

Defining “Publicness” in Service Contracts – Adding Colour to the Grey

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ABSTRACT

The objective of this paper is to identify the circumstances under which general principles of public administrative law apply to services delivered by private entities under service contracts with public authorities. Relying on a functional approach to public administration, it builds on the notion that public administration in the substantive sense is the key to the applicability of general principles of administrative law in service contract situations. It seeks criteria usable to define a function as “public” and so determine the applicability of such principles in the relations between the user and a private body carrying out services under a service contract. Icelandic law is used as test case, though guidance is sought from other sources and theories. Certain factors are deduced from judgements of the Icelandic Supreme Court, opinions of the Parliamentary Ombudsman and from theories on private liability for human rights violations. Together these form the grounds of a general holistic three-phased test, the *initial points*, the *material points* and the *supporting points*, for the definition of “publicness”. Application of the test may help clarify the “grey zone” between public and private law.

Keywords: Public administrative law; service contacts; public administration in the substantive sense; public services; public law and private law.

Introduction

The Starting Point

This paper concerns the applicability of general principles of administrative law to the relations between the users of public services and private bodies, who generally are not subject to administrative law, when performing public functions under a service con-



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tract.¹ It is about the situation when law and service contracts do not deal with the status of users of services provided under service contracts. The paper builds on the notion that the type or character of public functions, i.e. the “publicness” of contracted activities, is key to the applicability of administrative law to functions performed under service contracts. It sets out criteria usable to define a function as “public” in order to determine whether a service provided under a service contract constitutes public administration in the substantive sense to which general principles of public administrative law apply.

The paper concerns the legal certainty of the users of public services. The underlying assumption is that the question of applicability of public administrative law is important because its rules increase the likelihood of fair and correct application of the substantive law in question. It builds on the notion that a strict public/private dichotomy for approaching such relations has significant shortcomings. It relies on the fact that service contracts and their legal basis do not, although it is recommended (for instance in *Parliamentary Ombudsman’s opinion of 24 June 2009 in Case No. 4904/2007*),² always address the applicability of public administrative law. This is based on an empirical examination of a selection of service contracts (Kristjánisdóttir 2019). The users of services provided under a service contract may be in a different position, in this respect from those users that receive such services from public authorities. In legal literature, such situations have been referred to as a “grey zone” between public and private law. The idea of this paper is that this can be clarified – that the “greyness” may be given some colour.

The discussion relies on a functional approach to public administration (for functional approach, see, for instance, Boe 2002, 119; Christensen 1997, 97; Olesen 2006, 405). Unlike the Administrative Procedure Act, the scope of which is limited to the activities of public authorities, unwritten general administrative principles apply to the activities of private entities, insofar as the contracted activities include public administration in the substantive sense. This assertion relies on an analysis of the interpretation, meaning and development of the general authorisation for concluding a service contract in Article 40 of the Public Financing Act, No. 123/2015 and its predecessor, Article 30 of the now repealed Government Financial Reporting Act (for the analysis, see Kristjánisdóttir 2019, 48–53, 2020, 20).

Public authorities exercise their power according to the “constitution and elsewhere in the law”.³ Public administration in the substantive sense thus refers to the execution of the law (statutes) in force at any given time. This includes both the performance of the subject matter of legislation, i.e. *actual administration*, and the power to take decisions on the rights and obligations of the citizens under the legislation in question, *administrative decisions*. The discussion in this paper does not cover the activities of a purely instrumental or practical nature. However, it is not limited to administrative decisions in the strictest sense. It recognises that some decisions of a legal character are made during the performance of public functions, in that they affect the rights and obligations of their users (further on this issue, see Madsen 2010, 225–263). Thus, it is acknowledged that certain decisions affect citizens in the same way as administrative decisions, or in a

similar way, entailing questions of legal certainty and the protection offered by the procedural and substantive rules of public administrative law (see, for instance, *Parliamentary Ombudsman's opinion of 27 November 2014 in Case No. 2805/1999*, ch VII).

Given that public administration in the substantive sense is key to the applicability of public administrative law, we have reached the next phase of the analysis: the search for criteria suited for identifying public functions to which the principles of public administrative law apply. However, functions that are performed under service contracts do “not come labelled as “public” or “private”. Nor is publicness (or privateness) like redness – a characteristic that can be observed by the senses (Cane 2011, 8).” Still some indicators may be detected. Certain factors are deduced from judgements of the Icelandic Supreme Court, opinions of the Parliamentary Ombudsman and from theories on private liability for human rights violations. Together these form the grounds of a general holistic three-phased test for the definition of “publicness”, for determining whether services provided by a private party under a service contract constitute public administration in the substantive sense.

The Stage

The attention paid to public/private functions and public/private law must not be misunderstood. It is not meant to “wake up a ghost” regarding the public-private dichotomy. In a sense, it may be said, that the idea of the public-private dichotomy “as a way of describing and explaining the organisation of social and political life” (Cane 2004, 13) is not abandoned but rather conceptualised. Instead of excluding activities of a private party completely from the scope of public administrative law, the public or private character of an activity becomes a platform for determining whether, under a functional approach, contracted activities are to be considered public functions within the scope of general principles of public administrative law. In other words, the difference between public and private functions makes the argument for, not against, the applicability of public administrative law. The determination of whether a function is private or public is not the goal in itself, but rather a tool for determining whether the performance of a function is subject to public administrative law.

