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GOOD GOVERNMENT, TRANSPARENCY, AND ACCOUNTABILITY. REINFORCING PUBLIC AUTHORITIES DEMOCRATIC LEGITIMACY*

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Abstract

The object of this work is to analyse the good government, transparency and accountability concepts. Specifically, the aim is to determine whether the use of these notions derives from structural changes in the legislative policies adopted in recent years, by means of norms such as Law 19/2013 on transparency, access to public information and good government, and Law 19/2014 on transparency, access to public information and good government. The work shows how the emergence of these concepts responds to the need of increasing the government's legitimacy as a different entity form public administration. The new rules seek to efficiently guarantee government's integrity and accountability in front of citizens. The work shows that there has been a change in the object and scope of the principles of publicity and responsibility, inherent to democracy; good government is different in its object from good administration and transparency also means a change of perspective from the publicity concept. The object of the article is to offer a theoretical framework to interpret the legislative reforms and examine the theoretical and conceptual changes that guide the new public authorities and citizens relations legal framework.

Key words: legitimacy; good government; transparency; integrity; accountability.

BON GOVERN, TRANSPARÈNCIA I RENDICIÓ DE COMPTES. REFORÇANT I COMPLETANT LA LEGITIMITAT DEMOCRÀTICA DELS PODERS PÚBLICS

Resum

Aquest treball té per objecte l'anàlisi dels conceptes de bon govern, transparència i rendició de comptes. Es tracta d'examinar si el recurs a aquestes nocions respon a uns canvis estructurals en la política legislativa adoptada els darrers anys mitjançant textos com la Llei 19/2013, de transparència, accés a la informació pública i bon govern, i la Llei 19/2014, de transparència, accés a la informació pública i bon govern. El treball mostra com la irrupció d'aquestes nocions respon a la necessitat d'incrementar la legitimitat del govern, en tant que instància diferenciada de l'Administració pública. Les noves regles pretenen garantir de manera eficient la integritat i la rendició de comptes del govern envers els ciutadans. El treball evidencia com s'ha produït un canvi en l'objecte i l'abast dels principis de publicitat i responsabilitat inherents a la democràcia; el bon govern es diferencia en el seu objecte de la bona administració, i la transparència també suposa un canvi de perspectiva en relació amb la publicitat. L'objecte de l'article és subministrar un marc teòric per a la interpretació de les reformes legislatives i examinar quins són els canvis d'ordre teòric i conceptual que guien el nou marc jurídic de relacions entre els poders públics i els ciutadans.

Paraules clau: legitimitat; bon govern; transparència; integritat; rendició de comptes.

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Introduction

In 2015, Pierre Rosanvallon, one of the most renowned specialists on the history of public institutions and their current-day variations, published his fourth monograph on the transformations of contemporary democracies: *Le bon gouvernement*.[1] This concept has not arisen by chance. The expression 'good government' appears time and time again today, both in analyses in the academic literature (mainly economic and political, but also in other fields of the social sciences) and in positive law, as well as in some of the more innovative laws on transparency, as their titles alone illustrate.

The term 'good government' is expressly included in the titles of influential legal texts: Law 19/2013 of 9 November on transparency, access to public information and good government; Law 19/2014 on transparency, access to public information and good government; and Aragonese Law 5/2017 of 1 July on integrity and public ethics each devote a chapter to 'Codes of good government.' These legal texts are quite ambitious in the changes they seek to effect insofar as they are not limited to introducing new rights for citizens on an *ad hoc* basis, but also impose guidelines and obligations for those who create public policies. As such, the scope of application is not limited to the public administration in terms of the implementation of public policies, but is especially directed at government bodies. It is precisely these areas that are especially required by the more innovative measures in terms of transparency and accountability, since the new regulation governing conflicts of interest (which seeks to go beyond the traditional system of incompatibilities and which has not had very much practical success) and publicising personal or agency calendars (which is still quite limited since it is only explicitly referenced in Catalan law) only affect these actors.

If we consider that institutionalist theories suggesting that the quality of government is one of the key variables explaining low levels of corruption and that the aforementioned laws were adopted under the aegis of strategies to combat corruption, then it is apparent that referring to 'good government' is neither a chance occurrence nor a fad. For some time, the reforms in Spain, and also those in Catalonia, which have been more or less ambitious, have focused in the sphere of public administrations (their structures, procedures and legal systems)[2] based on the premise that a good administration, a Weberian bureaucracy, was critical for quality of life and economic and social progress. This model found its counterpart in the theory of the struggle against the impunities of power[3] that considered discretionality a distortion that should be reduced or limited. Perhaps the success of this view, which arises from the reforms introduced after the adoption of the package of administrative laws adopted in the late 50s, and which intensified with the changes introduced after the 1978 Constitution, offers an explanation as to why corruption is a phenomenon that has impacted the political sphere in our country, involving political leaders—whether elected or appointed based on trust—while having only limited impact on civil servants.

The above-mentioned laws are aimed at agencies, i.e. the bodies that draft public policy, and establish measures to avoid and, where necessary, control conflicts of interest and reinforce incompatibilities during as well as after terms of office, and require the disclosure of calendars (albeit very limitedly) to find out who is meeting whom and the contacts that could have an impact on policy formulation. In this regard, some legal provisions should also be considered that exclusively seek to address the system of incompatibilities and prevention of conflicts of interest for senior officials,[4] i.e. those appointed on the basis of political trust,[5] although at the level of the central government the status of civil servant is still required.[6]

1 París: Seuil.

2 E. Malaret. 'La modernisation administrative en Espagne: entre l'élan de la réforme de l'État et la discontinuité de la réforme de l'administration'. *Revue Française de Droit Administratif*, 25-2 (2009).

3 E. Garcia De Enterria. 'La lucha contra las inmunidades del Poder en el Derecho administrativo'. *Revista de Administración Pública*, 38. And later as a book from Civitas, Madrid, 1974 (1983, 3rd edition).

4 Such as Law 3/2015 regulating the exercise of the senior offices in the General State Administration, or Valencian Law 8/2016 on incompatibilities and conflicts of interest of persons in non-elected public office.

5 Although Law 3/2015 mentions the 'principle of suitability' as a criterion to be taken into account for appointments.

6 As expressly established by Law 50/1997. On the constitutional foundations of the leadership functions and also the classification of public officials, see Jimenez Asensio, R. *Altos cargos y directivos públicos*. Oñati: Instituto Vasco de Administración Pública (IVAP), 1996; and later Jimenez Asensio, R. *Directivos públicos.* Oñati: IVAP, 2006.

This paper aims to highlight how the emergence of the concept of 'good government' is appropriate in the context of the new regulations on integrity, transparency and accountability, and how the use of these concepts is relevant, while differentiating it from the notion of 'good administration.' We propose that the lack of clear delimitation of the two organisational and functional areas surely explains the shortcomings of the current state of positive law.

1 A situation of economic and political crisis that favours the adoption of reform measures

Transparency and accountability are founded on the democratic principle.[7] Departing from this notion, it is understood that they have a direct impact on the governmental sphere rather than on the sphere of public administration, and, as we shall see, the distinction between the two is relevant to constitutional order. Transparency and accountability lead to rules and procedures that have taken on increasing significance and relevance in enabling the strengthening of essential elements of democratic constitutionalism. They are basic pieces of contemporary transformations to the rule of law that are typical of democracy. It is true that these were already found in foundational texts, since the content of the 1789 Declaration of the Rights of Man and of the Citizen cannot be ignored, which already stated that 'Each citizen has the right to ascertain, by himself or through his representatives, the need for a public tax, to consent to it freely, to know the uses to which it is put...' (Article 14), as well as 'The society has the right of requesting an account from any public agent of its administration.' (Article 15). However, it is also true that in most legal systems of Western countries its potential was not fully realised until the end of the 20th century, with the notorious exception of Sweden, which since 1766 has had a law on freedom of the press that not only proclaimed freedom of expression, but also established the citizens' right to access public documents, establishing for the first time a link between the right to information and the right to access to public documents. A few centuries will have to pass before this link will once again be found in the jurisprudence of the European Court of Human Rights (ECtHR).[8]

One might ask what factors have led to the growing and unstoppable demand for transparency and accountability. The recent economic recession has certainly impacted our societies hard and generated growing inequality that seems to question not only the social and economic balances built over the decades following the Second World War (when European countries created or developed welfare state institutions), but also the political foundations of democratic societies. This economic crisis which unfolded in a context not unlike that of today, characterised by intensifying globalisation and the globalisation of trade as well as by the financing of the economy and the increasing gap in inequalities in Western countries,[9] has exacerbated unrest and disaffection. The erosion of social cohesion may even call democracy itself into question[10] (as has already happened in the past due as a result of the Great Depression). The economic recession and the lack of consistent and adequate responses on the part of European institutions, especially in the Euro area, have helped to worsen the situation and delay exiting the crisis.[11] Later when the sovereign debt crisis erupted, the reforms designed[12] and the policies implemented had an effect that could be described as

7 Sommermann, K. P. 'The need for transparent administration in the context of the principles of democracy and the rule of law'. In: García Macho, R. (ed.). *Derecho administrativo de la información y administración transparente.* Madrid: Marcial Pons, 2010. And later Garcia Macho, R. 'Ordenación económica transparente en el derecho público nacional y europeo'. In: Garcia Macho, R. (coord.). *Ordenación y transparencia económica en el derecho público y privado*. Madrid: Marcial Pons, 2014.

8 In certain circumstances the ECtHR has recognised the link between the right to access public documents and freedom of expression and information, since it considers that public authorities cannot interfere with the role of the press—and other organisations—in a democratic society in order to guarantee public debate. Public authorities cannot interfere with or prevent access to information, since this would imply an illegitimate restriction of the collection of information inherent to freedom of expression (ECtHR Társaság a Szabadságjogokért, Hungary, 14 April 2009).

9 Piketty, T. *L'économie des inégalités*. París: La Découverte, 2008.

10 Stiglitz, J. *El precio de la desigualdad* (Spanish language version). Madrid: Punto de Lectura, 2014.

11 Malaret, E. 'La malaise de la globalisation, la crise économique et les déséquilibres dans la structure des pouvoirs de décision. Pour un constitutionnalisme économique européen ouvert'. In: Various authors. *Le droit public et la crise* économique. Athens: European Public Law Organization, 2013.

12 About the legal framework designed to strengthen economic and monetary integration, see Ruiz Tarrias, S. *Las dimensiones constitucionales de la Unión Económica y Monetaria Europa.* Cizur Menor: Civitas,Thomson Reuters, 2016; and Balaguer Callejon, F.; Azpitarte Sanchez, M; Guillén López, E.; Sánchez Barrilao, J. F. (eds). *La reforma de la gobernanza económica europea y el progreso de la integración política*. Cizur Menor: Thomson Reuters, Aranzadi, 2017.

perverse since,although they exposed the shortcomings and weaknesses of the national public authorities in governing the Euro area, they did not allow for the resolute strengthening of the political project of European integration.

