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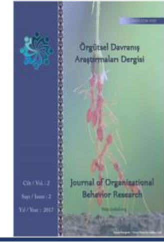

# An Investigation of the Concept and Characteristics of Public Services and Private Contracts

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***ABSTRACT***

*The objective of the present study was to examine the concept and characteristics of public services and private contracts, to enhance the appeal of such agreements to both government and other executive entities, as well as to the parties involved. The present study was carried out utilizing a descriptive-analytical qualitative approach, employing the library method. According to the findings of the study, public service is one of the fundamental principles in Iran's administrative law. The Constitution of the Islamic Republic of Iran delineates several principles wherein notable instances of public services are cited and their administration is delegated to the government. Privatization of public services involves reducing or removing government control and involvement in the creation of supply and demand mechanisms. This process also entails transferring ownership or control of the executive and economic institutions from the government to the private sector through private contracts. In contemporary times, agreements have become a crucial component in the provision of public services. This is primarily due to the growing demand for such services across various sectors, coupled with the limited financial resources available to governments in the public service domain. Consequently, the significance of private contracts has increased twofold. A thorough understanding of both general and specific regulations, as well as the various legal frameworks related to private contracts, is essential for adherence to the governing principles of such agreements.*

***Keywords:*** *Iranian law, Public services, Government, Constitution, Private contracts*

## INTRODUCTION

Private contracts refer to those agreements that fall beyond the purview of general international law and do not encompass international treaties and memorandums. Additionally, they are distinct from public contracts, which exclude government contracts. However, it is important to note that certain interpretive rules related to them may still be relevant within the context of this discourse. Government organizations enter into two distinct types of contracts, which are differentiated based on the legal framework that regulates them. Contracts can be classified into two categories: those that are subject to private law, such as sale and lease agreements, and those that are subject to public law. The latter category adheres to specific provisions and regulations within the field, including rules on authority, priority, and protection. These types of contracts are commonly referred to as administrative contracts.

Private contracts are agreements that are established on the fundamental principles of proper transactions, which include the mutual intention and consent of the involved parties, the competence of the parties, the definiteness of the subject matter of the transaction, and the legality of the transaction. Private law contracts and administrative contracts are subject to distinct legal frameworks, and adherence to these frameworks accounts for the divergent

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character of these contract types. The dissimilarity between administrative contracts and private law contracts is not inherent but rather stems from the mutual consent of the parties involved.

The term "public service" refers to the provision of certain services by the government to the populace. The provision of these services may occur through direct government delivery or through public-private partnerships aimed at facilitating citizen access to services. The expanding role of the government in economic and social spheres, coupled with the evolving nature of its functions and responsibilities, has necessitated the provision of public services to citizens in addition to its conventional duties. In certain instances, the government lacked the capacity and requisite resources to provide certain services, such as constructing schools, hospitals, and roads, without direct involvement. Hence, the inclination of the government to transfer the responsibility of delivering public services to private industry is evident. In recent decades, a majority of nations have endeavored to diminish the scale of government and its participation in the delivery of public services. This is because the government's monopoly on public service provision has resulted in inefficiencies, impeded competition, and hindered the introduction of innovative ideas and approaches in service delivery.

The significance of public services in the realms of social and economic development, as well as the provision of welfare amenities, surpasses the abovementioned on the matter. Insufficient and ineffective services not only diminish the standard of living but also impede the enhancement of productivity in other economic domains and give rise to injustices and social disparities, as well as serious and perilous political concerns. The privatization of public services has been regarded as a progressive development, resulting in the delivery of efficient and effective services. This approach has also contributed to the enhancement of individuals' quality of life and economic growth, ultimately bolstering the productivity of public services. Consequently, to address the issue of inefficiency, numerous nations opted to implement decentralization measures within the public service sector. This approach aimed to mitigate service delivery challenges by transferring responsibility for such services to non-governmental entities.

Privatization has been implemented as a means of economic reform for several decades, to enhance the social welfare of individuals in various nations across the world. Iran has prioritized private sector involvement and the transfer of a significant portion of government entities to private ownership in its development initiatives, as outlined in Article 44 of the Constitution. Regarding the referenced materials, the objective of this study was to examine the principles and characteristics of public services and private contracts.

**Definition and Characteristics of Public Services**

**Comprehending the Concept of Public Services**

The concept of "public services" has been a dynamic and ever-evolving concept within the realm of administrative law, as viewed through a legal lens. The theory of public services, which is considered a cornerstone of administrative law, initially focused on defining the traditional functions of the government and establishing a framework for government sovereignty to restrict its authority. It led to the development of the first generation of public services, also known as classic public services. Subsequently, the second generation of public services, or economic-social public services, emerged as a result of conceptual and exemplary advancements

