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APPROACH. PRIVATE LIFE OF  
ADMINISTRATION - PUBLIC LIFE OF PRIVATE  
ACTORS

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# New Frontiers of Administrative Law: A Functional and Multi-Disciplinary Approach. Private Life of Administration - Public Life of Private Actors

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## Abstract

*This paper is focused on those private bodies without position of formal executive power that are being and must be increasingly subjected to higher duties, in that they affect members of the public to a significant degree; private bodies which in addition work closely with administration, that is, in a collaborative and networked environment.*

*Regarding the private and public law relationship, I argue the need for collaboration, and, more specifically, for the internalization of public values and norms into private law, when “administrative” action is performed. It is about to “infuse” the private law with public law values rather than to replace the private law with rival legal norms.*

*Part I briefly explores these emerging new domains, and Part II specifically focuses on those areas that are dominated by non-governmental actors (the “public life” of private actors), or by administrations acting under private law (the “private life” of public administrations). Finally, Part III summarizes some preliminary features of new administrative law dealing with these new scenarios.*

‘(People) seldom realise at the time how deeply dynamic changes are cutting. Old pictures of a political and legal scene remain current long after it has been drastically altered.’\*

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\* Felix Frankfurter, ‘The Final Report of the Attorney-General’s Committee on Administrative Procedure’ (1941) 41 Col LR. 585, *apud* M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997), p. 2.

One important issue that today's *common European legal thinking* must deal with regards the dualism present in contemporary legal systems: the distinction between public and private law. For an administrative lawyer this is a critical question, because administrative law was conceived as 'règles dérogatoires au droit commun'. From the original perspective, administrative law lies beyond private law. Public and private law were located on two sides of a well-delineated border. The application of private law by the administration has been seen, not without reason, in a negative light, as an avoidance of administrative law and the guarantees it affords. In any case, the traditional approach has been a zero-sum game: the science of administrative law remained well beyond the rule of private law.

With the passage of time, however, this perspective has been broadened with new outlooks, whilst keeping in mind that the relationship between the two branches of law is quite complex and not one of mere opposition, in cadence with the ever-changing dividing line between what is public and what is private. The impact of the European Union has contributed in many ways to this constant state of flux and interaction between the spheres of public and private responsibility. In short, today we recognise a complementary function between the two branches of law. Indeed, public and private law constantly interact and find new ways of combining, exchanging tools and adapting solutions. That is the reason why, the science of administrative law can concern itself with private law matters, when the actions of the Administration are subject to private law. Administrative law, therefore, is the legal branch that encompasses the application of the executive powers of the administration, as well as those actions of the administration subject to private law.

This article takes a step even farther, and proposes that administrative law not only concerns the actions of the administration subject to private law (the 'private life' of the administration), but also when the actions of private agents can be classified as 'administrative' (the 'public life' of private actors). This chapter specifically focuses on those areas that are dominated by non-governmental entities (the 'public life' of private actors).

Employment law, for instance, is one well-known and consolidated area where the influence of public law values can be seen. Indeed, it is a branch of the law strongly infused with public law values, but it is just an example from an extensive field of examples. This chapter, however, will confine itself to only *new* areas of interaction

between private and public law, and, in these areas, mainly to the application of ‘administrative life principles’ to *services of general interest* and *regulatory activities* carried out by non-state actors under private law. It is the nature of the activity being exercised, not the actor that matters here –a *functional approach*, as it is also the ‘public life’ of the activity itself –where there is no exercise of public power involved– that defines it.

In other words, this article will focus on those private bodies, without position of formal executive power, that are being and must be increasingly subjected to higher level of responsibilities, in that they affect members of the public to a significant degree; private bodies which in addition work closely with administration, that is, in a collaborative and networked environment.

## **I. Rethinking the Boundaries Of Administrative Law: Old And New Questions**

*1. Preliminary remarks about the scope and meaning of ‘administrative’ action. The eternal question concerning its conceptual frontiers.*

I shall start with two critical questions:

a) Firstly, what makes the executive power and the administration *unique* in comparison to the legislature and to the judiciary? This is a very well-known and longstanding problem; one that is, in fact, impossible to solve, given that an administrative action might be judicial or legislative in nature. However, this classical problem at least assumes that these administrative actions, be they difficult to define, are carried out by an administration or by a governmental agency. In short, administrative law is centred in, and applicable by, an actor: a public administration (exercising power). *This is a subject-centred administrative law.*

b) Secondly, what makes an action ‘*administrative*’ or not, regardless of the actor? The classification of activities as ‘administrative’ by virtue of their character is very difficult, if they are not previously so defined by legal provisions or by case law. This question assumes a functional approach: administrative law can be applicable when a certain kind of activity is performed (i.e., public procurement regulations), whether by

public or private entities and whether domestically or extraterritorially. *This is a function-centered administrative law.*

Two problems, one common denominator: what is 'administrative action'? If the definition of *administration* based on the principle of division of power has been problematic from the very beginning of the administrative law (a), an emergent issue even more complex regards the *boundaries* of this branch of the law, that is, if it can be at times applicable to private actors as well, and if so, under what conditions (b).

Can this conceptual change cause a new crisis? 'The literature of the last ten years contains numerous references to two opposite trends: on one hand, "the end of administrative law", on the other, the "new administrative law"'.<sup>1</sup>

In any case, from our point-of-view, we can appreciate two tendencies, or challenges, for the traditional perspective, both clearly evident in the European Union. The first, the proliferation of private entities that without true executive powers nonetheless carry out functions that can be considered socially relevant, and therefore, 'administrative'. The other, an increase of powerful administrations whose actions reach far beyond the enforcement of preceding statutes enacted by parliaments.

a) In effect, on the one hand, at present there is a flourishing interest in administrative law around the world. In an age in which many formerly state-provided services are being contracted out, administrative law is increasingly expanding its ambit beyond its historical limits.

The profound changes brought about by globalisation or privatisation coincide with an upsurge in theoretical interest and research in administrative law, and, curiously, more so in common law countries since the Eighties.<sup>2</sup> And also just as curiously, when an expanding administration downsizes to a contracting one, the growth of administrative law

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<sup>1</sup> Sabino Cassese, 'New Paths for Administrative Law: A Manifesto', I-CON (2012). Vol. 10 No. 3 [hereafter, 'New Paths'], p. 603.

<sup>2</sup> See M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997, p. 2.

From a civil law view, one might say that common law countries has been very much familiar to extensions of common law doctrines (principle of 'business affected with a public interest', and 'prime necessity') to newly developing public utilities, that is, companies providing the public with gas, water, transportation, telephone, telecommunications, and the like at a reasonable prices and without discrimination.

'Early on in America a coherent body of law developed under this rubric of public utilities.' *Ibid.* p. 7.

paradoxically becomes greater.<sup>3</sup> At the same time that many regard the deregulation and the contracting out of formerly state-provided services or regulatory functions as a threat to the very core of public law values, others believe that the new, parallel mission of administrative law should be to inoculate private law with public law values rather than to replace existing private law with rival legal norms.<sup>4</sup> In fact, the response of many administrative lawyers to these reforms is 'to distil the essence of administrative law for transporting to the newly 'deregulated' and 'privatized' areas'.<sup>5</sup> Furthermore, new collaborative ways of global governance contribute to promote this growth, as the newly-designated 'global administrative law' shows.<sup>6</sup>

b) At the same time, on the other hand, powerful, networked administrations (super-agencies) are emerging in areas such as markets regulation, environmental protection, energy, public health, food safety, public security, and aviation safety, among others. Albeit that administrative law was mainly born as an implementation tool, these administrations now play leading roles, in that they establish substantive primary legislation by themselves and implement it. In addition to this, the domain of public administration has grown in general over the past century, threatening the primacy of legislatures as the policy-making organ of government.