In this context, it seems pertinent to ask which body ensures that the general interest prevails, especially over those of the large corporations of the new economy and the different financial funds,[13] and if this body effectively protects the general interest when it proposes legal reforms, formulates public policies and adopts decisions. These questions are at the heart of the proposals regarding guaranteeing the traceability of the regulations introduced in the legal texts.[14]

These shortcomings have led to widespread questioning of the public authorities' legitimacy, a crisis of legitimacy that is also related to the inability of the public authorities—still too often limited in their national territorial frameworks—to adopt adequate and consistent responses to the challenges posed by the complexity of contemporary societies.

In this context, in Spain, the appearance of numerous cases of corruption,[15] especially in the area of public procurement[16]—which have had a very notable impact on regional and local government offices[17]—and of irregular financing of political parties, has turned the debate on the integrity of political leaders into a central concern of the public discourse, as shown by the various CIS (Centro de Investigaciones Sociológicas, the Spanish centre for sociological research) surveys and indicators of the perception of international transparency.[18] Beyond the use or abuse of the position of power one occupies to obtain the profit and/or private gains characteristic of corruption according to the most common shared definitions in the international arena,[19] certain practices such as the 'revolving door'[20] (the possibility of transferring from the public to the private sector) are particularly brought into question[21] —although it should be noted that years ago the legislation established certain limitations, and very notably imposed a period of *ex post* incompatibilities[22]—

13 Although comparing the power of corporations to that of countries is not possible, since their capacity to influence is different, it may be useful to look at the data provided by a Global Justice Now study that compares the turnover of large companies with the figures in public budgets. The following piece of data may be illustrative: 69 of the top 100 economic entities in the world are businesses, while only 31 are countries.

14 See the Rules of Procedure of the European Parliament.

15 A list of cases in 'La huella de la corrupción en España'. *El País*, 16 November 2016. The report lists the most important cases in Spain's democratic period illustrating how corruption has affected numerous governmental bodies at different territorial levels. See also, by various authors: *La corrupción en España: Ámbitos, causas y remedios jurídicos*. Barcelona: Atelier, 2016.

16 Malaret, E. 'El nuevo reto de la contratación pública para afianzar la integridad y el control: reforzar el profesionalismo y la transparencia'. *Revista Digital de Derecho Administrativo*, 15 (2016); also, Cerrillo, A. 'Las compras abiertas y la prevención de la corrupción'. *Gestión y Análisis de Políticas Públicas*, 15 (2016); and Gimeno Feliú, J. M. 'Medidas de prevención de corrupción y refuerzo de la transparencia en la contratación pública'. *Revista de Estudios de la Administración Local y Autonómica*, 7 (2017). And on perspective of an international nature: OECD. *Integrity in Public Procurement: Good Practice from A to Z*. Paris: OECD, 2007.

17 Lapuente, V. (coord.). *La corrupción en España. Un paseo por el lado oscuro de la democracia*. Madrid: Alianza, 2016.

18 On the distinction between objective data and perception of corruption, see Villoria, M.; Jimenez, F. 'La corrupción en España (2004-2010): datos, percepción y efectos'. *Revista Española de Investigaciones Sociológicas (REIS)*, 138 (2012). From 2013 until the last quarter of 2017, according to the CIS and Transparency International reports, corruption was the second biggest cause of concern for Spanish citizens. See the CIS report http://www.cis.es/cis/export/sites/default/-Archivos/Indicadores/documentos_html/TresProblemas.html, and Transparency International http://transparencia.org.es/wp-content/uploads/2017/01/tabla_sintetica_ipc-2016.pdf.

19 See the UN Global Programme against Corruption and the 2014 EU Anti-Corruption Report. See also an approximation of the different characterisations in Cerrillo Martinez, A. *El principio de integridad en la contratación pública*. Cizur Menor: Aranzadi, 2014.

20 See Malem Seña, J. F. 'La corrupción. Algunas consideraciones conceptuales y contextuales'. *Revista Vasca de Administración Pública*, 104, 2 (2016)..

21 We should bear in mind that at the European level, the first case that caused a great deal of controversy was about a member of the European Commission, Commissioner Bangemann, who left his post as the telecommunications commissioner —and promoter of the policy of liberalising infrastructure in this area— to join the board of directors of Telefónica, one of the major operators in the sector (July 1999).

22 See especially Law 5/2006 on the prevention of conflicts of interest, which also led to the creation of the first conflict of interest office. This law was repealed and replaced by Law 3/2015.

especially when a deficient institutional framework or a lack of adequate rules may lead to conflicts of interest in the interrelationship between public and private actors.

There is also considerable concern about the influence of certain interests on the decision-making process, the existence of more or less public groups that via different channels can condition the capacity to formulate and implement public policies. These are phenomena that imply the privatisation of the public sphere, and which, in the political and economic context mentioned above, create disaffection among the citizenry that promotes the return of 'the shamans'.[23]

This range of problems has generated controversy over the limitations of models of government and public administration, as well as over the shortcomings of the current forms of legitimacy of public authorities. As renowned experts on corruption pointed out years ago, this pathology is a symptom of a deeper problem: The absence of 'good government' or 'quality of government',[24] which implies the need to improve the quality of government and institutions in general as well as the consequent need to introduce clear and effective rules of transparency, and to guarantee the responsible exercise of power and accountability.

In the democracies around us, the legitimisation of suffrage is a necessary condition, but one that falls short. Therefore, in the current context of great complexity, new ways of legitimisation should be explored. To this effect, the legitimacy of public authorities must be strengthened by recognising new rights and creating new instruments. In this context, ideas, values and principles that were latent in public law take on renewed force and greater centrality: transparency, impartiality, the requirement for justification or motive, the renewed assertion of procedural guarantees and accountability—these reinforce the substantive guarantees that are the corollary of the extension of rights. The need to put an end to abuse of power, to private appropriation of what is public, is essential for regaining confidence and ensuring that governments and administrations effectively fulfil their mission to serve the general interest objectively.

In the last quarter of the last century, Bobbio had already pondered whether the degradation of democratic systems was irremediable, when, conversely, the number of them had increased compared to dictatorships (with the fall of the Soviet system). In his analysis of the transformations that had taken place, he pointed to the necessarily dynamic nature of democracy, since the very idea of transformation is inherent to it, and, that what was often presented as a confrontation between the ideals of the founding fathers (the initial promises not kept) and the reality, were from the beginning illusions or hopes that ran up against unforeseen obstacles.[25] Some of the elements that were the object of analysis by the great Italian author at the time appear today with even greater force, and, above all, they have taken on a new dimension or facet: the persistence of an 'invisible power' next to or above a 'visible power,' i.e. the financial markets, the 'oligarchy,' the distant elites (and sometimes experts),[26] the 'representation of interests,' we now have the influence of interest groups, which must be ordered and rationalised. Even at that early juncture he pointed out that while democracy can be defined in several ways, nobody can ignore the visibility or transparency of power. Democracy could be defined as the 'government of public power in public',[27] the government of actions when these take place *au grand jour*, i.e. 'in broad daylight' to use a common expression in American literature. And, as Bobbio pointed out, 'public' has two meanings: one that can be opposed to the private, and the other that opposes secrecy, which allows us to understand why in Greek philosophy and later in the Enlightenment there is always a close link between democracy, transparency and oversight.

But, while in the sphere of ideas this link has always been present, its translation to the practical has been much more limited, especially in the domain of government in the strict sense. The publicity of the law

23 See Lapuente, V. *El retorno de los chamanes. Los charlatanes que amenazan el bien común y los profesionales que quieren salvarnos*. Madrid: Siglo XXI, 2015.

24 See, for example, Lapuente, V. 'El sistema de mérito como garantía de estabilidad y eficacia en las sociedades democráticas avanzada'. *Documentación Administrativa*, 286-287 (2010).

25 See the compilation of works in the book *El futuro de la democracia* (Spanish language version). Esplugues de Llobregat: Plaza & Janés, 1985.

26 Which analyses Colomer, J. M. *El gobierno mundial de los expertos.* Barcelona: Anagrama, 2015.

27 Also especially see the text *La democrazia e il potere invisibile*, p. 108 et seq.

and the public nature of parliamentary debates is a requirement that has been present since Spain's first constitutionalism, and therefore, appears in the Spanish Constitution of 1978 (Article 80). Conversely, despite increasing the concentration of power in the executive, the same is not found in government decision-making processes, which are still largely secret, as this is the nature of their deliberations and must be maintained.[28] Only agreements that are legally formalised and require publication in the official gazette are public. As for public administrations, the Constitution refers to the law to regulate access to administrative files and the right of 'interested parties' to be heard (Article 105). Although it must be said that publicity has been progressively gaining ground as administrative procedure has become more central as a specific institution of administrative law,[29] especially in going beyond merely guaranteeing access to administrative files (as an instrument of legal protection) and in shaping the entire procedural system as a forum where information can come to light and where dialogue between the different interested parties can take place.[30]

Again, we now see how the demand for transparency emerges strongly as a response to a kind of crisis in representative democracy. A commitment to the transparency of public authorities' actions to make the decision-making process more open should guarantee greater participation and oversight, and strengthen legitimacy, efficiency and accountability to citizens. Having the obligation to be accountable, to explain oneself, not only serves the general interest, but also contributes towards making better decisions. This perspective has guided the development of legislation that has undergone a process of continuous growth in terms of access to public information, although this expansion has not always been sustained in the area of Spanish administrative law. And, despite the foundations laid out in the 1992 Legal system applicable to public administration and common administrative procedure (LRJPAC), the change has only been brought about by the Law of transparency, access to public information and good government of 2013, which was complemented in the Catalan legal system by the Law of transparency, access to public information and good government of 2014. Information and debate strengthen not only legality but also to a large extent the legitimacy and effectiveness of the entire decision-making process, although in certain cases to guarantee the effectiveness of that process, it will be necessary to protect certain areas of deliberation, particularly internal consultations.[31]

References to the construction of the Citizen's Agora, a public forum for debate and deliberation, are once again to be found in the international literature[32] and, as such, transparency is also affirmed through freedom of expression and the right to information.[33] In order for public opinion[34] to exercise its function, information is required as well as knowledge of the arguments, criteria and data used. This means having access to information on par with the administrative bodies' information. However, this does not necessarily imply that every report needed must necessarily be published.[35]

Governing 'in broad daylight,' as the well-known metaphor goes, making public authorities open, means specifying the actors involved—both public and private—to show how and when they intervened and to provide the data, the reasons, and the arguments that led to the adoption of policies and decisions. The

28 Article 5(3) of Government (State) Law 50/1997 on deliberations, the same regulation applies to delegated government committees (Article 6(5)), Article 18(4) on the content of session minutes.

