

Good governance and public contracts

**A comparative perspective on the balance
between public and private law in Rwanda**

Goed bestuur en overheidscontracten

**Een vergelijkend perspectief op het evenwicht
tussen publiek- en privaatrecht in Rwanda**

(met een samenvatting in het Nederlands)

Proefschrift

ter verkrijging van de graad van doctor aan de Universiteit Utrecht
op gezag van de rector magnificus, prof. dr. G.J. van der Zwaan
ingevolge het besluit van het college voor promoties in het
openbaar te verdedigen op maandag 15 april 2013 des middags te
4.15 uur

door

Felix Zigirinshuti

geboren op 25 september 1960
te Ruhango, Rwanda

Promotor: Prof. Dr. G.H. Addink

Dit proefschrift werd (mede) mogelijk gemaakt met financiële steun van
NUFFIC, via het Centrum voor internationale juridische samenwerking
(CILC)

Doctoral Evaluation Committee

Promoter and advising member:

Prof. Dr. G.H. Addink, Professor of Administrative Law and Good Governance at Utrecht University (The Netherlands)

Other Members:

- Prof. Dr. Jean Bernard Auby, Professor of law and Director of MADP, Mutations de l'Action Publique et du Droit Public (Changes in Governance and Public Law) at Sciences Po Paris, France
- Prof. Dr. Anne Davies, Professor of Law and Public Policy at Oxford University (United Kingdom)
- Prof. Dr. Steven van Garse, Professor of Law at Antwerp University (Belgium)
- Prof. Dr. Gerdy Jurgens, Professor of Administrative Law at Utrecht University (The Netherlands)
- Prof. Dr. Alphonse M. Ngagi, Professor of Business Law at National University of Rwanda (Rwanda).

Cover image:
Gunnar Wrobel

Printed by:
Proefschriftmaken.nl || Uitgeverij BOXPress

Published by:
Uitgeverij BOXPress
Weerdskampweg 15
P.O. Box 5222 BA
's-Hertogenbosch
The Netherlands
Email: info@boxpress.nl

ISBN: 978-90-8891-596-3
© Felix Ziginshuti, 2013

Contents

<i>Dedication</i>	<i>xi</i>
<i>Acknowledgements</i>	<i>xii</i>
<i>List of abbreviations and acronyms</i>	<i>xiii</i>
1 Introduction	1
1.1 Problem identification	8
1.2 Questions under discussion	16
1.3 Methodological approach	17
Methodological departure of this study	17
Examination of the legal rules and principles applied to public contracts	18
Review of the literature and case-law in relation to public contracts.....	18
Connection of outcomes of this study with interviews	19
Comparative approach.....	19
Scope of the study	21
1.4 Remarks on the terminology in this study	22
Definition of important terms for clear understanding	23
Clarification of the terms ‘public contracts’, ‘public interest’, ‘legality, ‘good governance’.....	26
2 Categorisation of public contracts reflecting the public-private law divide	37
2.1 Categorisation in countries of divergence between public and private law	40
2.1.1 Types of public contracts in Rwanda	40
Administrative contracts	40
Private contracts.....	47
2.1.2 Types of public contracts in France.....	51
Administrative contracts	51
Private contracts.....	62
2.1.3 Types of public contracts in Belgium	65
Administrative contracts	65
Private contracts.....	70
2.2 Categorisation in countries of convergence between public and private law	72
2.2.1 Types of public contracts in England	72
Private law based contracts: Private contracts	72
Emergence of public law based contracts: Policy contracts.....	73
2.2.2 Types of public contracts in the Netherlands	77

