Revista catalana de dret públic #57

www.rcdp.cat

DEBATES ON LOCAL PUBLIC SERVICES: ANALYTICAL SURVEY*

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Abstract

This article analyses the discussions surrounding public services within the welfare state framework (Spanish Constitution, Art. 1.1) and the role played by local governments in their provision as agents of welfare. The discussions focus on the following areas of subject matter: the extension of public service activity in the local subsystem; whether public service provisions must necessarily be the exclusive domain of public bodies, identified with direct management, or if participation by a private entity, characterised as indirect management, could be allowed; within this indirect management, as concerns the relationship between the public body responsible for the service and who is to manage it, whether such a relationship can be articulated by a service concession contract or a service arrangement, pursuant to the Law on public sector contracts of 2017, or whether a non-contractual legal relationship is established, developing the possibilities enabled by the community directives of 2014 on services to individuals. Despite the damage done by the financial crisis and the legislation approved while it endured, the resilience shown by local governments and their capacity to keep welfare systems alive form the best possible backdrop to commemorate the forty-year anniversary of the establishment of democracy in the local sub-system in April of 1979.

Key words**:** Welfare state; public services; local governments; resilience; direct management; indirect management; contractual management; public management; financial crisis; budgetary stability; efficiency; economic-financial sustainability; social sustainability.

ELS DEBATS SOBRE ELS SERVEIS PÚBLICS LOCALS: ESTAT DE LA QÜESTIÓ

Resum

L'article analitza els debats a l'entorn dels serveis públics en el marc de l'Estat social (CE, 1.1) i la funció que desenvolupen els governs locals en la seva prestació com agents de benestar. Els debats se centren al voltant dels eixos següents: l'extensió de l'activitat de servei públic en el subsistema local; si la seva prestació s'ha de caracteritzar per l'exclusivitat en la intervenció d'entitats públiques, identificada amb la gestió directa, o si s'hi admet la participació d'un privat, qualificada com a gestió indirecta; dins d'aquesta, i amb relació al vincle entre l'entitat pública titular del servei i qui l'ha de gestionar, si ha de ser la d'un contracte de concessió de serveis o un contracte de serveis, en aplicació de la Llei de contractes del sector públic de 2017 o si s'estableix una relació jurídica de caràcter no contractual, tot desenvolupant les possibilitats que obren respecte dels serveis a les persones les directives comunitàries de 2014. Malgrat els embats de la crisi econòmica i la legislació aprovada sota el seu influx, la resiliència mostrada pels governs locals i la seva capacitat per mantenir uns sistemes de benestar constitueixen el millor bagatge per commemorar els quaranta anys de l'advenient de la democràcia al subsistema local l'abril de 1979.

Paraules clau: Estat social; serveis públics; governs locals; resiliència; gestió directa; gestió indirecta; gestió contractual; gestió pública; crisi econòmica; estabilitat pressupostària; eficiència; sostenibilitat economicofinancera; sostenibilitat social.

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* This article is a translation of an original version in Catalan. The author wish to thank those who performed the blind review of this article for their enriching remarks and suggestions.

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Article received: 08.10.2018. Blind review: 07.11.2018 and 14.11.2018. Final version accepted: 16.11.2018.

Recommended citation: Martínez-Alonso Camps, José Luis (2018). Debates on local public services: Analytical survey. *Revista Catalana de Dret Públic*, (57), 72-96, DOI: 10.2436/rcdp.i57.2018.3228.

Summary

1 Introduction[1]

Public services are the hallmark of the welfare state. Under its protection, a diverse array of services that ensure the welfare of citizens is provided. In Spain, the distribution of responsibilities that guarantee these benefits reveals the prominent role played by autonomous communities and local governments and administrations. This role came into being once the former state-owned public utilities (electricity, gas and telephony, to mention the most relevant) changed their status to that of 'private activities of general interest', in the wake of late-twentieth century deregulation processes. As we approach the end of the twenty-first century's second decade, public services are the object of intense, wide-ranging debate. An updated look at this discussion is especially significant now, on occasion of the fortieth anniversary of democracy in Spanish local councils.

The lack of a legal definition of public services has given rise to doctrinal or jurisprudential delimitations.[2] At the doctrinal level, *public service activity* in the local arena must be understood as that which is:

– conducted by a local public organisation, either on their own or through a management entity with which they are bound through a legal, contractual or other type of relationship, to meet the needs of users, or group of persons who are the recipients;

– objectively characterised as being made up of technical services that are useful to the users who receive them;

– configured with criteria of universality and equality and in conditions of continuity and regularity, and

– declared by legislation as a local public service or one assumed as such by the entity in the field of their competencies, and in accordance with the established administrative procedure.

This definition indicates that this is a specific sort of action, different from all other public activities (development, administrative intervention, economic initiative and the exercise of public duties). Their content in benefits and their projection toward society directly link public services to the welfare state, as they are one of the essential elements of the social pact that underpins it. In addition, through the distribution of public services among users, they promote and guarantee that equality among all people be true and effective (Spanish Constitution, Art. 9.2 and Statute of Autonomy of Catalonia, Art. 10.2).[3] This justifies their being subject to a *special legal system* that includes competencies and prerogatives, which must be exercised exclusively to ensure users' rights, and the continuity and regularity of public services within the framework of the welfare state (Spanish Constitution, Art. 1.1).[4]

In this reality there coincide economic, sociocultural and political factors, as well as regulatory and management responses, making up the diverse lines of reasoning that fuel the debates in this field. They could be classified into the following areas:

1 Abbreviations: LBRL: Law 7/1985, Local Government Framework Act; LCSP: Law 9/2017 on public sector contracts; LJCA: Law 29/1998, regulating judicial review jurisdiction; LPGE: Law on general State budgets; LRSAL: Law 27/2013 on rationalisation and sustainability of local government; MINHAP: Ministry of Finance and Public Administrations; ROAS: Regulations on works, activities and services of the local governments of Catalonia, approved by Decree 179/1995; TARC: Tribunal Administrativo de Recursos Contractuales (Administrative Court of Contractual Appeals); TRRL: Recast text of the Local Government Act, approved by Royal Legislative Decree 791/1986; TRLCat: Recast text of the Local and Municipal Government Law of Catalonia, approved by Legislative Decree 2/2003; TRLCSP: Recast text of the Law on public sector contracts, approved by Royal Legislative Decree 3/2001; TRLHL: Recast text of the Local Finance Administration Act, approved by Royal Legislative Decree 2/2004.

2 According to the Supreme Court, "in order for an activity to be authentically defined as one of public service, at the risk of denaturing the concept, it is not sufficient that it merely provides something useful to the public. Rather, it must be a technical intervention addressed to the public, provided on a regular and ongoing basis, and oriented towards meeting a public need, the responsibility for which is attributed to a Public Entity" (Sentencia Tribunal Supremo [Constitutional Court ruling, STS] of 2.3.1979, speaker, Ponce de León, LB 4).

3 The differences between other actions and those of public service, the evolution of the welfare state and the dimension of the debate on the role of the State have been analysed by Martínez-Alonso (2007: 41-58); for references to the impact of the crisis on the welfare state see Lorente and Capella (2009), Míguez *et al.* (2012), Baylos (2013), Ponce (2013) and Esteve (2014).

4 Emphasis is placed on this link with the welfare state, which justifies the specialisation of the legal system conferred to it, to respond to criticism of it in the current times, and underscore its instrumental nature as concerns the established aims, to the extent that use of their determinations for other purposes would constitute a *deviation of power*, due to an "exercise of administrative authority for purposes other than those established in the legal system and legislation" (Art. 70.2.2n §, LJCA).

a) A subject area surrounding the *scope* this public service activity must have, and the *duties* to be performed in their provision by local councils, other local administrations and remaining public administrations, without overlooking the *poly constitutional role* to be played by the respective local, autonomous and central State governments.

b) The debate on whether the provision of these services must be characterised by *exclusivity in the participation of public entities*, either independently or in association, and whether or not this gives rise to an instrumental personification (all such cases are identified with direct management), or if, to the contrary, participation of a private entity is allowable, qualifying it as indirect management.

c) Last, without leaving the area of indirect management, there is also debate on the alternatives existing for the *bond between the public authority responsible for the service and the body who is to manage it*; if it must be a relationship based on a contract articulated in one of the concession or service contract modalities introduced in 2017 with the Law on public sector contracts (LCSP) (and the problems these engender, now that the public service management contract has been scrapped), or whether the ties are to be built based on a non-contractual legal relationship, while developing the possibilities opened by the community directives of 2014 with respect to services for citizens.