It is this first trend that interests us here. Nevertheless, we will explore first the context of change and transformation that exists in contemporary administrative law. (Epigraphs 2-4)

## 2. The 'porousness' and openness of old premises. The emergence of new spaces

a) To begin with, *private institutions* increasingly apply administrative law principles not only at the domestic or the European level, but also in the global arena. An example of

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<sup>3</sup> *Ibidem*. It might be no coincidence that the self-conscious identification of public law values dates back to the early 1980s in Britain and was a response to deregulation, privatisation and the underlying theoretical attacks on the 'public-regarding' starting point of administrative law. *Ibidem*, p. 3, and note 10.

<sup>4</sup> Harlow, Carol (2009) *The 'Hidden Paw' of the state and the publicisation of private law*. In: Dyzenhaus, David, Hunt, Murray and Huscroft, Grant, (eds.) *A Simple Common Lawyer: Essays in Honour of Michael Taggart*. Hart Publishing, Oxford, UK, pp. 75-97; Janet McLean (University of Dundee), 'British Idealism and the Administrative State', en <http://www.law.yale.edu/academics/conference.htm>, Conferencia sobre Derecho Administrativo Comparado, en la Yale Law School, en 2009, unpublished manuscript, p. 23. See also Jody Freeman, 'Extending Public Law Norms Through Privatization', *116 Harv. L. Rev.* 2002-2003.

<sup>5</sup> M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997), p. 3.

<sup>6</sup> See Lorenzo Casini, "'Down the rabbit-hole': The projection of the public/private distinction beyond the state", *I·CON* (2014), Vol. 12 No. 2, 402-428.

the former are the private companies working in water, energy, transport, and postal services,<sup>7</sup> or many private companies owned by governments,<sup>8</sup> in that they are subject to public procurement law when acting as contracting entities or authorities.<sup>9</sup> The latter is exemplified by the Internet Corporation for Assigned Names and Numbers (ICANN) bylaws,<sup>10</sup> which in themselves are a sort of administrative procedure act.<sup>11</sup>

At the same time, *public bodies* making non-mandatory decisions are more and more expected to act as if they were enacting formal regulations. For instance, in many legal systems the administration has to observe procedural rules to enact voluntary codes of practice, such as recommended best practices for fisheries management.<sup>12</sup> A central bank attending the Basel Committee on Banking Supervision (BCBS)<sup>13</sup> should apply some procedural mechanisms, such as notice and comment procedures and common understanding, before making recommendations.

As we will see, all these different activities historically have in common that they, at least in part, did not have to comply with traditional administrative law requirements.

b) Indeed, traditional administrative law systems were constructed according to three main premises: the first, administrative law is inherently national, that is to say, a state-centred 'product' (i); the second, it is a law designed for the executive branch and its administration, when they discharge administrative authority (ii); and finally, administrative law has a definite executive and subordinate character: the administration puts into action what ordinary statutes have previously established (iii).

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<sup>7</sup> For instance, these firms are treated in Europe as contracting entities. Public contracts which are awarded by the contracting authorities operating in the water, energy, transport and postal services sectors are covered by Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. The current list of contracting authorities and entities can be found in the Annexes to Commission Decision 2008/963/EC (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:349:0001:0192:EN:PDF>). A general view at [http://ec.europa.eu/internal\\_market/publicprocurement/index\\_en.htm](http://ec.europa.eu/internal_market/publicprocurement/index_en.htm)

<sup>8</sup> See Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, article 1.9.

<sup>9</sup> See note 1 and 2.

<sup>10</sup> See articles I-IV (<http://www.icann.org/en/about/governance/bylaws/bylaws-08apr05-en.htm>).

<sup>11</sup> Sabino Cassese, 'New Paths for Administrative Law: A Manifesto', I-CON (2012). Vol. 10 No. 3 [hereafter, 'New Paths'], p. 607.

<sup>12</sup> US APA, Japanese APA, EU Soft-Law.

<sup>13</sup> 'The BCBS does not possess any formal supranational authority. Its decisions do not have legal force.' (Article I,3 Basel Committee on Banking Supervision, BCBS, Charter).

Nevertheless, in recent decades, administrative lawyers have begun to rethink these traditional frontiers. Administrative law is no longer strictly a *national* law, no longer exclusively a law for exercising executive *power*, and is no longer a law that merely *implements* primary and preordained legislation. Globalisation, privatisation, and the rising era of ‘super-agencies’ are well-known phenomena that speak for themselves. These are three trends in clear opposition to the classical definition of administrative law.<sup>14</sup>

The porousness of these premises opens new fields of interest to this evolving administrative law. We are not talking about a *quantitative* expansion of the scope of administrative law. Rather, we propose a *qualitative* redefinition of this scope, and, given that the pillars of administrative law are in a process of transformation, rethinking its boundaries is required.

### 3. A brief exploration of the new ‘lives’ of interest to contemporary administrative law.

New fields of interest could be described as follows:

a) *The private life of administration*: When administration performs activities required by its public life that are regulated *under private law*.

To give an example, according to the European law, government-owned private-law companies are considered a ‘contracting authority’ in regards to public procurement law. Therefore, they are required to award private contracts in accordance to the principles of equality, publicity and free competition enshrined in administrative law. Another example: if public services are carried out by private-law companies owned by an administration, they must allow other companies to compete unhindered in the marketplace. These government-owned private companies are subject to state aid laws and, consequently, they cannot enjoy an unlimited guarantee from the state, such as immunity from private

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<sup>14</sup> To give a few cases to illustrate:

- Administrative law now extends beyond the scope of the state: for example, the meetings of various central banks at the Basil Committee of Banking Supervision, or the indirect application by national administrations of regulations enacted by the WTO or the EU.

- Administrative law no longer just rationalizes the exercise of power by the state and authorities, it also concerns itself with: (i) the private actions of the administration (i.e., the management of urban transport by a municipal enterprise); (ii) actions carried out by private parties (regulated sectors, such as energy, for example); (iii) the making of soft law (such as best practice guidelines).

- Administrative law not only controls solely the administration’s implementation of regulations; it has to deal, as well, with the various aspects of an increasingly more powerful administrative authority: town and regional planning, environmental policies, food safety, financial markets regulation, etc.

law procedures in cases of insolvency and bankruptcy.<sup>15</sup> In both cases— notwithstanding administrative acts that fall under private law— these companies are not exempt from administrative law: in the former example, they must observe principles of public procurement; in the latter, they must comply with state aid rules.

Questions here are not limited to answering what administrative actions may be performed by a private law regime (whether or not they are permissible), but also under which conditions they should be carried out, and by which means.

b) *The public life of private actors*: When private actors are involved in services of *general interest* (energy, transport, telecommunication...) or participate in a regulatory process (standard-setting process, assessments, monitoring and the like).