Private law based contracts: Patrimonial or property contracts	77
Public law based contracts: Competence or public law contracts	78
Mixed contracts	79
2.3 Conclusions of this chapter	80
3 Normative framework: An evolving view of the legality of public contracts from a good governance perspective	83
3.1 Legality embedded in the ‘rule of law’ concept	84
3.1.1 General concept of the rule of law	84
Meaning of ‘ <i>Rechtsstaat</i> ’ in the Netherlands (and in Germany).....	85
Meaning of ‘ <i>Etat de droit</i> ’ in France, in Belgium and in Rwanda	86
Meaning of ‘Rule of law’ in England	86
3.1.2 Four key pillars of the rule of law	87
Principle of legality	87
Principle of separation of powers.....	89
Principle of independent judiciary.....	91
Principle of human rights protection.....	93
3.2 Understanding legality in relation to public contracts	96
3.2.1 Narrow view of legality: Analysis of three approaches	97
Legality of public contracts guaranteed by public law	97
Legality of public contracts guaranteed by private law.....	98
Legality of public contracts guaranteed by a combination of application	99
3.2.2 Growing view of legality when applied to public contracts.....	100
Legality with the support of principles of good administration	100
Legality with the support of principles of good governance	104
3.2.3 A new conception of legality, another way to approach public contracts.....	105
3.3 Principles of good governance used as legal norms	106
3.3.1 Different powers in respect of the principles of good governance	106
Power of the legislature to codify principles of good governance.....	107
Power of the administration to give practical effect to these principles.....	109
Power of the judiciary to review principles of good governance.....	111
3.3.2 Relevance of the principles of good governance to public contracting ...	112
The principles of properness in public contracting	112
Transparency in the public contracting.....	117
Effectiveness and efficiency in public contracting.....	117
Accountability in the public contracting.....	119
3.4 Conclusions of this chapter	120
4 Legality of public contracts in Rwanda: Primacy of public law	123
4.1 Power of administrative authorities to make contracts	123
4.1.1 Power to make administrative contracts.....	125
4.1.2 Power to make private contracts.....	126

4.2 Legal rules and principles applicable to public contracts.....	127
4.2.1 Rules and principles applicable to the making of public contracts.....	127
4.2.2 Rules and principles applicable to execution of administrative contracts	128
Public law based rules applicable to administrative contracts	128
Principles of law used as additional rules.....	130
4.2.3 Rules and principles applicable of execution of private contracts	133
Private contracts governed by private and public law in combination.....	134
Contracts of the government corporations governed by private law	136
4.3 Jurisdiction of courts over public contracts litigation.....	138
4.3.1 Jurisdiction of courts over administrative contracts	138
Application for administrative review, prerequisite for jurisdiction of courts	138
Jurisdiction of the administrative chambers	142
4.3.2 Jurisdiction over private contracts litigation	145
Jurisdiction of the administrative chambers over private contracts litigation	145
Jurisdiction of civil courts over litigation on contracts of government	
corporations	149
4.4 Conclusions of this chapter	150
<i>5 The origins of public contracts law in Rwanda traced to countries where</i>	
<i>public and private law diverge</i>	<i>153</i>
5.1 Legality of public contracts in France: Primacy of public law.....	153
5.1.1 Power held by administrative authorities to make contracts	154
The power to make administrative and private contracts	154
Power delimited by law and discretionary power.....	155
5.1.2 Which legal rules and principles apply to public contracts?.....	157
Rules and principles guiding the making of public contracts	157
Rules and principles guiding the execution of administrative contracts.....	158
Rules and principles guiding the execution of private contracts	163
5.1.3 Jurisdiction of courts over public contracts litigation.....	167
Jurisdiction of administrative courts over administrative contracts litigation	168
Jurisdiction of the ordinary courts over private contracts litigation.....	169
5.2 Legality of public contracts in Belgium: Combination of public and	
private law.....	170
5.2.1 Power to make administrative and private contracts	170
5.2.2 Legal rules and principles applicable to public contracts	172
Rules and principles applied to the formation of public contracts	172
Rules and principles applicable to the execution of administrative contracts	173
Rules and principles applicable to the execution of private contracts	180
5.2.3 Jurisdiction of courts over public contracts litigation.....	180
Courts having jurisdiction over administrative contracts.....	181
Jurisdiction of ordinary courts over private contracts	184

5.3 Conclusions of this chapter	185
6 Public contracts law in Rwanda influenced by countries where public and private law converge.....	187
6.1 Legality of public contracts in England: Primacy of private law	187
6.1.1 The power of the public authorities to make contracts	187
6.1.2 Legal rules and principles applicable to public contracts	189
Private law applied to public contracts	190
Restrictions on the application of private law.....	191
Principles of law applied to public contracts.....	195
6.1.3 Private law enforcement of public contracts before courts	197
6.2 Legality of public contracts in The Netherlands: Interaction of private and public law.....	200
6.2.1 Power of administrative authorities to make acts.....	200
Power of the administrative authorities to perform public acts.....	200
Power of the private authorities to perform public acts.....	203
Power of the administrative authorities to make private acts.....	204
6.2.2 Legal rules and principles applicable to public contracts	206
Private and public law rules applied in interaction	206
Restrictions on the application of private law.....	209
Principles of law applied to public contracts.....	210
6.2.3 Jurisdiction of courts over public contracts litigation.....	215
Jurisdiction of ordinary courts over public contracts litigation.....	219
Restrictions on the jurisdiction of ordinary civil courts over public contracts.....	221
6.3 Conclusions of this chapter	222
7 A new legality of public contracts in Rwanda from a good governance perspective	225
7.1 A ‘good governance’ approach to public contracts in Rwanda	226
7.1.1 Recognition of the principles of good governance in Rwanda	227
General application of principles of good governance.....	227
Introduction of principles of good governance to the public contracting	228
7.1.2 Recognition of the principles of good governance as having legal effect	229
Need for a general law codifying the principles of good governance.....	230
Prerogatives and privileges relinquished by principles of good governance	232
Effect of applying same legal rules and principles in similar factual situations	233
7.2 Good governance calling for a new legal approach to public contracts.....	234
7.2.1 The public law regime less justified for public contracts in Rwanda	235
Public contracts presumed to be concluded in the public interest.....	235
Challenges to the use of public law in defending the public interest	236