Due to space limitations, analysis of these debates on public services, discussed in the coming pages, must be summarised. Prior to that, a preview of the updated general structure of public service management modalities, with special emphasis on the local level, can be illustrative:

A) Direct management

a) By a single public administration

a.1) Management by the same body (distinct or not)

a.2) Autonomous body

a.3) Public undertaking

a.4) Commercial company 100% publicly owned by local govt.

b) By two or more administrations or public entities

b.1) Municipal Association

b.2) Consortium

b.3) Commercial company 100% publicly owned by local government, shares held by several organisations

b.4) Agreement between different administrations: delegation, management commission or other co-operative actions

B) Indirect management

B.1) Contractual management

a) Public service concession (transfer of operational risk to concessionaire)

b) Public service contract (no transfer of operational risk to contractor)

B.2) Non-contractual management

Social partnership, delegated management or other modalities regulated in autonomous community legislation[5]

5 Modalities and terms are used in the strict sense. In other words, they refer exclusively to provision of public services, therefore ruling out their extension to other activities. Having clarified this, we must be aware that it is quite common for the term to be used beyond these limits. Reference is often made to indirect management for the contracting of activities that do not form part of public services (such as cleaning of public offices). In this case, the term *outsourcing* should be used. In any event, it must also

2 Debate on extension of public service activity by local governments

2.1 Legal-political framework of local welfare systems[6]

From the advent of democratic local councils in April 1979, local governments have been providing a growing number of public services in the framework of the LBRL and the autonomous legislations ratified for its implementation. Despite the difficulties of an economic-financial nature, and those derived from the fragmented structure of the local sub-system, the exercise of this activity and their role as agents of welfare make up what have been called *local welfare systems*. Their characterisation is distinguished by two dimensions:

a) The *substantive dimension,* which includes a broad range of activities (social services, town planning, sociocultural and sport activities are among the most significant) and the provision of basic services and infrastructures (public water supply, street lighting, sewer systems, street cleaning and waste collection and management, to mention the most relevant).

b) The *procedural dimension* of these systems. This has to do with the network of agents–many of them pubic–who participate in the different phases of the service provision process.

Table 1. Local actors in Catalonia and Spain; comparison (July 2013 - July 2017)

	Municipalities	*Provincial councils*	Cabildos *and island councils*	*County councils*	*Metro. areas*	*Smaller local councils*	*Municipal assoc.*	*Local instrumental personifications (PIL)* *	*Total*
Spain	8,117/8,124	41/41	11/11	81/82	3/3	3,727/3,628	80/76	4,875/4,203	16,935/16,168
Catalonia	947/947	4/4	-	41/42	1/1	63/65	-/2	1,050/835	2,106/1,896

* PIL: Local Instrumental Personifications (autonomous bodies, public business organisations, local businesses, associations of municipalities and consortia).

Source: https://serviciostelematicos.minhap.gob.es/BDGEL/aspx/default.aspx [Accessed: 23.7.2013 and 15.7.2018]. The following paragraphs examine the figures for PILs and their evolution over recent years.

Over the years, the networked articulation of this entire structure had been configured in the LBRL on the basis of the municipality's pre-eminence as the matrix of the local subsystem, intergovernmental cooperation and the essential nature of the different actors intervening therein, having achieved undeniably positive results. However, the reality of Spain's local welfare systems would be affected by a number of factors.

2.2 The financial crisis and the principles of budgetary stability and financial sustainability

The intensity of the financial crisis that began in 2007 and 2008 and its duration severely conditioned states' room to manoeuvre, with legal-political impacts in all areas. The consequences of the crisis and the commitments derived from Spain's membership in the European Union had their strongest regulatory manifestation, and most visible effect on the configuration of the Spanish welfare state in the reform, in September 2011, of Art. 135 of the Spanish Constitution, focused on budgetary stability and the absolute priority of servicing public debt.

After the constitutional modification, a reform was begun that culminated in the passage of Organic Law 2/2012 on budgetary stability and financial sustainability (LOEPSF), a law that would impose strict discipline on local governments. This purpose was reaffirmed with ratification of Law 27/2013 on rationalisation and sustainability of local administrations (LRSAL).

be acknowledged that the same thing occurs with forms of direct management used to carry out activities different from those of public service, such as those for the exercise of public duties (autonomous tax collection bodies), administrative intervention (town planning agencies or authorities) or economic activities (public companies for the sale of officially-protected housing).

6 For more on the conceptualisation of the dimension of local welfare systems, see the works of Navarro and Rodríguez (2009) and Martínez-Alonso (2013 and 2016) and bibliography referenced therein.

2.3 Local welfare systems and the Law on rationalisation and sustainability of local administrations: the local counter-reformation

Despite its expedited parliamentary processing (September-December 2013), debate on the LRSAL was kept alive by the strong opposition it aroused, the rulings by the Constitutional Court resulting from the numerous appeals filed by autonomous governments and parliaments and the conflict that arose from the defence of local autonomy by the Municipal Government of Barcelona and 2,392 other local councils.[7]

For the sake of brevity, it is not possible to describe in depth the lines of reasoning and specificities of this process.[8] However, a summary can be given of the main measures established by the LRSAL, along with the correlative evaluation of their relevance:

a) *A disempowerment and severe reduction of municipal competencies*, made manifest in:

their transfer to autonomous communities in the areas of health care and social services, and education [new versions of Art. 25.2, letters i), k), e) and n) and 26.1.c) of the LBRL, stipulated by the LRSAL, as well as 'Disposición Adicional' (Additional Provision, DA) 11, and 'Disposiciones Transitórias' (Transitional Provisions, DT) 1, 2 and 3 of this Law]; however, this transfer was deemed unconstitutional in STC 41/2016 on the three aforementioned DTs and DA 11, for having surpassed the limits of a basic regulation on local competencies (149.1.18 of the Spanish Constitution), encroaching on the statutory competencies of autonomous communities by prohibiting the decentralisation of those services [Legal Base (LB) 13.c) and d)], as well as being an object of interpretation pursuant to DA 15 along the same lines (LB 13.e)];

a reduction of internal competencies of the municipalities in the list featured in Art. 25.2 of the LBRL and the interpretation of this list made for a maximum threshold, and a limit for autonomous competencies. This interpretation was ruled out by the Constitutional Court as it held that, as basic legislation, the list set a minimum that could be extended by autonomous community legislators [STC 41/2016, LB 10.c)];

the *reductionist redefinition* of the prior universal competency clause of Art. 25.1 of the LBRL, which was not considered unconstitutional by the Constitutional Court [STC 41/2016, LB 10.d)],[9] and

the repeal of Art. 28 of the LBRL, that legitimised municipal activity in activities complementary to those of other administrations, also upheld by the Constitutional Court [STC 41/2016, LB 10.d)].

b) *A weakening of local governments' institutional position,* shown in the loss of municipalities' pre-eminence which, through the aforementioned reduction of their competencies, were the object of a limitation of possible sectors and areas of action. Further, in a mutation of the functional definition of provincial councils which, without losing their competencies to cooperate with and assist municipalities (Art. 36.1.b. of the LBRL in the draft given by the LRSAL), received the legal mandate to coordinate the provision of the main mandatory services of municipalities with populations of less than 20,000 inhabitants, with the agreement of the affected municipalities, in a confusing process in which the mandatory report of the autonomous community and the MINHAP's decision were both declared unconstitutional [Art. 26.2 LBRL, STC 111/2016, LB 12.d)].

c) *Subordination of local public policies to the principles of budgetary stability and financial sustainability, as well as that of economic efficiency,* seen on one hand by the MINHAP's strict control and monitoring of the budgetary and economic-financial performance of local councils, and on the other, in the regulatory provisions which, validated by the Constitutional Court, condition the action of local governments; and are specifically seen in:

c.1) Submission to the so-called *three tax rules*, referring to compliance with the aforementioned principles and the rules on expenditure or limit in the variation of eligible expenditure, which cannot exceed the mid-

7 The list of rulings on the unconstitutionality appeals is as follows: Sentencias del Tribunal Constitucional (Constitutional Court rulings, [STC]) 41, 168 and 180/2016, and 44, 45, 54, 93 and 101/2017; on the conflict, STC 107/2017.

8 For more detail on the process and lines of reasoning, see Martínez-Alonso (2016b: 53-78) and the bibliography cited therein. Of later publications, those of Velasco (2017) and Jiménez Asensio (2018) are especially noteworthy.

9 The graphic expression highlighted is taken from Jiménez Asensio (2018: 5).

term reference rate of GDP growth for the Spanish economy (LOEPSF, 3, 4 and 11 to 13) and which, in the case of breach of any of the rules, would trigger the requirement to approve an economic-financial plan with severe restrictions (LRSAL, 116 *bis*).

c.2) The limitations for application of any accumulated surpluses, which can only be applied in local governments with healthy finances, and is restricted to investments in projects that could be qualified as financially sustainable (DA 6 LOEPSF, DA 16 TRLHL and Law 3/2017, PGE 2017, DA 96 and Royal Decree Law 1/2008).

Given the constitutionality of these measures, as confirmed by the Constitutional Court, it is worth analysing their need and even opportunity on the side of economic-financial reality. Therefore, it is very illustrative to make a comparison of the situation, at the inter-administration and time levels, between December 2013 (when parliamentary processing of the LRSAL concluded), December 2015 and December 2017, once two and four years of validity of the modification of the LBRL have passed, respectively.