and adherence to economic and social policies. Some scholars argue that the concept of public services is primarily a political concept rather than a scientific one.[1]
According to the theory of public services, the government is no longer viewed as a ruling entity, but rather as a collective of individuals who wield the authority to establish and administer public services[2]. Consequently, the lack of provision of public services has significant implications for the government[3]. The inability of the public service system to adequately address the needs and expectations of citizens can lead to a decline in public confidence[4]. Similar to how the government's unilateral responsibility in domains such as national defense, diplomacy, adjudication, law enforcement, and criminal punishment establishes a fundamental rationale for the government's legitimacy, the inability to furnish public services also results in a reduction of public confidence, thereby eroding the system's legitimacy[5]. The statement raises inquiries regarding the efficacy of political and governmental administration[6]. According to scholarly literature, public trust can be defined as the anticipated favorable outcome that the general public expects to receive in response to their requests from individuals or groups responsible for managing public affairs[7]. The legitimacy of a government is derived from its ability to promptly and adequately address the demands of its citizens[8]. As such, the efficient delivery of public services can be regarded as a crucial factor for the government's continued existence[9].
The term "public service" is derived from the combination of the words "service" and "public". Service denotes the act of providing or doing something for the benefit of another, while the public pertains to the general populace. The literal meaning of public service, therefore, is firstly a duty[10] that involves actions and activities which secondly carried out by individuals or institutions for the benefit of the people.

Upon scrutinizing the contemporary doctrine considering the notion of public service, it can be inferred that a common thread across all viewpoints is the interrelation between public service, public interest, and national interest[11].

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[1] Katouzian, Nasser, Fundamentals of Public Law, 3rd edition, Tehran: Mizan Publishing House, 2007: 139.
[2] Dogi, 2009: 112
[3] Bew, Paul. "The Committee on Standards in Public Life is responding to the need for scrutiny of ethical standards in local government." Democratic Audit UK 2014: 11
[4] Thomas, Craig W., "Maintaining and restoring public trust in government agencies and their employees." Administration & Society 30, no. 2 1998: 14
[5] Jing, Yijia. "Prison privatization: A perspective on core governmental functions." Crime, Law and Social Change 54, no. 3 2010: 266
[6] Alvani, Seyed Mehdi and Fard Hasan Danaei, "Government Management and Public Trust", Knowledge Management Quarterly, Year 14, Number 55: 2001, 14
[7] Alvani et al., 2001: 9
[8] Raadschelders, Jos CN., "A coherent framework for the study of public administration." Journal of Public Administration Research and Theory 9, no. 2 1999: 290.
[9] Zarei, Mohammad Hossein and Najarzadeh Henjani, Majid, "The concept of public services and its transformation in the light of the doctrine of public function", Public Law Research Quarterly, 19, No. 56, 2016: 137
[10] Perry, James L., and Lois Recascino Wise., "The motivational bases of public service." Public administration review 1990: 368
[11] Katouzian, 2007: 136

The centrality of public interest in defining public services has resulted in a relationship of significant magnitude. Following this statement, the trustees of public services must prioritize the public interest as a fundamental principle[12].

According to Professor Dolobader, a French academic, public service does not possess any unique characteristics in comparison to other types of services, except for its objective to provide benefits to the general public. This particular aspect is what distinguishes public service and lends it a public-oriented designation[13]. Similarly, a majority of legal scholars, in their elucidation of this correlation through the utilization of a subjective approach, maintain that the objective of public services is to furnish advantages to the general populace or public interest[14].

Upon further analysis of this perspective, one is prompted to consider whether the term "public service" exclusively pertains to activities that were established and presented to provide subjective and personal benefits to the public, or if any service that genuinely serves the public interest may also be classified as public service. The objective criterion is a standard or measure used to evaluate or assess something without any personal bias or subjective influence[15]. The inquiry pertains to whether the objective of a taxi driver in collecting and transporting passengers to their intended location is primarily driven by personal financial gain or by the provision of public service. It is evident that in certain instances, the taxi driver's primary objective is to attain personal gain through earning monetary compensation (a subjective measure). Through the individual's pursuit of personal gain by eliminating a portion of a communal necessity, there arises a concomitant benefit to the public. It implies that the public interest is effectively realized, thereby satisfying an objective criterion. The utilization of subjective criteria in the recognition of public services can result in deviation from accurate identification, given the privatization of certain public services and the influence of market mechanisms based on personal interests. Hence, with regards to elucidating the correlation between public services and public interest, it is inappropriate to adopt a "subjective" standpoint wherein an activity is deemed a public service activity solely based on its aim to provide public benefit, while an activity that serves personal and private interests is not considered a public service activity. Therefore, adopting a pragmatic and objective approach confirms that public services are intended to serve the public interest. Public service is an endeavor that ensures the fulfillment of needs and the provision of benefits to the public[16].