7.2.2 The private law regime to public contracts also acceptable	239
Private law can also protect the public interest.....	239
Advantages of applying private law to public contracts	241
7.2.3 The mixed law regime more suitable to public contracts in Rwanda.....	242
Rwanda’s civil law heritage lessened	244
Reference to common law countries following a convergent approach	249
Movement to a convergent approach with reference to civil law countries	250
Movement towards a mixed legal approach to public contracts in Rwanda	253
7.3 Conclusions of this chapter	256

8 Consequences of the new legality of public contracts from a good governance perspective..... 259

8.1 A functional categorisation of public contracts.....	259
8.1.1 Contracts for a function of high level public interest	260
Public institutions performing public utility under contract	261
Private institutions performing public utility under privatisation contract ..	261
Contracts of lease of state’s assets or services	264
Grant of subsidy to perform a public service under contract	266
8.1.2 Contracts for a function of medium level public interest.....	267
Public procurement contracts	267
Employment contracts	270
8.1.3 Contracts for a function of low level /no public interest.....	273
Contracts of sale of the State’s private assets.....	274
Contracts involving commercial dealings of the administration.....	275
8.2 A combined application of public and private law to public contracts.....	277
8.2.1 Public and private law rules/principles applied in combination.....	277
More public law rules/principles to contracts of high level public interest..	277
Less public law rules/principles to contracts of medium/low public interest	278
8.2.2 Principles of good governance applied to all public contracts	279
Principles to apply to the pre-contractual and award phases.....	280
Principles to apply to the execution of public contracts	287
Principles to apply to litigation arising from public contracts	293
8.3 A dual jurisdiction of courts over public contracts litigation	296
8.3.1 Administrative chamber competent over pre-contractual phase litigation	296
Principle	296
Exception to the rule	297
8.3.2 Jurisdiction of ordinary courts over the contractual phase litigation.....	297
8.4 Conclusions of this chapter	299

9. General conclusions and recommendations	303
9.1 Study findings.....	309
Findings in relation to the categorization of public contracts	309
Findings in relation to the legal rules applicable to public contracts	310
Findings in relation to the jurisdiction of courts over public contracts.....	311
9.2 Proposition	312
Justification I: A ‘good governance’ approach to public contracts.....	312
Justification II: A new conception of legality from a good governance approach	312
Justification III: Grounds for a mixed application of public and private law	313
9.3 Recommendations	314
General recommendations	314
A draft code of good governance of the public contracts recommended.....	316
Summary in Dutch.....	321
Table of laws and regulations.....	333
Table of court judgments.....	341
Table of Interviews.....	345
Bibliography	347
Useful websites.....	359

Dedication

This study is dedicated to my loving wife and children, and my dear brother who suffered the consequences of injustice and oppression, as well as family members, academic colleagues and friends.

Acknowledgements

I must thank all the people who helped me to accomplish this study.

I am most grateful to my promoter Prof. Dr. G.H. Addink for his guidance, time and support.

My heartfelt gratitude also goes to members of the Evaluation Committee for accepting to examine and evaluate this study.

A great deal of appreciation is extended to all academic and staff members of the Institute of Constitutional and Administrative Law of Utrecht University and its International Office Department for their cooperation.

I also appreciate the financial support received from the Dutch Government through the Centre for International Legal Cooperation (CILC).

Many thanks to Mr. Edward McCullagh from Cambridge University, for editing this study and alerting me to errors in this writing.

Special thanks are expressed to Ms. Anoeska W.G.J. Buijze from Utrecht University for her outstanding work in the design of the cover page.

