

Good Governance as a Conceptual Framework to Address the Discussion of Public Private Distinction in Public Procurement ^{*)}

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Abstract

Legal developments happen in EU member states can be inspirations for other countries to conduct their legal amendments. The amendments can be meant broadly, but also narrowly, for instance in public procurement, an area that will be discussed further in this paper. Related to that, countries which have desire to develop their legal system may be in doubt in relation to which model that should be adopted: public law model as in France, private law model as in the United Kingdom (UK), or mix law model as in the Netherlands? To seek the answer, it is relevant to discuss on public private distinction matters. So that, this paper will elaborate three meanings of public private distinction, from the perspective of: (i) legal history, to what extend the state has been regulating the market; (ii) practical matters; and (iii) legal traditions. From the first perspective, it is found that contestation of powers between public and private law in relation to “state regulates market” has been happening from centuries ago, and there is no indication that the contestation will be ended soon. From the second perspective, no relevant matter is found. From the third perspective, it is found that each country in different legal traditions has its own mechanism to give protection on public and private interest (has certain mechanism for accountability). Each county also has embodied principle of good governance. Based on the findings above, this paper argues that, conceptually speaking, countries which have desire to develop their legal systems can adopt any approach considered suitably for them. It is because the point of adoption is not laid in the approach, but more on the principle of good governance.

Keywords: public private distinctions, public procurement, good governance

Introduction

Public procurement is simply defined as the government’s activity of purchasing goods and services which it needs to carry out its function.¹ To perform this activity, each government has a particular legal guidance; however, every country has its own characteristic.

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¹ Arrowsmith, S (ed.). 2010, p. 1

In the context of the European Union (EU) member states there are at least three approaches as follows.² *First*, countries that take the public law approach. This approach states that there is no separation between award decision of the contract and the contract itself. If conflicts arise, then the administrative court will become the forum of settlement, and public law will be applied. *Second*, countries that recognise public law, but unlike usual public law, the government is not regarded as holding a superior position, but it is the same as a contracting party in a commercial case. *Third*, countries that make a distinction between award decision and the contract. Conflicts that arise related to award decision should be submitted to the administrative court, and public law should be applied. In addition, conflicts that arise related to the contract should be submitted to a judicial (ordinary) court, and private law will be applied.

To clearly visualize the context, then it should be clarified that the first, second, and third approaches are represented by France, the UK, and the Netherlands, respectively. These different approaches can inspire other states for their developments in public procurement law.³ However, the countries may be in doubt in relation to which model that should be adopted: public, private, or mix law model?⁴ This paper will argue that a country should not be too focused on public private distinction, as the important thing is laid on the embodiment (and implementation) principle of good governance.

Before starting the discussion, it is worth clarifying the character of public procurement law, whether it is public law or private law. There are two perspectives. From a narrow perspective, since public procurement is regulated by a particular regulation then it can be simply considered as public law. However, as a contract between the government and the private parties is seen as the central element in PP procedure; then people may also categorize this as contract law, and therefore fall into private law. It is also possible that people combine those two points of view. Nonetheless, from broad perspective, scholars admit that the distinction between public and private are confusing, not only from philosophical and political point of view,⁵ but also from legal perspectives.⁶ This paper notices three perspectives when legal scholars use public-private distinctions, namely: from legal history, from practical character, and from legal family/legal tradition.

Public Private Law Distinctions from a Legal History Perspective

² OECD. 2000, p. 16

³ Indonesia for instance, this country amended its constitution in 9 November 2001, and one of the consequences is that it shifted Indonesia's legal system from Civil Continental legal tradition to Mix legal tradition. Nonetheless, this shifting is not easy to be implemented, as many people still consider that the development should merely refer to Civil legal tradition. See: Article 1 (3) of the Constitution of the Republic Indonesia in: <http://www.mpr.go.id/pages/produk-mpr/panduan-pemasyarakatan/bab-ii-uud-nri-tahun-1945/d-hasil-perubahan--naskah-asli-uud-1945-1>, last visited 22 April 2014. In addition, Rwanda also can be considered as a country that has a desire to shift its legal system from Continental to Mix legal tradition due to its accession to East Africa Community (EAC). See: Zigirinshuti, F. 2013, p. 28

⁴ This question is tightly related to conceptual discussion whether legal scholar should find best approach to regulate public procurement, or whether legal scholar should not find it, as the approach should be let divergence. In relation to that, this paper aims to participate in the discussion and supports the divergence approach.