The European Court of Justice has taken an objective stance on the matter, stating that commercial and industrial entities that are subject to public procurement contracts are not required to operate with the primary objective of securing the public interest, regardless of whether this is their subjective purpose or not. Hence, the mere act of actively providing public goods suffices for their inclusion in the official documents of the union[17]. Through these elucidations, one can gain a comprehensive understanding of the phrase that is articulated in the context of expounding upon the notion of public service: "The provision of a service that

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Bio, 2014: 3[12]
Katouzian, 2007: 136[13]
Zarei et al., 2017: 140[14]
[15]
Tabatabai-Motmani, Manouchehr, Administrative Law, 15th edition, Tehran: Samt Publishing House, 2017: 264[16]
Case C-360/96, Gemeente Arnhem V. BFI Holding BV (BFI), (1998) ECRI-6821[17]

results in the advancement of the welfare of the general populace is a distinct attribute of said services."

Another inquiry that has been raised pertains to how public services deliver benefits to the public. Stated differently, what is the mechanism by which public services provide public benefit? The solution to this inquiry lies in the premise that the domain of public services is to cater to the requirements of the general populace. In other words, public services aim to fulfill the public needs of individuals. In the realm of public administration, it is widely acknowledged that public services constitute the segment of the government's juridical entity that engages in endeavors related to public welfare by catering to the requirements of the populace[18].

The fundamental objective of all definitions of public services is to cater to the societal requirements of the general public[19]. Public services have been established based on the collective requirements of the community[20]. Professor Jez asserts that public services are primarily intended to cater to the needs of the public[21]. Hence, it can be inferred that public services are essential services that fulfill certain social requirements of the public[22].

Public service theories posit that the unique economic and social attributes of public services necessitate government involvement and intervention for optimal provision and management. As previously stated, Leon Dogui, the originator of the theory of public services, contends that the complete realization of public services necessitates government intervention[23].

The significance of such a presence and intervention is noteworthy, to the extent that certain scholars have contended that public service constitutes a fundamental responsibility of governments[24], and that the administration's primary objective is to provide public service[25]. The notion of public service is inherently linked to the existence of governmental involvement and intervention. Hence, the government assumes either a direct operational role or a participatory role in the delivery of public services, or it exercises significant oversight over the provision of such services[26].

Historically, the provision of public services has been a primary obligation of the public sector[27]. However, in contemporary times, the private sector has also assumed a role in the delivery of public services and bears corresponding responsibilities. Hence, in light of the emerging generations of public services, the notion of restricting public services solely to the public sector

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[18] Feies, Gheorghe Claudiu, Cristian Feies, Dorel Mates, and Dumitru Cotlet., "The role of accounting information within the management process of public utility services." Procedia-Social and Behavioral Sciences 83 2013: 711

[19] Rezai Zadeh, Mohammad Javad and Kazemi, Davoud, "Recognition of the theory of "public services" and its governing principles in the Constitution of the Islamic Republic of Iran", Scientific and Research Journal of Islamic Jurisprudence and Law, 3rd year, 5th issue, 2013: 24.

[20] Feies et al., 2013: 715.

[21] Jèze, Gaston Paul Amédée. Les Principes généraux du droit administratif. Vol. 1. M. Giard & E. Brière, 1914.

[22] Davitkovski, Borce, and Ana Pavlovska Daneva., "Organizational Concepts of Public Services in the Republic of Macedonia." Lex Localis-Journal of Local Self-Government 7, no. 2 2009: 150.

[23] Kia, Fatemeh, The fundamental principles governing public services with an emphasis on the laws, regulations and judicial procedure of the Islamic Republic of Iran, public law master's thesis, University of Tehran, 2013: 17-18.

[24] Zerashkian, Sohrevard, Legal aspects of providing public services through information technology, Master's thesis in public law, University of Tehran, 2013: 20.

[25] Biluosiak, 2012: 238.

[26] Zarei et al., 2017: 142.

[27] Anguvi, 2008: 98.

appears to be misguided. In this instance, the relinquishment of administrative responsibilities by governments and their subsequent adoption of governance roles, along with the transfer of public service provision to non-governmental and private entities, may be regarded as a decline in the quality of services provided. This, in turn, may lead to the erosion of the notion of "public services" in the context of public law. The evolving role of government in economic and social management, coupled with theoretical reevaluation of its function, necessitates a shift in perspective from perceiving public services as deteriorating to conceptualizing their transformation. Denhardt (1999) emphasized in the article "The Future of Public Administration" that new skills and abilities will be required to provide public services in the future[28].

It is imperative to establish a precise criterion for distinguishing public services offered by the private sector from other private sector activities. This is essential to differentiate between the two categories. In the absence of a clear definition and with ample room for interpretation, public service may enable opportunistic behavior[29].

In contemporary political and economic contexts, characterized by the implementation of policies such as adjustment policies, government downsizing, and privatization, the notion of public services ought not to be restricted solely to those services furnished by the public sector. The notion that public service is a function and therefore not inherently associated with either public or private responsibility is a commonly held perspective[30].

The aforementioned approach may be referred to as either the "doctrine of public function" or the "doctrine of traditional state function" within academic discourse. As per this doctrine, the provision of public service is considered to be a function that is carried out by the government or public entities. Whether the provision of a service is carried out by the government or the private sector, public and private institutions have the potential to function as public-interest enterprises[31]. The involvement of the private sector in the provision of public services does not alter the fundamental nature of the service as a function but rather changes the manner [not its function] in which it is executed[32].