The activities assigned to public authorities are of various kinds and belong to different categories or fields of law. In an attempt to determine “publicness”, one must be aware of the effect that ideologies, policies (Davies 2008, 245), and value-judgements (Cane 2011, 8) have on which functions are considered important enough to justify the involvement of public authorities and control in accordance with public law principles (Cane 2011, 9). Which distinctive features contribute to the “publicness” of certain functions thus depends on the societal structure and realities at a given time and place. The question of “publicness” may therefore be answered differently in different countries and at different times (for examples, see for instance, Cane 2011, 8). The characteristics of different societies thus make it difficult to define the characteristics of public functions, including public services. The idea that public services can be defined as activities

in the public interest (substance), for which public authorities (form) are responsible, is widely shared, however (Malaret Garcia 1998, 57),⁴ at least in countries that more or less share ideas regarding the relations between the state and society.

It should be noted, that the implementation of a “public function” test has been perceived as difficult, the likelihood of successfully demonstrating that any task is the exclusive and traditional responsibility of government being slim (Donnelly 2007, 284). It has also been argued that analysis of the “publicness” of functions may be inconclusive and not take us very far. For courts to apply such a test, they would have to make policy decisions as to what is public and what is not (Davies 2008, 245). The effectiveness of seeking the “inner character” of functions has also been questioned and it has been argued that such speculation may only lead to “conceptual jurisprudence” or “metaphysical irrationality” (Boe 2002, 121).⁵ Pierre Schlag makes notable points in this respect, in his article “A brief survey of deconstruction”, in which the deconstruction and reconstruction mode is described as “norm-selection and norm-justification” (Schlag 2005, 743). He claims that “most legal academics who thought at all about deconstruction received it in such a way as to leave their own normative and political commitments intact – indeed unquestioned” (Schlag 2005, 745). Accordingly, deconstruction tended to stop “precisely at the point where the deconstruction had reconceptualised the field so as to enable the advocacy of a preferred political agenda” (Schlag 2005, 751). One may agree that deconstructing a phenomenon to its core may depend on one’s view on what the “core” is and its reconstruction on where one sees fit to go, and that “normative legal thought may be difficult to do” (Schlag 2005, 751). The question of this paper which infers that certain functions are of a public character, in that they are somehow integral or essential to the achievement of a governmental objective and must be identified, may be susceptible to this view. So may the current criteria of public administration. The underlying normativity of the question and the difficulties involved are acknowledged. Nevertheless, responding to society and law in states that have public services on their legal agenda also carries with it a degree of objectivity. Taking away considerations and legal principles that do not fit to the relationship between provider and user of public services in service contract situations and replacing them with legally relevant criteria does not entail an unlimited normative process. It relies heavily on a recognised societal structure.

The identification of the circumstances under which public administrative law applies to services delivered by private entities under service contracts has value in and of itself. However, it must be recognised that the public law approach is not the only way to examine the legal status of the users in their relations with private providers of public services. Other means, contract law (see, for instance, Mak 2007), consumer law (see, for instance, Rickett & Telfer 2003), or other legislation may apply and provide comparable (or alternate) protection for the users of public services. It is not however, the purpose of this paper to compare such rules to public administrative rules, nor to examine whether or how they provide sufficient and/or comparable protection for the recipients of services provided under a particular service contract. This is material for a different study.

The Approach

The study adopts a position on the type of approach that should be applied in defining an activity as public. It concludes that a *holistic approach* should be adopted. A “single criterion approach” is not usable because none of the detected criteria, together with the statutory requirement, is sufficient to define a particular activity as public. A *checklist approach*, according to which the fulfilment of several criteria defines “publicness”, may also be too limited. A *holistic approach*, on the other hand, is flexible enough to consider the relevant criteria and perform an evaluation of the extent to which they apply and the value of each criterion, independently and in relation to other suitable criteria. The discussion is limited to activities taking place because of an actual transfer of authority by contract. Activities that the public authority needs for its own operations are excluded. It also excludes the execution of tasks undertaken by a private party on its own initiative (not involving transfer of authority).

1. Defining “publicness”

1.1 The Existence of a Service Contract as criterion

A service contract involves a delegation of statutory activities. Under the rules of delegation, a delegate undertakes the government’s role vis-à-vis the citizens – with the same obligations and authorisations as the delegating authority (Hreinsson 2013, 218). In other words, it entails a transfer of power from one party to another. Accordingly, a private party that carries out legally delegated activities, in its relations with individuals, acts in the same capacity as a public authority and is subject to the same requirements and controls as it would be had the delegating authority been the actor. Thus, a valid delegation includes both the transferred powers and the applicable restraints. (See further, Kristjánsdóttir 2019, 27–28). In the context of public administrative law, this would mean that when a valid delegation is in place, all restrictions are attached – including those resulting from public administrative law. In this light, one might presume that the existence of a valid service contract could serve as a kind of a *short cut* to a conclusion as regards the “publicness” of the contracted activity; this condition being fulfilled would suffice to define the service as public.

An approach, which may be referred to as an *assumption/rebuttal* approach, set forth in relation to reliability for compliance with human rights, has relevance to the *short cut* question above: On the assumption that no usable test exists, direct reliability is assumed, unless there is a link to the authority’s own operations (Davies 2008, 246). Applied to administrative law and service contracts: The first step would be to assume applicability of administrative law. As a second step, this assumption would be rebuttable in situations where the contractor’s role is to provide the authority in question with the elements it needs to perform its own tasks and obligations (Davies 2008). Under this approach, the applicability of administrative law could be claimed, as regards all activities subject to a service contract that are not performed for the public authority’s own operations. But, – applicability of general principles of administrative law in service contacts situations

depends on whether the contracted services in question constitute public administration in the substantive sense. The determination of the “publicness” of the service in question still remains. At this point, this criterion, the existence of a contract, is an indication, but cannot alone suffice as basis for the applicability of the procedural and substantive rules of public administrative law in service contract situations. However, together with other criteria it may contribute to the definition of publicness.