In the recently ‘deregulated’ and ‘privatised’ areas, the state and the administration have by no means disappeared. If we take a look at financial market regulation, public health, energy, transport, food safety, product and management standards, environmental issues, and economic services, among others, it is not difficult to discern the labyrinth in which the multitude of public and private actors interact in each area, both inside and beyond national boundaries. The European Union repeatedly illustrates this phenomenon, which is appropriately described by metaphors of network, cascade or composite organization and composite procedure.

For our purposes, the general outcome is that no private actor involved in these areas acts in isolation. On the contrary, private organizations have become integral parts of a joint plan, and as pieces of this complex plan, the private actors must meet some of the similar requirements as the public agents.

Which principles or criteria should rule the public-interest activities of these private actors? In this case we refer to the denominated ‘regulated sectors’ such as telecommunications, energy or the post, whose services are guaranteed, but not directly provided, by the state.

Moreover, when private actors are involved in a regulatory cascade: how should professional associations proceed to establish codes of conduct when they act under self-regulatory regimes? How should companies assessing and certifying private or public

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<sup>15</sup> JUDGMENT OF THE COURT (First Chamber), 3 April 2014, In Case C-559/12 P, APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 December 2012. See at [http://curia.europa.eu/juris/document/document.jsf?text=&docid=150285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=103101#Footref\\*](http://curia.europa.eu/juris/document/document.jsf?text=&docid=150285&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=103101#Footref*)

activities proceed in such cases? Which principles should govern the ICANN and ISO decision-making processes or the assessments of credit rating agencies?

Again, one issue here is to analyse which public values or administrative principles should be applied in a situation that is governed by private law, and with what tools.

c) *The public life of the administration beyond command and control regulations*: the administration's non-mandatory decisions and other administrative actions that are not properly decisions

Soft law created by the administration and other activities carried out by the administration, like information gathering, are much more numerous and important than before. In these instances, what procedural principles should the administration follow in order to establish soft law mechanisms, such as guidelines or recommendations? And what procedural guidelines should be observed when the administration negotiates, is involved in consensus-building, reports on the state of public health or of the economy, or assesses the environment? In the case of soft-law, neither binding nor enforceable means are used; in the latter instances, substantial activities are realised, but no decisions made.

Traditional administrative procedure acts regulate mandatory decisions made by the administration. New procedural mechanisms are being developed to deal with these non-binding 'products', and also with those administrative activities, such as information gathering and sharing, when no formal decision is made.

d) *The international and global life of the administration*: the administration's actions in 'outer space', *i.e.*, beyond the confines of the state.

For example, taking into account that a central bank is not answerable to the electorate, how should a central bank make decisions in the regional or global arena, such as in the realm of the Basel Committee? Whom does that central bank represent, and to whom is it accountable? Which decision-making process ought to be followed by the central bank acting beyond the state? Important dilemmas and legitimacy questions concerning the administrative process are arising in this area. As Sabino Cassese states, new developments, such as a growth of a global space, 'require administrative law scholarship to be denationalized.'<sup>16</sup>

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<sup>16</sup> Sabino Cassese, 'New Paths for Administrative Law: A Manifesto', I-CON (2012), Vol. 10 No. 3 [hereafter, 'New Paths'], p. 603.

e) The *influential life and political leadership of the administration*: the administration's actions in a steering role, beyond the mere implementation of a prior primary legislation.

Taking into account that the administration does not only implement a well-defined public policy, and that it must also define and develop relevant political goals, means and tools in significant domains by itself,<sup>17</sup> what principles should be complied with by European food safety or drug agencies, for example, so that their actions are effective, accountable, verifiable and motivated?

One problem here is that the binary classification 'legislation (by parliament) – implementation (by the administration)' can no longer claim to be representative of the whole regulatory process.

Most of the historical administrative law tools designed to steer and to control a well-defined administration through detailed ordinary statutes have become ambiguous or even obsolete. For instance, in these scenarios, judicial review may not be a simple decision made by a single national agency, but one made by various administrations working together. In such a case, composite procedures from administrations of different jurisdictions must be structured to allow accountability and review. Administrative procedure plays here a leading political role. A reconsideration of the parliament's leading role in the process is required as well.

f) Final remarks.

*These 'lives' are not separate in the real life.* To give an example, globalisation and privatisation may work together. 'In the global polity, hybrid and private bodies are as numerous as public bodies.'<sup>18</sup>

Public-private divide, state and beyond the state lines, or legislation and implementation division, are in many ways blurred. The panorama has become more complex, and as a result, there are new territories and perspectives emerging for administrative law. Accordingly, it is becoming clear that traditional 'administrative law' is itself an overly constraining rubric and that we need to construct an expanded framework. As Sabino Cassese states, the crisis of administrative law refers most precisely to the

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<sup>17</sup> *Supra* l.1.

<sup>18</sup> Sabino Cassese, 'New Paths', p. 607.

adjective, not the noun: the so-called ‘administrative’ law, more than just the law of the administration, is the genuine law of society.<sup>19</sup>

#### *4. The exercise of administrative power by administrations as a central and traditional criterion of administrative law.*

The ‘exercise of administrative power’ has been, from the very beginning, the central concept of administrative law. Consequently, delegation and attribution of powers to the administration, on the one hand, and accountability and judicial review of administrative action, on the other, remain since the outset core principles underpinning the limits and scope of the administrative law field. Accordingly, administrative law is a branch of the law that comes into play when two basic requirements are met: subject (an administration in action), and action (a vested power). In short, administrative law is born linked to an administration ‘in uniform’, in the exercise of authority.

Such limiting criteria were soon undermined: administrative law also became applicable to other actors outside the administration itself (a), as well as to other activities different from the exercise of authority (b).

a) This subjective conception (the exercise of power *by* the administration) was expanded in two main ways. Firstly, administrative law also applies to private actors exercising administrative authority. When private actors exercise governmental power (*ejercicio privado de funciones públicas* in Spain or in France,<sup>20</sup> *Beleihung* in Germany, etc.), they are required to comply with rules of administrative law, even though they are not a public administration. Thus, for example, the Council of Europe Convention on Access to Official Documents, of 18 June 2009, establishes that ‘public authorities’ are also ‘natural or legal persons insofar as they exercise administrative authority’.<sup>21</sup> The rationale here is still consistent: it refers to the exercise of administrative authority.

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<sup>19</sup> Sabino Cassese, *Derecho Administrativo: historia y futuro*, Global Law Press-Editorial Derecho Global, Sevilla, 2014, p. 397.

<sup>20</sup> *Infra*, 5

<sup>21</sup> Article 1, 2) a, in French: *les personnes physiques ou morales, dans la mesure où elles exercent une autorité administrative*.

Secondly, administrative law is applicable to other public powers which do not form part of the administration in many jurisdictions, such as the parliament, the judiciary, the ombudsman, or the European Court of Auditors, but do exercise administrative authority in the case of personnel selection and management or of public contracting, among other issues. This is also the case of the administrative functions of public powers regarding their employees and assets.