My sincere thanks also go to Ms. Melissa van den Broek from Utrecht University for checking and finalising the summary translation in Dutch.

Felix Ziginshuti.

List of abbreviations and acronyms

ALL ER	: All England Law Reports
Art.	: Article
BORU	: <i>Bulletin Officiel du Ruanda-Urundi</i> (Official Gazette of Ruanda-Urundi)
CAP	: <i>Commission d'Assistance Publique</i> (i.e. CAP de Liège)
CC	: <i>Cour de Cassation</i> (France, Belgium)
CE	: <i>Conseil d'Etat</i> (Council of State: France, Belgium)
CPAS	: <i>Centre public d'aide sociale</i> (Public centre for social support, Belgium)
CROUS	: <i>Centre régional des œuvres universitaires et scolaires</i> (Regional centre for university and school actions (France))
CS	: <i>Cour Suprême</i> (Supreme Court, Rwanda)
ETNIC	: <i>Entreprise publique des Technologies nouvelles de l'Information et de la Communication</i> (Belgium)
ECR	: European Court Reports
Ed.	: Edition or Editor
Eds.	: Editors
EU	: European Union
GALA	: General Administrative Law Act (The Netherlands)
GPPA	: General Principles of Proper Administration
HC	: <i>Haute Cour</i> (High Court, Rwanda)
HCC	: <i>Haute Cour de Commerce</i> (Commercial High Court, Rwanda)
HCR	: <i>Haute Cour de la République</i> (High Court of the Republic, Rwanda)
i.e.	: <i>id est</i>
ISAE	: <i>Institut des Sciences de l'agriculture et de l'élevage, Rwanda</i> (Higher Institute of Agriculture and animal husbandry)
KB	: Law Reports – King's Bench Division (England)
LGDJ	: <i>Librairie générale de droit et de jurisprudence</i> (France)
Loc. cit.	: <i>Loco citato</i>
N°	: Number
NUR	: National University of Rwanda
O.G.	: Official Gazette of the Republic of Rwanda
IRDP	: Institute of Research and Dialogue for Peace (Rwanda)
Op. cit.	: <i>Opere citato</i>
OPHLM	: <i>Office public d'habitations à loyer modéré</i> (Public office for

	moderate income housing (France))
Par.	: Paragraph
p.	: Page
pp.	: Pages
PPP	: Public-Private Partnership
PUF	: <i>Presses Universitaires de France</i>
GB	: Law Reports – Queen’s Bench Division (England)
R.Ad.	: <i>Role Administratif</i> (Rwanda)
RC	: <i>Role Civil</i> (Rwanda)
R.Com	: <i>Role Commercial</i> (Rwanda)
RGAC	: Rwanda Governance Advisory Council
RGB	: Rwanda Governance Advisory Board
R.Soc	: Role social (Rwanda)
SAPIEM	: <i>Société de participation dans l’industrie alimentaire</i> (France)
SEM	: <i>Société d’économie mixte</i> (company of mixed economy (France))
SONARWA	: <i>Société Nouvelle d’Assurances au Rwanda</i>
TC	: <i>Tribunal des Conflits</i> (France)
TGI	: <i>Tribunal de Grande Instance</i> (Intermediate Court, Rwanda)
UAP	: <i>Union des Assurances de Paris</i> (Union for insurance in Paris)
UK	: United Kingdom
ULK	: <i>Université Libre de Kigali</i> (Kigali Independent University)
UN	: United Nations
UN-ESCAP	: United Nations Economic and Social Commission for Asia and the Pacific
v.	: versus
WLR	: Weekly Law Reports (England)

1 Introduction

Before the exploratory epoch of Europeans into the African continent and their introduction of the modern era, there was no written law in Rwanda. This was because Rwandans did not have a written language. However, one cannot conclude from this that there was no law in the country. It was a land governed by monarchs, with boundaries and unwritten laws which constituted a body of customary law. Naturally, the constitutional and administrative law in Rwanda were also unwritten. The administration was organised in a hierarchical feudal structure, with the King (the *Mwami*) at the top and the head of the family (*umutware w'umuryango*) at the bottom.