A related question is whether the classification of service contracts as *administrative contracts* (Hreinsson 2005, 193–196), as opposed to private-law contracts made by public authorities, provides some guidance as regards the question of “publicness” of contracted activities. While certain rules of public administrative law generally apply to all contracts concluded by public authorities (Hreinsson 2005, 196), including those that are based on private law,⁶ administrative contracts have been referred to as contracts to which more public laws apply than those that apply to all contracts concluded by public authorities (Hreinsson 2005, 196; see also Guðmundsson 1987). All contracts concluded by public authorities are, in other words, subject to certain public rules; administrative contracts are subject to these rules and some additional ones as well. Interestingly, qualifying as an administrative contract seems to have contributed to the conclusion of the Supreme Court of Iceland as regards the applicability of public administrative law to a contract situation (Hreinsson 2005, 197).⁷ The Court ruled that relations between contracting parties under the contract were subject to the Administrative Procedure Act.⁸ The question is whether its example may be transferred to relations between the performer and the user of contracted services.

An unconditional answer to this question in the affirmative would be too broad. Public rules applicable to an administrative contract may concern substantive functions and/or they may be essentially formal. Rules on the duration of a service contract and on the procedures for its conclusion are examples of the latter kind. Such rules do not address the “publicness” of the substantive activities in question. Principles of public administrative law applies to public functions only. Although more public rules may apply to an administrative service contract than those that apply to all contracts (private and administrative) made by public authorities, qualifying as an administrative contract does not provide much additional aid in the search of a criterion for identifying public functions.

1.2 Cases - Courts and Parliamentary Ombudsman

The purpose of the following examination is to see whether and how several Supreme Court judgements and opinions of the Parliamentary Ombudsman provide some guidance as regards the definition of “publicness”. Although they do not all concern service contract situations, they do address the question of “publicness” in one way or another.

Three of the cases examined concern a private company established by law for certain purposes. Supreme Court Case No. 19/2008 (Vesturbyggð) concerns the decisions of a private company, established by a municipality by law. Its role was to perform some of the municipality’s statutory functions. An adequate legal authorisation being in place, and as the municipality had chosen this option instead of having them performed by

its own employees, the Court stated the applicability of public administration law to decisions concerning the rights and obligations of individuals as regards the activities entrusted to the company in question (*Supreme Court Judgement 22 January 2008 in Case No. 19/2008*, ch II, para 3).

The same criteria are stated in Supreme Court Case No. 822/2014 (Isavia), in which the Court decided that the Administrative Procedure Act applied to a private entity in the performance of activities within the scope of the legal authorisation in question (*Supreme Court Judgement 18 June 2015 in Case No. 822/2014*, ch 1, para 1 in fine). Having chosen to use the authorisation to entrust a private company with performing some of the public authorities' statutory functions instead of carrying them out themselves, seems to have been a determining factor for the Courts conclusion in these cases. Accordingly, these factors are placed in a "tool kit" of criteria for defining "publicness".

The Parliamentary ombudsman refers to the same points in Case No. 5544/2008 (Félagsbústaðir hf.). The City of Reykjavík had expressed and practised the view that decisions made by Félagsbústaðir, on the occasion of a violation of leasing contracts under the Social Services Act, No. 49/1991, and the Housing Act, No. 44/1988, were of a private-law nature and thus not subject to the rules of public administrative law. In a letter, the ombudsman inquired whether the relevant legal provisions, including the one allowing for the establishment of limited companies to manage the leasing of housing in municipal ownership, could be viewed as a basis for limiting, or even repealing, the legal protection granted by public administrative law, otherwise enjoyed by lessees of social housing in their relations with the municipality (*Parliamentary Ombudsman's letter (inquiry) of 31 December 2008 in Case No. 5544/2008*, ch V, para 2). In his later concluding opinion, the ombudsman referred to the above conclusions of the Supreme Court. Having, and exercising, the choice given by law to entrust a private entity with the performance of activities constituting public functions, the private entity was subject to the written and unwritten rules of administrative law. Article 101 of the Local Government Act, No. 138/2011, which prescribes the applicability of the general rules of public administrative law to private parties when they perform services based on a service contract, supported this (*Parliamentary Ombudsman's opinion of 13 June 2016 in Case 5544/2008*, ch III.5.1, paras 6-8). In the ombudsman's opinion, performance by a private party did not change the public nature of the tasks in question as part of public administration of state and municipalities (*Parliamentary Ombudsman's opinion of 13 June 2016 in Case 5544/2008*, ch III.5.1, para 11).

In his examination of the "publicness" of the assignments delegated to Félagsbústaðir, the ombudsman pointed out the municipalities' obligations under the Social Services Act, No. 40/1991, to provide statutory services and assistance to persons and to ensure their ability to provide for themselves and their families (*Parliamentary Ombudsman's opinion of 13 June 2016 in Case 5544/2008*, ch III.3, para 2). Its provisions furthermore embodied the legislative implementation of constitutional and conventional rights.⁹ The fact that the statutory functions in question constituted public services and

enjoyed protection by the Icelandic Constitution and international and European conventions, seems to have played a role in assessing their “publicness”. On this basis, human rights, legal certainty, public services and the issue of choice can be regarded as factors indicative of public functions and thus contribute to criteria that can be used to identify statutory activities as public.

The issue of choice regarding the way in which a service is operated also appears in the Parliamentary Ombudsman’s Case No. 2904/2007 (Ferry). The ombudsman also noted that operation enjoyed public funding and that the delegation involved important public interests as well as the interests of the users of the delegated services (*Parliamentary Ombudsman’s opinion of 24 June 2009 in Case No. 4904/2007, ch IV.6 para 4*).