This double-fold expansion to actors other than public administrations requires the relaxation of a subjective criterion in favour of an objective one. Namely, that the exercise of administrative authority entails the use of administrative law, regardless of whether the subject exercising such power is a public administration or not. *As long as administrative authority is exercised, administrative law necessarily comes into play.*

b) An administration does not exercise authority when is subject to private law (*e.g.*, to provide a service through a corporation or foundation). The traditional approach when this occurs seems to be a zero-sum game: either the administration exercises administrative powers and therefore acts under administrative law, or it does not –and therefore acts under private law. For this reason, in continental Europe, since the early twentieth century, the phenomenon of the application of private law by or to an administration had been considered something negative ('an escape from administrative law', '*huida al Derecho Privado*', '*Flucht ins Privatrecht*') because when dressed as a 'civilian', leaving behind the 'uniform', the administration was considered to have tacitly dissociated itself from the controls and guarantees of administrative law.

c) Increasingly, however, this view is changing. Administrative law does not disappear when the administration is subject to private law. Moreover, the administrative law system has entered into the realm of private law in different ways in order 'to fill the accountability vacuum left by the retreating state':<sup>22</sup>

- Many administrative law authors hold that, even when the administration is subject to private law, it still has to observe certain criteria of public law. For example, a public-capital corporation, created to provide the public service of urban transportation or electric

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<sup>22</sup> This expression is coming from Michael Taggart, *The Province of Administrative Law*, cit. p. 2.

power, must respect fundamental rights, equality and antidiscrimination principles, and the principle of proportionality.<sup>23</sup>

- Lawmakers have started to create more direct routes of application. Sometimes statutes dictate that an administration wearing ‘civilian clothes’ should still be governed by certain principles of administrative law. This is the case, for example, of the requirement to comply with the principles of public procurement law of public-capital corporations when acting as a contracting authority. Increasingly, the ‘private life’ of administration,<sup>24</sup> and the ‘public life of private actor’ as well, are regulated by statutes that oblige the application of public norms. Public law values are being gradually included into legislation and administrative schemes.

- Case law extends these public law values into the newly ‘deregulated’ and ‘privatised’ environment.

There are, of course, other strategies and approaches;<sup>25</sup> however, this article is focused on the need to infuse public law values to interactions with private law.

For examples of the above-mentioned ideas see table 1 as follows:

TABLE 1:  
ILLUSTRATION OF NEW OPEN SPACE FOR ADMINISTRATIVE LAW

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<sup>23</sup> For example, the German doctrine about ‘*Verwaltungsprivatrecht*’. It applies when an administration carries out important activities related to public service (gas, oil, water...) by means of private law, such as through a company.

<sup>24</sup> For example, the Italian Administrative Procedure Act (*‘Legge sul procedimento amministrativo’*) establishes: ‘*1-bis. La pubblica amministrazione, nell’adozione di atti di natura non autoritativa, agisce secondo le norme di diritto privato salvo che la legge disponga diversamente*’.

<sup>25</sup> See W. Hoffmann-Riem / E. Schmidt-Aßmann (editors), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, Nomos Verlag, Baden-Baden, 1996.

| TRADITIONAL<br>Adm. Law  | PRESENT<br>(IN ADDITION)   | NEW FRONTIERS   | EXAMPLES   |
|--|--|---|--|
| Law within state boundaries (Inherently national law)  | Law beyond the state   | Permeability of the border between the state and 'outer space':<br>Supranational administrative space (e.g., the European Union and the global arena)   | Presently, there is an <i>international life of the administration</i> in active development:<br><ul style="list-style-type: none"> <li>- Financial markets</li> <li>- Public procurement</li> <li>- International trade/Lex Mercatoria</li> <li>- Internet (ICANN)</li> <li>- ISO / GLOBALG.A.P.</li> <li>- Lex Sportiva</li> <li>- Environmental Law</li> <li>- Aviation or Food safety</li> </ul>   |
| 'Command and control' law<br><br>(exercise of public authority on a 'hard law' basis)            | Law that applies, beyond administrative powers, to both administrations and certain private actors (regardless of whether or not they actually wield power). | <p>Permeability of the border between the state and society: from public-private divide to public-private co-responsibility and collaboration.<br/>Public actors, subject to private law, are required to comply with certain public principles, values and rules (contracting authority, transparency and accountability).</p> <p>Similarly, the public actor is subject to public law even when not exercising authority (soft law recommendations).</p> <p>Private actors are recognized to have relevant regulatory functions (self- or co-regulation) and, consequently, they are required to comply with certain public values, principles and rules.</p> | <p>Today, there is an actively evolving <i>private life of public administrations</i> (governed by private law but also influenced by administrative law):</p> <p>A clear example is when the administration acts as a 'civilian' – removing its public 'uniform' (as is the case of an enterprise that provides public transport services or airport management).</p> <p>There is a growing <i>public life of private actors</i>. Two examples:</p> <ul style="list-style-type: none"> <li>- When a private organization is involved in the regulatory process (ISO, GLOBAL G.A.P, professional associations, etc.).</li> <li>- When a private, regulated sector company provides services of general interest and is therefore required to comply with the principles of public procurement, etc.</li> </ul> <p>Currently, an ever-increasing <i>public life of administrations beyond command and control regulations</i> (under administrative law) exists:</p> <ul style="list-style-type: none"> <li>- When an administration acts in a non-coercive way or carries out activities that do not require decision-making. (Soft Law).</li> </ul> |
| Branch of the Law for implementation and application of the substantive rules made by parliament | Substantive primary legislation to be made by 'super-agencies'   | From a binary regulatory scheme (legislation-implementation) towards a circular regulatory cycle (agenda and priority setting-draft-rules and regulations-implementation-monitoring-review) and greater leeway given to agencies  | Urban planning, environmental issues, financial markets regulation...<br><br>Regulatory impact assessments.  |

## ii. Private Life of Administration and Public Life of Private Actors

### 1. Principles of public life

Some of the public law norms that we are interested in are openness and transparency, honesty and fairness, objectivity and impartiality, participation and representativeness, rationality and the duty to give reasons, equality or antidiscrimination principles, accountability and review, and so on. Of course, these values are not the only ones underlying the legal system.

We understand 'principles of public law' to be those principles that must be accomplished by administrations and private bodies not exercising executive authority, mainly in services of general interest and in regulatory activities subject to private law.

### 2. 'The public life of private actors' (services of general interest and regulatory activities).

For the purposes of this chapter, we are mostly interested in those private actors that do not exercise administrative authority, but do participate in *regulatory activities* (a) or in *services of general interest* (b). This is what we refer to as the 'public life of private actors'. In our view, the key point in those situations is that *administrative authority is not exercised* by the involved private entities. In spite of this, new pathways may be opened to administrative law.

On the one hand, private actors working in regulated sectors (such as telecommunications, water, energy, post and the like ) are subject not only to common private law, but also to some principles, rules, and guarantees of administrative law (*i.e.*, public procurement in water, energy, transport and postal services sectors must to be followed by private companies in some cases).<sup>26</sup> *Public service activities* are a concern of administrative law whether they are carried out by the administration or by non-governmental actors.