The doctrine of public function posits that private entities are regarded as agents of social institutions and entities that pursue public interests[33]. Consequently, certain specific limitations are imposed on them to enable them to provide public services[34].

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[28] Denhardt, Robert B., and Edward T. Jennings., "The future of public administration: the pursuit of excellence." Dialogue 6, no. 3 1984: 279

[29] Cox, Helmut. "The provision of public services by regulation in the general interest or by public ownership? Consideration of recent developments in the public economy under aspects of institutional competition." Annals of Public and Cooperative Economics 70, no. 2 1999: 164

[30] Cassie, Jenny, and Dean Knight., "The Scope of Judicial Review: Who and What May Be Reviewed." 2019: 65.

[31] Cabral, Sandro, Sergio G. Lazzarini, and Paulo Furquim De Azevedo., "Private entrepreneurs in public services: A longitudinal examination of outsourcing and stabilization of prisons." Strategic Entrepreneurship Journal 7, no. 1 2013: 8.

[32] Zarei et al., 2016: 143.

[33] Cabral et al., 2013: 8.

[34] Zarei et al., 2016: 144.

Ascertaining the public nature of a function is not a straightforward task, as the attribute of publicness does not possess the same conspicuousness as that of red color, for instance[35]. The legal discourse surrounding the doctrine of public function within the United States' legal framework has acknowledged the notion of public service in the context of privatization. Initially, this concept was predicated on the traditional government operation of said activity[36]. Consistent with this legal precedent and as a means of supplementing it, certain individuals have underscored the notion that public services "... have traditionally been furnished by the state or subject to stringent governmental oversight[37]."

Hence, under Iranian legislation, the public function doctrine can be deemed valid by strictly adhering to the standard of "governmental traditional service provision". Consequently, those activities that are beneficial to the public and are either currently being provided by governmental entities or were previously provided by the government and are now being provided by non-governmental entities can be classified as public services. In consideration of the genre and chapter concerning the definition and doctrine of public function, it can be inferred that public service in a substantive context refers to a collection of activities and behaviors that are executed by the government or were formerly within the purview of governmental functions. Presently, these activities are performed by the non-governmental sector and are subject to oversight by the supreme authority of the government and they are responsible for facilitating and ensuring the fulfillment of public needs and interests[38]. Therefore, regarding public function doctrine, it is imperative to underscore the notion that public services can be rendered by private companies, government-owned and bureaucratically managed entities, or a combination of both[39].

Thus, within the framework of this doctrine, it is conceivable to acknowledge the feasibility of public service provision by private entities. Hence, the application of private law regulations concerning public affairs and services does not contradict the public nature of the mentioned services.

## 2. The Position of the Concept of Public Services in Iranian Administrative Law

The administration has established public service as a benchmark for enjoying distinctive privileges. Any endeavor that exemplifies public service is entitled to special privileges, including the expropriation of private property and unique contractual rights. The examination of the functions and spheres of influence of public service is deemed necessary and significant, given its status as the cornerstone of administrative rights and the existential philosophy of governments. The sound theoretical and practical explication and coherence of this concept are likely to result in enhanced efficiency, accountability, and transparency of the government, along with improved delivery of public services to citizens. In a broader sense, it can be argued that the fundamental principles of good governance will be achieved. To date, the notion of public services has received limited attention in Iran. Previous research endeavors have

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[35] Casey et al., 2007: 65.

[36] Black, William R., "Flagg Brothers, Inc. v. Brooks: The Public Function Doctrine in Retreat, 12 J. Marshall J. Prac. & Proc. 637 1979." UIC Law Review 12, no. 3 1979: 650.

[37] Cabral et al., 2013: 8.

[38] Zarei et al., 2016: 147.

[39] Cabral et al., 2013: 8.

primarily concentrated on the fundamental principles and overarching aspects of public services, with little emphasis on the contextualization of this concept[40].

The third, twenty-ninth, and thirty-first principles of the Constitution of the Islamic Republic of Iran have assigned the government with various responsibilities, including the provision of complimentary educational resources, the promotion of welfare, the reduction of poverty, and the assurance of social security services for all members of society. Regarding the analysis of certain legal scholars, the aforementioned instances being conspicuous illustrations of services rendered to the public, this notion may be regarded as a fundamental pillar of the administrative entities of the government[41]. The evolution of societies and the consequent proliferation of needs, coupled with the expanding roles and functions of governments in providing improved services to their citizens, have necessitated the establishment of auxiliary arms to support the government. Hence, the establishment of public organizations and institutions has occurred, which bear the responsibility of managing public affairs in conjunction with governmental agencies[42].

Historically, the provision of certain societal needs was a straightforward task, with institutions solely responsible for the administration of public services. However, due to socio-economic shifts and the expanding roles and functions of governments, a diverse array of public institutions and organizations now provide public services in conjunction with the government[43].