In the combined Cases No. 4552/2005, 4593/2005, 4888/2006 and 5044/2007 (Affairs of the elderly), delegation of activities concerning the affairs of the elderly to private parties gave rise to questions regarding the legal certainty of the users of the delegated activities and applicability of administrative law (See further *Parliamentary Ombudsman’s opinion of 10. June 2008 in cases No. 4552/2005, 4593/2005, 4888/2006 and 5044/2007, ch III, para 13*). The case does not analyse the degree to which the affairs of the elderly constituted public administration in the substantive sense (*Parliamentary Ombudsman’s opinion of 10. June 2008 in cases No. 4552/2005, 4593/2005, 4888/2006 and 5044/2007, ch III paras 4 and 5*) or provide definite criteria for the “publicness” of such activities. However, some indicators to that effect may be read into the ombudsman’s considerations; reference was made to the services in question being statutory activities and their being constitutional rights. That they were to a considerable extent publicly funded also played a role – in addition to which they were included in the national budget.

Some detecting factors may be inferred from the Parliamentary Ombudsman’s cases concerning the authorisation to charge fees. Case No. 5002/2007 (Hospital hotel) mainly concerned whether legal authorisation was required for charging patients for accommodation at a hospital hotel. As the accommodation was directly and integrally connected to statutory public health services, and related to a constitutional right (to health), the ombudsman concluded that legal authorisation was required for charging patients for it. The ombudsman makes the same point in the joined cases No. 4650/2006 and 4729/2006 (Music school). A specific legal authorisation was required for students being charged for their for music-school studies as such studies constituted part of their primary school studies and as such had status as a constitutional right to education and a right subject to international conventions (*Parliamentary Ombudsman’s opinion of 3 April 2007 in Cases No. 4650/2006 and No. 4729/2006*).

Since the authorisation to charge fees for public services depends on the activity in question not being included in the services as prescribed by law, it may be worth pondering, whether “publicness” in the sense of public administrative law may assumed when service contracts cover activities, which are to be provided without cost, unless fees are specifically authorised by law.

Besides concerning statutory activities and the existence of a service contract, most

of the above cases handled by the Supreme Court and the Parliamentary Ombudsman refer to the activities in question being assigned to public authorities because of the public interests involved. They also refer to an entity's being publicly funded and to the legal certainty of third parties. Some also make the point of the public authorities in question having the choice of transferring their statutory powers to other entities or otherwise performing the functions themselves. When this is done by means of a service contract, the contracting party takes the place of the public authority with respect to the contracted activities. References to the statutory activities constituting human rights are also prominent.¹⁰ This last point implies that activities that constitute constitutional rights and rights that are subject to the protection of international and European conventions are public functions.

However, it should be kept in mind that not all legal provisions that prescribe citizen's entitlements involve constitutional rights. A situation may require an examination as to whether a statutory right or entitlement of individuals constitutes a human rights or public interests in a wider context. For example, do pension rights ensured by the pension insurance system,¹¹ constitute rights under Article 76 of the Icelandic Constitution to assistance in case of illness, disability, old age employment or comparable circumstances? This right is ensured by a system for social security. Although the two systems are related, the social system is the system that fulfils the requirement of Article 76 (Helgadóttir 2013, 201). Despite being obligatory, the pension insurance system does not change this (Helgadóttir 2013, 201). Accordingly, decisions taken by contractual pension funds on the rights and obligations of their members do not concern constitutional rights (*Parliamentary Ombudsman's opinion of 14 February 2003 in Case No. 3715/2003*).¹² This example does not disprove the "rights criterion" as a means of determining public functions; what it reveals is that not all legal provisions that prescribe citizens' entitlements involve constitutional rights.

The value of and how these points relate to each other is not further explained in the cases examined. Some are referred to more frequently than others are; this seems to depend on the situation in each individual case. They are thus not set forth in a *checklist* manner.

1.3 Public administration in the formal sense

It is noteworthy, that the above criteria partly coincide with the tentatively established criteria for determining the legal status of an entity as a public authority in Icelandic law (Hreinsson 2013, 95–105). These include; whether the entity in question it is established by or based on law, funded by public money, performs public administration, is governed by rules of a public-law nature, is subject to the supervision or involvement of public authorities in daily operations and in the appointment its of board members (*Parliamentary Ombudsman's opinion of 29 February 2000 in Case No. 2830/1999*). (See also, for instance, *Parliamentary Ombudsman's opinion of 13 February 1997 in Case No. 1807/1996 and of 12 June 1996 in Case No. 1508/1995*; Hreinsson 2013, 118–124; Gammeltoft-Hansen 2002, 84; Christensen 1997, 86). These points may, or may not, all point in the same di-

rection.¹³ The conclusion, with respect to the identity of a particular entity, depends on a holistic evaluation on their basis.

The same points appear both as factors of criteria for public functions and public authorities. Interestingly, public function is one of the criteria used for determining whether an entity is to be considered a public authority¹⁴ and vice-versa (*Parliamentary Ombudsman’s letter of 22 December 2000 in Case 3107/2000*).¹⁵ In the light of the direct link between activities in the public interest and public responsibility upon which the theory of public services is based, this should not come as a surprise. In this context one must, however, make sure that the “publicness” of the function is not written off on basis of criteria used for identifying public authorities that have no relevance to the actual functions in question. In other words, a functional approach may not be replaced by a purely structural approach. Accordingly, these criteria does not, without further notice, suffice to define a particular activity as public, but may be added to other criteria that give indications as to the “publicness” of services provided by private entities on the basis of a service contract.

1.4 Conditions for Private Liability for Human Rights Violations as Criteria

1.4.1 Introduction

The above shows that fundamental rights, as stated in constitutions and international conventions have elements usable for the definition of public administration in the substantive sense. Here, fundamental rights will be addressed in a slightly different manner. In human-rights discourse, when private parties replace the state or municipalities in relations with the citizens, concerns have been raised as regards whether, and if so, then under what conditions, the former are liable for human rights violations in the performance of delegated activities. The task here is to examine whether conditions for such liability provide guidance as to the evaluation of the “publicness” of services delivered under service contracts. Various arguments support such an approach.