On the other, non-governmental actors collaborate in a variety of ways in all stages of the regulatory process, from standard-setting to implementation and enforcement<sup>27</sup> (*i.e.*, voluntary standards, certification, labelling systems...). A regulatory space occupied by a variety of public and private actors, each with different resources, contrasts with the traditional state-centred concept of regulation, in which the public agency has formal top-down control over standard-setting, implementation, and enforcement. Indeed, private actors participating in a regulatory cascade (standardisation, evaluation, certification, monitoring, and so forth) are, or should be, subject to public values and guarantees of administrative law as well. For example, the Italian Administrative Procedure Act (*Legge sul procedimento amministrativo*) establishes that private actors must apply administrative principles when they participate in some regulatory activities:

*'1-ter. I soggetti privati preposti all'esercizio di attività amministrative assicurano il rispetto dei criteri e dei principi di cui al comma 1, con un livello di garanzia non inferiore a quello cui sono tenute le pubbliche amministrazioni in forza delle disposizioni di cui alla presente legge.'*

These principles must be observed by private actors in the same way administrations do:

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<sup>26</sup> Directive [2004/17/EC](#) of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors. In Spain, in application of this Directive, a statute was enacted in 2007: *Ley 31/2007, de 30 de octubre, sobre procedimientos de contratación en los sectores del agua, la energía, los transportes y los servicios postales*.

<sup>27</sup> Jody Freeman, 'Private Parties, Public Functions and the New Administrative Law', *Administrative Law Review*, (52 Admin. L. Rev. 813) 2000 [hereafter, 'Private Parties'], p. 816.

*‘L’attività amministrativa ... è retta da criteri di economicità, di efficacia, di imparzialità, di pubblicità e di trasparenza secondo le modalità previste dalla presente legge e dalle altre disposizioni che disciplinano singoli procedimenti, nonché dai principi dell’ordinamento comunitario.’<sup>28</sup>*

In a broad sense, if a regulatory function can be described as an enactment of requirements, restrictions or conditions, or setting standards or giving guidance, in relation or any activity,<sup>29</sup> and these functions can be carried out not only by public regulators, but also by non-governmental actors, one can conclude that the principles of good regulation must be applied to all of them (proportionality, accountability, consistency, transparency or targeting, for instance).

Similar cases also happen in the global arena. The ICANN Bylaws<sup>30</sup> are a good example. They provide the ‘core values’ concerning the performance of its mission<sup>31</sup>, as

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<sup>28</sup> Article 1.1.

<sup>29</sup> See UK Legislative and Regulatory Reform Act, Part 2.

<sup>30</sup> <http://www.icann.org/en/about/governance/bylaws#/>

<sup>31</sup> ‘Article I, Section 2

In performing its mission, the following core values should guide the decisions and actions of ICANN:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.
4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will

well as the principles such as non-discriminatory treatment,<sup>32</sup> transparency,<sup>33</sup> accountability, review,<sup>34</sup> and the like. In another example, the European Regulation on Credit Rating Agencies<sup>35</sup> establishes various principles that must be observed by the affected private agencies: transparency, independency, expertise, and rules on conflict of interest, and so forth.<sup>36</sup> In short, regulatory activities are also of importance to administrative law, whether they are performed by administrations or by private actors, inside or beyond the state.

### 3. Why are public values expanding into private law?

Sometimes the transfer of public values to private law is simply due to a lawmaker's decision based on heterogeneous reasons, as in the above-mentioned examples (European public procurement law, Italian law on administrative procedure, etc.). In other cases, the incorporation of administrative law values or principles is achieved through soft law (codes of practice, guidelines, recommendations, etc.), or through self-regulation. This is the case of ISO, ICANN and of many other private organizations. Practical reasons may also come into play, or coincide. In any event administrative law is the most experienced branch of the law regarding not only the control and legitimacy of power, but also the provision of *services of general interest* or the realization of regulatory activities.

General speaking, administrations are part of a richer institutional environment of public and private activity.<sup>37</sup> 'Contemporary regulation might be best described as a regime

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necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.'

<sup>32</sup> 'Article II, Section 3

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.'

<sup>33</sup> Article III

<sup>34</sup> Article IV.

<sup>35</sup> Regulation (EU) No 462/2013 of the European Parliament and of the Council of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies.

<sup>36</sup> See sections 6-12.

<sup>37</sup> Jody Freeman, 'Private Parties', p. 816.

of 'mixed administration' in which private actors and government share regulatory roles.<sup>38</sup> In this regard, there are many 'regulatory regimes' and 'services of general interest regimes' dominated by a high degree of interdependence between agencies and non-agency actors. Consistency between public and private actors when both participate in the same regulatory process is a strong argument in favour of the interaction between private law and public law. Working as a team, they all are ensured to follow equivalent rules or principles. For example, a private certifying body (in environmental, water, or reporting activities), when preparing an evaluation, becomes part of the regulatory activity; its contribution is relevant so that the whole process works. Therefore, private entities should meet requirements coming from the culture of administrative law, such as technical competence, expertise, impartiality, openness, or fairness, for example.

The main point here is that private bodies providing services of general interest, participating in regulatory activities, or both, affect the members of the general public to a significant degree. These private activities do not exercise public power, at least in a formal sense. However, if we take a look at the effects or at the results of these activities for the entire society, we might agree that the anti-discrimination principle must be applied when private bodies provide services of general interest, or transparency and expertise principles when they set the standards of a product must meet to be imported. Requirements of due process are imposed and arbitrary and unreasonable conduct is not permitted.<sup>39</sup>

### **iii. From A Traditional 'Subject-Centered' Administrative Law Towards A Functional and Multi-Disciplinary Approach**

*1. Beyond the exercise of governmental authority. New frontiers for administrative law: Regulatory and services of general interest performed by private actors without executive power*

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<sup>38</sup> Mark Aronson, 'A Public Lawyer's Response to Privatization and Outsourcing', in *The Province of Administrative Law* 40, 52 (Michael Taggart ed., 1997) (discussing roles of public and private actors in what he calls 'mixed' administrations).

*Supra*, 17: Jody Freeman states: 'Private individuals, private firms, financial institutions, public interest organizations, domestic and international standard-setting bodies, professional associations, labor unions, business networks, advisory boards, expert panels, self-regulating organizations, and non-profit groups all help to perform many of the regulatory functions that, at least in legal theory, we assume agencies perform alone.'

<sup>39</sup> See *Forbes v. New South Wales Trotting Club Ltd* (1978-9) 143 CLR 242, apud M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997, p. 11).

As said above, administrative law is the branch of law that governs the *exercise of formal authority* by public actors (mainly administrations, and to a lesser degree other public powers) and, exceptionally, by private actors. State actors must comply with many constitutional and administrative requirements and constraints, including, but not limited to, procedural norms. Private actors, in contrast, remain relatively unregulated by procedural norms.<sup>40</sup> This is the traditional view in both constitutional and administrative law.

However, we are interested in new perspectives for contemporary administrative law, in which private actors perform ‘administrative’ activities.

It is a matter of fact that private actors today perform a huge variety of regulatory tasks and provide services of general interests. In our view, administrative law science is not allowed to ignore them. This means that the exercise of public power is no longer administrative law’s only field of interest – new frontiers are opening for study and research. They consist, in our understanding, of ‘administrative’ actions performed by private actors (table 2).