Table 2. Required and real percentages of net public debt vs. GDP (months of December 2013, 2015 and 2017)

Percentage of GDP	*Total*	*Deviation from the required percentage*	*Central admin. (including Social Security)*	*Deviation from the required percentage*	Autonomous admins.	*Deviation from the required percentage*	*Local admins.*	*Deviation from the required percentage*
LOEPSF requirement	60 %	-	44 %	-	13 %	-	3 %	-
Actual December 2013	95.5 %	59.2 %	70.9 %	61.1 %	20.5 %	57.7 %	4.1 %	36.7 %
Actual December 2015	99.4 %	65.7 %	71.8%	63.2 %	24.4 %	87.7 %	3.3 %	11 %
Actual December 2017	98.3 %	63.8 %	71.1 %	61.6 %	24.8 %	90.8 %	2.5 %	-16.7%

Source: Banco de España (Bank of Spain). Public administrations. 11.7 Debt according to the Excessive Deficit Protocol (PDE) and financial assets. Percentages of the GDP in net debt. See: http://www.bde.es/webbde/es/estadis/infoest/a1107.pdf [Accessed: 7.8.2018][10].

The deficit data show that, since 2012, these local councils have not only achieved the required budgetary balance, but also surpluses that they have maintained:

Table 3. Deficit of the public administrations 2011-2017 (in % of the GDP)

	2011	*2012*	*2013*	*2014*	*2015*	*2016*	*2017*
Central administration	-5.13	-4.21	-4.22	-3.57	-2.53	-2.48	-1.86
Autonomous communities	-3.31	-1.86	-1.52	-1.75	-1.66	-0.84	-0.32
Local authorities	-0.45	0.22	0.52	0.57	0.44	0.61	0.59
Social security	-0.07	-0.99	-1.11	-1.04	-1.26	-1.59	-1.48
Total	-8.96	-6.84	-6.33	-5.79	-5	-4.29	-3.07

Source: *Stability Program Update, Kingdom of Spain, fiscal years 2011-2016*. For 2017 figures, see: http://www.mineco.gob.es/stfls/mineco/comun/pdf/180503_np_estabilidad.pdf

10 To see the data expressed in millions of euros, see: Banco de España. Public administrations. 11.6 Debt according to the Excessive Deficit Protocol (PDE) and financial assets. Amounts. www.bde.es/webbde/es/estadis/infoest/a1106.pdf

Analysis and evaluation of the determinations established by the LRSAL leads one to question their legal relevance and economic justification. In any event, its prescriptions undeniably and seriously compromised the future of Spain's local welfare systems, especially taking into account the critical economic-financial situations of autonomous communities, who were the initial recipients of the competencies stripped from the municipalities. It therefore comes as no surprise that, when assessing this law and the measures it established, some authors have described it as "a counter-reformation, a true regression in municipal autonomy".[11]

2.4 Resilience of local governments and provision of public services

It is hard to give a categorical, generalised description of the degree of acceptance of the LRSAL prescriptions, given the plural, wide-ranging nature of the *local government* realm.[12] Any hypothesis could apply within this subsystem: from the strict compliance with the legal mandates on restriction of local public action to a given local community's maintenance of the status quo from a time prior to the law, never entering the complex process of requalifying municipal competencies and the intervention of autonomous communities as per the new Art. 7.4 of the LBRL. There are also approaches that aim to reconcile citizen demands and the local legal system, which was already dense, and has only become more complex with the LRSAL, and the autonomous regulations handed down in this area.

Having made this caveat, it can be said that the debate has been intense. First, for the financial crisis suffered over the past ten years, although its impact on the local subsystem, translated into the 'fiscal and budgetary crisis' line of reasoning as a justification for the LRSAL measures, has turned out to be more of a source of damage, and less a true reason. Obviously, this is not to say that local treasuries are by any means affluent. That idea can be ruled out for any administration that only manages 11.4% of the total public expenditure, as compared to the 55.7% and 32.9% of the general (including Social Security) and autonomous levels of Spain, respectively (2016).[13] It is simply a reiteration of the concepts already brought up concerning local governments' small share of the overall public debt (around 3%) and its strong capacity for self-discipline.

There has also been ample debate on the so-called *duplication of services* and the need to avoid it, another reason to endorse the LRSAL (preamble, § 3r) and its modifications in the LBRL (Arts. 7.4 and 25.5). But the truth is that this duplication, understood as an inefficient scenario–in other words, the same service provided by two or more administrations with the same users as beneficiaries–has practically never happened. The reality is that there is a distribution of roles among the different players, some of whom are local, with autonomous government actors (for example, in health care, social services and education) and in the end, those of the central government (for example, traffic control in cities). Lately, the economic recovery and rulings of unconstitutionality of the court on the excesses of the LRSAL have helped calm the debate on the scope of public services and the demands and control over the local administrations that provide them.

At the present time, local governments have competencies that enable them to provide public services at three successive levels which, like concentric circles, are the following:

1st - The essential public services, made up of the minimal or mandatory municipal services described in Art. 26 of the LBRL (drinking water supply, waste management and others listed therein).

2nd - A second ring made up of voluntary municipal services configured around the exercise of their own competencies (Art. 25.2 LBRL), the concurrence of characteristics inherent to public service activity, and assumption by the local council's plenary session of the service provision as their own (publication, *e.g.* LBRL, 22.2.f and LCSP, 284.2).[14] Within this second circle, the voluntary services configured by the exercise

11 Zafra (2015: 25).

12 According to Magre's suggestive expression (1999: 13).

13 Source: *Report of the Committee of Experts for the review of the autonomous financing model* (2017: 28).

14 It bears mentioning that case law has validated the configuration of voluntary municipal public services and features, among its emblematic rulings, STS of 6.5.1999 (Ar 4300, public parking services) and the STS of 20.6.2006, 14.2.2007 and 29.6.2009 (Ar 8317, 1523 and 4424, aerobic exercise, fitness and other analogous services, respectively). For an analysis of the configuration of these services, which complement the mandatory services and their jurisprudential treatment, as well as their provision by different local public actors, see Martínez-Alonso (2007: 96-204):

Recently, there has been an extension of internal municipal competencies with the activities to promote gender equality, as well as in the fight against gender-based violence (new Art. 25.2.o LBRL) and that, for these competencies, municipalities will receive

of internal competencies conferred by autonomous legislation, and whose legitimacy has been confirmed by the Constitutional Court, must also be included.[15]

3rd - The third and final circle is made up of the services constituted on the basis of exercising competencies delegated by the central Administration and autonomous communities, and of the so-called *different competencies* from internal and other competencies attributed by delegation (LBRL, Arts. 27 and 7.4, respectively) and compliance with the established requirements.[16]

To conclude this section, there must be a reflection on the *poly constitutional role* that governments will foreseeably play with regard to local public services. First, the *central administration* takes a *regulator role*, to the extent that it is able to promote the possible legislative initiatives planned for local legal systems (e.g. Spanish Constitution, Art. 149.1.18) as well as control over the *financing of local governments*, either of the ordinary variety through the transfers established by the LPGE, or extraordinarily, through the funds made available for this purpose (those stipulated in Royal Decree Law 17/2014, for example). As for *autonomous communities,* they also participate in a *regulator role*, albeit at a lower level, more geared to reorganising services, without signs of centripetal tendencies, which would be impossible to implement in any case given their precarious economic-financial situation, while promoting the decentralisation of services in favour of local administrations. Last, *local governments* devote efforts to the *exercise of conferred competencies* and *provision of mandatory public services as well as those they have assumed* based on cooperation among them. I do not believe any substantial changes are foreseeable in the distribution of responsibilities among the different actors, neither among territorial levels nor reorganisation within the local sub-system itself.[17]

3 Debate on the option between direct management and indirect management of local public services

3.1 Introduction

Of all the debates on local public services, perhaps the most intense in recent times has to do with the dilemma posed between direct management, characterised by the exclusive participation of public bodies, and indirect management, identified by the intervention of a private body as a service provider. The starting point can be found in Art. 85.2 of the LBRL, which in the version given by the LRSAL opens with the following prescriptions: "The public services of local competency must be managed in the most sustainable and efficient manner, from among those listed hereafter [...]". Next, two mandates are defined as applicable to direct as well as indirect management:

a) An appeal is made to the constitutional principle of efficiency when it comes to choosing service management modalities (Article 31.2, Spanish Constitution) which implies an introduction of economic cost criteria to ensure effective operation of the public service at hand (e.g. Spanish Constitution, Art. 103.1), while linking this choice to the mandate regarding the fact that "management of public resources is oriented toward effectiveness, efficiency, economy and quality, which is why policies must be applied for expense rationalisation and the improvement of public sector management" (LOEPSF, Art. 7).

additional funding as stipulated by the LPGE (RDL 9/2018, DF 1a and DF 3a).

15 For example, the cases of Andalusia, with relation to the "management of community social services" [EA/2007, 92.2.c)] or "the implementation of social and community action policies in the health care realm" [Law 5/2010, 13.c)], and Catalonia, as regards the "provision of telecommunications services" (EA/2006, 84.2.l) or "social cohesion" (TRLCat/2003, 66.2).