Both public administration and human rights laws are traditionally discussed in the context of the protection of the individual against the state. They overlap and have various points in common. The legality principle, for example, is to be strictly construed in cases where intervention in human rights is involved (*Skýrsla Umboðsmanns Alþingis fyrir árið 2006 2007*, 24) and the interpretation of administrative rules must take account of constitutional provisions and international conventions protecting human rights (*Hreinsson 2013*, 78). Both fields also respond to situations that involve delegation of power from one party to another by subjecting private bodies to the same limitations, as would a public authority if the delegation had not taken place.¹⁶

The actual protection provided by law is yet another common point. The protection of human rights not only depends on content of the provisions (the substance of protection) but also their reach. A failure to enforce human rights protection against private entities that have been delegated governmental powers may undermine such protection (*Donnelly 2007*, 231). This argument may be projected onto public administrative law. It is the objective of public administrative law to ensure the proper implementation of

law. The rules on investigation, the right to be heard and the right to information, for instance, all contribute to the disclosure of all information needed for the conclusion of a case. If private parties are not subject to these and other rules of public administrative law, their objective in this respect may be lost. Furthermore, just as a failure to hold private delegates to human rights standards may result in inequality for citizens (Donnelly 2007, 231), users of public services may be differently situated with respect to the protection of public administrative law, depending on the identity of the provider of such services. In neither field, those affected by the delegation of activities involving human rights have a say in the making of the contract and cannot demand protection clauses (Donnelly 2007, 232).

Various tests have been developed, in different jurisdictions, for determining when constitutional standards are applicable to private parties in a human-rights context. Although the aims are similar or the same, the tests place emphasis on different issues.¹⁷ It is not the intention here to account for all such criteria or tests, or to provide a comprehensive analysis of the relevant comments and criticism. However, a few examples may provide insight into the conditions for non-public bodies' being liable towards individual for human-rights infringements – and how public functions in the context of public administration law may be identified.

1.4.2 The State Action Doctrine

The wide discussion that has taken place on the US State Action doctrine makes it a convenient example of tests used for private accountability and of criticism thereof. Various criteria have been applied in state action analysis over the years (Metzger 2003).¹⁸ Traditionally, the establishment of state action depends, on the one hand, on the public nature of an activity, referred to as the “public function theory”. The “nexus theory”, on the other hand, relies on the closeness of the cooperation between a private and a public entity.¹⁹ Under the latter, government involvement with the private activity in question is so substantial that distinguishing between the two is inappropriate (Barak-Erez 1994, 1174). Under public function theory, activities that a private entity takes upon itself to carry out are considered public in nature when they concern functions that public authorities are expected to perform or for which they are responsible (Barak-Erez 1994, 1175). The nature of the activity involved is the reason for public involvement; duality of form and substance is assumed. In this respect, the state action doctrine coincides with the ideas behind public services.

State action tests have been subject to various criticisms. They have been criticised for being too narrow and for not conforming to new realities (Barak-Erez 1994, 1186). Courts have been accused of “reluctance to find state action where ordinary people would see it” (Kennedy 2001, 21). Various adjustments have been suggested which are meant to face the “new realities of an age of privatization” (Barak-Erez 1994, 1171). For example, new forms of activity in the public sphere should be recognised (Barak-Erez 1994, 1188) the nexus requirement should be considered fulfilled when a private entity performs a public function for the state (Barak-Erez 1994, 1190) and more attention

should be given to situations where private entities act on the behalf of public authorities by delegation (Metzger 2003, 1370). Updated understandings of state responsibilities provide some extension to the public function theory by including for instance, welfare, health and education issues (Barak-Erez 1994, 1190). Still, state passivity is required. A private party must step into a situation without any intervention by a public body. Accordingly, service contract situations, which by definition involve participation of public authorities by the act of transfer, seem to be excluded.

Although it is meant to respond to increased privatisation of the public sector, the state action doctrine has been accused of not being sufficiently alert to contracts as a tool of governance – the tool most likely to involve situations where private entities wield the powers of public authorities (Metzger 2003, 1370, 1377). On its face, adjusting the nexus theory to delegation seems to assume inclusion of service contract situations. Still, it omits activities that are operated simultaneously on both levels. Conditions are not fulfilled if public authorities provide an alternative (Barak-Erez 1994, 1188). The private body must act as a substitute for a public one (See further Barak-Erez 1994, ch V).

Another modification to the state action theory concentrates on delegations that “create an agency relationship between private entities and the government” and stresses the need to “rethink state action in private delegation terms” (Metzger 2003, 1376). This includes contract situations. However, it does not assume direct constitutional constraints on private parties in such situations. This may occur only in exceptional situations (Metzger 2003, 1487). Although delegation is the centre point of this approach, its primary concern is, whether it is adequately structured to preserve constitutional accountability (Metzger 2003, 1486). This approach asks whether the private entity acting on the government’s behalf is provided with mechanisms to meet constitutional concerns (Metzger 2003, 1456). The validity of this argument (that the private party should be given the means to enable it to meet constitutional concerns) is not questioned here. It acknowledges that a contract may involve delegation of governmental power and provides a solution that, if followed, is likely to enhance protection of the users of public services. Therefore, it may to some degree, counterbalance the alleged narrow implementation of the state action doctrine. However, this approach does not contribute much to the definition of public function. It calls attention to the state’s responsibility to react to situations where the execution of public functions is delegated to private parties. In this respect, this approach resembles the various recommendations that have been made by the Parliamentary Ombudsman about service contract situations, i.e. that the status of users of public services should be defined in law or contract (see, for instance, *Parliamentary Ombudsman’s opinion of 24 June 2009 in Case No. 4904/2007*; *Parliamentary Ombudsman’s opinion of 13 June 2016 in Case 5544/2008*, regarding the responsibilities of public authorities in this respect). However, although it assumes certain activities to be of public nature, it does not explain the basis of their “publicness”.