In short, it is indispensable that these activities not remain unregulated by public law values. State-society responsibility, sharing and cooperation is now augmented by a partnership and symbiotic role between public and private law. Statutes around the world demonstrate that governance is now considered a common enterprise to be undertaken by public and private actors. The oft-mentioned ‘privatisation’ is often only superficial or incomplete; in most cases, the state remains in the background.

*2. A functional approach: administrative law as a law of regulatory and public service activities (or services of general interest), be the actors public or private.*

a) Beyond the public/private divide.

At times, administrative law acquires a functional dimension. It is not just the law of a public or private subject when exercising administrative authority. Subjective criteria can explain the existence of traditional administrative law, but cannot sustain the above-mentioned new lives or spaces, namely the ‘private life of administration’, and the ‘public life of private actors’.

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<sup>40</sup> Jody Freeman, ‘Private Parties’, p. 843.

Regulatory responsibilities, on the one hand, and services of general interest, on the other, are shared in many ways by public and private entities. These activities are *administrative functions* in a broader sense. That is, they are 'administrative' tasks, not because they are carried out by an administration, but because they are in some way *administrative in nature*, according to statutes or case law, regardless of whether they are performed by a governmental authority or by private actors. For this reason, one can find case law or legal provisions<sup>41</sup> that have imposed procedural requirements on private actors, based on the fact that they are behaving as public actors.<sup>42</sup> The point here is that we must avoid labelling an activity as essentially public or private. The public-private line is constantly changing: in many areas the public-private divide, responsibilities or roles are elastic. Therefore, this distinction may be a formally, historically and conceptually dubious classification. Rather, statutes should clarify, first and foremost, what must be currently considered an 'administrative' function with due regard to all the circumstances involved in benefit of the entire society.

b) Which values and principles are to be transposed to the newly privatized areas?  
When and how?

Currently, as already noted, the most important shared 'administrative' activities by public and private actors seem to be services of general interests and regulatory activities.

For this reason, the first challenge for contemporary administrative law is to establish *when* to extend legal requirements to private organisations performing these two 'administrative' functions. The second is to analyse *which* requirements are to be extended in each case. The third is *how*, namely, which *mode or format* to use in order to concretise these legal requirements into private law.

- In regard to *when*, the lawmaker has the 'first word'. There are many examples (already mentioned), on the imposition of new legal requirements on private actors - some of them even upheld by case law. The role of administrative law scholars is crucial in this area in order to identify into which regulatory and public service scenarios to extend public law values.

- As to *which* criteria are to be extended, these could be classified into two groups. Some of them, stemming from the *rule of law*, are transparency, the duty to give reasons,

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<sup>41</sup> See the above-mentioned examples, especially the Italian administrative procedure act.

<sup>42</sup> Jody Freeman, '*Private Parties*', p.841.

impartiality, fairness, accountability or review. Others, derived from the democratic principle, might be statutory delegation, representativeness, participation, notice and comment, expertise and the like.

- Finally, *how* to achieve the 'transposition'. Such criteria will often be expressed as *general principles*. Since their realisation takes place within, and in collaboration with, private law, these general principles must be specified and adapted accordingly. That is the reason, for example, why European legislation on public procurement only establishes that (private) contracting powers must apply the *principles* of the public contract laws, and not the formal procedures that the statutes establish for administrations.

The main proposal here is to expand public law values into private law.<sup>43</sup> This task entails a *process of adaptation* for traditional administrative law. Not a mere application, but rather, a transfer, export or inoculation of public law values to this area. Therefore, it is a process of seeking and building equivalent rules and principles to be adopted into private law.

Indeed, the transfer of these provisions, values or principles must be an 'essentialist' process. It is a distillation. This means that these basic essences (principles or values) should not be mechanically transferred *en bloc*, but adapted. Most important here is the outcome, the end itself. Hence, it is an essentialist transfer of key principles or values in order to guarantee results.

Thus, both co-exist: On the one hand, traditional administrative law, actor-oriented, regulating administrative actions when dressed 'in uniform' in the field of services of general interest and regulatory activities; on the other hand, new administrative law, function-oriented, accompanying actors in determined activities under private law.

c) Lack of monopoly. A multi-disciplinary approach: conceptual bridges between public and private law.

On the one hand, while the principles for 'public life' are extracted primarily from administrative law, there is much in common here with constitutional law.<sup>44</sup> The need for private entities performing regulatory tasks to justify their actions against recognised criteria and the inability to exercise the same freedom of action as individuals is a conclusion derived from constitutional law (principle of rule of law, rationality,

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<sup>43</sup> To rehash a phrase from the influential work of Jody Freeman: 'Extending Public Law Norms Through Privatization', 116 *Harv. L. Rev.* 2002-2003.

<sup>44</sup> M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997, p. 3.

transparency, accountability, and the like), and administrative law (duty of give reasons, review, control by the public or those affected...).

On the other, the metaphors used for describing this functional process ('infuse', 'transfer', 'adaptation' or 'application' from public law to private law) do not mean that *all* these values belong exclusively to public law. Indeed, it would be wrong to suppose that there are no parallels between these branches of the law. In any case, the transfer from public to private law started a long time ago.

Indeed, conflict of interest rules, transparency, representativeness, anti-discriminatory principles and so forth are now customary principles in private law. Increasingly, legislative interventions place limits on the private law's instinctive privileging of self-regarding behaviour. 'So much that in particular instances the results derived from private law analysis may well approximate those derived from administrative law analysis. Starting points leading in different directions do not necessarily lead to different end points. At a reasonably high level of abstraction public law and private law share several underlying values'.<sup>45</sup> 'What we are witnessing in some areas at least is a synthesis or blending of public and private law principles.'<sup>46</sup>

For this reason, we believe that the construction of 'conceptual bridges' between both systems is methodologically required, in order to analyse systematically the underlying values and principles in services of general interest and/or regulatory activities. For example, in such cases private actors must justify their actions in terms of the general interest, and not their own interests; and the duty to give reasons in a decision-making process should be considered as a basic duty, whether the actor is public or private, even though that duty may manifest itself differently in each circumstance.

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<sup>45</sup> M. Taggart, *The Province of Administrative Law* (Oxford, Hart, 1997, p. 5; Dawun Oliver, 'The Underlying Values of Public and Private Law' in *The Province of Administrative Law*, edited by M. Taggart, p. 217-242.

'There is a good deal of interaction between the two bodies of law, and there is increasing evidence of cross-fertilisation... Employment law is one area where the influence of public law values can be seen.' (M. Taggart, *ibid.*).

<sup>46</sup> 'While the distinction between, and the symbolic functions of, private law and public law are unlikely to fall away, the tensions between them is being mediated in ways that look interestingly familiar to both public and private lawyers.' (M. Taggart, *ibid.*, p. 5-6).

d) Some values can be classified in two ways from an administrative law viewpoint: by organization and by procedure

Under those assumptions, a formula to successfully accomplish the above-mentioned task could be to establish *procedural* arrangements (consultations, transparency, duty to give reasons, impartiality and the like) and *organisational and structural* layouts (composition, openness, expertise, representativeness, avoidance of conflicts of interest, etc.).<sup>47</sup> Organisation –the way to be– and procedure –the way to act– are institutions with structural effects.