⁵ d'Entreves, MP and Vogel, U. 2013, p. 1

⁶ d'Entreves, MP and Vogel, U. 2013, p. 1. See also Barnett, RE. 1986, p. 267

Based on a legal history perspective, it is found that public-private law distinction is associated to general societies when they determine to regulate or to de-regulate the economic activities of their citizen. The analysis can be seen as follows.

In medieval times, there was no public law. English law for instance, the King was held as the feudal lord and the people were considered as having a private relationship with him for cultivating the King's land.⁷ Later on, public law appeared, and made a categorisation in which it was called "public" land.⁸ After that, public law was developed and gained a dominant and influential position with the public.

Over a period of one hundred years, during the 19th century, orthodox judges and jurists wanted to sharply separate between law and politics. Private law came to be understood as a neutral system to facilitate voluntary transactions and vindicating injuries to private rights. In contrast, state regulation (public law) was considered dangerous and unnatural,⁹ and therefore private law was more developed.

This situation continued until the 1930s. The world learned from the great depression in the United States. In 1929 - 1933 economic recession hit the US, many scholars believe it was caused by the (US) government which placed too few (public) regulations to control the private activities; hence, the market was seen as liberal and weak.¹⁰ Not long after that, Roosevelt was chosen as a President. He implemented a policy which was called the "new deal" that enabled the government to step in for regulating private activities by creating restrictions, tariffs and subsidies. Pound regarded this social context as influencing the public private law relationship, as he wrote: "we (private lawyers) shall be living under a regime of the new public law and shall no longer be consociated."¹¹ Public law was then well recognized as a "law of subordination". Meaning, public law was seen as a primacy over private law; individual interest is under subordination of public interest.¹²

Interestingly, later on, there was a revivalism of the trend towards privatizations, deregulation, devolution, and contracting out of services to private providers. This private participation of the government was seen as powerful, and, according to Freeman, it eliminated the legitimacy of public law (particularly administrative law).¹³ In addition, he highlighted that the time had come for public law (administrative law) to grapple with private law. Another administrative law scholar, Aman, also endorsed the conclusion above. He regarded that the current trends on global administrative law referred to market approaches, structures and incentives in order to achieve the (regulatory) goals.¹⁴

Indeed, the revivalism of private law as above mentioned is balanced by another public law branch: constitutional laws and human rights laws. A lawyer regards that private contract is not immune from public law, particularly if the contract undermines the human rights aspect; therefore, the

⁷ Horwitz, MJ. 1982, p. 1421-1422

⁸ Horwitz, MJ. 1982, p. 1423

⁹ Horwitz, MJ. 1982, p. 1425-1426

¹⁰ US History, *Great Depression*, available from: <http://www.ushistory.org/us/48.asp>, last visited 16 October 2013

¹¹ Pound, R. 1939, p. 482

¹² Pound, R. 1939, p. 472

¹³ Freeman, J. 2000, p. 545-547

¹⁴ Aman Jr, A.C.1997, p. 90

contract can be brought to a human rights court.¹⁵ As protection of human rights is seen as a basic relationship between the individual and the state, and it falls under constitutional law issues, some legal scholars observe that private contracts can be brought to a constitutional court.¹⁶ Hence, in short, up to now, it can be seen the “contestation” between public law and private law.

Public Private Law Distinctions from a Practical Character Perspective

This part relies on Barnett’s explanation when he classified four senses of the public law-private law distinction based on a practical (functional) approach. The elaboration is as follows:¹⁷

First, the classification between public-private is based on the scope of the harm-impact from unwanted conditions. If an action causes public harm or violates the public standard of decency, then it may be regulated by public law. In contrast, damage of contract is considered as a private harm, and it falls within private law. However, on particular matters, theft for instance; even though it causes private harm, this action infringes on the public standard of good conduct. Hence, it may be sufficiently considered as “public” in the nature, and is regarded as a crime (public law).

Second, the classification between public and private law are based on who has the standing position to complain of violations from a particular action. In public law, the complaint is usually brought by government institutions; contrastingly, in private law, the complaint is brought by the individual (or their representatives) who was harmed.