The King, the *Mwami*, was uniquely sovereign, and was endowed with legislative, executive and judicial powers. In the exercise of his powers, he was helped by three categories of provincial chiefs (*abatware*), respectively in charge of the army (and people in general), the land and the cattle:

“The King was the personification of the organising power of the entire Rwandan society: He reigned without sharing, but all the same distributed the weight of his power to a number of chiefs who owed absolute submission and allegiance to him. The distribution of power was done in the following ways: at the Military organizational level Rwanda was divided into provinces and each province was headed by a military chief (*Umutware w'ingabo*); at provincial level the property domain was divided into two categories, the pasture domain which was headed by the chief of pastures (*Umutware w'umukenke*) and the agricultural domain which was headed by the chief of the landholdings (*umutware w'ubutaka*)”.¹

Family disputes were generally resolved through the intervention of family heads, including disputes of a criminal nature. However, depending on the severity of the crime, redress could be sought from the appropriate provincial chief or even the king. Acts of a public nature were also governed by

¹ Institute of Research and Dialogue for Peace (IRDPA), *L'Etat de droit au Rwanda*, Kigali, December 2005, p. 28 (translation from French).

customary law. There were no courts in the modern sense, but a traditional administrative system of problem solving was organised.

On a lower level, disputes were resolved through *gacaca*, a traditional form of dispute resolution, coordinated by the elders among the community of a given village. The procedure for *gacaca* was as follows. When a dispute arose which could go beyond the competence of the head of family, or which was between two different families, the whole village sat down on a flat plain in the grassland (*agacaca*). Then the elders would help resolve the issue, with the participation of the whole community. Accordingly, it was a form of participatory justice, whereby the people themselves took a primary role in trying to solve the dispute. When a case was not or could not be resolved through that procedure of *gacaca*, then the respective provincial chief could be summoned to solve the problem at a higher level. It was only on their failure to provide a satisfactory redress that the king's intercession could be sought.²

Written laws were instituted in Rwanda during the colonial era, when European countries were partitioning Africa amongst themselves. Rwanda was initially colonized by Germany from 1896 to 1916 and the Germans made great efforts not to destabilize the country's administration and leadership.

² The traditional participatory justice *gacaca* was renovated, and it has been incorporated into the modern courts structure. From 2004, Rwanda has had the so-called 'Gacaca courts', to deal with genocide cases and other crimes against humanity. Article 28 of Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts (*O.G.* n° 14 of 15/07/2004), provides that "[t]here are in existence Gacaca courts which are charged with the duty of prosecuting and trying persons accused of genocide and other crimes against humanity committed between October 1st, 1990 and December 31st, 1994, except some of such crimes which fall under jurisdiction of other courts". Such *gacaca* courts were created by Organic Law n° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between October 1st, 1990 and December 31st, 1994, *O.G.* n° special of 19/06/2004 (as amended and complemented to date). After trying over 1.9 million cases of genocide suspects, Gacaca courts wound up on June 18th, 2012 (see "The process of Gacaca jurisdictions closure with pride", in http://www.minijust.gov.rw/MoJ/AX_Articles.aspx?id=1147&cidl=14,15). Cases which were not definitely decided to that date were left to the jurisdiction of ordinary criminal courts.

Germany applied an 'indirect rule' system of administration,³ in which the core aim was to avoid fundamentally intervening in the existing organization of the social and political institutions of Rwanda.⁴ Apart from a German Local Administrator, Dr Kandt (a civilian), who from 1907 controlled the country in conjunction with the King, territorial entities were administered by the traditional local leaders, under supervision of German military officers.⁵

After Germany, Rwanda was subject to Belgium which took over its leadership from 1916 until its accession to independence in 1962. Created by a (Belgian) Royal decree of 22 November 1916, a commission was charged with temporarily administering the territories occupied by colonial German troops in East Africa.⁶ Later on, the provisional administration had to be converted into a colonial mandate as per the terms of the Versailles Treaty of 28 June 1919.⁷ This was confirmed by the Decision of the Council of the

³ During the colonial period, Germany (and also Britain) chose a system of ruling its colonies (including Rwanda) with a system of administration whereby the administrative duties were left to the traditional local authorities, guided and restrained by their own customary law, but with the help, advice and control of the German officers. This was done in order for these communities to develop from their own past. Cameron explains the system as follows: "The principle of indirect rule is that of adapting for the purpose of local government the institutions which the native peoples have evolved for themselves, so that they may develop in a constitutional manner from their own past, guided and restrained by the traditions and sanctions which they have inherited (moulded or modified as they may be on the advice of [German] officers) and by the general advice and control of those officers" (D. Cameron, *Principles of native administration and their application*, Dar Es Salaam, Government Printer, 2nd Ed., 1930, p. 6, cited by F. Reintjens, *Pouvoir et droit au Rwanda – Droit Public et évolution politique, 1916-1973*, Musée Royal de l'Afrique Centrale – Tervuren, Belgique Annales – Série IN-8° - Sciences Humaines - N° 117, 1985, p. 71).