29 On the functions of procedure and the shift of the focus from the minutes to the procedure, see especially, Malaret, E. *El régimen jurídico administrativo de la reconversión industrial.* Madrid: Civitas, 1991.

30 See especially, Barnes, J. 'Sobre el procedimiento administrativo: evolución y perspectivas'. Barnés, J. (coord.). *Innovación y reforma en el derecho administrativo*. Sevilla: Derecho Global, 2006.

31 See the Court of Justice of the European Union Ruling of 1 July 2008, C-39/05 and C-52/05.

32 Surely one of the most relevant works in the current debate is Gordon Ash, T. *La libertad de palabra: Diez principios para un mundo conectado* (Spanish language version). Barcelona: Tusquets, 2017.

33 Again, Gordon Ash, T. *Free Speech. Op. cit.* And also on Spanish administrative law,, Guichot, E. *Transparencia y acceso a la información en el derecho europeo.* Sevilla: Cuadernos Universitarios de Derecho Administrativo, Derecho Global, 2011.

34 On the historic process of public opinion, see the seminal work Habermas, J. *L'espace public* (French language version). París: Ed. Payot, 1992.

35 See Article 70(4) of Law 39/2015 on common administrative procedure of public administrations, which establishes that 'Information that is auxiliary or supportive, such as [...] notes, drafts, opinions, summaries, [...] shall not be included in the administrative file, except in the case of reports, mandatory and optional, requested before the administrative resolution that terminates the procedure'.

information published increasingly covers areas traditionally far removed from citizens' awareness. In order to understand the scope of the transformations that have taken place in recent years, it may be useful to revisit the relatively recent debate on the advisability or inadvisability of publishing the minutes of the Governing Council of the European Central Bank—since the rule of confidentiality had hitherto been applied.[36] Accordingly, in keeping with the guidelines of the US Federal Reserve,[37] the debate concluded with the publication of ECB proceedings on 19 February 2015, the first of which was the Governing Council session of 22 January 2015. This is the most notable example of the changes under way, since monetary policy has traditionally been a legal exception to the exercise of the right of access.[38]

It is in this new context that the idea of 'good government' has reappeared in full force. It is found in certain legal texts alongside transparency, participation and accountability, which we will come back to later In the above-mentioned temporal milieu, within the framework of the institutional changes that have taken place in the last few decades (and those referenced later) the idea of good government takes on its full relevance and significance.

This is why, after the Treaty of Amsterdam was adopted, the European Union made clear its desire to 'make decisions as openly as possible and as closely as possible with the citizenry.' This idea of open government reflects in a very synthetic way the meaning and scope that transparency has for democracy, beyond what the use of information technologies makes possible.

The purpose of the article is to provide a theoretical framework for the interpretation of legislative reforms that have led to changes in public law. Our aim is not to address questions related to the application of the law, but to examine the theoretical and conceptual changes that guide the new legal system in its relations between public authorities and the citizenry brought about by legislation on transparency, access to public information and good government adopted after 2013. These represent a qualitative leap forward and go beyond the changes in relations between public administrations and the general public that have been taking shape since the 1990s. In the Spanish legal system, these are reflected in the 1992 Law on the Common Legal System and Administrative Procedure, especially in the statements referring to citizens' rights.[39]

If it were not for the fact that Kuhn's proposal on the idea of the paradigm—and the role of paradigm shifts in scientific revolutions—has been trivialised in recent years in the field of law, making it less relevant as a method for understanding the structuring of responses to new facts, perhaps we could consider whether, in fact, we need to open a path to a new way of understanding, and, moreover, of building relations between authorities (only public ones?) and citizens.

In this regard, perhaps it would be pertinent to examine and characterise the meaning and scope of a range of concepts that often appear in an amalgamated form without precise meaning. In any case, this is a process that will only allow us to advance our knowledge if we practice it openly with dialogue. As such, it may prove particularly useful in the context in which this work finds itself.

In our view, the notions used already express changes in the relationship between citizens and public authorities, although legislators have not always been precise in their use of the terms, which has created more confusion than clarity.

So, in the following sections we will examine a couple of concepts in a dichotomous manner, although not covering the same scope.

36 A rule specific to governments and typical of the collegial bodies of independent administrations that initially followed the secrecy guidelines typical of government deliberations. See Articles 5(3) and 6(3) of Law 50/1997.

37 A summary as published initially, and six years later, the full transcript of the proceedings were published. See www.federalreserve.gov. This publication is crucial to understanding the basis and reasons for the monetary policy implemented by the Fed.

38 On mandatory exceptions under European law, see Guichot, E. *Transparencia y acceso a la información en el derecho europeo. Op. cit.*, pages 140 et seq. And in case law, the ruling of the Court of First Instance of 27 November 2007, Case *A. Pitsiorlas vs the EU Council and ECB*.

39 Embid, A. *Los derechos de los ciudadanos*. Madrid: Instituto Nacional de Administración Pública (INAP), 1992.

2 Good government vs good administration: a necessary distinction, a conceptual duo, due to the differentiation between government and administration

2.1 On the origins of the expression 'good government' and the relevance of its current meaning

As mentioned above, one wonders why the idea of 'good government' has reappeared so forcefully in recent times, and why it is often found both in academic studies[40] and in legislation, alongside transparency, participation and accountability. What is the purpose of bringing the term back? What purpose does it serve in the current context? In order to answer these questions it may be useful to first briefly recall when, how and why the concept was constructed, and then later, to present developmental axes and changes in the structure and functions of the executive authority, and the transformation of how relations between government and administration are conceptualised, while considering factors from the temporal context in which we find ourselves.

According to Rosenvallon,[41] its origins can be found in medieval philosophy. At that time, in the late Middle Ages, when power began to become concentrated in the hands of princes and monarchs, philosophers contemplated what the virtues and talents of good governors should be. The unipersonal nature of the exercise of power and its concentration led them to consider the relevance of a ruler's virtues in the exercise of power. This was the only way the necessary limitations could be constructed due to the institutional shortcomings of the system.

In this world, we find the famous fresco in the Hall of the Nine of the Palazzo Pubblico in Siena, the Allegory of Good Government, and also of Bad Government.

This fresco currently adorns the entry to the Council for Transparency and Good Government (CTBG),[42] created by Law 19/2013 to guarantee the adherence to the obligations of publicity, the right of access to public information and the observance of the provisions on good government (Article 34).

Title II of the law, called 'Good government,' contains a very heterogeneous set of provisions, although it is also true that the scope of application is defined along the same lines as those mentioned above. Likewise, some confusion may also arise from the fact that under this heading we also find a type of infraction (with the corresponding sanctions) in the area of economic and financial management that have more to do with what is established by budgetary and/or financial stability legislation than with the appropriate management of public funds.

To see the specificity of the requirements that legislation has associated with good government, the scope of application has to be taken into account, as it refers to the governmental sphere and explicitly includes the members of the government (the state or the autonomous communities and local authorities),[43] currently limited to those who have ministerial status, and to the second tier in a broader sense (secretaries of state and senior officials). We should bear in mind that to date the former are not legally considered as government, but as equivalent to the Council of Ministers[44]. This does not rule out the possibility that the second tier may be considered as such in the future,[45] since the Constitution does not limit the composition of the government to the status of ministers (Article 98(1)).

Stating the general principles put forward in a regulation does seem more consistent and, moreover, coherent with the idea of good government—which, as we have already mentioned, is usually linked to transparency,

40 See, for example Villoria, M.; Jimenez, F. 'La corrupción en España (2004-2010): datos, percepción y efectos'. *REIS*, 138 (2012).

41 Rosenvallon, P. *Le bon gouvernement*. Paris: Seuil, 2015.

42 http://www.consejodetransparencia.es/ct_Home/consejo/agenda/2017/01/31.html.

43 Article 25.

44 According to the provisions of Law 50/1997, on the organisation, competence and functioning of the government.

45 An initial opening seems to be offered in the provision that 'in the meetings of the Council of Ministers, secretaries of state and also in exceptional cases senior officials may attend when they convened' (Article 5(2)) incorporated into Law 40/2015 on the legal system governing the public sector.

participation and accountability—since beyond the principles shared with public administration (effectiveness, economy and efficiency in serving the general interest), particular attention is paid to the requirement to maintain 'dignified conduct,' to act with 'due diligence,' while respecting the principle of impartiality to 'follow independent criteria removed from any personal interest,' and 'to take responsibility for their own decisions and actions, and those of the bodies they manage, notwithstanding any other responsibilities which might be legally required of them' (Article 26(2)).[46] This is a list of principles that until now were considered to be the realm of public administration, which shows that the changes taking place in the governmental sphere and the growing concern to ensure when policy is made—not in the later implementation phase—that positions are adopted, where appropriate, to make decisions that are not 'contaminated,' 'captured' or influenced by interest groups or the particular interests of certain agents. In this regard, to consider the need for authorities to be guided by their own assessment of needs and relevant balances, it is important to recall that the ECtHR considered that proportionality had not been respected and, as such, the right to respect for private and family life sanctioned by Article 8 of the ECtHR had been interfered with when the Secretary of State concerned took a decision without having his own study or one conducted by an independent body for the interested party.[47] This shortcoming made it impossible to consider that the objective of the general interest laid out in limitation of the law had been duly pursued.

It is true that most authors (political scientists) who have tried to describe the notion of 'good government' point out that *a priori* it is very vague, especially if it is approached from a certain theory on the functions and tasks of the state, since this also draws into question the question of the necessity of incorporating the commitment to social justice and redistribution. Others, on the other hand, believe that the perspective should be more limited, taking into account only the use of instruments and structures that promote economy, effectiveness and efficiency. Lastly, yet others are inclined towards a more precise concept that at its core assumes the need for instruments, processes and structures that encourage transparency, integrity, accountability, participation and impartiality. This would be a more functional concept that, instead of placing the virtues of the rulers at the centre of the concept, emphasises the importance of institutions and rules and that would coincide with those put forth by the Law on Transparency, Access to Public Information and Good Government, especially if, instead of being limited to the virtues, it placed emphasis more decisively on creating institutions more consistent with proclaimed and implicit requirements. It seems that not even the general attribution of objectives related to good government in the Council for Transparency and Good Government is an appropriate way forward.

In any case, there is a certain consensus that only the latter meaning, that is the one referring to institutions and rules, is relevant for giving precise meaning to 'good government'.[48]

Rosanvallon shows how, in Western democracies, there has been a profound transformation of that part of the executive power which has meant reinforcing presidents—if their functions go beyond that of representatives—or prime ministers (or presidents of government). In this context, since personalism plays an increasingly important part in electoral dynamics, personal qualities count; in the era of parliamentary democracies what mattered most were programmes. Now, on the other hand, the qualities of the political actors, their personalities and their styles, have taken on a great centrality in the electoral process. *Virtuousness* has once again become a consideration; it is a required condition, even if it comes up lacking. However, we

46 In the same vein, see Article 55 of Catalan Law 19/2014, which expressly establishes as principles of action: i) Transparency of official activities, acts and decisions related to the management of public affairs they are entrusted with and their official agenda; ii) Impartiality in decision-making, guaranteeing the necessary conditions for independent action which is not influenced by conflicts of interest.