Third, the classification between public-private is based on the scope of the subject to legal regulation. If the regulation is meant to rule the internal conduct of the government, and that defines the relationships or duties to private individuals, then it is categorized as public law. If the regulation defines the rights and obligations among private individuals (or groups); then it falls into private law.

Fourth, the classification between public-private is based on application and enforcement of regulation. If the application of the regulation is limited to public institution, then it falls in public law. In contrast, it falls into private law.

Public Private Law Distinctions from a Legal Tradition Perspective

Based on legal tradition, the contestation between public and private law can be seen from the differences of legal traditions of civil and common law. Civil law countries prefer to use more on public law while common law countries prefer to use private law. The terminology of legal tradition, by some scholars, is referred to as ‘legal families’.¹⁸ It should be noted that there are other legal families which are based on custom and religion; however, for this paper purpose, it will focus on civil and common law traditions.

¹⁵ Barkhuysen, T and van Emmerik, M. 2006, p. 43

¹⁶ Cherednychenko, O. 2004, p. 16. See also: Haq, H. 2011, p. 392-396

¹⁷ Barnett, R.E. 1986, p. 267-276

¹⁸ Orucu, E. 2008, p. 1. See also: Smits, JM. 2003, p. 553

Civil (public law) legal system was based on Roman law. One of the main references in civil law is the French law. Civil law has the characteristic that the substantive rules are laid down in national codifications, and by applying the statutory rules, it should, essentially, lead to a just result.¹⁹ Another characteristic of civil law is that it gives a lot of power to the government, but at the same time it also ties its hands, so the government can be a “good giant”.²⁰

The reason why civil law has those two characteristics can be seen from influence thinking of the philosopher and from French legal history. Civil law tradition is highly influenced by Rousseau. According to him, state should be acted upon based on general will,²¹ and to ensure the state performs it appropriately, it needs (public) law. The French view liberty and progressive reform by the presence of the state; therefore France is categorized as a “stateness” country.²² France creates strong legislature and limits judicial independence.²³ The legislature issues legislations to give power to the government for serving the general will; in relation to that, the judge examines the case based on those legislations.

The *Common (private law) legal system* did not develop from Roman law. It is not characterized by creating legal regulation. It is developed by case by case adjudication, consequently, it is less systematic.²⁴ Common law tradition usually refers to English law.

The English legal system exercises heavily on private law. English law regards liberty as the absence of the government.²⁵ Therefore, the government does not have any privilege while conducting administrative duties, as the government is considered as equal as the ordinary man. In other words, there is no hierarchy in the relationship between the government and the citizen. This idea has been embodied in the English system, and it looks remain so. Somehow, it is highly influenced by Dicey, as he has said, “the English know nothing about administrative law and wish to know nothing”.²⁶

The reason why common law has this characteristic can be seen from the influential thinking of the philosopher and from English legal history. Common law tradition is highly influenced by John

¹⁹ Smits, JM. 2003, p. 554

²⁰ Harlow, C. 2008, p. 434

²¹ Russell, B. 2007 [1946], p. 910

²² Nettl categorized France and Germany, which are civil law countries, as being stateness countries. Nettl, J.P. 1968, p. 561 and 564.

²³ Indeed, this situation is related to the historical context at that time. In the 18th century the judiciary’s reputation had deteriorated as the monarch sold judgeships to rich families; the families controlled the courts to support their own interest. As a consequence, public limited the authority of the judiciary and gave more authority to the legislative and executive. Dawson names this situation as “the French deviation”, as France does not follow the Roman law concept as the reaction of judiciary problems above. See: Dawson, JP. 1968, p 263-373. It is also relevant to note that, due to the French Revolution, executive administrative bodies and disputes among them is not subject to control by the judiciary. Therefore, administrative dispute-settling mechanism is put under the executive branch, namely *council d’etat*. This fact strengthens the logic that France wants to limit the power of the judiciary. Glendon, M.A., Gordon, M.W. and Osakwe, C. 1994, p. 119

²⁴ Smits, JM., 2003, p. 554

²⁵ Nettl categorizes the UK and the US, which are Anglo Saxon countries, as stateless countries. Nettl, J.P. 1968, p. 561 and 564.