As has been noted before, if public and private actors interact in different ways in many privatised areas, and they are part of a joint plan of action, to design procedural and organizational arrangements, not only for administrations, but also for non-governmental organisations will give coherence to the whole system. For example, an association that establishes professional standards in a self-regulatory regime can no longer act as merely a private association. It must instead be a representative of its entire professional field, it must give reasons why it establishes said standards, and it must act with transparency, among other requirements.

Procedure and organisation could be understood as two *conceptual bridges* between administrative and private law in these areas. Administrative law and private law scholars should be equally interested in both these fields when networked public and private actors provide services of general interest, participate in the regulatory cascade, or do both.

### 3. Final remarks. Principles to be internalized by private law

As said, new domains for administrative law are arising from increasingly relevant fields, such as: the ‘private life of administration’ (i), the ‘public life of private actors’ (ii), the ‘public life of administration beyond command and control regulations’ (iii), the ‘international and global life of administration’ (iv), and the ‘influential life of administration performing crucial public policies’ (v). These fields are not entirely new for administrative law. Nevertheless, they have continued their exponential growth and significance, and, even more importantly, their interactions with other branches of the law.

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<sup>47</sup> See Javier Barnes, ‘¿Le importan al Derecho Administrativo las organizaciones y los procedimientos sujetos al Derecho Privado?’, in Javier Barnes (editor), *Innovación y Reforma en el Derecho Administrativo*, 2.0, 2ª edición, pp. 305-338.

In many ways, *customary* administrative law has been absent from these ‘lives’. This is because basic and central requirements were not being met, in part or completely, as occurs, for example, when an administration does not act ‘in uniform’, i.e., as merely a private actor (i); when private organizations participate in regulatory process or in public service activities or *services of general interest* (ii); when an administration enacts soft law, or just gathers, processes and shares information (iii); when an administration does not act within state boundaries (iv); or when an administration (a super-agency) leads and implements significant public policies (v).

However, for a number of reasons, a *new* administrative law is evolving and has a challenging role to play in these areas, in interaction with the other branches of the law. It is an administrative law system based on functional and multi-disciplinary approaches. Values, principles or rules stemming from public law are, and still have to be, adapted according to the peculiarities of each ‘life’, in collaboration with other areas of the law: private law, constitutional law, international law, global administrative law and the like. These public values, principles or rules are determined by the task or function to be accomplished, whether the actor is public or private, whether the actor operates domestically or in the global arena, or whether the actor is vested or not with administrative powers. The question of the scope of these public law values will become a central point of controversy among public-law lawyers.

Regarding the private and public law relationship, when ‘administrative’ actions are performed, mutual collaboration, and, more specifically, the internalisation of public values and norms into private law are needed. In other words, the premise is to ‘infuse’ and to blend private law with public law values, rather than to replace private law with rival legal norms.

In short: this article does not advocate, as a continental-European lawyer might think, for replacing private law with rival legal norms – ‘more administrative law’, nor for abandoning administrative law – ‘less administrative law’. On the contrary, it calls attention the mutual benefits to be found in a collaborative work between both of them.

a) A Functional approach: transfer of public norms to private law to perform a variety of functions

Administrative law is in transition. That being said, however, it can be argued that ‘Administrative law will continue to be evolutionary and strongly conservative in character’,<sup>48</sup> at the same time.

In this article, firstly, I claim that given that administrative law scholars must deal with two different and evolving activities (regulatory and public service activities) –even if they are performed without vested executive power and are subject to private law— our field of study is broader than it used to be.

Secondly, administrative law is also evolving in a functionally-oriented manner. I hold, then, that these new functions, performed with the massive involvement of the private sector, are mainly two: the regulatory function and the public service one. If administrative law does not adapt according to the changing conditions of these new ‘lives’ to become, in the pertinent scenarios, more functional –so that these lives can be properly rationalized and regulated<sup>49</sup>– it risks going backwards.

Finally, I suggest a way –one perspective among others– of solving the conflicts arising from public-private interactions in the new frontiers and this would be that private law adopts and embraces public values or principles.

Plainly, contemporary administrative law embodies a wide range of formats, apart from the traditional one. Moreover, it is undergoing a transition from a purely subjective definition (in essence, the law that applies to the administration when it exercises authority) to a broader, function-defined approach.

#### b) Case by case approach.

‘New administrative law’ here, first and foremost, can be understood as a functional law in nature, , which may be articulated in principles. We mean by this that public values and principles, not detailed norms and regulations, are to be transported from public law into private law. For instance, professional associations at the European level, which establish codes of conduct under self-regulation regimes, are not expected to apply or incorporate traditional and strict administrative law procedural rules to make decisions. The intention is to not constrain these private organizations as if they were administrations,

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<sup>48</sup> Richard B. Stewart, Essay: Administrative Law in the Twenty First Century , 78 NYU L. REV . 437, 453 (2003). As Mark Seidenfeld states, ‘Stewart is correct in his understanding that administrative law is evolutionary and builds upon prior doctrine without ever jettisoning that doctrine entirely.’ The Quixotic Quest for a ‘Unified’ Theory of the Administrative State.

<sup>49</sup> *Supra* l.

rather, what is expected of them is that they adapt the public values derived from those rules into private law.

Case by case arrangements are necessary for adapting to different areas and to maintain coherence with the other public actors involved in the same area. On the one side, in the field of private regulatory activities, self-dealing, conflicts of interest, secrecy, irrationality, lack of representation, procedural irregularity, and the like are to be avoided; and, on the other, in the area of services of general interest, low quality service, lack of universality, lack of competition, discrimination, poor consumer protection, and so forth must be avoided. Each function (regulatory and public service) is different, as well as is each sector. Furthermore, '[w]hen a private actor plays an enforcement role, we might expect it to act differently than when it develops standards. In the former case, we might worry about private motivations that threaten to conflict with a rational enforcement agenda. In the latter case, we might want to minimize self-dealing and anti-competitive behavior'.<sup>50</sup>

All in all, since public policies are implemented through a myriad of regulators and service providers (as is the case of the of financial market regulation), each requiring a different approach, there is a mission to accomplish: to promote the *coexistence* between the different *formats* of administrative law and the collaboration between public and private law. For instance, a central bank might be subject to strict domestic rules on administrative procedure regarding rulemaking (hard or traditional subjective-centred administrative law); the same central bank will be subject to informal administrative principles when acting before the Basel Committee on Banking Supervision (soft and functional administrative law). In addition, private credit rating agencies are expected to follow similar (administrative in nature) principles when performing their tasks in the same market. As Jody Freeman states, '[e]ven traditional command and control regulation —a hierarchical arrangement in which the agency dictates and enforces standards— is characterized by informal interdependence between government and private actors.'<sup>51</sup>

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<sup>50</sup> Jody Freeman, 'Private Parties', 52 Admin. L. Rev. 846.

<sup>51</sup> 52 Admin. L. Rev. 849 p. 857: '[A]dministration is an enterprise characterized by interdependence among a host of different actors (agencies, private firms, lenders, insurers, customers, non-profits, third party enforcers, and professional associations, for example). Government and non-government actors operate in a context of institutional richness, in relationship to each other, and against a background of legal rules, informal practices and shared understandings. These public-private arrangements defy easy division into purely public and purely private roles.'