In France, public institutions are categorized into administrative[44] and industrial-commercial institutions[45] based on the government's public service offerings. In Iran, technical decentralization is established by segregating certain activities from the country's administrative organization based on their inherent nature and necessity. The responsibility is delegated to a legally autonomous organization. Under French legislation, these self-governing legal bodies are referred to as public institutions. However, despite the recognition of this notion in Iranian legislation, a comprehensive definition and explanation have yet to be provided[46].

Public institutions can be broadly defined as legally established organizations comprising personnel and resources that are dedicated to conducting public affairs and possess an autonomous legal identity. These establishments can be classified into three primary classifications: The three types of organizations that exist within the public sector are government institutions, state companies, and non-governmental public institutions. The Civil Service Management Law has been utilized by the legislator to identify and establish diverse categories of public institutions. According to the provisions of Article 2 of the aforementioned legislation, a governmental institution is a distinct organizational entity that is either established or will be established under law and possesses legal autonomy to execute certain responsibilities

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[40] Vaezi et al., 2017: 11

[41] Emami, Mohammad and Ostovar Sangari, Kourosh, Administrative Law, Volume 1, 12th edition, Tehran: Mizan, 2010: 35

[42] Vaezi et al., 2017: 12

[43] Madani, Seyed Jalal al-ddin, Administrative Law of Iran, Tehran: Jangal Javadane, 2010: 89

[44] Etablissements publics administratifs

[45] Etablissements publics industriels et commerciaux

[46] Madani, 2010: 85

and functions that are attributed to one of the three branches of government or other legal entities. According to the provisions of Article 4, state companies are characterized as economic entities that have been legally established to execute certain responsibilities of the government. Additionally, these entities are required to have over fifty percent of their capital and shares owned by the government. State companies are a distinct category of governmental institutions that operate under a unique structure in the form of shares. They are entrusted with the responsibility of fulfilling government service obligations in the domains of industry and trade, with a focus on natural resources. Article 3 of this legislation provides a comprehensive definition of non-governmental public institutions. According to this definition, such institutions are characterized by their legal independence and are established or will be established with the approval of the Islamic Council. Besides, more than fifty percent of their annual budget is derived from non-governmental sources. The entity in question is expected to receive and assume the obligation of carrying out tasks and functions that are public. Evidently, on certain occasions, the lawmaker unambiguously articulates their intention concerning the public character of an establishment. Regarding this matter, reference can be made to the legislation related to the roster of non-state public entities and associations, which was endorsed in 1994. In certain instances, the absence of legislative guidance can pose challenges in determining the character of an entity and, consequently, the applicable legal framework. In France, the criterion of public service is employed as an organizational recognition criterion, whereby a legal entity that is responsible for providing an enduring public service is deemed a public institution by the judiciary. Consequently, such entities are subject to certain regulations that govern them[47].

It is deemed desirable and fitting that the administrative judge be vested with the power to ascertain the character of an institution by taking into account conceptual benchmarks such as public institution, the extent of an institution's undertakings, and administrative imperatives while expounding on the constituent components of each concept. The ability to differentiate significant effects, such as the decision's nature, the employment relationship's nature, and the resulting lawsuit's nature, is crucial for the individual to achieve this[48].

To discharge its prescribed obligations, the governmental legal entity engages a group of individuals to provide the necessary public services required by the community, acting in the name and on behalf of the government. During the period in which the principle of sovereignty and tenure held legal validity in French law, it was also applied to the realm of employee recruitment and termination. This resulted in a bifurcation of public services into two categories: those on governance and those about tenure. Consequently, employees in these two sectors were segregated from one another and experienced significant disparities in their employment status, including discrepancies in union rights, appointment status, and the right to strike, among other factors. The creation of the aforementioned entity was predicated upon the principle of sovereignty. Over time, alternative perspectives and hypotheses emerged that challenged the validity of this principle of differentiation. Dougi contends that the differentiation between employees based on their job roles is not justifiable, as the ultimate objective of all employees is to deliver public services, and their circumstances are inextricably linked to the provision of such services.

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[47] Vaezi et al., 2017: 14
[48] Vaezi et al., 2016: 15

Following Iranian legislation, individuals who provide public services are classified as Public Service Officers and are differentiated from non-employees (i.e. volunteers) based on formal criteria, specifically their employment relationship with the government. The Islamic Penal Code's Articles 523 and 598, the Law on Intensification of Punishment for Bribery, Embezzlement and Fraud's Articles 3 and 5, and the Civil Liability Law's Article 11 impose an absolute disqualification on employees, including official and contract workers, as well as official and volunteer public officials. These individuals are subject to the same criminal and civil liability, despite the absence of such obligations for private sector employees in comparable situations. The attribution of criminal and civil responsibility to public officials is linked to their occupation in the public sector. This common status is derived from the fundamental characteristic of their position, namely their engagement in public service, which serves as the distinguishing factor between them and individuals who are not affiliated with the public sector. Hence, it can be asserted that while public service has not been deemed a distinguishing factor between official and contractual personnel, the public nature of their employment has rendered them comparable in terms of criminal and civil accountability and differentiated them from non-employees in the public sector[49].

