we notice that in the Albanian legal framework, there is a framework law for services, which aims to determine the right to exercise the activity for providers (private) of services in the Republic of Albania. The law excludes from its scope a wide category of services or activities such as non-economic services of general interest; services in the field of transport, including road, rail, sea, and air transport; health and pharmaceutical services, provided with a therapeutic purpose, through health care structures or not, and regardless of the way their financing is organized or whether they are public or private; activities related to the exercise of official authority; social services offered to individuals and groups in need, who are unable to meet, with the resources they have, their vital needs, provided by the state or non-public entities, licensed by the state; social housing

services, etc. (Law no. 66/2016, art. 2) the law, assessing the fact whether a service is performed for a fee or not, has classified services of general (public) interest into two categories: services of general economic and non-economic interest. (Law no. 66/2016, art. 3)

According to the legal framework, public or private entities that operate these services in these sectors must be supported by the state to cover the uncovered costs of the service through state aid that is subject to special regulation by law. (Law no. 9374/2005, art. 13 /3) Law no. 9374/2005 "On state aid", sanctions the obligation of the state through a certain mechanism known as the State Aid Commission, to help public or private entities operating in the field of services of general economic interest and public. In the sub-legal framework that regulates the field of state aid, we find a more comprehensive definition of the notion of services of general public and economic interest, as any service in the general interest, which the beneficiary enterprise is charged or obliged to provide, based on a mandate of public service. (DCM no. 650/2016). Whereas, a public service mandate is considered a legal act, in the form of a law, decision, concession or contract, private or public, public private partnership, based on which the enterprise is charged or obliged to provide a public service. For example, in the law on the energy sector, the establishment of the public service obligation by the decision of the Council of Ministers is defined as licensees in the electricity sector who exercise the activity of production, transmission, distribution, and supply of electricity. (Law no. 43/2015, art. 47)

From the analysis of the legal framework in general, it results that the basis of the work of the state administration is not only its administrative activity that is related to the exercise of public authority in the creation of rights and obligations towards subjects, but also a series of other activities which by nature are not categorized as administrative, but can have an economic or non-economic character, for example social (health, education), industrial, etc. and that meet the important needs of citizens and other subjects. These types of economic or non-economic, social activities are included as part of state responsibility in various areas of governance. It seems that the legislator has followed the model of not providing a definition of what public services are that are performed at the central level by the state administration. In material terms, this would constitute a narrowing of the discretion enjoyed by the executive power.

5. Conclusions

Albanian law has followed the French legal model in the construction of a framework legal framework for the organization and functioning of the state administration, evidencing that public services are the object of the daily work of its activity. It is not without purpose that the legislator, like other countries, has not given an exhaustive definition to the notion of public services. This is because the legal institute has a complex nature. After all, it includes in itself the addressing of the basic economic and social needs, through the imposition of the obligation on certain subjects, public or private, to carry out activities in the interest of the public. Another difficulty encountered is that the concrete object of public services is the provision of goods and public goods, which in themselves represent dynamic social-economic needs. This implies that there cannot be an exhaustive list of them, but they vary over time and space in different jurisdictions.

Also, giving a definition would narrow the discretion of the legislative and executive power about the shaping, structuring of the government and administration, and further regulation of a public service that may be newly born. On the other hand, the diversity of schemes for the provision of these services by public or private operators represents another influencing issue. In the construction of a definition, one of their special characteristics should be taken into account, which has to do with the obligation to offer them to certain categories or the entire community, providing them with access, quality, continuity, and equal rights.

As discussed in the paper, the main influence towards the construction of a profile of what are and what is included within the notion of public services has been given by Community law. To improve and increase their efficiency, community law has encouraged member states to consider public services between competition and the legal reserve of the state. Despite this impact, it must be said that the horizontal determination in the special jurisdictions of what public services are should not violate community law in the field of the free market and competition. Therefore, the regulation by law of the concept of public services and their categorization represents a difficult task and a balanced solution that will take into account both national and local interests, as well as the evaluation of different areas of sectoral policies in which the EU- enjoys the competence.

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