⁴ F. Reintjens, *op. cit.*, p. 38.

⁵ M. Dessaint, *Historique et chronologie du Rwanda*, Kigali, Office du Résident du Rwanda, 1947, p. 21.

⁶ F. Reintjens, *op. cit.*, p. 49

⁷ Art. 22 of the Covenant of the League of Nations provides: "To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their

League of Nations on 31 august 1923, as approved by the Belgian Law of 20 October 1924.⁸

It was during that period that various missionary groups ushered in Christian religious teachings to Rwanda. For the purpose, they were conceded land under the so-called emphyteusis or long-term lease. Their efforts culminated in the setting up of churches, schools and health centres across the country, and they started educating people about Christianity and also teaching how to read and write:

“Finally the enthronement of King Rudahigwa was characterized by the official acceptance of Christianity and European civilisation. (...) The *de facto* monopoly accorded to the Christian religion encouraged general adherence to the ideals that it propagated and facilitated both its dissemination and, to a greater extent, its perfect assimilation.”⁹

It was also at that time that written laws started being enforced in Rwanda,¹⁰ in parallel with, but towards the gradual replacement of, the old customary law. Since the introduction of written law in Rwanda at the dawn of the 20th century, Rwanda has been applying the *Congo Belge* law,¹¹ derived from Belgian law and the principles underpinning the Belgian legal system.¹²

experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League. (...)” (“The Covenant of the League of Nations”, in http://avalon.law.yale.edu/20th_century/leagcov.asp, accessed October 16th, 2009).

⁸ Belgian Law of 20/10/1924, *B.O.R.U.*, 1925, n° 1, p. 1, cited by F. Reintjens, *op. cit.*, pp. 41-47.

⁹ L. de Lacger, *Rwanda*, Kabgayi, Imprimatur, 1959, pp. 504-505 (translation from French).

¹⁰ Articles 1 & 3 (read jointly) of the organic law of 1925 subjected the Rwanda-Burundi territory (under mandate) to the regime of Congolese laws born out deliberations of the Belgian parliament (F. Reyntjens, *op. cit.*, p. 50).

¹¹ See *supra*, footnote 9.

¹² “The introduction of the Colonial Charter [a legal instrument of government approved on October 18th, 1908 by the Belgian Parliament and containing the rules under which the Congo-Belge colony had to be governed] had a subordinative effect in a sensible way to the European laws” (G. Feltz, *Causes et conséquences de la guerre civile au Rwanda*, Aix, Université de Provence, thèse de doctorat de troisième cycle, 1969, p. 81, cited by F.

On commencement of the Belgian colonial power, the traditional administrative subdivisions of Rwanda were maintained. In parallel, but using the indirect rule system (as described above), a local Belgian Military Administrator supervised the country, with the help of four military local administrators at local military level base.¹³ It is only in 1926 that public institutions and public administration were restructured and modernised. From that time Rwanda-Burundi, even if it was still in Administrative, financial and monetary Union with the Congo-Belge, could form one administrative territory, with a separate budget. The Belgian colonial power also decided to replace the (Belgian) military administration with a (Belgian) civil administration and to abolish the three-fold hierarchy of provincial chiefs, vesting all the powers over people, land and cattle in one chief).¹⁴

New administrative public organs were then created. On central level, Rwanda had a (Belgian) Local Administrator, subordinate to the General Administrator of Rwanda-Burundi in Bujumbura. Rwanda was also subdivided into ten territorial units, headed by local territorial administrators, all civilians (Belgians). The traditional local administration had then to follow the same administrative structure, and the King had to appoint his chiefs accordingly. From this time, revising the indirect rule system and reversing the positions, the traditional local administration was subordinate to the Belgian local administration.¹⁵ At the same time, a civil service, which could also benefit the local community, started its way, on the basis of individual civil service

Reyntjens, *op. cit.*, p. 53). Later on in 1925 (see footnote 9, Organic law of 1925) the laws of Congo-belge were *mutatis mutandis* applied to Rwanda-Burundi; in this instance the Rwandan customary law had been subordinated to the Belgian legislation, as provided by the Charter.

¹³ B. Paternostre de la Mairieu, *Le Rwanda. Son effort de développement, Antécédents historiques et conquêtes de la révolution rwandaise*, Kigali & Bruxelles, Editions Rwandaises & Editions A. De Boeck, 1983, p. 110.