16 For more on the articulation of competencies derived from the new drafts of Arts. 25.2 and 7.4 of the LBRL and rulings of the Constitutional Court, see Velasco (2017: 41-45) and Jiménez Asensio (2018: 7-12).

17 It is a fact that the proposal for provincial councils to assume the substitution mandates from local councils as established in Law 27/2013 was unsuccessful. I believe this proposal was doomed to fail because, as I have already written, "contrary to what the draft [of the LRSAL] purports, (the proposal) does not strengthen provincial councils. This judgement can only arise from ignorance of how the local sub-system is articulated, and from conceiving it as a 'zero-sum game'; in other words, strictly in terms of power, so that any parcel of power acquired by one player always comes at the cost of it being lost by another. The local subsystem has long been a fertile breeding ground for the development of what are essentially relationships of cooperation and partnership among the various players, always in the framework of the municipality, which is its matrix. The outcome of these co-operative relationships has always been greater than the simple sum of its parts because after all, it is a *positive-sum game*" (Martínez-Alonso, 2013). There is another line of reasoning derived from political culture that must be added: neither municipal governments would have tolerated the change in the pre-eminence of roles, nor would provincial governments have dared to attempt it because, among other reasons, there is a fundamental one: their members are not deputies, but town or city councillors.

b) Reference is made to sustainability, which must be understood as referring to the financial area and specifically, the provisions of Art. 4.2 of the LOEPSF, as already discussed.

3.2 Reasons for direct management, its modalities and limitations

3.2.1 Controversy around direct management

Within this debate, advocates of direct management make an appeal for the relevant role that must be played, on one hand, by the *supply activity of the public service*, inherent to the welfare state, and on the other, *public initiative in economic activity*, in keeping with the constitutional recognition they have (e.g. Arts. 1.1 and 9.2, and 128.2, respectively). The result is an enhancement of the public values associated with the pursuit of the general interest, and the not-for-profit nature of government activity. Without reaching any extremist position, it is argued that the area of public services is among the best-suited to guarantee users' rights and the rest of demands that come with providing them.[18] Its high efficiency is also used as a reason to support public management. For example, at a more operative level of municipal management, the following lines of reasoning are put forward:[19]

1st - Because of their nature, private companies that provide public services must make profits, financed by being charged to a part of the tariffs paid by users, or the price paid by the local council, a proportional part that would be saved if the management were conducted by the local council's own instruments.

2nd - With regard to VAT, the legislation states that administrations do not have to pay it if they provide public services. This generates a cost that is lower than that of indirect management, in which the local council does have to pay it to the private service provider (Law 37/1992, Article 7.8.D).

3rd - Private or mixed companies must pay corporate tax whenever they show a profit. If the company is entirely municipal the legislation stipulates a corporate tax rebate of 99% in the provision of most public services (Law 27/2014, 34).

4th - In the case of indirect management, the local council has to implement new control mechanisms, the cost of which would not be generated if the service were carried out by the local council.

As a counterpoint to the reasons indicated above, it could be objected that the option for direct management of a service means taking on fixed costs and indirect expenses, those of administration and management, logistics, and human resources (training, substitution for leaves and other contingencies). Further, there will be more financial expenses. Liquidity issues could arise, and investments will have to be made in capital goods. Beyond that, this assumption will irremediably generate additional burdens in the decision-making processes for municipal government teams, who must face this entire array of determinations. In the evaluation of the indicated constraints, consideration must ultimately be given to the structure of the municipal network, which throughout Spain as well as Catalonia is characterised by a vast majority of small municipalities. Consequently, their local councils have limited management and decision-making capacity.[20]

3.2.2 Direct management modalities and their conditioning factors

A) General outline

Within the local sub-system context, direct management of public services is very heterogeneous. It is diversified into the various modalities highlighted in the general outline featured at the beginning of this article, and gives way to the phenomenon of the local instrumental personifications (PIL).[21]

18 Here, the proposal to develop techniques of administrative self-supply must be classified. This follows the adage of "don't contract from a company what a public organisation can do for you" (Amoedo, 2018: 86).

19 Here I follow those outlined by Garzón (2017), complementing them with regulatory references.

20 On 1 January 2018, municipalities with populations below 5,000 inhabitants stood for 84% of the total in Spain and 77.8% in Catalonia. Those with 2,000 inhabitants or fewer were 72% and 62.8%, respectively. Source: Spanish National Institute of Statistics [Accessed: 10.9.2018]. Available at: http://www.ine.es/jaxi/Datos.htm?path=/t20/e245/p04/provi/l0/&file=0tamu001.px and http://www.ine.es/jaxi/Tabla.htm?path=/t20/e245/p04/provi/l0/&file=0tamu001.px&L=0

21 For more on the causes, dimensions and other characteristics of the PIL phenomenon in Catalonia and Spain, see Martínez-Alonso (2013b: 61-75).

B) Conditioning factors on services provided in the framework of a single local government

In Article 85.2.A of the LBRL, the LRSAL introduced preferential criteria and a number of requirements regarding modalities of *functional decentralisation*: the public undertaking (EPE) and the commercial company are subsidiary by nature to management by the autonomous body, or the local government itself. The former two can only be used when it has been certifiably accredited that they are more sustainable and efficient than the latter two. Therefore, criteria of economic profitability and investment recovery will have to be borne in mind. Nevertheless, I believe that if a rigorous approach is taken, logic would lead to a preference for the modality that best met those criteria, without prejudging that, in and of themselves, some will do so to a greater (management by the local government itself or autonomous body) and others to a lesser degree.

In light of the conditioning factors imposed by the LRSAL, another front is opened regarding dependent entities: that having to do with their possible consideration as a *management commission* made to one's *own instruments*, in the framework of what community case law and doctrine have termed *in-house providing* contracts. This is a highly controversial topic, and is the object of detailed regulation (LCSP/2017, Arts. 31 to 33 and Directive 2014/24/EU, Art. 12). So-called *vertical public cooperation* identifies the service commissions that contracting authorities make in favour of associated instrumental personifications. These are not considered contracts based on the consideration as an instrument of the Administration, and compliance with the established requirements (no shares held by private capital, control over the personification by the contracting authority, for whom they perform over 80% of their activity, and recognition of their status as an instrument of the Administration). Nonetheless, these requirements do not affect the case at hand, as it can be reduced to the attribution by a local government of management of a public service, for which it is responsible, to a dependent instrumental personification (LBRL, 85.2.A and DA 9.3 *a contrario sensu*). This is the exclusion established by the LCSP itself when, upon regulating the commissions of contracting authorities to personified instruments, it states that "it is not applicable in cases in which the management of the public service is carried out through the creation of public-law entities established for this purpose, nor to those in which this management is attributed to a private law company with capital that is entirely publicly-owned", despite the fact that the inclusion of this sentence, of long-standing tradition, in the new Contracts Law (Art. 32.7, 3r §, paragraph 2) is not entirely appropriate.[22]

Consequently, it is necessary to distinguish between *direct management of a public service through the option of creating a dependent PIL*, a manifestation of the self-organisation competency of local territorial governments [LBRL, Art. 4.1.a) and 85.2.A) and TRLCat, 8.1.a) and 249.3)], from the technique of *service commissions by contracting authorities to their personified instruments* [LCSP, 31.1.a) and 32], as has already been ruled on by the Tribunal Català de Contractes del Sector Públic (Catalan Tribunal of Public Sector Contracts)[23] and by other parts of the doctrine, though not pacifically.[24]

C) Conditioning factors regarding services provided in partnership

The LRSAL and other regulations have intensely affected manifestations of *local cooperative decentralisation*. In summarised terms, the most relevant aspects of this process are the following:

22 The transcribed expression was already part of the State Contracts Act of 1965 (Art. 62, 2nd §), and it has been reproduced in successive legal tracts ever since: Law 13/1995 (Art. 155.2), TRLCAP/2000 (154.2), Law 7/2007 (8.2) and TRLCSP/2011 (8.2), but always as a clarification following the definition of the public service management contract. The problem has come to light with the LCSP/2017, which has done away with this contract, as is well-known. Left without a definition of reference, lawmakers have stuck the mentioned passage right in the middle of the lengthy paragraph 7 of the already-extensive Art. 32, to which I refer. With this clearly unfortunate placement, the reading of the exception and non-application of the system that governs commissions in the case being analysed must be taken independently, while we await a modification of the LCSP that either eliminates it for being inapplicable (it is not a matter of commissions to an instrument of the administration) or repositions it in a more appropriate place (like another paragraph, number 8, placed at the end of Art. 32, as a closing clause).