²⁶ Harlow, C. 2008, p. 434. Indeed, at the conference, the author was reminded by one of the reviewers, Dr. Albert Sanchez, to be careful for citing the statement as above, as English law has developed many administrative tribunals which are exercised by administrative law. Regarding this matter, author has conducted further research after presentation, and has found that administrative law has been developed in certain ways, particularly related to tribunals as it has been mentioned above. See: Partington, M. 2014, p. 144-175. Nonetheless, author decides to keep the Dicey’s statement in the body of the paper and provides this additional information in the footnote, as author regards, the government and its contractual party still have equal position in the government contract.

Locke's thought. According to Locke, the main reason why people unified to establish the state is that to ensure the proprietary of its citizen.²⁷ As it is emphasizing on proprietary, its legal development also focuses on private law.

Examining it from a legal history perspective, the private law tendency arose due to the state social condition. It is noted that between the 15th and 17th centuries, the parliament and the kings battled for control of the country.²⁸ The Crown attempted to reassert feudal prerogatives and sell monopolies to raise revenues. Parliament, which was composed of landowners and wealthy merchants, together with the courts objected that idea. As a result, the King was unable to reassert feudal privileges and his ability to grant monopolies was also restricted. This situation developed the liberty of property rights (private rights).²⁹ One consequence of this is that, the common law system heavily depended on private law.

Mixed legal systems are the third legal traditions. Actually, one scholar regards that all the legal systems are mixed; however, it varies the level of combinations.³⁰ This term usually refers to a combination of various legal sources; a combination on more than a body of law within the nation; etc.³¹ The combinations can happen between civil and common laws as above, but it can also happens between one or both these two along with religious law or customary law.

Due to the different points of view, some scholars have different opinions about in which legal family a state falls.³² The Netherlands is one good example. According to a research group of world legal systems in the University of Ottawa, it is considered having a civil legal system.³³ However, another scholar, Smits, has a broader point of view. The Netherlands can be seen from two approaches, the substantial and the methodological approach. From a legal substance perspective, by picking the origins of the Netherlands' civil code, it can be seen that its civil code is based on French, German, and Dutch law. Hence, it is safe to say that Dutch legal traditions belong to Roman-Civil law.³⁴ However, if this country is examined by a methodological (or functional approach), a method for obtaining a just result, then it can be seen that judiciary in the Netherlands is given authority to develop the law if the code remains silent.³⁵ As it has been explained, giving the wide role to the judicative is one of the characteristics of common law. At this point, Dutch law can also be considered as a mixed legal system.

Indeed, a government combines its legal system with (an)other legal systems in order to improve it. Before doing so, the government should understand the contextual and functional aspect of the law

²⁷ Russell, B. 2007 [1946], p. 820

²⁸ Beck, T., Kunt, A.D., Levine, R. 2003, p. 657

²⁹ Beck, T., Kunt, A.D., Levine, R. 2003, p. 657

³⁰ Orucu, E. 2008, p.11

³¹ Orucu, E. 2008, p.11

³² The different points of view do not always happen in examining the legal traditions of the country. Indonesia for instance, according to world legal system research group, is considered as a mixed legal system contained with Civil law, Moslems, and Customary law. Orucu shares the same opinion, even though he adds that from the primary parentage, Indonesia belongs to Dutch law groups, together with South Africa, Sri Lanka, etc.

³³ Jury Globe World Legal System Research Group University of Ottawa, *Alphabetical Index of the Political Entities and Corresponding Legal Systems*, available from:

<http://www.juriglobe.ca/eng/sys-juri/index-alpha.php>, last visited 20 October 2013

³⁴ Smits, JM., 2003, p. 555-556

³⁵ Smits, JM., 2003, p. 555-556

that they wish to adopt (transplanted),³⁶ so that these two aspects can be taken into account. Otherwise, the adoption of the law will not work properly, and may be dangerous for the legal system.³⁷

Lesson Learnt From the Discussion of Public Private Distinction Above

There are three essential things that can be drawn up from the long discussions about the legal concept of public-private laws as mentioned above. *First*, based on the perspective of legal history, public-private law distinction looks very dynamic; there was a time when public law was more dominant than private law, but there was also a time when private law was more dominant than public law. These fluid situations are based on the general will of society and how they distinguish public - private law. Up to now, the contestation between these two still happens.

Second, based on the functional character perspective, there is no conclusion that can be made. However, it is worth noting that public law stems on the idea of protecting public interest, in which the government is the one which bears this responsibility.