¹⁴ C.M. Kanimba & L. Van Pee, *Rwanda. Its cultural heritage, past and present*, Huye, Institute of National Museums of Rwanda, 2008, p. 55; Institute of Research and Dialogue for Peace (IRDPP), *Histoire et conflits au Rwanda*, Kigali, January 2006, p. 157.

¹⁵ B. Paternostre de la Mairieu, *Op. cit.*, p. 112.

contracts. The traditional local leaders started office work in the modern sense, and salaries were introduced in the system of administration.¹⁶

When one examines the legal system of public contracting in Rwanda during the period before the colonial period, which (the later) in practice started with the beginning of the 20th century in Rwanda, it is noticeable that it was not well organised, as public entities were not involved in a large number of transactions. Whilst the contractual arrangements between the ordinary citizens were based on exchange of goods (e.g. agricultural products, materials) and services (e.g. cattle keeping, cultivating, seeding, harvesting), the administration used contributions collected from the population (consisting mainly of agricultural products), through the administrative chiefs,¹⁷ to maintain its activities.

During the colonial period, the system of customary contributions was gradually replaced with tax payment, as a result of the introduction of money: "Amongst the positive acts of colonial legislation acts was the replacement of customary contributions with taxation. Contributions that were traditionally paid by means of harvest yields were from then on done on monetary terms".¹⁸ The German colonial power introduced money in the country, the monetary unit being the *rupia* (rupee) and in 1912, a tax-poll of one rupee (or its equivalent in kind) per adult and healthy person was also introduced.¹⁹

¹⁶ Institute of Research and Dialogue for Peace, *Histoire et conflits au Rwanda, op. cit.*, pp. 157-158.

¹⁷ "To become a chief is to raise tax" (L. Classe, *L'organisation politique du Rwanda au début de l'occupation belge*, 1922, p. 685, cited by Institute of Research and dialogue for Peace, *History and Conflicts in Rwanda, op. cit.*, p. 111). The chief of pastures organized grazing and collected the relevant fees; the 'chief of the landholdings' organized agricultural matters and collected land taxes; the chief of military matters looked at the population rather than the crops or the cows; he was in charge of security matters and used to recruit soldiers for the King's army (G. Prunier, *The Rwanda crisis. History of a genocide*, Kampala, Fountain Publishers, 1994, p. 406). As observed by Prunier, "the three functions could be concentrated in a single person for a certain area, but in a difficult or rebellious area, according to the principle of 'divide and rule', the King could separate all three positions and give them to different men" (See G. Prunier, *Op. cit.*, p. 11).

¹⁸ Institute of Research and Dialogue for Peace, *L'Etat de droit au Rwanda, Op. cit.*, pp. 38-39 (translation from French).

¹⁹ B. Paternostre de la Mairieu, *Op. cit.*, p. 90.

The Belgian colonial power in 1917, as the Congo-Belge and Rwanda-Burundi used to form one administrative, financial and monetary union, replaced the rupee with a franc and a tax of 3,5 francs per adult and healthy person was launched, which, year after year, continued to increase (15 francs in 1930, 30 francs in 1940, 46 francs in 1945). Other categories of tax were also introduced, including a tax on revenues and a tax on cattle (one franc per cow).²⁰ It is thus from that time that administrative authorities could initiate the procurement of goods and services by paying money in exchange. Overtime the transactions which involved the public institutions started to become more numerous and significant, and in 1959 the country adopted a law in relation to public procurement procedures.²¹

Positive Rwandan law of public contracts is made up of many written rules contained in different acts of parliament, published through the Official Gazette of the Republic of Rwanda,²² and which are compiled in the Codes and laws of Rwanda.²³ These have been the major means of law making in general. The case-law has played a minor role in developing the law in general, or the administrative law rules in particular.²⁴ It is only of recent that the Rwanda Supreme Court started a publication of few courts judgments, both on print and website, to serve as reference.²⁵ Though they are not yet commented, the role of courts judgments understood as forming case-law is growing.

Nowadays Rwandan administrative law contains some rules which regulate administrative procedures, and, more particularly, the contracting power of

²⁰ *Idem*, pp. 109 & 114.

²¹ Decree-Law of 25/02/1959 relating to Public Procurement of works, goods and transport activities, *Official Bulletin*, 1959.

²² Official gazettes, in <http://www.primature.gov.rw/publications>

²³ "Codes and Laws of Rwanda", in <http://www.amategeko.net>

²⁴ The case-law culture was not well known in the country, to the extent that the courts laid down few administrative law rules guiding the contracting process in the public sector (for example, criteria for differentiation between administrative and private contracts have been case law developed (see *infra*, 2.1.1)).