23 In Decision no. 113/2018, which dismissed the appeals accumulated against the Municipal Government of Terrassa in plenary session, approving the form of direct management, through a local public undertaking, of the public water supply service (LB 4 and 5). Available at: http://exteriors.gencat.cat/web/ca/ambits-dactuacio/contractacio-publica/tribunal-catala-de-contractes-del-sector-public/.content/oarcc/tribunal_resolucions/2018/Resolucio-num.-113_2018.pdf

24 After delivering the first version of this article, I learned of other contributions to this subject: along the lines of the viewpoint I defend herein, those of Villar (2018: 81-82) and Fibla (2018: heading 3); and to the contrary, that of Ezquerra (2018). Therefore, the debate is still wide-open on what has been called "the enigmatic regulation of public service management through instrumental personifications" (Amoedo, 2018: 122-124).

a) The *subsidiary character of the consortium to the agreement* was established, conditioned to the fact that the constitution of the agreement, in terms of economic efficiency, allows a more efficient assignment of economic resources, eliminates duplications and does not jeopardise the financial sustainability of the entirety of the local government treasury and the consortium itself, which will not be able to request more resources than those initially planned for (LBRL Arts. 57.2 and 57.3). The legal system governing consortia was regulated, first, in the LRSAL, which modified Law 30/1992 (DA 20a) and later, in Law 40/2015, on the legal system of the public sector (Arts. 118 to 127).[25] Its determinations made it necessary to adapt the statutes of the consortia (a burdensome procedure that fully occupied all of the administrations involved) and conditioned their operation in the areas of budgetary management, human resources, and economic-financial control by the entity with which the consortium is affiliated.

b) The LRSAL also established for associations of municipalities the obligation to adapt their by-laws (DT 11a) gearing them exclusively to the execution of works and provision of the public services established in Arts. 25 and 26 of the LBRL.

c) The LRSAL imposed a number of measures for what was qualified as *resizing the local public sector*, a true act of 'organisational surgery' aimed at the PIL (new draft of the DA 9a of the LBRL), some of which were of a conditional nature, determining the dissolution of those in financial imbalance, and others that were more permanent, which severely conditioned their activity.[26]

d) In light of the conditions prescribed by the LRSAL, cooperative decentralisation is also concerned with the problems of management commissions and the technique of in-house providing, with characteristics that, although they share things in common with the issues surrounding dependent entities, they also present unique characteristics of the relationship between local entities and their associated PILs. So-called *horizontal public cooperation* is characterised by the intervention of diverse entities belonging to the public sector, with different roles (contracting authorities and associated PILs, such as consortia or invested commercial companies) and implies the application of the management commission technique to these legal relationships, with the intention that they not have the consideration of contracts, which is why compliance with established requisites will be necessary [LCSP, Arts. 6.1, 31.1.b) and 32.4]: formalisation of an agreement by which the parties intervening must not be 'market-oriented' (they are presumed to be when they carry out a percentage equal to or greater than 20% of the activities that are the object of cooperation on the open market) to guarantee the public services they are responsible for, and guided solely by considerations related with public interest. Furthermore, the previously-discussed requirements to be considered an instrument of the administration must also be observed, although they will now be those referring to the totality of entities intervening as contracting authorities and exercising joint control over it in the legally-established terms (LCSP, Art. 32.4). This is a very complex, and for that reason, highly controversial matter, as the decisions handed down by administrative contract courts and administrative procurement consultancy boards have shown.[27]

25 Among the new developments in this latter law was that encapsulated in the very definition of the figure, according to which, "consortia are public-law entities, with their own, differentiated legal status, created by different public administrations or entities making up the institutional public sector among themselves or with the participation of private entities for the performance of activities of common interest to all, and within the framework of their competencies" (Law 40/2015, Art. 118.1). This made for a break from the criteria previously held as regards actually allowing entities that were private, but that were also non-profit, as established, among others, in Art. 87 of the LBRL, before being repealed by the LRSAL, or DA 20a.3 of Law 30/1992, before it was repealed by Law 40/2015. Consequently, with the new draft, in addition to foundations, associations and other non-profit companies, commercial companies can join consortia. This innovation was not an object of justification in the preamble of the new law, despite its transcendence.

26 For more on this complex resizing process and the derived conditioning factors, see Montoya (2014: 111) and Martínez-Alonso (2014: 615-650).

27 Three rulings can be selected for examination:

a) Resolution no. 75/2017 of the Administrative Tribunal of Public Contracts of Aragón, allowing the special procurement appeal (*recurso especial de contratación*) filed against the agreement by the Local Council of Huesca approving the commissioning of street cleaning services for this municipality from the Consorcio para la Gestión de Residuos Sólidos Urbanos de la Agrupación núm. 1 de Huesca (made up of the aforementioned local council and three counties) through its instrument, the public undertaking GRHUSA, declaring it null and void. Available at: http://obcp.es/index.php/mod.documentos/mem.descargar/fichero.documentos_TACPA_75_2017_bed0ff31%232E%23pdf/chk.6ba30133ea515cd73524ac255db7ac17

b) Report No. 19/2016 by the Aragon Administrative Procurement Consultancy Boards, in which, after the examination of the community case law and the directive 2014/24/EU (art. 12), it analyses the possibilities of the consortium as a figure of horizontal

D) Conditioning factors on the exercise of local public economic initiative

The LRSAL also touches on the regulation of public economic initiative, whose connection with the topic being analysed comes about with the public economic services. First, there is a requirement to fulfil the goal of budgetary stability and financial sustainability in the exercise of the competencies, processing an accreditation file on the suitability and opportunity of the initiative (LBRL, Art. 86.1). Also affected was the execution under a monopoly system of the activities reserved in the (new) Article 86.2 of the LBRL (domestic water supply and treatment, waste collection, management and recycling, and public passenger transport, all of which are public economic services) in the regard that it will be necessary to secure a report from the relevant competition authority (either at the state or autonomous community level) if one has been established (new draft in Article 97.2 of the TRRL/1986).[28]

3.2.3 Quantitative dimensions of Local Instrumental Personifications (PILs) and their evolution

Among the aims of the LRSAL was the aforementioned *resizing of the local public sector* (preamble § 15 to 17 and new DA 9a of the LBRL). That is why it is relevant to examine the evolution of the number of PILs in Spain and Catalonia, since the approval of this law in December 2013.[29]

Table 4. Quantitative dimensions of PILs in Catalonia

Year (month)	*Autonomous Body*	*Public undertaking*	*Local commercial company*	*Municipal Association*	*Consortia*	*Total*
2013 (7)	304	32	312	83	319	1050
2016 (5)	224	31	282	82	266	885
2018 (7)	192	31	275	81	256	835
Variation 2018-2013 (%)	-112 (▽36.8 %)	-1 (▽3.1 %)	-37 (▽11.8 %)	-2 (▽2.4 %)	-63 (▽19.7 %)	-215 (▽20.5 %)

Source: https://serviciostelematicos.minhap.gob.es/BDGEL/aspx/utilidades/contaDes.aspx [Consulted: 23.7.2013, 13.5.2016 and 15.7.2018].

cooperation or collaboration, based on the concurrence of the requirements in order to have the status of own instrument and whenever it is about the management of public services from the competency of the associated entities (Local Council of Jaca and Residuos Sólidos Urbanos para la Gestión de la Agrupación No. 1 of Huesca). Available at: http://aragon.es/estaticos/GobiernoAragon/OrganosConsultivos/JuntaConsultivaContratacionAdministrativa/Areas/02_Informes_Actuaciones/192016.pdf

c) Resolution no. 105/2018 of the Catalan Tribunal of Public Sector Contracts, partially allowing the special procurement appealed filed against the approval by the Pla de l'Estany County Council of the commission for management, and agreement for provision of home care service in that county by the company Serveis Públics d'Acció Social de Catalunya, SL (a company included in the public sector of the Girona Provincial Council). This Provincial Council, along with 15 local councils and nine county councils, among them that of Pla de l'Estany, held a majority stake in the company. The appeal was partially upheld, to roll back the actions taken up to the time at which it was necessary to formally and materially justify and reason the suitability of a direct management modality of the service by commissioning it from an instrument of the administration. Available at: http://exteriors.gencat.cat/web/ca/ambits-dactuacio/contractacio-publica/tribunal-catala-de-contractes-del-sector-public/.content/oarcc/tribunal_resolucions/2018/Resolucio-num.-105_2018.pdf

28 For an in-depth development of this topic, see Colomé and Grau (2017: 147-157) and Martínez-Alonso (2014: 610-614).

29 For more on PIL data relative to the 1998-2013 period, the LRSAL project and its evaluation, see Martínez-Alonso (2013b: 66-68). Concerning the available data and those that will be shown hereafter, it must be noted that they refer to all sorts of instrumental personifications, in other words, without differentiating those that manage public service from those that carry out other activities (exercise of public duties, administrative intervention, economic development or activity, etc.).

Table 5. Quantitative dimensions of PILs in Spain

Year (month)	*Autonomous Body*	*Public undertaking*	*Local commercial company*	*Municipal Assoc.*	*Consortia*	*Total*
2013 (7)	1,250	56	1,590	1,003	976	4,875
2016 (5)	1,048	55	1,496	962	856	4,417
2018 (7)	944	57	1,464	951	787	4,203
Variation 2018-2013 (%)	-306 (▽24.5 %)	+1 (△1.7 %)	-126 (▽7.9 %)	-52 (▽5.2 %)	-189 (▽19.4 %)	-672 (▽13.8 %)

Source: https://serviciostelematicos.minhap.gob.es/BDGEL/aspx/utilidades/conta.aspx [Consulted: 23.7.2013, 13.5.2016 and 15.7.2018].