47 ECtHR judgement *Hatton and Others vs the United Kingdom*. See Marsal, M. 'Una Constitución en evolución: control de los poderes públicos y protección de los derechos humanos en el Reino Unido. A propósito de la sentencia del TEDH Hatton and Others vs UK'. In: Montoro, M. J. (coord.). *La Justicia administrativa*. Barcelona: Atelier, 2003.

48 See Villoria, M. in Villoria, M.; Wences, M. I. (coord.). *Cultura de la legalidad. Instituciones, procesos y estructuras*. Madrid: Los Libros de la Catarata, 2010. This author had previously examined in detail the processes of the transformation of public administrations that began in the 1980s in *La modernización de la administración como instrumento al servicio de la democracia*. Madrid: INAP, 1996.

now find that the legislation that establishes ethical principles for senior officials as well as their conduct is also disciplined by codes.[49]

We believe that to better define good government, to see what this concept provides and the shortcomings it aims to remedy, which so far has been addressed inadequately, it would be pertinent to identify what good administration is. The two terms are often used as synonyms, as if it were just a matter of *fashion* or linguistic trends.

Very briefly and in summary, since the origins and meaning of good administration have been addressed extensively,[50] we will examine a reference from positive law and its essential content.

The right to good administration provided for in Article 41 of the EU Charter of Fundamental Rights (developed by the Code of Good Administrative Behaviour) has been considered by the ECJ as the expression of a set of subjective rights[51] and in the same vein, also in different statutes of autonomy from the last generation—especially Catalonia's[52]—as a formula for the synthesis of a set of rights of interested parties in formal administrative procedures: a renewed understanding of the obligation to state reasons (in the sense of explaining the reasons for a particular decision and why it is the best decision in the given context)[53] and to be heard, of the contradictory nature of the process and of how the need for it is reflected in the final decision. These are requirements that, obviously, reach their utmost meaning and scope in cases of the exercise of discretionary powers.

Good government is not merely an addition to good administration; it is not a redundancy. Rather, it has a different objective, another area of application, one that until recently seemed exclusive to the political arena and beyond the scope of the legal one—in any case, beyond the scope of administrative law since the government, as such, not as a body that also performs administrative functions, was only regulated by the Constitution and, where appropriate, by parliamentary regulations and the uses of the chambers.[54]

In the early stages of the adoption of the *White Paper on Governance*, some authors were already stressing that the principles of good governance were not the same as those of good administration, since the latter were applicable only to the administration, while the others were applicable to other actors in the relational network.[55] The principles of good governance were not only applicable to public authorities, but also to the other stakeholders involved in the process.[56] Good administration was therefore a necessary but insufficient condition for good governance.[57] In our view, this broad perspective cannot be uncoupled from the debate on the representativeness of European institutions and their shortcomings in terms of democratic legitimacy.[58]

However, let us examine another perspective that shares something in common with the previous perspective insofar as it is also a question of focusing on the time when public policies are created, promoted and defined, although this is no longer done by private bodies rooted in democratic legitimacy, since governments have

49 See the text of Chapter 1, Title V of 'Del bon govern' from Catalan Law 19/2014.

50 Bousta, R. *Essai sur la notion de bonne administration en droit public*. París: L'Harmattan, 2010; Ponce, J. *Deber de buena administración y derecho al procedimiento debido*. Valladolid: Lex Nova, 2001.

51 EGC Judgement of 26 February 2013.

52 Mancilla i Muntada, F. *La recepció a Catalunya del dret a una bona administració*. Barcelona: Institut d'Estudis Autonòmics, 2014.

53 Bousta, R. *Essai sur la notion de bonne administration en droit public*. *Op. cit*.

54 The low normative density of the government law and its content,which is basically organic, provide insufficient references.

55 See especially, Ponce, J. 'Dret, bona administració i bona governança'. In: Cerrillo, A. (coord.). *Governança i bona administració a Catalunya*. Barcelona: Escola d'Administració Pública de Catalunya, 2007.

56 Cerrillo, A. *La gobernanza hoy: 10 textos de referencia*. Madrid: INAP, 2005.

57 Ponce, J. *Dret, bona administració i bona governança. Op. cit.*

58 Bar Cendón, A. 'El Libro Blanco: La gobernanza europea y la reforma de la Unión'. *Gestión y Análisis de Políticas Públicas (GAPP)*, 22 (2001).

this, albeit indirectly through the parliamentary origin of their formation. In modern constitutionalism, it is precisely the government that is the central figure and the driving force of political activity.[59]

And, for this reason, the legislature has now begun to adopt a whole set of provisions aimed at ensuring that the principles inherent to democracy (such as transparency) are also respected in this body, but not only that, because, as we have already pointed out, other shortcomings have emerged, and as a result integrity and transparency in the formulation of public policies must be ensured, and conflicts of interest prevented. This also includes a whole set of provisions aimed specifically at members of government and senior officials, i.e. those appointed on political rather than professional grounds, such as merit and experience. These high officials, despite the fact that they do not reflect meritocratic legitimacy, but rather political trust, must also guarantee the principle of objectivity as expressly established by Law 8/2016 of the Valencian Community.

2.2 Changes in how executive power is conceived, the emergence of the distinction between government and administration characteristic of the bureaucratic or Weberian model and its subsequent reinforcement due to the impact of new public management

In the original formulations of administrative law, the administration did not have its own substantiality; it was merely the branch that executed the law. Government and administration were a conglomerate: *executive power*. In this context, the administration did not have its own decision-making forum or specific tasks and therefore operated with absolute opacity. Publicity was not necessary, since there was no recognition of the existence of a specific sphere of the administration. If an infringement of rights or freedoms took place a judge would intervene. That was the agency that guaranteed rights, rights that in the beginning were also limited in scope.

The functions assigned to the public administration would gradually be extended, especially as soon as it was no longer limited to tasks of policing and maintaining law and order and began providing public services. The change in the administration's tasks, which would expand as the twentieth century progressed, was accompanied by the recognition of the existence of discretion in its appraisal of the general interest. At the same time, the scope and extent of judicial review of the public administration increased. The increased number of tasks and their increasing complexity are at the core of the second wave of guarantees, although in the early stages they are directly linked to the idea of effective judicial protection and defence, as this is the meaning of a very restrictive and limited view of the obligation to state reasons and the right to be heard in proceedings, understood as formal requirements and limited to interested parties, although the circle of those included will be gradually extended by case-law to allow for a higher degree of control.

This restrictive interpretation of the obligation to state reasons the right to be heard showed its limitations to provide substantial guarantees to balance requirements related to the effectiveness of judicial protection by recognising discretion in the assessment of the general interest.[60] The legislature has increasingly formed complex decisions that affect an indeterminate number of subjects, such as decisions not bound by legal mandates of a conditioned nature but rather of a conclusive character[61]—as is often the case in economic, environmental or urban planning public law—and in this legal environment the process has taken on a new meaning. The procedure has been formulated in such a way as to provide an institutional forum for the exchange of information and assessments made by a more or less heterogeneous set of interests, and for studies and reports from different public bodies and institutions of different natures—territorial or specialised administrations.[62] In these cases, the decision-making process is critical, as is the provision of reasons, bases and a detailed explanation, i.e. one based on the circumstances of the specific case or event. Judicial review will then focus on analysing the rationality of the decision. The broadening of participation, in the type of formats in which it is implemented as well as the possibility of submitting documents and making proposals

59 Solozabal, J. J. 'El estatuto normativo del gobierno y su configuración efectiva'. In: Aragón Reyes, M.; Gómez Montoro, A. J. (coord.). *El Gobierno. Problemas constitucionales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2005.

60 Beltrán de Felipe, M. *Discrecionalidad administrativa y Constitución*. Madrid, 1993.

61 Malaret, E. *El régimen jurídico-administrativo de la reconversión industrial*. Madrid: Civitas, 1991; and later Bacigalupo, M. *La discrecionalidad administrativa (estructura normativa, control judicial y límites constitucionales*). Madrid: Marcial Pons, 1997.

62 Malaret, E. *El régimen jurídico-administrativo de la reconversión industrial. Op. cit.*

that must be taken into account—i.e. considered, even if they are rejected—and the number and type of interested parties in the procedure, has given rise to the French administrative law that has been characterised as 'administrative democracy':[63] a controversial theoretical construct, but one that illustrates the pursuit of mechanisms to complement representative democracy.

In this context and within the framework of the process of extending judicial oversight, the debate on government's so-called 'political acts'[64] (when it does not act as the highest authority of the administration) and the progressive limitation and reduction of these to the sphere of relations between constitutional powers, international relations and other decisions that are not regulated,[65] takes on new meaning. In short, and to simplify, everything that is specific to the government as a political body and that has no direct impact on rights is excluded.[66] Judicial oversight in this area reveals its limitations; it is not a question of deference, rather of respect for the constitutional distribution of functions.

Given that judicial oversight of the formulation and proposal of public policies is not appropriate, other avenues of oversight must be considered and new forms of responsibility or accountability opened up. It is here that demands for transparency are applied effectively to guarantee integrity and impartiality, and allow for oversight and accountability.

The differentiation between government and administration, which we have seen emerge in a second phase, is the theoretical basis of the public service model, understood precisely as a system of access and careers based on the principles of equality and merit as opposed to trust—the basis of the previous spoils system model—a distinction[67] that political scientists and economists who have delved into this question currently tend to relate to a low level of corruption as well as less disaffection, and so to a better quality of government and better results for representative democracy.

This distinction is found in the Spanish legal system. It was expressly included in the 1978 Constitution, a text that, in the spirit of the time, devoted an entire chapter to government and administration. 'The Government shall conduct administration,' the government is accountable before the Congress of Deputies. In this constitutional framework, the legitimacy of the administration is part of the so-called 'chain of democratic legitimacy',[68] typical of representative democracies. In this traditional scheme, the administration is an instrument at the service of the government and its legitimacy is derived from compliance with the law, in full subordination to the law (as stated expressly in Article 103 of the Spanish Constitution). The increase in the number of tasks takes place within the framework of the aims and conditions established by the legislature[69], although the relationship with the legislature is not homogeneous, since mandates may be conditional or conclusive—which leave very different degrees of leeway for administrative decisions.[70] We understand that this perspective is now no longer sufficient to describe the changes taking place in the legal system.[71]

63 See, by way of illustration, the set of studies published in the monograph *La démocratie administrative,* de la *Revue Française d'Administration Publique (RFAP)*, (2011), 137-138.