A flexible approach, on the other hand, seems to establish a workable state action doctrine (Kennedy 2001, ch IV). It requires a flexible application in which factors such as the nature and extent of government funding and government control play an im-

portant role. The extent to which a government has authorised private exercise of government powers is also an important factor; this requires a functional analysis. If the government is actually responsible for an activity, funds it, allows someone else to act on its behalf and controls its performance, an association with the government should be acknowledged (Kennedy 2001, 26). Under this approach and entity does not have to be identified as a state actor for state action to apply. Neither would state action be excluded solely because both public and private schools operated the activity in question. The conclusion would depend on an analysis (Kennedy 2001, 23), based on the extent of variety of criteria, including funding, control, agency and function (see further Kennedy 2001, 24–27).

The US state action doctrine may not be the most suitable model for defining “publicness” in the Nordic context. It may exclude activities that would be considered public functions in Iceland and countries that share the same legal tradition. However, it does address the same questions. It is reiterated that this doctrine, with and without the above modifications, is but one example of a test upon which the applicability of constitutional norms to private parties may be established. Models of other jurisdictions may also provide interesting information in this respect. However, it is not the purpose of this study to explore the terms and framework of the issue of constitutional accountability of non-state actors or to perform a comparative study of it. The purpose of bringing in the state action doctrine as an example is that it brings out some of the ideological differences and complexities involved in applying constitutional norms to private parties. The main point here is to identify usable criteria of “publicness”. Using the US state action doctrine, modified by the *flexible approach* may produce some indicators to that effect.

1.5 The “Starting Points” Test

In a study on delegation of governmental power to private parties, Catherine Donnelly has set forth an example of a method for testing for private liability for human rights violations (Donnelly 2007, 283–289). This method, which is referred to as the “starting points” test, is based on a comparative study of three jurisdictions: those of the US, the EU and the UK. It focuses on function and does not require state passivity. It addresses delegation without stressing a particular structure and it does not exclude activities that are performed by both public and private bodies. The “starting points” test involves four factors: public funding, exercise of statutory power, a private party’s taking the place of a public authority and the activity in question constituting a public service.

Referring to the connection between human rights and public administrative law, this test may be of use in determining “publicness” in the sense of public administrative law. The first point, public funding, examines the extent to which the government funds the provision of the services in question. This fits very well into a service contract situation. A service contract, by definition, concerns services that are not only to be provided, but also paid for by law. The concept thus actually assumes that providers of such services will receive payment for their provision from the authority to which the finances have

been allocated by law.

The second point takes notice of the extent to which the exercise of statutory power is involved. Here we are talking about a private party being given power, by contract, to perform statutory (including constitutional) services. The advantage of this criterion is that it replaces politics with facts. It is not about whether a particular service should be provided, but the fact that it actually is, by law, to be provided and the responsible authority is given the power to do so. The delegation is the source of power for the private party's activities. The more power delegated, the more likely it is that the activity constitutes public function. If a private party is specifically given power to take administrative decisions, then public administrative law, in its strictest form, applies. If, on the other hand, the delegated power is insignificant, it is less likely that it involves exercise of statutory power.

A service contract is about one party taking the place of another. The contract is the means by which the transfer from a public to a private party takes place. Service contracts therefore fit nicely to the third criterion, the extent to which the private party takes the place of public authorities.

The fourth point concerns public services, i.e. services that are in the public interest and for which public authorities are responsible by law or under the Constitution. If public services are provided by a private party under a service contract, then its provision should be subject to the same statutory and constitutional constraints (Donnelly, 2007, 286).

This *starting points* test is claimed to have the advantage of relieving “publicness” of ideological conflicts (Donnelly 2007, 287). Whether “publicness” tests can be free from ideologies, may be contestable. Must this not depend on policy decisions about what is, and what is not, public? (Davies 2008, 245). Does determining whether certain functions are publicly funded, for instance, in itself not involve a policy decision? The determination simply relies on an assessment of the degree to which their performance relies on public funding; the decision to use public funds for their performance, on the other hand, is a policy decision. In this respect, the criticism above has a point. The point of departure here is the fact that it has already been decided that a particular activity is to be publicly funded. Its “publicness” under this criterion then depends on the extent to which its performance is paid for by public funds.

What the *starting points* test does is that it identifies factors that may be seen as indicators of “publicness”. However, establishing the presence of these factors does not suffice to define an activity as public. The extent of each factor and its relation to the other ones must also be assessed. In this respect, this test is similar to the *flexible* modification of the state action doctrine. It is acknowledged that an evaluation of a particular activity may or may not provide exact conclusions. However, as evaluation with respect to the circumstances of each case is normally inherent in the application of public administrative law in general, it should as such not cause unfamiliar strains. It may be true that the elements in the “starting points” test are not devoid of ideology; in the light of the political and ideological background of public services it is not fair to expect them

to be. Nevertheless, a *holistic approach*, which acknowledges that certain criteria may be regarded as signs of “publicness” and requires an evaluation to take place with respect to the contracted activities in each given case, provides a usable test for the formulation of criteria for “publicness” to which public administrative law applies.