3.2.4 Debate on PILs and confirmation of their downward trend

Shortly before the approval of the LRSAL, the analysis of Quantitative dimensions of PILs showed a surge that was kept up in Catalonia until 2012, while in the rest of Spain it had lasted until 2009, the time as of which the beginning of a decline could be detected.[30]

The five years since 2013 have confirmed the trend alluded to: the significant reduction in the number of PILs in statistics concluding in July, 2018, both in Catalonia (▽20.5%), and Spain (▽13.8%), and even following the same tendency as regards the order of affectation to modalities of Autonomous Bodies, consortia and Local Commercial Companies (▽36.8%, 19.7% and 11.8% in Catalonia, and ▽24.5%, 19.4% and 7.4% in Spain, respectively).

Given the alarming indicators with which the upturn in these personifications had been manifested, I believe it is necessary to take a favourable view of their decline, and even more so if, from a qualitative standpoint, there is an awareness of the difficulties and operational problems of PILs: in short, the ambiguous legal system that regulates them and the limitations on the local regulatory competencies to resolve them; the fact that the establishment of a PIL is a costly organisational decision, that duplicates structures, drains resources from administrations that create them and compromises their future; that their operation, as occurs with their parent administrations, is also subjected to formal restraints, and that the experience of their management reveals difficulties and a high level of complexity of their decision-making processes.

The quantitative reduction of PILs cannot be dissociated from the LRSAL, for the way this law substantially modified the previously-existing landscape: where there had once been an atmosphere of freedom without any entry barriers to their establishment, now there were severe conditioning factors, more in some cases (local commercial company, local public undertakings and consortia) than others. In any event, the balance is far from satisfactory: the new regulations have not resolved the management problems of PILs. To the contrary, they have worsened them by adding more formalities and restrictions to their operation, and subjecting everything to a final *efficiency and sustainability judgement*.[31] Therefore, it must be concluded that the resizing of the local public sector has taken place, and that further reductions may even be in the pipeline. What seems unlikely is a new upsurge in PILs, not only for the conditions that restrict them, but also because there are fewer incentives for the management 'fast tracks' that private formats (local commercial companies and local public undertakings) once had. This is due to the fact that, in addition to the existing requirements on personnel (subjection to the same limitations on remuneration and onboarding of staff

30 For more about the causes, evaluation and predictions of PILs, see Martínez-Alonso (2013b: 69-75 and 82-83).

31 Because this is the mandate proclaimed by lawmakers in Art. 85 of the LBRL: using the public service management format that best complies with these principles that, in reality, are desiderata that place the local government closer to an exercise of futurology in which technicians and politicians must work to predict the economic-financial scenarios of tomorrow, referring everything to the report on the underlying intervention, and placing the person responsible for this task in an extremely compromising position.

members that are in force for administrations) there has been added a new hiring regulation that, in practical terms, and as contracting authorities, puts them on par with public service provision formats (LCSP/2017, Art. 3.3 and 316 to 320).

3.3 Reasons for indirect management

If, as has been discussed, direct management options are based on the supply of public services in the welfare state, but also on public initiative in the economy, options for indirect management are based on the constitutional recognition of *the freedom to conduct a business in the framework of a market economy* (Spanish Constitution, 38). Having situated the issue in this context, there will also be financial, budgetary and efficiency-related considerations that guide the debate, at a minimum, conditioned by the determinism usually attributed to the pre-eminence of the economic dimension over the legal, and even political realms.

Therefore, facing the dilemma of choosing direct management of services or one of the contractual modalities that characterises indirect management, their lower cost, as well as the appropriateness of implementing private management, market-compatible techniques and the need to not commit an excessive volume of public resources will invariably be brandished as reasons. That is why, in the juncture of a financial crisis like the one that began in 2008, the proposals in favour of indirect management become even stronger. Following this line of reasoning, mention can be made of the paragraph incorporated by the LRSAL in 2013, at the beginning of Art. 85.2 of the LBRL, stating that public services of local competency must be managed in the *most sustainable and efficient way* among those listed in the precept. Furthermore, among the criteria to consider in resolving the dilemma between direct and indirect management, high relevance must be attached to that of competition, as the National Commission on Competition (CNC) underscored at that time.[32]

Once the Spanish economy began to recover as of 2014 (positive GDP growth rates above 3% and growth of employment around 2.5%),[33] the debate continued, and a number of *criteria for private management of public services* was offered: professionalism of management (fewer obstacles and more incentives for mechanisms that reinforce effectiveness); leverage of scale economies; investment capacity; flexibility in the legal and administrative instrumentation of management; agility in decision-making; decisions not bound to the short-term time frames or electoral cycles, and introduction of competition in the market access phase (a situation that is supposed to expedite the introduction of efficiency).[34] Nonetheless, *lines of reasoning* are also set forth that *question indirect management:* questionable quality of services; fraud in public tendering processes (corruption, anti-competitive behaviour of operators, etc.); costs of service (remuneration of administrator, cost of tendering process, etc.) and little transparency in management.[35]

From a more general perspective, it cannot be denied that community law, especially directives on public procurement, have driven the various modalities of public-private cooperation, the importance of which has been highlighted by European doctrine, although experiences in this field within the European Union have had more than a few blemishes.[36]

Having thus situated the debate on the contending reasons in favour of one or another management format, I believe two reflections especially stand out. In the first place, that the decision made must be the result of a thorough process of analysis and comparison of circumstances and factors surrounding each specific case. Second, and directly linked with the previous consideration, it will be necessary to pay close attention

32 Precisely, in its report of 13.3.2013 (NPI 88/13) and with relation to the draft bill of the LRSAL (cited as an *avantpojecte de llei*, or draft bill, APL), the CNC stated the following (page 7): "The CNC deems it necessary for the draft bill to establish the obligation for local government of deciding between direct and indirect management in the manner that most favours competition, and specifically, analyse *ex ante* certain elements that indicate the possibility of introducing effective competition. [...] When, among others, these elements are present, the APL must establish that local governments choose formulas of indirect management that enable private service supply". For a deeper discussion of this matter, see Martínez-Alonso (2011: 606-607).

33 On these and other indicators that confirm the recovery, the summary by Hernández de Cos is very insightful (2018).

34 The authors of the summary are Colomé and Grau (2017: 128).

35 Selection of the reasons also analysed by Colomé and Grau (2017: 128).

36 On the former definition, "the European Union, though it has declared neutrality regarding the management formats for public competencies, has stressed the importance of balance and formulas for public-private cooperation to preserve public interest" (Gimeno, 2018: 6-7). For more information on these blemishes, see the special report of the European Court of Auditors, with its eloquent title: "Public Private Partnerships in the EU: Widespread shortcomings and limited benefits" (2018). Available at: https://www.eca.europa.eu/Lists/ECADocuments/SR18_09/SR_PPP_ES.pdf

to the independent variables that condition the municipality or other local government at hand: geographic location, configuration (rural, urban or metropolitan), role they play (diversified, residential or bedroom community) and structure of the population group (integrated or scattered) among others. On another note, these reflections lead to an entirely logical conclusion: prejudices on the pre-eminence of one format over another must be abandoned. Depending on which is ultimately chosen, a number of consequences will be derived that will lead the local government to have to act in kind (for example, direct management will require an extra effort in all of its structures, and indirect management will require implementation of certain follow-up and monitoring mechanisms so as to not lose control and administration of the public service).[37]

4 Problems with the change of management format and contractual management modalities

4.1 Contextualisation

Having outlined the different lines of reasoning, it is true that the debate becomes more intense when a transition is made from one type of management to another, and reaches its high point when the counter-decision made by the relevant local government means changing from indirect to direct management, which reflects the controversy surrounding the primacy of private or public initiatives. As it turns out, to grasp it in all of its dimensions, there must first be an examination of the current regulations in the Law on public sector contracts (LCSP).

4.2 The LCSP and the paradigm shift regarding contractual management of public services

In force since 9.3.2018, the LCSP's approach to the topic at hand is based on the following criteria:

1st - Elimination of the Public Service Management Contract and its various modalities (concession, managing authority, partnership and mixed-ownership company), archetypical figures of administrative law and Regulations for local government services since 1955.

2nd - Attribution to the service concession contract for management of those "offset either by the right to operate the services that are the object of the contract, or this right accompanied by that of receiving the price", an operation that "will involve transfer of the operational risk to the concessionaire" (Art. 15).

3rd - Dual configuration of this concession, as its object may be public as well as non-public services (Art. 282). Block translation of the precepts on Public Service Management Contracts taken up in the TRLCSP/2011 for the regulation of the concession, with certain caveats in cases in which the object are public services, and express reference, of an additional nature, to the "regulations established [...] regarding the works concession contract, as long as it is compatible with the nature of said contract" (Art. 295).