Third, based on a legal tradition/legal families perspective, it can be seen that the development of civil law in France and common law in the UK were tightly related to their social situation in the 17th and 18th centuries. Both French and the UK keep their legal styles. From this, it is assumed that each legal family has its own mechanism to reduce its weaknesses of their respective legal systems. In addition, as it has been discussed, it is also possible for a country to try combining all of the good elements from other legal systems.

Regarding the first and second points above, it is safe to say that *public law* is a set of authorities and responsibilities given by the citizen to their government in order to empower them for serving the citizen's interest, either directly or indirectly. In addition, *private law* is any law except the public law. However, it should be noted that public law should be meant broadly, not only norms in the statutory, but also on its meta-level, like principles.

From the definition of public law above, it is worth noting to highlight the statement of "authorities and responsibilities given by the citizen to their government". This definition has a nature of relativity which is differentiated by proportion, time and space. For instance, there are possibilities that the government was given authorities and responsibilities by its citizens to do something, but then the powers and tasks was minimized. Furthermore, there are possibilities that such a government is given powers and tasks by its citizens, but other governments are not given the authorities and duties by their citizens. In other words, there is no "one size fits all" regarding the scope of public law. It is believed that this condition influences in many sector, including public procurement.

Comparative Application on Public Procurement Law in Relation to Three Different Legal Traditions

³⁶ Ernst Rebel highlighted: "You cannot compare legal rules, institutions, or systems without knowing how they function, and you cannot know how they function without situating them in their legal, economic, and cultural context. See: Glendon, M.A., Gordon, M.W. and Osakwe, C. 1994, p. 11

³⁷ Orucu, E. 2002, p. 206

In previous discussion, it has been discussed the definition of public and private law. From that meaning, it is interesting to observe how the comparative application on public procurement law in different legal traditions. Henceforth, there will be three relevant countries that will be re-elaborated, namely: France for civil-public law orientation; the UK for common-private law orientation; and the Netherlands for mixed law orientation. The examination is as follow.

Civil (public law) legal system

As it has been mentioned, the civil law legal system tends to use public law. One consequence of this approach is that the contractual relationship between the government and private parties is not equal. Public authorities are the ones who may create, perform, modify, and terminate public contracts.³⁸ Such modifications and terminations may happen even without prior consent to their counterpart (private) parties.³⁹ Consequently, this unequal position is considered less favourable for the interest of private parties.

Those authorities are granted to the government because administration is considered as representation of the general will of society; the government should use those powers to safeguard the public interest.⁴⁰ The contract is called administrative contract.⁴¹ As administrative contract exercises public law; if the disputes arise, it will fall in the jurisdiction of the administrative court.⁴² Indeed, there is a perception that the administrative court is less able in considering compensation.

Those perceptions of less protection to the private parties do not seem correct. It was true that administrative courts had been less generous in giving compensation; however, in later developments the compensation became better.⁴³ In addition, started in 1987, Council d'État started to recognize the civil law idea of a "loss of a chance".⁴⁴ Furthermore, the awareness of protection of private parties requires French law to give the contractors the right for the "financial balance of the contract". Therefore, when the contract has to be modified in order to suit the public needs, the contractors may seek the financial balance.⁴⁵ Realizing this condition, it is safe to say that French civil law also respects the issue of protecting a private party's interest in a public contract.

Common (private law) legal system

³⁸ Zigirinshuti, F. 2013, p. 121

³⁹ Zigirinshuti, F. 2013, p. 151

⁴⁰ Zigirinshuti, F. 2013, p. 58

⁴¹ Brown, N.L., Bell, J.S., Galabert, J.M., 1998, p. 202. Indeed, French law separates contracts into two categories, which are called private contract and administrative contract. Council d'état develops three guides in order to differentiate these two. The elaboration is as follows: first, there can be no administrative contract unless at least one of the parties is a public authority; second, a contract that tightly associate a private party in meeting the public need is seen as an administrative contract; third, if the contract's nature differs with those in which a similar contract regards private law, or when it is different in nature from those which could be included in a similar contract under the civil law. Brown, N.L., Bell, J.S., Galabert, J.M., 1998, p. 143

⁴² Zigirinshuti, F. 2013, p. 51

⁴³ Brown, N.L., Bell, J.S., Galabert, J.M., 1998, p. 200-201

⁴⁴ It means, one may ask compensation for loss of opportunity because the fault of administration. Brown, N.L., Bell, J.S., Galabert, J.M., 1998, p. 200-201