64 According to the terminology used in the law on contentious-administrative jurisdiction of 1956.

65 Or, to revisit the legal conceptualisation, unregulated elements of administrative actions, according to Article 1(2) of the 1998 law on contentious-administrative jurisdiction.

66 Without minimising the dual nature of government as a constitutional body and as the highest organ of administration.

67 Prats, J. 'Los fundamentos institucionales del sistema de mérito: la obligada distinción entre función pública y empleo público'. *Documentación Administrativa*, (1995), 241-242.

68 This concept comes from Böckenförde, E. W. *Estudios sobre el Estado de Derecho y la democracia* (Spanish language version). Madrid: Editorial Trotta, 2000.

69 Bacigalupo, M. *La discrecionalidad administrativa… Op. cit.*

70 Recently, Rodriguez de Santiago, J. M. *Metodología del Derecho Administrativo. Reglas de racionalidad para la adopción y el control de la decisión addinistrativa*. Madrid: Marcial Pons, 2016.

71 A more conventional view of administrative provision of information to the citizenry in one of the first works addressing information in the Spanish doctrine, Tornos, J.; Galan, A. (coord.). *Comunicación pública*. Madrid: Marcial Pons, 2000.

The distinction between government and administration is very much present in Nordic institutional systems.[72] In other institutional environments, it has been strengthened and often exacerbated by the emergence of a managerial model based on the new public management (NPM) approach.[73] Reforms guided by this approach have led to the introduction of considerable management autonomy for organisations, especially in sectors that handle significant economic and financial resources—an autonomy of management that should be accompanied by the professionalisation of managers. The principal-agent distinction inherent to this model has often involved the 'contractualisation' of a relationship that had previously been based on a hierarchical model.[74] Although it should be pointed out that this model did not work for the Spanish institutional system,[75] because the management positions in the so-called 'agencies' (found in the different autonomous community, regional and local public administrations) are based on political appointments, which are often made directly by the Secretary of State or the councillor of the corresponding autonomous community charged with doing so. Additionally, the other key instrument, a contract programme or some manner of document with an analogous relationship has gradually disappeared. The proliferation of different bodies of wade-ranging types introduce a new critical element in the struggle to ensure integrity and accountability.

J. Prats showed the weaknesses and limitations of NPM—very much associated with the privatisation and criticism of public administration movements—and put forth another type of approach that more closely jibes with the notion of governance.[76] This idea was also present in the well-known *White Paper on European Governance*, which strongly advocated increasing the legitimacy of public action, especially at the EU level, by improving interaction with citizens, businesses and NGOs, and incorporating the democratic principles of transparency and participation into the requirements of effectiveness, efficiency and economy. Criticism of lack of democratic legitimacy of European institutions has found an answer in incorporating transparency, participation, dialogue and the exchange of information. Has administrative democracy come to the aid of the lack of representative democracy?

To summarise these developments, we can point to the configuration of the relationship between government and administration, a structural framework in which cases of clear separation often coincide—in the same place and time, but in different sectors—with cases in which differentiation is not always so clear due to the accumulation of decisions concentrated in governmental spheres.

The distinction between government and administration also appears to be inherent in the distinction between the political and the technical and has its correlation in the differentiation between democratic vs professional legitimacy. This has a constitutional significance and foundation, but the distinction is certainly complex.[77]

What is certain is that the impossibility of always operating, in all the fields and sectors of public activity, with a radical differentiation between government and administration, and the acknowledgement of the transformation of the tasks of administration and their expanding and growing complexity (with the environment and the economy the foremost sectors, and planning as a form of intervention) has illustrated the broadened scope of discretionality, or in other words, in the decision-making sphere not directly linked to the legislature, an entire series of factors that have led to the focus being placed on the government. This is a view of government, of its capacity to formulate public policy, of its relevance in initiating decision-making processes, which in recent reforms has begun to be put to practice by introducing new regulations on transparency and integrity, and, to a far lesser extent or not even at all, in the area of accountability.

72 Ziller, J. *Administrations comparées. Les systèmes politico-administratifs de l'Europe des Douze.* París: Montchrestien, 1993.

73 An analysis of reforms implemented in different areas of public administration following that direction in Fabre Guillemant, R. *Les réformes administratives en France et en Grande-Bretagne. Centres de responsabilité et agences d'execution*. París: L'Harmattan, 1998.

74 Chevallier, J.; Rouban, L. *La réforme de l'état et la nouvelle gestion publique: mythes et réalités*. París: École National d'Administration, 2003; Various authors. *Les agences: une nouvelle gestion publique?* París: La Documentation Française, 2013.

75 For an attempt to advance in this direction, which was never implemented to its full potential, see Law 28/2006 on state agencies for the improvement of public services, currently repealed by Law 40/2015, on the legal system governing the public sector.

76 *De la burocracia al management, del management a la gobernanza. Las transformaciones de las administraciones públicas de nuestro tiempo.* Madrid: INAP, 2005.

77 Rodríguez Pontón, F. J. 'Gobierno, política y Administración: elementos de debate para las Administraciones independientes'. *Autonomies, Revista Catalana de Dret Públic*, 24 (1999).

Indeed, if the government directs the administration,[78] the citizenry must know and has the right to know how and why it is operating in a certain way. As a result, the scope of application of certain principles that until recently seemed to be restricted to the administrative sphere are being extended in the legislation. This is a practical and operational delimitation, despite our insistence on the organic and functional distinction,[79] which must be maintained.

3 The broad strokes of the transformation: from limited publicity for interested parties to transparency to let citizens exercise accountability

3.1 A summary of the changes

The most relevant components of the changes implemented by means of the new legal framework can be narrowed down to the following: i) the recovery of impartiality and service to the general interest—as opposed to private interests of any nature—and, therefore, the relevance of the regulation of interest groups (inclusion in a registry[80] and traceability of contributions, suggestions, comments and information); ii) integrity and the prevention of conflicts of interest—declarations of assets and activities, codes of conduct[81] of high officials,[82] a strict system of *ex post* incompatibilities for a period an established period of time (2 years); iii) transparency in all activities and above all in the decision-making process (considered from an overall perspective) and paying particular attention to the preliminary phase of the exercise of regulatory power and, obviously, in the subsequent preparation phase,[83] the double content of transparency as a duty of the administration, active publicity and the a right of citizens, the right to access public information—in other words, all the information in the administration's power (not necessarily produced by it, as it is possible that the administration's role has been limited to compiling it)—[84] without the need to explain motives or accredit one's interest; iv) citizen participation[85] in the process of drafting bills and regulations, strategic plans and action projects;[86] v) accountability and the obligation of different government agencies to explain themselves

78 As pointed out long ago, showing the changes this implied in concept of the executive, López Guerra, L. 'Funciones del Gobierno y dirección política'. *Documentación Administrativa*, 215 (1988).

79 Bilbao Utrillos, J. M. 'La dirección de la administración civil y militar por el gobierno de la nación'. In: Aragon Reyes, M.; Gomez Montoro, A. J. (coord.). *El Gobierno. Op. cit.*

80 Mandatory, Law 19/2014, of 29 December, on transparency, access to public information and good government, and Decree-Law 1/2017, of 14 February, creating and regulating the Register of Catalan Interest Groups, or voluntary according to the agreement of the National Commission on Markets and Competition (CNMC in Spanish).

81 On the reasons for the requirement of ethical codes, see Ponce, J. 'Ethic codes and codes of conduct. A key factor in the culture of integrity of local entities'. In: Villoria, M.; Forcadell, X. (coord.). *Buen gobierno, transparencia e integridad institucional en el gobierno local*. Barcelona: Tecnos, Diputació de Barcelona, 2017.

82 Agreement GOV / 82/2016, of 21 June, approving the Code of Conduct for senior officials and executives of the Administration of the Generalitat and its public sector entities, and other measures in the areas of transparency, interest groups and public ethics. Article 55(3) of Law 19/2014, of 29 December, on transparency, access to public information and good government, establishes a mandate for the Government to draw up a code of conduct for its senior officials that specifies and develops the ethical principles and rules of conduct in accordance with which they must act.

83 Araguàs, I. *La transparencia en el ejercicio de la potestad reglamentaria*. Barcelona: Atelier, 2016.

84 These distinctions have long been present in French administrative law, see Maisl, H. *Le droit des données publiques*. Paris: LGDJ, 1996; Bruguière, J. M. *Les donnéees publiques et le droit*. París: Litec, 2002.

85 The EU's interest in participative discourse goes a long way back. Since the problematic ratification of the Maastricht Treaty in 1992 —including an initial rejection in Denmark and a very close result in France— EU institutions have been promoting the idea that the limits of representative democracy at the European level —partly resulting from the absence of supranational parties or a public space— could be remedied by encouraging citizen participation either through organisations or directly. The Commission's first reference to the potential legitimacy of interest groups was made in 1992. Since 1996, the Commission has promoted the organisation of civil society at the European level to foster the creation of tools like the European Social Platform. Between 2000 and 2001, it was expressly stated that consulting organisations is a form of participatory democracy and that associations are a stakeholder in the governance framework of European public policies. Later, the reference to participatory democracy was introduced in the Constitutional Treaty and then transferred to the Lisbon Treaty —now there is no longer a specific title (currently Article 11 'The institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views in all areas of Union action. 2. The institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society').

86 Initially introduced in the Sustainable Economy Law, see Malaret, E. 'Regulación económica, autoridades independientes y transparencia'. In: Garcia Macho, R. (ed.). *Ordenación y transparencia económica en el Derecho Público y Privado*. *Op. cit.*

and justify their conduct—beyond acceptable financial management—to respond, if necessary, not only to damage caused, and to submit to evaluation.

These changes nicely sum up the link between the right to access public information inherent to the freedom of expression (from Swedish legislation of the 18th century) and the *open government initiative* (adopted by US President Obama), which has since been replicated by different governments.[87] Quite a transformation that expresses the radical change in the functions of the government and the administration and the impact that new information and communication technologies have had.

The phases of the transformation of the legal systems in our region can be briefly summarised as follows.

In the beginning, in the 1980s, there was an explosion of publicity about the activities of the public administration, decidedly strengthening the expansion of *stakeholders' rights*: i) the right to be heard and to have access to the documents forming part of the administrative procedure; and (ii) the obligation to state reasons for administrative acts, requiring that the motives that influence individual administrative decisions be made public, and are therefore explained. As mentioned earlier, this expansion of rights operates based on the defence or guarantee and effectiveness of the right to legal protection. The right to good administration in the European Union's Charter of Fundamental Rights expressed the state of the issue well.

This is a transition phase, an 'administrative democracy,' which, together with the extension of participation, takes on a less administrative connotation within the European institutions than we can find in the area of the rights of the Member States,[88] in terms of both the circle of people and the formats (public hearings, public information, open statements, 'organised public debate') and the opening up of access to administrative documents without having to prove one's interest., It is a transformation that is linked to a change in the concept of procedure and the obligation to state reasons: Now it is a question of providing information, of bringing to light diverse and sometimes contradictory interests and positions, which then force us to ponder and reason why we have chosen one or the other solution.