1.6 Evolution of Private Law

Although the issue of “publicness” is approached from the perspective of public law, it should be noted that private law may be touched by values normally associated with public law and vice versa. Certain types of functions in society are of such importance that they have become a matter not only of public law, but of private law as well. Some functions have been claimed to be “so fundamental that they should be guaranteed on all levels of public as well as private law” (Mak 2007, 59). Rights have been generalised into general values, “which are radiating into non-state areas” and “re-specified by adapting them into the particularities of private law” (Teubner 2012, 132). On this basis, the content and interpretation of contract law provisions have been influenced by concepts generally related to public law. This development has been explained in various terms: as public law having effect on private law; as private law borrowing from public law; as a mixture of public and private law; as an interplay between them, or by other phrases catching the same meaning.

The idea here is that an identification of the type of functions that affect the content of private law may provide some guidance as to the “publicness” of particular services in service contract situations (but not to set forth a theory on private law after privatisation). Fundamental rights, protected by national constitutions and international human rights treaties, protect individuals against the state. A study by Chantal Mak of fundamental rights and European contract law concluded that fundamental values of the constitutional order affected the content of private law. In other words, fundamental-rights arguments had a place in ensuring that private law and its interpretation complied with constitutional traditions. Fundamental rights thus bring new solutions into European private law and play an important role in bridging public and private law (Mak 2007, 59). In the context of the present study, the status of fundamental rights may be viewed as a criterion of “publicness”. Such rights are, so to speak, as public as they get. The conclusion is that public services that involve human/fundamental rights not only provide a criterion of “publicness” but also one that has added value among other criteria in the evaluation of particular services under service contracts.

2. Conclusions

The paper is about the situation when law and service contracts do not deal with the status of users of services provided based under service contracts. The assignment was to identify criteria by which “publicness” may be determined. When services are to be provided by law and when a contract has been concluded under special legislation or the general authorisation of Article 40 of the Public Finances Act, this can be taken as an indication of “publicness”. Neither factor, however, suffices to define a function as

public, but both may be regarded as a basis for the relevance of the question of “publicness”. The cases examined in 2.2 above, provided some guidance on elements of “publicness” that are usable in such situations. Although the cases were not systematically subjected to a specific test, they contained more or less the same factors as evidence of “publicness”. However, because of the lack of a systematic test, they did not produce a definite checklist, in the sense that if it applies, then a function should be regarded as public. The points included functions in the public interest, human rights and legal certainty. In this context, constituting human rights is a criterion in itself and, it is argued, a rather clear sign of “publicness”. The public interest point, in a wider sense, may also have independent value in a “publicness” assessment, not least in combination with legal certainty. Legal certainty being one of the main objectives of the Administrative Procedure Act, and an important viewpoint in the interpretation of public administrative law, it can hardly be ignored in a search for factors that may contribute to a formulation of criteria of “publicness”. The public interests and human rights criteria coincide to some extent. Icelandic laws prescribe various functions in the public interest for which public authorities are responsible and to which the citizens are entitled. Some, but not all, also have constitutional status and enjoy the protection of international human-rights conventions. Thus, not all services of public interest involve human rights.

Human rights are also relevant in another context. Methodologies of holding private parties liable for human-rights violations were consulted as part of the attempt to formulate “a new definition of the public sphere” (Donnelly 2007, 229). The *starting points* approach, explained in 2.5, stems from the view that the transfer of certain functions from a governmental actor to a private one should not negatively affect human-rights protection (Donnelly 2007, 288).²⁰ Such rights should remain intact when the activities can be defined as public, regardless of the legal nature of the actor. The idea of upholding the constraints of public administrative law on private parties in service contract situations relies on the same kind of arguments (Donnelly 2007, 291, 327). In terms of content, the *points from the cases* and the *starting points* reveal the same criteria. They may be differently worded, but they have essentially the same meaning. Both methods refer to the issue of *public funding*. The point about a private party *taking the place of* a public authority also occurs in both instances. Reference made in the case analysis to public authorities having the choice of entrusting a private party with the performance of their functions or else performing them themselves meets this understanding. As pointed out by Donnelly, taking the place of government is exactly what private delegates do (Donnelly 2007, 286). They perform functions that the delegator transfers to them by the contract.²¹ State passivity is not required and a public and a private body may carry out an activity at the same time. This point has close connection to the next point, the *statutory power* being delegated. In conformity with the general rules of delegation, which make delegates subject to the same obligations and authorisations as the delegators, the power being delegated cannot exceed the power of the delegating authority. However, the delegation concerns specific parts of statutory activities and different degrees of power. Therefore, the power being delegated in different situations may give different

answers to the “publicness” question. As for the last point of the *starting points* test, public services, i.e. activities that public authorities are responsible for performing are, due to their substance, closely related to general interests, as was frequently referred to in the case analysis.

All the above points may contribute to criteria of “publicness”. Together, they form a “*publicness*” test. They should not, however, be regarded as a checklist. For that, the criteria provided by the case analysis are too indefinite as regards their application, independent value and significance in relation to each other. They also present an accumulation from different cases. The “starting points” test also pre-supposes an evaluation of the extent to which each point applies. The “publicness” criteria are thus presented in the form of a holistic approach. Applicability and extent must be evaluated in each case. Not all criteria have to be fulfilled for a function to be defined as public function to which general rules of public administration apply. At this point, it is useful to sort them into three groups. The first group covers the extent of public funding, the extent to which a private alternative is entrusted with the performance of a statutory activity, the exercise of statutory power and public service. These points can be referred to as the “publicness *initial points*”. The factors in the second group, human rights, legal certainty and public interest in a broad sense are given specific weight and are, in a sense, included in the public service factor, although they also have individual value. These will be categorised as the “*material points*”. The third group, referred to as the “*supporting points*” include factors such as public control and supervision and the extent to which the functions in question are governed by public law. As holistic criteria, the value of each criterion may differ, however, depending on the circumstances in each case and the combination of the applicable criteria.