Forecasting financial resources is a crucial aspect of managing a public service. As per governmental regulations, any financial undertaking, be it expenditure or revenue, necessitates legislative approval. Therefore, the initiation or cessation of a public service activity is subject to the legislator's discretion. The executive authorities are solely responsible for organizing public affairs and ensuring that citizens receive these services under the law. The legislature has acknowledged the legal obligations of a public matter by delegating its management to the executive branch following the matter's specifications and prerequisites[50].

On the grounds of administrative law, it is commonly held that administrative officials lack the necessary competencies, in contrast to civil law. However, in the realm of public affairs management, administrative officials are presumed to possess authority, even in the absence of legislative specifications, which are solely justified based on public service criteria. The justification for granting administrative bodies the authority to provide public services lies in the fact that these bodies were established for this very purpose. Moreover, it is noteworthy that discretionary power holds considerable importance in this regard. Discretionary power is an essential element in the management of public affairs, whereby administrative officers are granted the power to bridge the divide between security and individual rights. To clarify, discretionary power refers to the exclusive authority granted to the administration to modify the application of the law in response to particular circumstances[51].

Discretionary power refers to the degree of autonomy granted to administrative authorities in selecting a course of action from among various options, as prescribed by the legislature while taking into account the requirements and exigencies of public interest and public services. The legislator has granted the administrative officer the discretion to make decisions based on non-

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[49] Vaezi et al., 2017: 17

[50] Vaezi et al., 2017: 18

[51] Kahn, Jean. "Discretionary Power, and the Administrative Judge." International & Comparative Law Quarterly 29, no. 2-3 1980: 526

legal factors such as public service, public interest, and necessity, which are not explicitly outlined in the relevant statutes[52].

Given the vast responsibilities of the government in providing public services to the populace, it is imperative to anticipate adaptable prerequisites to enhance the governance of public affairs[53]. In essence, discretionary power constitutes a crucial component of public service administration in the contemporary societal framework[54]. Hence, it is deemed that endowing administrative bodies with jurisdiction and power is founded on the principles of public service and geared towards the arrangement and provision of optimal public services. The subsequent text highlights two crucial competencies of the administrative authority that are essential for organizing public service, namely the authority to make decisions and the authority to enter into contracts[55].

Effective organization and management of public services necessitate the delegation of decision-making authority to the administrative officer. To this end, administrative bodies have been vested with the power to render determinations in both private and public domains. As per the extant definitions, a decision denotes a lawful measure employed by administrative entities to modify the preceding or current legal state of affairs[56]. Thus, the decision-making process of the administration has a significant impact on the legal framework and the citizens' rights and duties. General decision-making is considered to be one of the most crucial actions undertaken by the administration. A general decision refers to a decision made by the governing body that pertains to all or a portion of the populace, with regulations being the most significant manifestation of such decisions. As per Article 138 of the constitution, the power to legislate is conferred upon the ministers and council of ministers, with the rationale behind this delegation being the execution of administrative tasks and the establishment of an administrative structure[57].

Consequently, the government has been vested with the power to promulgate autonomous rules and regulations to discharge its obligations. The service regulations are considered to be a crucial set of independent regulations, serving as a decision-making tool for the head of the service and as a regulator of public services[58]. While conferring such authority to the executive branch may contravene the principle of separation of powers and encroach upon the legislative branch's domain of lawmaking, the rationale behind this power is the indispensability of legal instruments to facilitate the execution of public affairs and the provision of public services. In contrast to the legislature, which establishes broad regulations removed from everyday interactions with the populace, executive entities engage in daily interactions with citizens and possess a keen understanding of public necessities. The diverse and dynamic nature of public needs necessitates

[52] Mousa Zadeh, Ebrahim, Administrative law, Tehran: Dadgstar, 2012: 153

[53] Mashhadi, Ali, Judiciary of Selection, Tehran: Legal Deputy of the President, 2012: 72

[54] Kargozari, Javad and Nabilou, Hossein, "Execution of discretionary powers by administrative authorities", Legal Information Quarterly, No. 13, 2008: 10

[55] Vaezi et al., 2017: 19

[56] Gorji Azandriani, Ali Akbar, Fundamentals of Public Law, Tehran: Jangal Javadane, 2021: 100

[57] Emami, Asad al-llah, "The Role of Will in Contracts", Haq Quarterly, Department 4, Tehran, Ministry of Justice, 2013: 40.

[58] Vaezi, Seyed Mojtaba, "Comparative study of the authority to enact by-laws with an emphasis on the legal systems of France and Iran", Mofid Quarterly, No. 79, 2009: 153.

the use of legal instruments such as by-laws and approvals to effectively regulate relations and adequately address these needs[59].