The procedure for drawing up regulatory provisions is one of the areas in which these requirements for greater justification have been further developed,[89] linked to the demand for higher quality as an indirect way of increasing the legitimacy of public intervention. This consist of demands to improve regulatory quality,[90] driven by regulations that have been highly relevant in this environment, as a result of both European policies for better regulation and deregulation policies.

Finally, the process of expanding citizens' rights has taken a qualitative leap forward with the adoption of the perspective of good government and/or open government (which although not equivalent, have elements in common), which involves the incorporation of rules and institutions to promote integrity, transparency and accountability, although some manifestations incorporated in the legal texts may seem rhetorical excesses with more than questionable practical effectiveness.[91] And it is also true that these changes are not presented or reflected in the same way in the different European legal systems, as there are generally no laws that systematically regulate transparency and, even less so, good government strategies.

87 See Title VI 'Open Government' of Catalan Law 19/2014; following a peculiar legislative tradition and characteristic of the Spanish legal system, the legislator has made explicit, in a law, a set of principles that will later guide the actions of the different components of the executive power and especially the exercise of regulatory power.

88 See the different contributions in the monograph edition of *Revue Française d'Administration Publique*, (2011), 137-138.

89 Orti Ferrer, P. 'Transparencia y buena regulación: el derecho de acceso a los expedientes normativos y la evaluación de impacto'. In: Canals Ametller, D. (coord.). *Datos: protección, transparencia y buena regulación*. Girona: Documenta Universitaria, 2016.

90 See one of the latest contributions in this area by one of the most renowned specialists in the matter, Canals Ametller, D. 'El acceso público a datos en un contexto de transparencia y buena regulación'. *Op. cit*., as well as the work of Orti Ferrer, P. cited in the previous footnote.

91 In relation to this see Article 65 of Catalan Law 19/2014, which establishes a set of principles: i) the principles of open government are based on permanent dialogue (although this seems surprisingly to be between the public administration and citizens and not between the government and citizens); ii) decision-making considering the needs expressed by citizens; iii) participation and collaboration in the definition of the most relevant public policies, transparency and participation; iv) permanent evaluation of administrative management and participation processes; and v) continuous assessment of administrative management and participation processes.

3.2 Publicity vs transparency: from publicising procedures to transparency in the activity as a whole

In the current context, characterised by the emergence of the adoption of so-called transparency laws,[92] both by the State and by the different autonomous communities, it seems appropriate to find out whether the use of the term 'transparency' is indicative of an actual change in the scope of publicity, in its forms and in terms of the subjects concerned, or whether it is only an indicator 'that no other slogan dominates public discourse as well as transparency,' as Byung-Chul Han[93] says, and the trend has to be pointed out for the sake of mere mimicry.

Are the two notions equivalent? Are they synonymous? What good is transparency? and why has it become a kind of mantra,[94] in the face of growing mistrust of the action of public authorities?

Publicity goes against secrecy. Is it the consequence of the application of a rule?

Transparency is the opposite of opacity. Is it the result of a behaviour?

As has been highlighted on other occasions, the double meaning of 'public' cannot be ignored: on the one hand, it refers to what belongs to the public administration and, on the other hand, it implies what is publicly known.

As defined in dictionaries, transparency is the quality of making reality appear in its entirety, 'to make visible to all,' to make clear and evident what was hitherto obscure. Transparency is the quality of letting something be seen. Therefore, it should come as no surprise that in this context expressions such as 'rule in the sunlight' or 'as open as a glass house' are sometimes used. It is for this reason that the idea of transparency is *prima facie* positively valued,[95] although it is clear that transparency has its limitations, both for reasons related to the protection of fundamental rights (and most notably the guarantee of privacy and the protection of personal data)[96] and the necessary defence of constitutional assets and values, such as the effectiveness of the decision-making process. So, the explanation of the motives behind the Transparency Law of 2013 establish that the right to access '*shall only be limited in cases in which this is necessary given the nature of the information—resulting from the provisions of the Spanish Constitution—or when it comes into conflict with other protected interests. In any case, the limits set forth shall be applied on the basis of a test of the harm done (to the interest safeguarded by the limit) and a test of the public interest of dissemination (that in the case in question, public interest in disseminating the information does not prevail), and in a proportionate manner, limited by its aim and purpose.'*

In public law, only very recently has transparency been associated with combating corruption, appearing on the scene as an effective tool against the private appropriation of public resources. From this perspective, it is not surprising that the association between integrity and transparency should be so common in reports issued by international organisations like the OECD.[97]

All of these elements can be found in the evolution of the legal framework.

92 See the systematic presentation of the different legal texts in Barrero, C.; Descalzo, A.; Guichot, E.; Horgué, C.; Palomar, A. (coord.). *Transparencia, acceso a la información pública y buen gobierno. Study of Law 19/2013 of 9 December.* Madrid: Tecnos, 2014; Cerrillo, A.; Ponce, J. (coord.). *Transparència, accés a la informació i bon govern a Catalunya. Comentaris de la Llei 19/2014, de 9 de desembre*. Barcelona: UOC-EAPC, 2015; Fernández Salmerón, M.; Valero Torrijos, J. (coord.). *Régimen jurídico de la transparencia en el sector público: acceso, uso y reutilización de la información administrativa.* Cizur Menor: Thomson, Aranzadi, 2014.

93 *La sociedad de la transparencia*. Barcelona: Herder, 2016.

94 In other words, its invocation would already hold a power, it would make it possible to change things.

95 Latelier, R. 'Logros y frustraciones de la transparencia'. In: Latelier, R.; Rajvec, E. (coord.). *Transparencia en la administración pública*. Santiago de Chile: Abeledo Perrot, 2010.

96 Fernández Salmerón, M. *La protección de datos personales en las Administraciones Públicas*. Cizur Menor: Thomson-Civitas, APDCM, 2003; Guichot, E. *Datos personales y Administración pública*. Cizur Menor: Thomson-Civitas, APDCM, 2005, especially, page 272 et seq.

97 See, as an illustration, Cerrillo, A. *El principio de integridad en la contratación pública. Mecanismos para la prevención de los conflictos de intereses y la lucha contra la corrupción*. Cizur Menor: Aranzadi, Thomson Reuters, 2014.

It is well known that since the beginnings of constitutionalism both the legislative procedure (the debates and their result or product, the laws), and the essential moment in the judicial procedure (the trials and their result, the judgements) have been organised on the basis of the principle of publicity, and this has also been established by the Constitution (Articles 80 and 120 EC). Although it must be specified that the Constitution guarantees the publicity of plenary sessions, not those of commissions, which depend on the rules of procedure for each chamber.

Meanwhile, until quite recently, administrative activity has been governed by the principle of secrecy, with the modulation or exception of the right of access to files by the interested parties and a right of citizen access which, as it is stipulated in Article 105 EC, has led some authors to consider that it had the nature of the rights of legal configuration; although this more reductionist view has recently been displaced by the evolution of ECtHR jurisprudence, it has been admitted, in certain circumstances, that the right of access to public documents is linked to freedom of expression and information, given that public authorities cannot interfere with the role played by the press—and by other organisations—in a democratic society as guarantors of public debate.[98] Public authorities may not interfere with or impede access to information, as this would constitute the illegitimate restriction on the collection of information, which is one of the inherent components of freedom of information.[99]

This conception is essential to understand the broad deployment of the current content of transparency, given that it clearly establishes the link between access to public information and public debate, as well as the social control of the activity of public authorities. Indeed, the social function of the press is decidedly contributory to the formation of the public agenda, to the promotion of vigorous debate and the oversight of power.

The LRJPAC (Legal System Applicable to Public Administration and Common Administrative Procedure) of 1992 extended rights vis-à-vis public administrations beyond the administrative procedure and, to emphasise this reinforcement, used the notion of citizens' rights; but, despite this openness, it did not expressly recognise either the principle of transparency or the principle of participation, which were included in the 1999 reform. It is true that the law is not the place to formulate principles, as this is a more the specific task of jurisprudence, but it is also true that a legal reference helps to interpret the most specific precepts in a certain direction. The LRPAC, in accordance with the provisions of Article 105 EC, is restricted to regulating a very limited right of access to files and administrative archives, both from the subjective point of view—a requirement for legitimation in broad cases in which nominative documents existed—and from the objective point of view—since it limited the documents that formed part of a file that has been closed and stored; and as a guarantee of the right of access[100] was not created, the provision has proved completely ineffective.

The lack of accurate instruments as well as the absence of citizen complaints, and the press plays a role in this weakness, provides insight into why the Spanish legal system has taken so long to incorporate principles that we believe are inherent to the rule of law and democracy. We would have to wait until 2013, with the adoption of the Law on transparency, right of access to public information and good government, and the corresponding laws of the autonomous communities, for the contemporary notion of 'transparency' to be effectively introduced into Spanish positive law, understood in the dual sense of active publicity, that is, the obligation of the administration to publish a wide range of documents in its possession, and the right of access to information.

These two components are complementary and allow us to advance the scope of what must be public and to define precisely what, on the contrary, must be considered privileged information; the scope of this privilege could be modulated over time, but it has not yet been determined when to make public not only what may be

98 From the very beginning, the analysis of this order gave rise to two concepts: The first later opened the way to the jurisprudence of the ECtHR, see Villaverde, I. *Los derechos del público*. Madrid: Tecnos, 1995; the second was a reading of the order in terms of the rights of the interested parties in the procedure and was more restrictive, Pomed, J. A. *El acceso de los ciudadanos a los archivos y registros administrativos.* Madrid: INAP, 1989.

99 ECtHR ruling re: *Társaság a Szabadságjogokért c Hungría* (14 April 2009).

100 E. Guichot highlighted the existence of doctrinal unanimity in the criticism of this regulation, see *Transparencia y acceso a la información en el derecho europeo*. *Op. cit.*

secret,[101] but also what, after a period of time, no longer has a reason to be remain privileged, as the purpose of its non-publication status has lost its raison d'être.

This duality characterises transparency and the difference between transparency and publicity. First the first instance, we would be talking about a rule that assumes that all activities of a public nature can be made public, and this affects the set of public activities. On the other hand, publicity implies a certain set of processes, of moments within the procedure.