⁴⁵ Brown, N.L., Bell, J.S., Galabert, J.M., 1998, p. 206

As it has been mentioned, common law legal system tends to use private law. One consequence of this approach is that the contractual relationship between the private parties is (relatively more) equal. Because of the nature of this relationship it gives flexibility to the parties (the government and the contractors) to review and to amend the contract whenever particular circumstances happen.⁴⁶ Consequently, it is no wonder when Bailey regards this mechanism as relatively efficient and effective from different modes of public contracting.⁴⁷ However, UK legal scholar, Davies, is suspicious that the nature of private law in a public contract can reduce the protection of public interest.⁴⁸

The criticism above is probably true and should be examined further. However, it is relevant to see that the UK government has been trying to take into account the public interest issue. According to Bailey, contracts can be seen as the government strategy to regulate the ways in which public services will be provided,⁴⁹ for instance it has to respect human rights in labour conditions, and not harm the environment, etc.

In addition, currently the UK government encourages public bodies to use a standard form.⁵⁰ The government also endorses the adoption of policy guidelines.⁵¹ Having said these, it is safe to say that UK common law takes into account the public law approach to protect public interest and to endorse public policy.⁵² Even concerning some developments as mentioned above, the nature of the public contract in the UK is still based on private law, and therefore, it falls within the ordinary court.

Mixed legal system

In the Netherlands, public and private law are used in relation to public contracts. The explanation is summarized as follows;⁵³ In essence, public bodies have the right to enter a contract based on private law; however, it needs power from the statutory to conduct such. Public law is applied on public contracts law under a principle of proper administration, but private law is also applied under a principle of reasonableness and fairness. When disputes related to public contract arise; then it falls within ordinary courts, except in a few situations where it can fall into administrative courts.

Sub-Conclusion on the Concept of Public Procurement (PP) and its Relation with Good Governance (GG)

⁴⁶ Craig, P.P. 1999, p. 124

⁴⁷ Zigirinshuti, F. 2013, p. 75

⁴⁸ Zigirinshuti, F. 2013, p. 98

⁴⁹ Indeed, public contract in the UK has two variations: as the means of exchange and as the regulation or transformation of public contracts. The first mentioned falls under private contracts, while the second point falls within policy contracts. In the first category, the highlight is given to the equal position between the government and the contractor, and in the second category, the highlight is given as a technique of government regulation. Zigirinshuti, F. 2013, p. 72

⁵⁰ Zigirinshuti, F. 2013, p. 76

⁵¹ Craig, P.P. 1999, p. 122

⁵² This condition is also strengthened by harmonization for some of public contracts under EU law. Craig, P.P. 1999, p. 121

⁵³ Zigirinshuti, F. 2013, p. 223. It is also relevant to see the description of administrative litigation in an ordinary court in Hooijdonk, Mv and Eijvoogel, P. 2012, p. 192-193

Based on the above discussion, there are several important similarities that can be highlighted from the application of public procurement in different legal traditions.

First, the existence of a terminology of administrative “contract” in France reflects that the nature of private law still can be sensed. On the contrary, the nature of public law can be sensed even though in the UK, as it can be reflected from its way to develop policy guidelines. In addition, if one compares the implementation of public procurement in three countries in the previous section; then it can be clearly seen that each system has its own characteristic and mechanism to deal with the procurement system, practical issues on public or private distinctions, and the protection the interest. Even though France heavily uses a public law approach, it also accommodates protection for private party. On the other hand, even though the UK heavily uses a private law approach, it has mechanism to protect public interest.

Second, (some part of) the results of PP are certainly used to build and/or to maintain public facilities, such as roads, bridges, etc. Therefore, it deals precisely with the government task, to serve the citizen. Nonetheless, even though the result of PP is not used directly to provide public facilities, but to equip the administration (for instance, buying computers for the administration); it can be meant that the equipment is acquired in order to ensure that the administration can better perform their duties to serve the citizen.

Third, the second point above indicates that PP uses public money. Therefore, it is assumed that the public want to ensure that the result of the procurement is value for money. In relation to that, there must be a certain mechanism to give rights to the citizen to control and evaluate the procurement process and result, also a guidance (obligation) for the government to perform its duties. This right and obligation exactly match with the GG which will be discussed later.