Transferring the responsibility of organizing public service to the executive branch entails an implicit transfer of regulatory power in the particular domain of government administration. The establishment of rules and alteration of the social order through the creation of rights and obligations for citizens is a clear indication of the limitation of individual rights and freedoms. The sole criterion that can attest to this authority is the standard of public services. From this perspective, the provision of public services serves as the foundation for the administrative authority's legitimacy to make decisions, and this legitimacy further contributes to the improved provision of public services. It is important to acknowledge that the power to establish regulations is exclusively vested in the head of the service, who is the top-ranking official responsible for the entity overseeing public matters. Moreover, this authority has been delimited solely within the framework of the structuring of a particular service[60].

In contemporary times, with the advent of economic and social advancements and the consequent proliferation of governmental responsibilities, the range of activities undertaken by governments has become increasingly multifaceted. As a result, it has become arduous for governments to single-handedly cater to the provision of public services on a large scale. Therefore, it is imperative to acknowledge the role of the administration as a collaborative partner in the management or provision of certain services. One of the significant methods of delivering public services is through the execution of a contract by the governing body[61]. The government may engage in bilateral legal actions that are either normal or administrative[62]. To differentiate administrative contracts from normal administrative agreements, two criteria are taken into account: organizational and material. Administrative contracts are defined as agreements entered into by public officials or their representatives to provide public benefits and delegate the execution of a service (not related to fulfilling the specific needs of the organization) to the contracted party. Such contracts may include privileges and exceptions that are not available to ordinary individuals or may contain conditions that are deemed extraordinary. As a result, the administration is placed in a superior position vis-à-vis the other party. Within the realm of French administrative law, the mere presence of either of these two criteria may be deemed adequate to classify a contract as administrative[63]. The administrative contract serves as a mechanism for institutions to offer public services, to safeguard public interests. As a result, the principles that govern contracts in private law are not applicable in this domain.

## The Concept and Characteristics of Private Contract

The legal system of Iran recognizes the principle of freedom of contracts, which is enshrined in Article 10 of the Civil Code. As per the provisions outlined in Article 10, it can be posited that a

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[59] Emami, Mohammad and Ostovar Sangari, Kourosh, Administrative Law, second volume, Tehran: Mizan, 2012: 40.

[60] Vaezi, 2014: 153 and 154.

[61] Vaezi, 2014: 154.

[62] Rezai Zadeh, 2008: 138.

[63] Brown, Lionel Neville, John Bell, and Jean-Michel Galabert. French administrative law. Oxford University Press, 1998: 193.

private contract constitutes a legally binding agreement that necessitates adherence to its terms and conditions by all parties involved. Regarding the information presented in the aforementioned article, private contracts entered into by individuals are deemed legally binding and enforceable, provided that they do not contravene any explicit legal provisions. Concerning the concept of express law, it must be noted that the lawmaker, as referred to in this particular article, is referring to obligatory laws. Mandatory laws, also referred to as enforceable laws, are characterized by their non-negotiable nature and inability to be contravened. The Civil Rights Amendment designates contracts that are governed by Article 10 of the Civil Law and adhere to the principle of contractual freedom as indefinite contracts. The lack of specificity in legislative provisions regarding the regulation and implementation of private agreements contributes to their inherent uncertainty. Stated differently, the lawmaker has delegated to the parties the responsibility of establishing and executing the terms and provisions of an agreement that conforms to the specifications outlined in Article 10. Hence, the involved parties in private contracts must establish the conditions governing their regulation and execution through mutual consensus.

**The Characteristics and Legitimacy of Private Contracts in Law**

The lawmaker endorses the accuracy and juridical legitimacy of contracts entered into by private parties. Conversely, it is imperative to acknowledge that agreements are underpinned by statutory provisions that encompass fundamental legal prerequisites. Article 190 of the Civil Code outlines the fundamental prerequisites for the legitimacy of any agreements entered into by individuals. Provided that they are formulated in compliance with the provisions of this article, any contractual arrangements between individuals are deemed legally binding. Stated differently, it can be posited that the failure to adhere to the stipulations outlined in this article results in the invalidity or ineffectiveness of the contract. A review of the conditions that have been specified in this article has been taken into account in the following section.

Within the realm of private law, the guiding principle is that of contractual freedom. This principle dictates that any individual, provided they possess the requisite legal capacity, is entitled to engage in business dealings with any other individual under any mutually agreeable terms. However, in the context of public law, the government exercises its authority to restrict the aforementioned freedom that individuals enjoy in their private relationships. The subject in question is currently lacking possession of the item in question. From a legal standpoint, the government is not at liberty to arbitrarily select a contractor, nor can it unilaterally dictate the contractual provisions. The prevalence of contracts within the administrative entities of the nation is extensive, and the distinction between administrative and non-administrative contracts is discernible across three domains: civil, commercial, and international. In the context of non-administrative government contracts, the government serves as one of the parties involved, yet the practical application of private contract principles is observed. It is worth mentioning that government contracts that are non-administrative, similar to private contracts, stem from the fundamental philosophical and legal concepts of 'authority of will' and 'contractual freedom'. Advocates of the independence theory of administrative contracts contend that the principles and regulations of public law should serve as the guiding criteria for the government's contractual relationships, rather than those of private law. As such, it can be observed that administrative government contracts adhere to distinct principles in comparison to non-