The scope of application of transparency seems to go beyond public administration in the broad sense[102]—although subjective restrictions are also introduced in relation to the scope of the obligation[103]—as it is expressly stipulated that it shall apply to a whole range of institutions, such as the Royal Family, the Congress of Deputies, Senate, the Constitutional Court, the General Council of the Judiciary, the Ombudsman, the Court of Auditors and the equivalent autonomous institutions (Article 2(1)(f)). However, this extension is relative, since it is immediately specified that it will only take place to the extent that the activities are subject to administrative law, that is to say, in the case of materially administrative activities, which means disregarding the functions of each institution, as they may have their own *ad hoc* system of publicity established in their respective laws of creation. The substantive extension of the scope of application is one of the relevant features of the new transparency regime, although it must be pointed out that the government as a constitutional body is not explicitly mentioned, probably because its activities subject to administrative law are expressly regulated in the different lists of documents discussed below. These lists serve as a clear illustration of the change in perspective that occurred with the new legal framework. But first it is important to explain the essential components of the new model of transparency.

Active publicity is also an obligation of other organisations that are not public authorities, but that are charged with regularly managing public resources. Therefore, a general rule has been established that does not admit any distinction with regard to political parties, trade unions and employers' organisations. And, on the other hand, other private entities are only obligated to the extent that they receive significant public subsidies, the quantity of which is expressly established (Article 3(b)). Meanwhile, other private subjects that are also linked to the public administration in that they provide public services, exercise public authorities or are contractor must only submit information to the public administration when required to meet legal obligations (Article 4).

It is essential to determine the basis of the legal obligation to disclose the documents, either directly as active publicity, or at the request of the citizens exercising their right to access. The purpose of the transparency act is to determine the precise scope of the obligations, to specify the type and characteristics of the documents to be made public, in short, its interpretation is crucial. The transparency of information held by the Administration ensures participation and oversight. It is expressly stipulated in Law 19/2014 that the institutions must 'publish regular and updated information, knowledge of which is relevant in guaranteeing the transparency of their activity related to the functioning and monitoring of public activity.' (Article 5).

The bodies concerned must therefore 'publish information about the duties they perform [...] the annual and multi-annual plans and programmes in which they establish their specific goals, as well as the activities,

101 In application of the Official Secrets Law and Law 9/1968 of 5 April, which was modified in 1978 and which may ultimately be modified. See: https://politica.elpais.com/politica/2016/11/28/actualidad/1480358972_843372.html.

102 Given that both a formal and an organic criterion are applied, the latter of which includes a) the General State Administration, the administrations of the Autonomous Communities and of the cities of Ceuta and Melilla and the entities that make up the local administration; b) the managing bodies and common services of Social Security, as well as private occupational health centres that collaborate with Social Security; c) autonomous bodies, state agencies, public business entities and public law entities which, functionally independent or with a special degree of autonomy recognised by law, have external regulatory or supervisory functions over a given sector or activity; d) bodies governed by public law having legal personality and attached to any of the public administrations or subsidiaries, including public universities, commercial companies in which the direct or indirect holding of the bodies referred to in this Article exceeds 50 per cent; [...] h) public sector foundations provided for in the legislation on foundations; i) associations constituted by administrations, bodies and entities provided for in this Article. Public law corporations, as regards their activities subject to administrative law.

103 And so it is operated with the restrictive concept of public administration that only includes territorial administrations and their instrumental organisations.

resources and deadlines set forth for achieving them' (Article 6).[104] They must also publish 'guidelines, instructions, agreements, circulars or replies to queries from individuals or other bodies, to the extent that they constitute an interpretation of Law or have legal effects, or reports forming part of the dossiers for drafting legislative texts, in particular the report on the analysis of legislative impact' (Article 7).

Moreover, the series of documents described below must also be made public; and these take on special relevance from the perspective of citizen oversight, given that, in practice, they are the most important for the purposes of subsequent accountability. They have to make public 'a) All contracts, indicating their subject matter; duration; the amount tendered and amount awarded; the tender procedure used; the instruments by means of which, if appropriate, the tenders were made public; the number of participants in the tender; and the identity of the awardee, as well as any modifications to the contract. Likewise, decisions on withdrawal and waiver of contracts shall also be made public. Information regarding minor contracts may be made public on a quarterly basis. Moreover, statistics on the percentage of the total budget of contracts awarded through each one of the procedures stipulated in the laws on public sector contracts shall also be published; b) the list of agreements signed and the management delegation; c) public grants and assistance awarded, specifying their amount, objective, purpose, and beneficiaries; d) budgets, including a description of the main budget items and updated, understandable information on the state of implementation and compliance with budget stability and financial sustainability of the Public Administrations;e) compulsory annual accounts and the audit and monitoring reports by external supervisory bodies issued regarding the aforesaid; f) annual remuneration of senior officials and heads of the entities included in the scope of application of this Title. Likewise, if a post is relinquished, the severance pay received shall be made public, when applicable; g) resolutions on authorisation or recognition of compatibility affecting public employees, as well as those authorising senior officials of the Central State Administration, or their equivalents according to Autonomous Community or local regulations, to exercise private activities after relinquishing their posts; h) annual statements of property and activities of local representatives' (Article 8).

In order to be informed of the activity and operation of public authorities and to be able to discuss, debate, question and, lastly, monitor, information must be made public in a clear, structured and comprehensible for all interested parties and, preferably, in reusable formats (Article 5). The information has to be kept up to date —in other words, it has to be published periodically— and everything that might be of a relevant or significant nature must be made public, excluding things that might be considered anecdotal (like certain inexpensive gifts, the publication of which aims only to generate rifts). It has to be presented in a manner that is clear, structured and understandable to the citizenry.[105] In other words, haphazardly dumping a load of information to make it difficult to understand can be understood as a fraud of law, as a non-precise application, as a pathology. The necessary information is that which is pertinent, sufficient and necessary. It is precisely to guide this operation of making information and documents public, considering the purpose of transparency.

To respond to this purpose of generating knowledge to favour debate and the exchange of opinions and criteria, and also to ensure oversight, where the information is published is important. We must not forget that a significant part of this information was previously subject to publication in the official gazettes of the corresponding administrations, but the format did not guarantee that it was within reach of the wider public. Now, it is necessary to be precise about the target public and, therefore, the place, the websites or the institutional portals, as well as the way of organising, are fundamental for achieving the purpose.

In the public sphere, 'the tyranny of intimacy' must be avoided.[106] The public sphere is not a place for exhibition; it is a common space, and to guarantee debate about that which is common, to achieve effective accountability on the part of public authorities, it is important to consider both what is lacking, that which is

104 And the insistence on evaluation appears again, but without the necessary instruments having been properly incorporated. It states that 'their degree of compliance and results must be evaluated and published periodically together with the measurement and assessment indicators'.

105 Article 5 LTAIPBG.

106 Han, B. *Op. cit.*

not adequately resolved within the new legal framework, as well as the potential that the creation of a new *ad hoc* authority of administrative oversight and the ensure rights of access.

The controversy over the publicity of the calendars of senior officials illustrates very well the changes that the shift from publicity to transparency entails and how it is aimed at understanding the decision-making processes and identifying the subjects that have actually participated, even if not through formalised procedures.[107] It is not a matter of making public irrelevant information—useful only for *snooping* (it is therefore important to avoid giving too much importance to small rules) or else to *obfuscate* what is significant—about what might have happened beyond the walls of official offices (in the reserved section of a restaurant). The public must have access to information about controversial matters of general interest which are the subject of the meeting, the exchange of views, data and analysis. The goal of public access to knowledge and documents in the hands of public authorities is 'to offer citizens the possibility of more efficiently monitoring the legality of the exercise of public authority'.[108]

If the purpose is monitoring, then the starting principle or premise is that normally established by the legislation of other legal systems, the principle of the broadest possible access to information, which implies, correlatively, a restrictive interpretation of the exceptions. In relation to the content of the calendars, the goal of monitoring must also guide the content and the scope of the information made available to the public.

As stated in the explanatory statement of Law 19/2014, which has been taken into account in the criteria adopted jointly by the Spanish Data Protection Agency (AEPD) and the Transparency and Good Government Council (CTBG) on the publicity of calendars,[109] 'Only when the action of public authorities is subjected to scrutiny, when citizens can know how decisions affecting them are made, how public funds are managed, and under what criteria our institutions act, will we be able to speak of the outset of a process in which the public authorities begin to respond to a society that is critical, exacting and demands that public authorities enable participation. [...] citizens can judge, more accurately and using better criteria, the capacity of their public authorities and decide accordingly.' So, insofar as the law does not establish the obligation to make calendars public (although some administrations have specific policies in this regard, like the National Commission on Markets and Competition (CNMC)), the question arises of whether it is possible to know the identity of the people who participate in meetings.

As the CTBG states on its website: '*Although it is true that the contents of the calendars of senior officials are not affected by the principle of active publicity of the Transparency Law, it is also true that these calendars do constitute, in general, information that falls within the scope of application of the regulations on access to public information, since they are held by public bodies bound by the Law and have been prepared or acquired in the exercise of their functions. In other words, they constitute public information within the meaning of Article 13 of the Transparency Law. Information regarding the daily activities of the people who you want to direct, organise and hold responsibility for decision-making contributes to the acquisition of improved knowledge of public activity and, at the same time, facilitates the scrutiny of the person who directs that activity, constituting a good practice that appears more and more frequently among the people entrusted with carrying out public activities.'* In conclusion, it establishes a principle of access for petitioners, and a duty to weigh the names of the attendees according to their responsibilities. However, the obligation to make officials' calendars public may eventually be adopted as a general rule, without the need to request them, since this is the criterion promoted by the CTBG.[110]

107 A study by a well-known think thank in Brussels examined the relevance of European leaders (the president of the ECB, German Finance Minister Schäuble, European Commissioner for the Economy, president of the Italian Government at the time M. Monti, etc.) on the basis of the calendars of the members of the Obama administration, whom they had interviewed, with whom they spoke on the phone and how long the conversation lasted, among other factors.

108 The most recent was the judgement of the EU Court of First Instance of 6 July 2006 in *Franchet and Byk vs Commission*.

109 Criterion 2/2016 on information related to the calendars of public officials.

110 Statements of the chairperson, *eldiario.es*, 10/12/2016.

Catalan law does not directly or expressly address the calendar issue either, although there is an indirect reference that seems to stipulate that interest groups should make their contacts and meetings public in the updated record.[111]

In any case, we put forth that analyses of the information published so far in the corresponding transparency portals highlights major shortcomings, given that not all the encounters are publicised. Some of these have been reported in the press and are not included in the public data, nor is the subject of the meeting precisely identified (it would seem that anecdotal and protocolary assumptions take up the most of the time), nor the time the meeting lasted, nor the exchange of unpublished documents or studies (on the other hand, irrelevant data are included). It should be remembered that in the Spanish administrative tradition it is not customary to write reports or brief notes on these meetings, so information cannot be accessed in this indirect way either, unlike in other countries; this has already been raised by some media outlets and associations focussing especially on transparency.[112]

As stated earlier, the Official Secrets Law is still in force. The time required before documents classified as secret can be accessed must be reviewed, as well as the criteria and practices for adapting those documents to the new legal environment.[113] Is it conceivable that the minutes of the various governments could be published after a while, once the conditions requiring the duty of reserve have disappeared? In fact, this possibility is already being explored in other spheres, like in the CNMC.[114]

The creation of an administrative body to guarantee compliance with the law has been fundamental.[115] The general state administration's compliance with its obligations, both in terms of active publicity and those derived from the exercise of rights to access, has contributed to advances in transparency. One fact that summarises the work done and the difficulties encountered is the high number of appeals filed by the different ministerial departments against the decisions of the CTBG itself: Since its creation, a total of two thousand claims have been resolved and, perhaps even more significant, forty-four government appeals are in the courts against their resolutions.