Fourth, disregard wherever PP is conducted, one of the parties is always government. So that, this paper will argue that one should not focus on the law (public private distinction), but should focus on the institution (government). As the focus is primarily on government, then GG perspective can be used as a concept to discuss PP.

PPG Has Been Embodied in PP Law in Common, Civil, and Mixed Legal System

GG and Principle of GG (PGG)

The nature of governance is to setup the certain standard in order to achieve the desired ideal goals. Hence, the term “good” is attached as a prefix on “governance”, to be good governance. On its development, good governance is considered to become a sort of mantra which is consisted of axioms regarding good conduct of governmental and bureaucratic processes.⁵⁴ This mantra is usually used in relation to aid development.⁵⁵

⁵⁴ Griffin, L. 2013, p. 15

⁵⁵ Addink, G.H. 2005, p. 47-48.

In relation to above, GG can be broadly interpreted as “a method to set mechanism and process (formal and informal) through a group of actors... aimed at managing and regulating human activity”.⁵⁶ But, it can also be interpreted narrowly, as “norms for the government and rights for the citizen”.⁵⁷ This paper will use narrow perspective.

Besides, GG can be divided as a concept and as a principle. This paper focus on the last mentioned, because a principle has legal characters;⁵⁸ therefore, starting from now, this paper will use a terminology: principle of good governance (PGG).

Element of PGG

Actually, each institution and scholar has their own opinions on the elements of GG. However, if the opinions are compared, it is found that all opinions always contain the principle of transparency and the principle of accountability.⁵⁹ It is believed, these two are fundamental principles under PGG. Besides, principle of equality is considered as the core principle in public procurement.⁶⁰ Since these three principles are important, these are used to represent the PGG. Following discussion will try to argue that these principles have been embodied in the public procurement law in three selected countries.

PGG Has Been Embodied in Regulations related to Procurement in the UK, France, and the Netherlands

Procurement in the UK is regulated in Public Contracts Regulations 2006.⁶¹ In article 4 (3) (b), it can be seen an obligation for a contracting authority to act in a transparent and proportionate manner. Principle of transparency can also be seen from the instruction to announce tender opportunity by sending a notice to the Official Journal of EU.⁶² In relation to principle of equality, the instruction can be seen in article 4 (3) (a). It is stated: a contracting authority shall treat economic operators equally and in

⁵⁶ Martinelli, A in Brugnoli, A and Colombo, A (ed.), 2012, p. 3

⁵⁷ Griffin, L. 2013, p.13. Addink, G.H. 2013. p. 3. Also: Addink, G.H. 2005, p. 47-48. Addink distinguished three functions of good governance: (i) related to aid development; (ii) related to public administration, particularly governance as a networking theory; (iii) related to administrative law. His statement above refers to the third category; therefore, it is no wonder that he regards good governance from legal perspective (rights and obligations).

⁵⁸ According to Raz, principles are normative statements specifying condition of applications that are met by normative consequences; therefore, principles have only a *prima facie* force (Raz, J. 1978, p. 322). Two moral theories are embodied in principles, includes two parts: a doctrine of virtue determining how one must act and a doctrine of how others should be treated for their own well-being (Raz, J. 1978, p. 323). However, principles should be differentiated from the rules. A principle will be applicable more often than a rule, but it does not prescribe the legal outcomes like a rule; rather, it will inspire the decision of a particular case (Heijden, V.D. in Buijze, A. 2008, p. 23) (Dworkin, R. 1978, p. 23).

⁵⁹ Comparisons from OECD (<http://www.oecd.org/investment/toolkit/policyareas/publicgovernance/>); UNESCAP (<http://www.unescap.org/pdd/prs/ProjectActivities/Ongoing/gg/governance.asp>), Commission of European Communities (http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf), last visited 05/03/2013. Also: Addink: 2013. p. 17

⁶⁰ Arrowsmith, S. 2010, p. 173. See also: Howell, J. 2012, p. 3

⁶¹ Available from: http://www.legislation.gov.uk/ukxi/2006/5/pdfs/ukxi_20060005_en.pdf, last visited 06/03/2014

⁶² Noguellou, R. and Stelkens, U. (eds). 2010. *Droit Compare Des Contrats Publics / Comparative Law on Public Contracts*, p. 347

a non-discriminatory way. The embodiment of principle of accountability can be found in the whole part 9 of the regulation concerning on applications to the court in relation to enforcement of obligations.⁶³