Regarding the colour metaphor in the title of this paper, it is maintained that the methods and criteria of “publicness” help to give the so-called “grey zone” between public and private law a more assertive colour, and thereby help identify this area as an independent area to which general administrative law applies. One way of applying the colour metaphor is to think of the colour grey as grey in the sense that it is neither black nor white but something in between. Applied to contracts, public functions provided by private bodies tend to be placed in the middle in what has been referred to as a grey zone between public and private – between black and white. Some situations may be seen as having a lighter tone towards pure white, on the one side, or darker, towards pure black, on the other – the public and the private sides. This application of the colour metaphor helps to understand the problem but not quite to solve it. We are still stuck with the grey and the uncertainties as regards the applicable legal rules. Because of the demarcation of this study, it does not, nor is it intended to lay the foundation for the broad conclusion that the grey represents a separate zone, an intermediate sector between public and private (See Freedland 1998, 2–5).²² It is limited to certain situations to which public administration law applies because of the ‘publicness’ of the services to which its application is connected. The colour metaphor is used to present this situation by picturing the grey area in a new colour, red for instance. Admittedly, this image forfeits the

fading and blackening description usable with the “grey” one. The “red”, on the other hand, captures the uniqueness of the situation. This uniqueness justifies applicability of general administrative law in service contract situations, where the provider is a private entity but the service in question is a public service. This is important because the rules of public administrative law are capable of enhancing fair and correct performance of public services. In other words, they have a role in the achievement of the objectives of the respective service. Accordingly, identification of public activities to which such rules apply results in greater legal certainty for the users of public services.

Notes

- 1 A service contract is contract between a public authority and a private entity under which the latter provides services to a third party and receives payment for doing so.
- 2 In this opinion the ombudsman remarks on the importance of law and contracts taking a stance on the relevance of public administrative law to contracted services. (See also Skýrsla Umboðsmanns Alþingis fyrir árið 2006, 2007 [Parliamentary Ombudsman’s Yearly Report for 2006]. For other recommendations of legal reform in this respect, see, for instance, Davies 2008).
- 3 “... samkvæmt stjórnarskrá þessari og öðrum landslögum” Article 2 of the Constitution of the Republic of Iceland, English translation as published on: <https://eng.forsaetisraduneyti.is/acts-of-law/>
- 4 It is pointed out that these are the underlying common denominators of public services in the Member States of the EU.
- 5 Referring to Alf Ross in “Tu-tu” Festskrift til Henri Ussing, København 1951, Om Ret og retfærdighed, 3rd ed. 206 ff. See also (Bogason 2013, 23), who claims that public functions cannot be defined by nature.
- 6 Contracts concerning purchases or leases would be a typical example of the former (see, for instance, *Supreme Court Judgement 22 January 2008 in Case No. 19/2008*; *Supreme Court Judgement 23 March 2000 in Case No. 407/1999*).
- 7 See also *Supreme Court Judgement 29 March 1999 in Case No. 318/1998*. The case concerned the cancellation of a contract on the operation of a home for children under the *Child Protection Act No 80/2012*.
- 8 The Court’s reference to the Administrative Procedure Act, may be questionable, considering the scope of the Act, i.e., whether an analogy from the Act’s rules or a reference to the general principles of public administration law as legal basis, had been more appropriate.
- 9 Article 76 of the Constitution (assistance in case of sickness, invalidity, infirmity due to old age, unemployment and similar circumstances) Article 71, (private- and home life), the International Convention on Economic, Social and Cultural Rights (first paragraph of Article 11) and the European Convention on Human Rights (Article 8). See further *Parliamentary Ombudsman’s opinion of 13 June 2016 in Case 5544/2008*, ch II.3, paras 3-5.
- 10 Similar points may be drawn from Danish legal practice and literature, see conclusions of (Madsen 2010, 154–155) The author notes another interesting point in this respect; whether the purpose of entrusting a private body with a certain activity was specifically to separate a particular function from a public authority’s other functions. If so, administrative rules are not applicable.
- 11 Act on Mandatory Pension Insurance and the Activities of Pension Funds, No. 129/1997.
- 12 The rights-criterion was not involved in this deliberation. This does not apply to the Government Employees’ Pension Fund, cf., for instance, the *Parliamentary Ombudsman’s opinion of 17 November 1999 in Case No. 2517/1998*.
- 13 On the one hand, see, for instance the case of the Academy of the Art (*Parliamentary Ombudsman’s opinion of 29 February 2000 in Case No. 2830/1999*). On the other, see *Parliamentary Ombudsman’s*

opinion of 20 September 2011 in Case No. 6327/2011, (Íslandsstofa, e. Promote Iceland).

- 14 In the Íslandsstofa case, for instance, the ombudsman referred to its administrative tasks for the state and municipalities.
- 15 The “non-publicness” of the activities of the Association of Icelandic Insurance Companies was argued based on some of the criteria used for the public or private identity of an entity.
- 16 See ch. 2.1 above. For a summary of important reasons for holding private delegates liable for human rights violations in (Donnelly 2007, 229–233, 229, 145–147)
- 17 See summary of tests that have been applied in the US, England and the EU in Donnelly (2007, 284). Some of these criteria, have in one form or the other, been mentioned above in various contexts.
- 18 For a summary of the “Current State Action Doctrine” see, for instance Kennedy (2001, 8–23).
- 19 For further discussion on the two central theories on the state action doctrine (public function and nexus theory) and their insufficiencies, see, for instance Barak-Erez (1994).
- 20 “The existence of a contractual relationship should not be too readily assumed to exclude human rights liability. Contract is no more and no less than a mechanism for transferring a function from a governmental to a private actor. In this era of contracting-out and privatisation, it is unacceptable not to account for this.”
- 21 It does not mean, however, that the contracting authority itself would otherwise carry out the activities.

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