4th - Subsumption in the service management contract of those public services in which the service provider does not assume the operational risk for their management. This criterion is derived from the reasoning, by contrary inference, of the already-discussed definition of the service concession contract, and complemented with regulation of the so-called *specialities of service contracts that involve direct services for citizens* (Art. 312).

Albeit with slight variations, this was already the proposal of the LCSP drafts of April and October 2015, and the 2016 bill, which were based on the exclusive duality of the community figures of service concession and service contracts, the object of directives 2014/23 and 24/EU, respectively. Without a doubt, it was a legally possible option. But of course, it was not required by community directives, which are only compulsory concerning the result to be achieved, leaving the choice of the format and resources up to national authorities

37 In this regard, reference must be made to the *Informe de fiscalización del Sector Público Local, ejercicio 2011* (Special Report on Monitoring the Local Public Sector, 2011 fiscal year), by the Spanish Court of Auditors (published in the *Official State Journal* no. 58, of 9.3.2015, Section III, p. 20900 to 21208), which downplays the preconceived notion of greater efficiency as something associated with indirect management, and is usually used to defend direct management. This thorough report analyses five public services (public drinking water supply, street lighting, street cleaning waste collection and the cemetery), providing in-depth, rigorous coverage, and among its conclusions, states: "No significant and common correlation has been observed for the five services in the provision format and the greater or lesser cost of the service" (p. 21068). This article is highly recommendable as a way of gaining insight into the multiplicity of factors at play in this area, and being able to evaluate the need and complexity of the decision-making process when choosing a public service management format.

(Treaty on the Functioning of the European Union, Art. 288, 3). This result was perfectly achievable with the update of the Public Service Management Contract that distinguished concessions, characterised by the transfer of operational risk to the concessionaire, from the rest of modalities of the aforementioned contract, identified by the non-assumption of the risk by the contractor, subjecting all of them to the relevant community-wide advertising and all other demands of directives 2014/23 and 24/EU, and under the protection of a unified legal system that guarantees the rights of users and the continuity and regularity of public services within the welfare state framework. This has given way to the response and debates triggered on the articulation of the proposal for service concession contracts and services as a correlate to the suppression of the Public Service Management Contract, in the doctrinal area as well as the Council of State itself.[38]

Within the context of the law in force, the configuration of contractual management of public services in the LCSP is characterised by the following traits:

a) *Repeal of the basic, autonomous, contractual and local legislation regulating the Public Service Management Contract and its modalities,* with the exception of that referring to concessions, which is not incompatible with the new approach. This leads to the discarding of all those determinations that could eliminate a substantial transfer of operational risk to the concessionaire (e.g. LCSP, Art. 15.2, in relation with 14.4 and Directive 2014/23/EU, Art. 5.1, and RECs 18 to 20).[39]

b) The object ceases to be the only delimiting criterion of the contract, and what had been a constant since the State Contracts Law of 1965 is abandoned. Thus, with the new law, *service concession and service contracts* are defined exclusively depending on whether or not they involve the transfer of operational risk to the contractor. The maximisation of this criterion explains how these contracts contain heterogeneous objects:

i) Service concession contract, a type that, as it involves the transfer of operational risk, covers two possible objects:

   - Those featuring services that constitute *public services*. In other words, that meet the traits defined (they satisfy users' needs with criteria of universality and equality, and in conditions of continuity and regularity) and match up with obligations and competencies attributed to government agencies and governed by the mandates of assistance and guarantee to all citizens that are derived from the welfare state format defined in Art. 1.1 of the Constitution.

   - Those that make up other services in which, though they are constituted by utilities and received effectively by citizens, their management is not aligned with a mandate directly associated with competencies of the Administration, which is why they must be identified as *non-public services*.[40]

ii) Service contract, which could contain, without any presence of operational risk transfer, three different contractual objects:

   - Development of activities for public sector entities (office cleaning, security and other logistic activities).

   - The distribution of benefits that make up public services (totally or partially free services, such as those for health care or assistance).

38 The approach embodied in the LCSP was attributable to the positions defined some time ago by Gimeno (from 2012 to 2018) with the support of prestigious doctrine (Gallego, 2011; Raquin, José Antonio, 2012; Carbonero, 2015; and Razquin, Martín María, 2014, among others) and a number of resolutions of the TARC and the JCCA. The opposition to this stance was initially that of a minority: Martínez-Alonso (2015), the reasons for which were taken up in Opinion 116/2015 of the Council of State (March 2016), Fuertes (2015 and 2017) and Hernández González (2016). Later, the body of critics grew, with the addition of Laguna (2017), Magide (2017), Martínez López-Muñiz (2017) and Martínez Pallarés (2018: 112). For more information on this debate, see Martínez-Alonso (2018: citations 3 and 4).

39 For specification of the affected regulatory tracts, see Martínez-Alonso (2018: heading 2.2).

40 For example, this could include the usual cafeteria and restaurant services in public buildings (ministries, universities, etc.); photocopy, printing and binding services, so common on university and college campuses, or the newsstands and gift shops found in hospitals or other places visited by the public. For more details, see Martínez-Alonso (2018: citation 14).

- Performance of activities whose beneficiaries are citizens, but in which the object is not considered a public service.[41]

c) *Ambiguity in the legal definition of legal systems*, a consequence partially resulting from the heterogeneous presence of objects within the same contractual figures, but also due to the faulty regulatory technique used, which does not differentiate between the application of prerogatives that should be exclusive in the cases of the remainder, which have different objects, falling to public services.[42]

d) The result in the LCSP is the creation of a rule on *public service concessions* which, despite the deficiencies, is sized to match their complexity (Arts. 15, 20 and 284 to 297). This contrasts with the sparse regulation of *public service contracts* (Art. 312), which is a barrier for the execution of these contracts and can even give rise to legal insecurity in the provision of public services, in which a transfer of operational risk to the manager does not take place.

e) Last, it must be stated that the LCSP contains a reference to the *mixed-ownership company*, not as a way of preserving it as a modality of public service management contracts, but as a direct winning tenderer of a works or services concession contract, with a majority involvement of public capital, and as long as the choice of private partner has been made pursuant to the rules set out in this Law (see preamble, IV, § 6, 28.3 *in fine* and DA 22).

4.3 Problems associated with changes in the management format

Few topics have stirred up as much commentary in recent times as those of remunicipalisation, internalisation or bailout of public services. The vast bibliography generated only allows an attempt to summarise the characteristics of these figures, which, very concisely, are as follows:[43]

1) The usage of the term *remunicipalisation* is erroneous, both because the municipality never lost ownership of the public service and because its meanings transcend management formats. This is because municipalisation implies, by rigorous strict definition, the assumption of the service by the municipality, and does not prejudge whether the management is direct or indirect, or if it is an object of monopoly.

2) A more accurate term; reinternalisation, should be reserved for cases in which, on conclusion of the contract whose object is provision of a public service, the local government decides to provide it through one of the direct management modalities. With this premise in mind, the essential aspects on which to focus are:

2a) That modification must naturally observe the requirements established in the legislation: agreement of the plenary session, of non-delegable nature (e.g. BRL, 22.2.f) submission to the established procedure (in Catalonia, e.g. ROAS/1995, 159-162) and subjection to the various conditioning factors established depending on the previously-discussed modality of direct management chosen (LBRL, 85.2 and 86 and TRLCat, 97).

2b) That among the most problematic aspects of internalisation, mention must be made of staff, specifically in application of Art. 44 of the Recast text of the National Labour Relations Act (approved by Royal Legislative Decree 2/2015), on their subrogation, and the controversy surrounding the regulatory provision approved to

41 Therefore, it would cover the cases described in the previous note, but with a configuration of the economic equation of the contract that does not entail assumption of operational risk by the manager.

42 Therefore, the enthusiastic announcement of the need to distinguish within the legal system of the concession when it is a matter of public services (preamble LCSP, IV, § 16) is not backed up in its articles, throughout which there are significant omissions. There is no reference to public service in transcendental cases: the maintenance of economic balance, recovery and suppression of the service for reasons of interest of the service, and the unseizability of the assets belonging to the concession [LCSP, 290, 294, c) and d) and 291, respectively].

A similar inaccuracy is present in the regulation of the other contractual figure, in which all of the effort developed in the preamble of the Law to link the contracts for services that involve direct benefits to citizens with the object of the public services (repeatedly cited this way in the § 13 to 15) is completely ignored in Art. 312 of the LCSP, which does not cite them even once, and is limited to refer its determinations to (mere) services. This is an error to which there must be added the omission of the inapplicability of service contract suspension in cases of non-payment by the Administration for a period of more than four months (LCSP, Arts. 198.5 and 208.1), which, on another note, is generally established for all service concessions in Art. 286 of the law.