A case resolved by the courts illustrates the validity of certain practices: The case seems almost absurd, as the type of documents requested have to be, by their very nature, public. As the ruling expressly establishes: '*The information requested in the application for access to information refers to the process of implementation of the first action plan, as well as to the planning and creation of the second action plan of the OGP, therefore, by the nature of the process of the Open Government Partnership itself, it should already be public.*' The decision of the Central Court of Catalonia of 6 April 2017 ruled that it dismissed the administrative appeal filed by the Ministry of the Presidency against the 11-11-15 decision of the Council for Transparency and Good Government, which partially upheld the complaint filed on 10 September 2015 by Access Info Europe against the decision of the same Ministry and urged the same Ministry to remit, within fifteen working days, the information requested related to documents about the open government strategy, because, '*the specific case at hand, i.e., in the case of implementation and planning of policies and action plans, public awareness of the content of the information submitted by the different departments is essential to understanding the process. This information not only serves as background and basis for the decision, but is also essential for the accountability of how the decision has been adopted and what criteria have been taken into account in order to make it.*'

111 See the work of A. Cerrillo in this issue.

112 See Access Info's petition related to the meetings prior to drafting the new legislation on renewables and which won a favourable ruling from the CTBG.

113 'Hundreds of Spanish and international historians have urged the unblocking of the reform of the Official Secrets Law (which dates to Franco's regime). Researchers call on parliamentary groups not to delay changing an obsolete and undemocratic norm'. *El País*, 24/5/2017.

114 The Council for Transparency and Good Government has obliged the CNMC to provide the agenda for the plenary session since October 2013, which initially did not agree to provide these documents, but once the judgement was known, announced that it would not appeal the decision to the courts, but would not make the minutes available to the general public (*eldiario.es*, 19/09/2017).

115 See the contribution of Oriol Mir in this issue.

4 Final considerations: accountability as the ultimate goal

Earlier, we highlighted the importance of taking into account the major transformations that have occurred since the beginning of the 21st century, in order to more accurately identify the meaning of transparency as an instrument for strengthening the legitimacy of public authorities and, in particular, of the government, given that the framework for legal relationships between public administrations (which must now always be considered in their plurality and heterogeneity) and citizens, businesses and NGOs has been undergoing progressive reforms.

The fact that globalisation and European integration denote a relative loss of capacities to manage national agencies required traditional systems of operation to be rethought. Furthermore, privatisation, in the double sense of externalisation and transferring previously public activities to the private sector, has also contributed enormously to the questioning of government agencies.

It is in this social, economic, political and institutional context that the concept of 'accountability' has emerged, which alludes to activities that go beyond their original purpose. In effect, at the beginning, it was directly linked to the idea of submitting accounts, that is to say, the financial component of public action and, in this original institutional environment, it also referred to responsibility; but it is no longer just about accounting.

In spite of the ambiguity of the term 'accountability,' it cannot currently be conceived solely from a financial point of view, as it is not only a question of examining how the financial resources made available have been used[116] (the task has required and continues to require complete information),[117] but also of being aware of administrative activities as a whole.[118]

Therefore, the evaluation of public policies[119] is an essential part of the accountability process, and as has been the case since its inception in the field of economic and financial oversight,[120] this function must be carried out by a body different and separate from that which has adopted the policy or taken the corresponding decision to avoid the possible conflict of interest that could arise if it were a dependent body ('contamination'). However, the practice of evaluation is not yet widespread and, above all, its legal status and its insertion in the institutional framework still present serious weaknesses in that it continues to seem an excessively voluntary and conjunctural undertaking.[121] Therefore, evaluation must be introduced on a regular and sustained basis, it must be institutionalised, the legislature must take it seriously and impose it as a legal obligation, and the legal status of the body that will be required to perform it must be defined in order to avoid regulatory capture (of the actors involved) or practices of secrecy (failing to publicise the

116 The Court of Auditors is the supreme body for auditing the accounts and economic management and operates by delegation of the Spanish Parliament and is tasked with examining and auditing the general accounts of the State (Article 136 of the Constitution). The same idea can be found in the different statutes of autonomy of the autonomous communities and the respective laws of the oversight bodies.

117 Article 7 of the Organic Law on the Court of Auditors establishes that '*The Court of Auditors may demand the collaboration of all physical or legal persons, public or private, who must submit as much information, status reports, documents, background information or reports as required to exercise its oversight or jurisdictional duties. The State and all other entities belonging to the public sector subject to oversight by the Court of Auditors must provide the economic and financial information requested for the purpose of undertaking monitoring procedures*'.

118 See the contributions published in the monographic issue *Rendre des comptes, Rendre compte*, of the *Revue Française d'Administration Publique*, 160 (2016).

119 See the contributions published in the monographic issue *L'évaluation des politiques publiques: État(s) de l'art et controverses*, of the *Revue Française d'Administration Publique*, 148 (2013).

120 See Article 136(3) of the Spanish Constitution and Article 5 of the Organic Law of the Spanish Constitutional Court.

121 See the peculiar institutional form of IVALUA, created as a consortium, the list of founding entities that highlight certain weaknesses, initially, the Department of Economics of the Generalitat, the Diputació de Barcelona, Pompeu Fabra University, the Jaume Bofill Foundation and, later, the Labour, Economic and Social Council of Catalonia, and the Inter-University Council of Catalonia, as well as the vicissitudes of the State Agency for the Evaluation of Public Policies and the Quality of Services (AEVAL), created by Law 28/2006 of 18 July on state agencies for the improvement of public services for a short period and, finally, ceased to operate as a result of its dissolution by Royal Decree 769/2017 of 28 July, at which point its functions were assumed by the Secretariat of State for Public Service, through the Institute for the Evaluation of Public Policies and the Directorate General of Public Governance.

corresponding reports). This evaluation requirement must also include the normative component of public policies,[122] the results of the application and execution of laws and regulations,[123] to know the extent to which the intended results have been obtained;[124] a practice that in Catalonia has been initiated with the annual report that the Catalan Ombudsman must submit on the application of Law 19/2014.[125] These legal provisions should initially—in the drafting process—be subject to analysis from the perspective of the determination of their regulatory impact;[126] all of the relevant information, the necessary knowledge and expertise should be made available in order to rationally gauge and evaluate the planned measures and possible alternatives[127] in accordance with best practices and the principles of good regulation.[128] Evaluation requirements that are inferred from the rule of law clause and that require participation, consultation to obtain information, and opinions from those potentially affected.[129]

Accountability means explaining and justifying conduct before a specific body that can ask questions and adopt measures as a consequence of the observed and substantiated behaviours. Its practical execution translates into a wide range of mechanisms and formats.

Therefore, transparency is essential in the acts, activities and decision-making processes of public authorities. Transparency and accountability share a common aim: information. Information that must be provided to the citizenry. But this process, which involves disintermediation, cannot take place to the detriment of the government's traditional mechanisms of political accountability. Information to ensure accountability must also be conveyed through the appropriate institutions, through the institutional channels whose precise function is the intermediation between the government and citizens. Parliaments and local assemblies must be provided with the appropriate mechanisms for the effective and efficient accomplishment of their institutional missions, by providing themselves with the necessary means to perform their constitutional function, creating budget oversight offices and evaluation offices, among others. Although in the end, the final recipient of the reports and information processed and analysed is the public, the citizenry.

Transparency is for the purpose of participation and monitoring and, therefore, its effectiveness must be guaranteed through knowledge, illustration and the formation of public opinion; this must guide the practice of providing information and determining its content and scope. As we have seen, transparency means providing clear and meaningful information on how and why decisions are made, which means that this information also affects the allocation of public resources. To ensure strict accountability, parliament needs to equip itself with the tools and means to enable citizens to have information.

Restoring public confidence requires rethinking public policy-making and decision-making procedures, ensuring the equitable distribution of information among all participants, so they can also have equivalent speakers; this may make us rethink the guarantees of integrity and service to the general interest, so that not

122 See the work of Montoro, M. J. *La evaluación de las normas: racionalidad y eficiencia*. Barcelona: Atelier, 2001; and later, Domènech, G. 'El seguimiento de las normas y actos jurídicos'. *Revista de Administración Pública*, 167 (2005).

123 See Article 130 of Law 39/2015 on the administrative procedures common to public administrations.

124 Articles 25 and 28 of Law 50/1997 of the government modified by Law 40/2015 on the legal regime of the public sector.

125 In accordance with that established in Article 93(1) of the same Law and which started with the report published in 2016 and which continued with that published in 2017 and which can be found on the corresponding website.

126 Royal Decree 1083/2009, which regulated the regulatory impact report, introduced the requirement of this document, although the result has been very unsatisfactory and the so-called 'report' has become a document which is added to the file as a purely formal procedure, without any content which meets the requirements of analysis and provision of data which are specific to these types of practice; surely part of the shortcomings derive from the fact that neither the procedure nor the methodology was predetermined and, although it was initially entrusted to AEVAL, that entity was never able to carry out the task; the aforementioned regulation has recently been replaced by Royal Decree 931/2017 and the coordination of the new national regulatory plans and the proposal for an annual regulatory assessment report has been entrusted to a regulatory planning and assessment board (Royal Decree 286/2017 of 24 March).

127 See a good appraisal of this matter in Auby, J. B. and Perroud, T. (coord.). *La evaluación de impacto regulatorio* (Spanish language version). Sevilla: INAP, Derecho Global, 2013.

128 Which now includes Article 129 of the Spanish Law of Common Administrative Procedure (LPAC), although it does not explicitly mention the requirement for an ex-ante impact assessment.

129 Article 133 LPAC.

only are impartiality and objectivity preserved, but the visibility of that which leads to these conditions is also ensured.

Freedom of the press is essential in a democratic society. The press must provide information about all matters of general interest, as well as about reports, data, comments and meetings that have played a role in the creation of public policies and their implementation. The public also has the right to receive this information directly and without the intermediation of the media, since transparency makes it possible to ensure greater participation by citizens in the decision-making process and strengthens the legitimacy, effectiveness and accountability of public authorities towards citizens. Ensuring the accountability, the responsibility of public authorities and citizen oversight contributes to strengthening democracy and all the institutions necessary for its development, as well as respect for fundamental rights.