In France, principles of transparency and equality are explicitly stipulated in Public Procurement Contract Code 2005.⁶⁴ The regulation states: "... regardless of their amount, public contracts respect the principles of freedom of access to public procurement, equal treatment of candidates and transparency of procedures...". In addition to that, access to the (legal) accountability forum is also available. According to Article 2 of MURCEF Act,⁶⁵ "contracts awarded under the Public Procurement Code are in the nature of administrative contracts". Meaning, if a conflict arises, it will fall into the jurisdiction of the Administrative Court.⁶⁶

Public procurement in the Netherlands is regulated in Aanbestedingswet 2012.⁶⁷ Principle of transparency directly stipulates in this act in article 1.9 and 1.12. In essence, these articles mandate to a contracting authority and a supplier/contractor to trade and deal in transparent way. Principle of equality is embodied in Article 1 of the Dutch Constitution and for that reason there was no codification of this principle (on the law) required.⁶⁸ It states that "all persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds (...) whatsoever shall not be permitted". In relation to principle of accountability, access to the court for procurement case is private court. As in the Netherlands, public procurement contracts are considered civil law agreements, and are generally enforced through private law.⁶⁹

Conclusion

In order to answer the question which model that should be referred for countries that want to develop their legal systems, this paper considers that it is essential to discuss three meanings of public - private distinction. From the *first* perspective, legal history, it is found that there is a time that a public law is more dominant than private law, but also vice versa. The contestation between these two has been so

⁶³ See: UK Public Contracts Regulations 2006. Also: PPN Europe: <http://www.ppnueurope.org/docs/ItalianPresidency/Comparative%20survey%20on%20PP%20systems%20across%20PPN.pdf>, pg 228

⁶⁴ Available from: <http://www.track.unodc.org/LegalLibrary/LegalResources/France/Laws/France%20Public%20Procurement%20Code%202005.pdf>, last visited 06/03/2014. See also: Truchet, D. 2012. "Basic Principles of the Public Procurement Procedures in France and the Influence of EU law" p. 1106. Available from: http://en.iju.hr/ccpa/ccpa/downloads_files/05%20Truchet.pdf, last accessed 15 May 2015

⁶⁵ Emergency Reform Measures of Economic and Financial Nature Act 2001

⁶⁶ Truchet, 2011, p. 1104

⁶⁷ Available from: http://wetten.overheid.nl/BWBR0032203/geldigheidsdatum_06-03-2014, last visited 06/03/2014

⁶⁸ Addink: 2013, p. 83

⁶⁹ Decisions taken in the context of a PP procedure are classified as decisions taken in preparation of a private law juridical act, i.e. concluding a contract. Article 8:3 of the Dutch Administrative Law Act stipulates: the judicial review of such decision taken in preparation of a private-law juridical act does fall into a civil court. Nonetheless, this general mechanism has two limitations as following: (i) award decisions relating to public transport concessions must be appealed before an administrative court on the basis of the Public Passenger Transport Act 2000; and, (ii) a decision by an administrative body to award an exclusive right in the meaning of article 18 of Directive 2004/18 can also be challenged under administrative law. See: van de Meent and Munanza: 2014, p. 2. Available from: <http://www.nver.nl/attachments/article/95/Netherlands%20report%20Topic%203%20FIDE%202014.pdf>, last visited 06/03/2014

dynamic and happening for a long time. Therefore, if someone argues about the concept of public procurement based on public private law distinction categorized on the first perspective; then, the argument will be relied on unstable condition due to the contestation.

No relevant matter is found in the *second* perspective; so that, this part can be skipped. Coming to the *third* perspective, legal tradition, it is found that each country in different legal traditions has its own mechanism to give balance protection both for public and private interest. In good governance point of view, this protection refers to principle of accountability. Coherence with this finding, it is found that, in each country, government always becomes a party in the public procurement activity; hence, as it involves government, it is logic to use good governance as the normative framework for the public procurement.

Hence, conceptually speaking, it is safe to say that, countries which have desire to develop their legal system can adopt any approach considered suitably for them. It is because the keywords of successful adoption are not lied in the approach (public-private law distinctions), but more on the principle of good governance. This argument is backed up by evidences that each country has embodied principle of good governance in its procurement regulation or in other regulation which can be used for the implementation of public procurement.

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