See also Sabino Cassese, 'New Paths', p. 608: 'Administration, politics, and society now form a triangle; there is no longer a clear dividing line between administration and society; negotiation runs side by

c) Administrative law as a legal heritage and common basic system for private law when private entities provide public services or participate in the regulatory cascade

The view that we uphold here is not towards the application of private law in lieu of administrative law in certain traditional areas (typically, contracts), nor that of the inclusion of principles of private law within administrative law, but rather one in the opposite direction. On the contrary, I argue that the administrative law system operates as a common heritage for statutes and case law, supplemented by legal research, in order to determine the 'public life' principles that private entities should adapt and adopt in certain scenarios. I refer to a collaborative interplay or melange, by virtue of which 'public life' principles modify, complete or permeate private law, on the one side; and, on the other, at the same time, private law will transform these principles by its own means and personality. The resultant combination will be different in each case.

d) New perspectives: Can one single theory completely explain administrative law?

In my view, there is reason to believe that a broad, common, theoretical basis for administrative law, on the one hand, and a variety of branching, functional modalities of administrative law, on the other, may be compatible.

The question is not about finding one, new foundation or a monolithic theory for administrative law, but, on the contrary, it is about finding connections and interactions between a common basis and different functional modalities. A functional application of public law values to private law in some cases is just one example of that.

Indeed, I believe that exercising executive or administrative authority is not the only foundation of administrative law. Regulatory activities and services of general interest (and more broadly, public service activities), regardless of the exercise of power or of the performer, are also criteria that should be taken into account.

As Sabino Cassese concludes, new 'developments make it necessary to abandon the public law regime paradigm, to de-publicize the approach adopted by administrative law scholarship and to study the ambiguities and the richness of the interconnections

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side with command and control; as soon as new services require new structures, these new structures establish links with their institutional clients and attract new clients (both internally and externally); decision-making processes are replaced or accompanied by consultation, mediation, Parliament-like procedures, or, simply, muddling through.'

between public and private law.<sup>52</sup>

It is no longer a zero-sum game: 'privatisation' *versus* 'publicization'. The two phenomena are fundamentally compatible. It is not about abandoning private regulatory and public service activities to private parties; it is not about constraining private actors performing these tasks as if they were administrative agencies. I argue that one way to deal with this is the collaboration between the two branches of the law. In this regard, private law should internalise and embrace some administrative principles and values, adapted to its flexible operating system. Legislation should extend administrative principles and values to private actors through statutory provisions, contracts, subsidies or grants, and so forth.<sup>53</sup>

A key role to be played by legislator is to inculcate and to preserve public law values in the reconfigured public-private landscape.

The emphasis on public law principles or values allows the growth and influence of administrative law science to transcend its traditionally limited domains. However, it is not about a *public colonisation of private law*. It is about finding complementarity and interplay between administrative law and private law,<sup>54</sup> on the one hand, and building conceptual bridges for these values, that are not, or not entirely, monopolised by public law, on the other.

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The illustrations below are meant to be suggestive rather than comprehensive.

## TABLE 2

INTERACTION BETWEEN ADMINISTRATIVE LAW AND PRIVATE LAW:  
PUBLIC ACTION SUBJECT TO PRIVATE LAW AND PRIVATE ACTION SUBJECT TO  
ADMINISTRATIVE LAW

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<sup>52</sup> Sabino Cassese, 'New Paths', p. 607. See also Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 Am. J. Comp. L. 859 (2011).

<sup>53</sup> From a different perspective, see Jody Freeman, 'Extending Public Law Norms Through Privatization', 116 *Harv. L. Rev.* 2002-2003.

<sup>54</sup> See W. Hoffmann-Riem / E. Schmidt-Aßmann (editors), *Öffentliches Recht und Privatrecht als wechselseitige Auffangordnungen*, Nomos Verlag, Baden-Baden, 1996.

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|                                 |                |               |   |
|---------------------------------|----------------|---------------|---|
| <b>Administrative Authority</b> | Administration | Private actor | Kind and format of administrative law to be applied |
|---------------------------------|----------------|---------------|---|

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**Exercise of administrative authority**

|  |   |   |
|--|---|---|
| <p>Exercise of administrative authority by Administration (derived from statutory provisions)</p> <p><i>i.e.</i>, regulations, adjudications, mandatory self-regulation for standards and co-regulation in implementation, etc.</p>  | <p>Exercise of administrative authority by private actor (delegated by legislation)</p> <p><i>i.e.</i>, urban planning, car inspections, etc.</p> | <p>Traditional administrative law is applied both to administration and private actors</p> <p><i>i.e.</i>, throughout administrative procedure acts</p>   |
| <p>Exercise of administrative authority by administration under private law (derived from private contractual provisions)</p> <p><i>i.e.</i>, a company owned by administration establishes contractual provisions, when contracting with a third party, by which the company enjoys administrative authority in performing the contract: orders, unilateral interpretation...</p> |   | <p>Principles or values of administrative law in collaboration with private law</p> <p><i>i.e.</i>, the company's duty to provide reasoning, proportionality principle, control and review, compensation...</p> |

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| Non-mandatory regulatory activities | Administration | Private actor | Kind and format of administrative law to be applied |
|-------------------------------------|----------------|---------------|---|
|-------------------------------------|----------------|---------------|---|

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**Non-  
mandatory  
regulatory  
activities**

|   |  |  |
|---|--|--|
| <p data-bbox="459 282 699 595">Regulatory activities by administration without administrative authority</p> <p data-bbox="459 595 699 801"><i>i.e.</i>, soft law mechanisms</p> | <p data-bbox="762 282 970 539">Regulatory activities by private actors without administrative authority (co-regulation, self-regulation...)</p> <p data-bbox="762 539 970 741"><i>i.e.</i>, standardization, certification, evaluation, monitoring</p> | <p data-bbox="1034 282 1273 573">Adapted and evolved administrative principles and values, depending on the activity, the task and the actor</p> <p data-bbox="1034 573 1273 831"><i>i.e.</i>, transparency, public scrutiny, openness, notice and comment procedures, expertise, impartiality, fairness, representation, etc.</p> |
|---|--|--|

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| Public service activities (or services of general interest) | Administration | Private actor | Kind and format of administrative law to be applied |
|---|----------------|---------------|---|
|---|----------------|---------------|---|

|  |  |  |  |
|--|--|--|--|
|  | <p>Public services are managed by administration itself (service provided by public sector)</p> <p><i>i.e.</i>, company owned by administration performing public service - urban transportation</p> |  | <p>Private law and administrative law principles</p> <p><i>i.e.</i>, equality principles, public procurement principles (publication and competition), public selection and recruitment of personnel, etc.</p> |
| <p><b>Public service activities / services of general interest</b></p> | <p>Public services are contracted out to private providers</p> <p><i>i.e.</i>, contracted urban transportation services</p>  |  | <p>Traditional administrative law</p> <p><i>i.e.</i>, public procurement legislation</p>   |
|  |  | <p>Regulated sectors</p> <p><i>i.e.</i>, telecommunications, water, electricity...</p> | <p>Private law and administrative law principles</p> <p><i>i.e.</i>, public procurement principles</p>   |