43 Without any pretence of exhaustiveness, the following bibliographic references can be highlighted: Caamaño *et al.* (2017), Gimeno (2016), Mahíllo and Martínez-Alonso (2017), Magaldi (2012), Ponce (2016) and Tornos (2016).

limit the incorporation of non-established public employees into the public sector featured in LPGE/2017 (DA 26 and DA 34.2), declared unconstitutional as they were regulatory measures of a substantive nature and their connection with the object of the budget (activation of expenses and estimation of income) was neither direct nor immediate (STC 122/2018, of 31.10, LB 4 and 5).[44]

3 The *recovery* figure has a specific legal definition: *"*unilateral declaration by the contracting body, made for reasons of public interest, by which the concession is deemed concluded, even in cases of positive management by those responsible for it, in order to be managed directly by the administration" [LCSP, e.g. 297, 279.c) and 294.c]. In short, the following characteristics must be added:

3a) Their regulation is of a *basic nature* (DF 1a.3.2n §, by contrary inference).

3b) It is applicable to service concession and service contracts whose object is a *public service* [LCSP, preamble § 16 and 14 and art. 312.g)].

3c) Recovery has the nature of an *expropriation*, and must be subjected to a fair pricing procedure, which requires the necessary prior notification (TRL/1986, 99 and ROAS, 264-265). Specific rules are set to determine the amount of the compensation that includes general damage and loss of profits (LCSP, 295.4 and 280.3).

3d) The power for recovery comes from the aforementioned reasons of public interest, an ambiguous legal concept that would have to be argued and justified as it is the manifestation of a discretionary power (e.g. Law 39/2015, Art. 35.1.i and ROAS, 127.1.5). Additionally, it requires accreditation that direct management is more effective and efficient than concessional management [LCSP, 279.c) and 294.c), *in fine*], a requirement that makes recovery much more difficult.[45]

3e) The above-mentioned determinations are applicable to all concessions and public service contracts adjudicated after the entry in force of the LCSP or previously (DT 1a.3), which makes for additional retroactive protection against recovery agreements.

3f) Concession recovery agreements can be the object of a special procurement appeal [LCSP, 44.2.f], a measure that must be understood as equally applicable to public service contracts [e.g. Art. 312.g)].

4) The fact that the change from indirect to direct management is the most intensely debated should not make us overlook that the opposite movement (outsourcing) is also naturally subject to requirements for agreement of the plenary session and the above-detailed procedure, as well as those inherent to *public service procurement* pursuant to the LCSP. The requirements for outsourcing include the complexity in preparation of the service concession dossier, and especially, preparation of the feasibility assessment and all of its formalities (LCSP, Arts. 247, 285 and DA 3a.5).

5 Non-contractual management and other debates on local public services

The LCSP takes up what could be called *non-contractual management of public services* which in summary, has the following characteristics:

1) Its legal grounds can be found in directives 2014/EU: number 23 (REC 54) and 24 (REC 114 *in fine*), the contents of which are reproduced in Spanish law, and that are based on the premise that "Member States and/or public authorities remain free to provide these services themselves", "namely such services that are known as services to the person, including certain social, health and educational services", or "to organise (them) in a way that does not entail the conclusion of public contracts (the text of Recital 54 of Directive 2014/EU/23 reads 'concessions' instead of 'public contracts') [...]" (LCSP, IV § 7).

44 For more on the problems of personnel subrogation and the open-ended non-fixed staff members, or the subrogated, non-public employee, see among others Castillo (2018), Falguera (2018) and Mauri (2017).

45 Gimeno concludes that "the regulations in force make for a *de facto* elimination of the practical possibility of recovery, as it is very difficult to justify greater efficiency with this decision" (2018: 9).

2) The supply of these services by private organisations is excluded from the LCSP "whenever this is carried out without the need to conclude public contracts by, among other means, the simple financing of these services or concession of licenses or authorisations to all entities that meet the conditions that the contracting authority has previously established, without limits or quotas, the aforementioned system guarantees sufficient advertising, and complies with the principles of transparency and non-discrimination" (Art. 11.6).

3) As recognised in the LCSP (DA 49), this modality whose regulation, by virtue of the distribution of competencies (Spanish Constitution, e.g. 148 and statutes of autonomy), corresponds to autonomous communities, which, though with different names (*social partnership*, *coordinated activities* and *delegated management* are among the most widely used) have begun to articulate this new kind of indirect management, in which the relationship between the provider (with special importance for non-profit entities) and the Administration responsible for the service is defined in negative terms, namely, with the term *non contractual*, and is characterised in the previously-described terms of Art. 11.6 of the LCSP.[46]

There are other debates that touch on public service management in one way or another. Two stand out above the rest, although in the framework of this article they can only be mentioned in passing. The first is on the *legal nature of the economic compensations that users must pay to receive the services*, basically focused on concessions. The LCSP has sought to put an end to the recurrent discussion between considerations of *fees* and *tariffs,* understood as a private price, with the definition of *tariffs* as *public financial contributions of a non-fiscal nature*, as long the trait of *compulsoriness* is present (e.g. Spanish Constitution, Art. 31.3). This requires approval of a non-tax ordinance. It has been made manifest in the specific regulation of service concessions (LCSP, Art. 289.2) and tax precepts (the regulation of Art. 20.6 of the TRLHL, e.g. LCSP, DF 12a must be noted) although the debate will remain open, as it has been the object of a complaint of unconstitutionality.[47] Another matter that may affect local public services has to do with the *service organisation employees' right to strike,* whether it be a public or private entity, and to exercise this right intensively in the cases that can be conceptualised as *services essential to the community* (drinking water supply, waste management and health care), despite the fact that the constitutional mandate of Art. 29.2 to regulate the exercise of this right and establish the necessary guarantees to ensure the maintenance of these services is still incomplete.[48]

6 Epilogue

Over the past decade, local governments have proven their resilience, or capacity to maintain local welfare systems despite the disruptions they have suffered: at the general level, such as the financial crisis, or regulatory level, such as the LRSAL. With regard to this law, time has shown that the obsession to undertake this kind of local government reform had neither logic nor cause. This is clear, on one hand, because its impact on a number of economic-financial factors was minimal, and on the other, a vast majority of local actors have consistently behaved in a way that is much more compliant with the budgetary stability and financial sustainability goals than their counterparts in autonomous communities and the central administration.

Having overcome the LRSAL offensive, partly reduced by rulings of the Constitutional Court, and those of the economic-financial legislation inherent to the crisis, local governments now maintain *substantial essential competencies* that enable them to maintain their responsibility over a significant number of public services. To provide these services, they can choose from a range of modalities, although all of them are subject to various conditioning factors and detailed formalities, which are not easy to complete or process. As concerns

46 For more on the development of this modality, see Garrido (2017), Lazo (2017) and López-Veiga (2017).

There follows a list of autonomous community references. The list is not exhaustive: Andalusia: Law 9/2016 on social services, Arts. 101-107, social partnerships and 110, agreements; Aragon: Law 11/2016 on coordinated activities for social and health services to the person; Asturias: Law 1/2003 on social services, Arts. 44 *bis*- 44 h, social partnerships and agreements; Catalonia: Decree Law 3/2016 on urgent public procurement measures, DA 3a on social partnerships and delegated management and DA 4a on occupational partnerships; Valencia: Law 7/2017 on coordinated activities for provision of health care services to persons; Navarre: Law 13/2017 on social partnerships in health care and social services; Galicia: Law 13/2008 on social services, 33 *bis* - 33*f*, on social partnerships; Balearic Islands: Law 4/2009 on social services, 89 *bis* - 89f, on social partnerships; Basque Country: Law 6/2016 on the third sector, and Murcia: Law 3/2003 on the social service system, 25 *bis* - 25*j*, social partnerships and agreements.

47 Lodged by the Unidos Podemos-En Comú Podem-En Marea parliamentary group of the Spanish Parliament (see BOE no. 65, from 15.3.2018). This is a multifaceted debate. For analysis of these facets, see Tornos (2017).

48 On this topic, see Moreno (2016) for the labour law perspective, and Vázquez (2017) for that of administrative law.

direct management I believe that the key is in optimising the possibilities of territorial administrations based on their own management or that resulting from local cooperation, prioritising agreements and arrangements, and reducing PILs to cases in which they are functional (for example, when facing a clearly defined and highly technical goal, autonomous management capacity and a high level of self-financing). As for the *contractually-based indirect management* modalities, I believe that the new LCSP requires local legal actors to increase their efforts to overcome the shortcomings of an ambiguous concession and (especially) service contract legislation. Further, these actors must perform a task of conceptual filtering depending on the object of the contract, and prepare the list of special Administrative Bidding Conditions to define parties' rights and obligations, as well as the Administration's powers and prerogatives that correspond to the object at hand. This is a complex, risky task. It also faces certain limits, as it is an executive role that must necessarily be subject to the dictates of the legal regulations in force. Lastly, *non-contractual indirect management* requires autonomous regulatory implementation that enables local governments to make the most of the potential of the third sector and the advantages that can come from this type of service, without ever undermining the guarantees of legal security, objectivity and transparency.

With these scenarios in mind, and the perspective of forty years of *local democracy* that will be celebrated in April, 2019, governments of the entities that make up this sub-system must work to provide the public services set out in legislation and demanded by citizens. They must do so while remaining fully immersed in the different debates analysed, seeking greater levels of efficiency and sustainability among the different forms of management; efficiency and sustainability that must be conceived not only in terms economic-financial criteria, but their social dimension as well.

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