administrative government contracts. The aforementioned principles encompass various aspects of administrative contracts, including the principles of preference and authority. These principles pertain to the right of precedence of the government or municipality in terminating the contract, the right to unilaterally suspend the contract by the government or municipality, the right to expand the territory of influence of the contract to non-contractors, and the right to take over the work or the right of succession without resorting to legal proceedings. Additionally, the principle of the necessity of the presence of a public legal entity, the principle of the general purpose of administrative contracts, and the principle of compliance of public contracts with special rulings are also integral components of administrative contracts. The text outlines a set of principles that govern administrative contracts. These include the voluntary nature of such contracts, the need for cooperation among contractors in the provision of public services, the alignment of public power with administrative contracts, the principle of limited obligations, the legal jurisdiction of the highest administrative authority, the continuity and non-shutdown of public affairs, the principle of non-discrimination or equality in the use of public administration benefits, the principle of the legality of administrative contracts, the principle of maintaining the balance or the financial balance of the contract, the principle of the effect of material coercion or force majeure on the administrative contract, the principle of the personal fault of the parties, the principle of governing action, the principle of unforeseeable affairs (impervision) and the principle of the purpose of the contract.

## Conclusion

Privatization is considered to be a fundamental principle of a thriving economy and a key precursor to the economic advancement of developed nations across the world. Privatization refers to the act of transferring priorities to the market mechanism and aligning them with market-oriented principles. This process encompasses a broad range of activities, ranging from full privatization to the restructuring of state-owned enterprises. The term privatization was initially introduced in Webster's academic dictionary in 1983, where it was defined as the transfer of ownership or control from a public system to a private system. The term privatization was first documented in 1984. Hank purportedly generalized his tenure as a member of the economic advisory board for the President of the United States in 1980 and 1981[64]. Avaner et al. (1996) define privatization as a series of actions designed to expand the private sector's involvement or to implement shared methodologies in the public sector's growth, resulting in enhanced public sector efficiency.

As per the pronouncement of the lawmaker in diverse provisions of the Public Accounts Law and the Civil Service Management Law, a public institution denotes an autonomous entity that is instituted following the law and administers public matters. Hence, it can be argued that public service is not merely the fundamental philosophy of such establishments; rather, it can serve as a determining factor in situations where there is uncertainty regarding an institution's classification as either private or public. The wide-ranging authority of the administration to make unilateral decisions both on an individual and general level, coupled with its exclusive and

[64] Komijani, Akbar, Evaluation of Privatization Performance and Policy in Iran, Tehran: Ministry of Economy and Finance, 2004: 11.

exceptional privileges, such as the ability to terminate administrative contracts based on public services, serves as an indicator of administrative proficiency. Apart from the aforementioned instances, the potential postponement of the implementation of judicial verdicts that prohibit the seizure of state-owned assets and grant tax exemptions, coupled with the entitlements of power vested in the government and certain public entities, such as compulsory acquisition, evinces the impact of public services on the realm of fiscal prerogatives. Public services have demonstrated efficacy in the realm of civil liability as well.

Through an examination of the legal framework governing private contracts within Iran's service sector, it is evident that such contracts fall beyond the purview of prevailing international law, and are not subject to the provisions outlined in international treaties and memoranda of understanding. Private contracts in the service sector are legally bound by government laws and are subject to legal restrictions imposed as a result of the partial political process of privatization or the terms and conditions governing the conflict of interests between the private and public sectors. The utilization of legal powers and strategic planning by governments has been observed in the establishment of private-sector service contracts, with a clear focus on their respective interests. Hence, it can be inferred that the infringement of private contracts in Iran's service industry is influenced by the intervention and power of the government, and legal remedies are imperative to eradicate and mitigate the government's involvement in contract regulation.

Following the privatization of public services in Iran, there has been a notable shift in the legal framework governing these services. Despite a reduction in government tenure, there has been an increase in the scope of regulatory, supervisory, and oversight activities employed as alternative measures. The legal system in question involves government intervention through preferential rules, granting the administration extensive authority to make unilateral decisions both individually and generally. Additionally, the administration holds exclusive and extraordinary privileges, including the right to terminate administrative contracts based on public service as a criterion of administrative competence, and the right to suspend contracts due to administrative requirements. Furthermore, contracts may be stipulated with the condition of non-assignment to others and may be terminated due to agreement, law, or other legal damages. Despite these provisions, a transition is still necessary.

The complete implementation of the principle of private contract equality after the privatization procedure is imperative, without any exemptions. The principle of freedom of contract and private law mandates that both parties involved in private contracts within Iran's service sector, namely the private and public sectors, possess equal rights. However, the government upholds the principle of equality in dispensing public services. In certain regions of Iran, privatization has been observed to deviate from the principle of civil rights which stipulates that the parties to a contract must be treated equally, particularly in cases where public interests are at stake. Certain preferential rights persist, and the determination of public interests necessitates further verification and contemplation.

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