²⁵ Rwanda Supreme Court website, in <http://www.supremecourt.gov.rw>

public authorities, the applicable legal rules and principles to public contracts, and the jurisdiction of courts in relation to public contracts litigation. As we shall explain, most of the rules and principles have been transplanted from the Belgian and French legal systems. This results from the mere fact that Rwandan law in general, and law of public contracts in particular, was inherited from Belgium law, which itself was influenced heavily by French law. The literature of the two countries has played a major role in clarifying the rules and principles of law applicable to public sector contracting.

1.1 Problem identification

The administration has always been treated in law as the supreme power in the country, and it became involved in many spheres of activity, to maintain public order and safeguard the public interest. Individuals had to consider the administration as a powerful administrative body that was not legally equal to the individuals which constituted its population. This powerful position still exists in many countries, particularly in Rwanda, and no Rwandan individual would consider himself to have powers rivalling those of the State, even in the contractual context. That is why it is important to begin our explanation with some examples of contracts which the administration often makes, and then to examine the legal power which it has at the time of making and executing them.

In considering the activities of the administration in Rwanda, and, in particular, the contracts it enters into with other people or entities, it is significant that such activities are governed by administrative law to a greater extent than private law. This is simply because they are supposed to be done in the public interest. The different public contracts, such as procurement contracts, concession contracts, privatization contracts and employment contracts, are mainly governed by public law from their preparation to their termination. The other public contracts governed by private law are very few, such as those contracts made by the so-called 'national' or 'government' companies.

This means that the administration sets out procedures for the award of these contracts and their execution. Furthermore, it is capable of 'streamlining' these contracts – that is, changing or terminating them in light

of the public interest.²⁶ It is clear that a private party which enters into a contract with the administration is in a weaker position than the administration, which has certain special powers. The other contracting party is duty bound to abide by the contract, but to also be aware that the administration may take a different view of the contract, depending on what is in the public interest.

The reason for this dominance of the state and its decentralised entities *vis-à-vis* their private partners lies in the historical roots of the *Etat Gendarme*: “All goals and purposes of the “*Etat-gendarme*” command an efficient defence of public policy and protection of the public good against potential external treats”.²⁷ This was and still is the reason the administration is vested with the power to control execution of the contract and if need be to compel the contracting party to certain performance, the power to vary the terms of contract and if necessary, to terminate execution of the contract, in the public interest. Thus in all these contracts, the administration is endowed with various powers, the so-called prerogatives and privileges of the administration, which grant it the status of a ‘super party’ to the contract.²⁸

These prerogatives supportive of the administration were usually a response to the need to ensure faultless execution, within the time-limit determined in the contract. But in reality, the provision of such prerogatives does not always ensure effectiveness in the execution of public contracts. There are cases where the so-called administrative contracts were not executed within the pre-set time limits, and other cases where poor execution led to the cancellation of those contracts.

For instance, an examination of some of the public contracts, which have been concluded in the course of public procurement or privatisation contracts, reveals that some of them were poorly executed. In the case of the contract for the construction of the head office of the National Bank of

²⁶ In Rwanda these types of procedures, which vested the administration with special powers were inherited from Belgian and French law (see above).

²⁷ G. Dupuis et al., *Droit Administratif*, 10th ed., Paris, Sirey, 2007, p. 4 (translation from French).

²⁸ Similarly, see G. Braibant & B. Stirn, *Le droit administratif français*, 7th edition, Paris, Paris, Presses des Sciences Po & Dalloz, 2005, pp. 202-203.

Rwanda (a public procurement contract for works), awarded to SOGEE Enterprise in 1978, litigation concerning defective execution was before the courts until 2007, when it finally concluded. The Supreme Court, in its ruling, ordered the National Bank of Rwanda to accept final completion of the works of construction started in 1978, and to release the security bond that the Bank had been holding until 2007.²⁹

There are also cases where the state, years after privatisation of government companies, and for the preservation of the public interest, has been obliged to retake some of the ceded enterprises. This was often a result of a failure by the private party to carry out the primary undertaking set out in the business plan, as agreed upon by the beneficiary and the State. In most cases, a substantial period of time may have elapsed after the conclusion of the contract before the State becomes aware of the flaws.

This can be seen in the cases of the Kigembe fishery (*Gone Fishin' v. Rwandan State case*) and the Kibuye Guest house (*Munyampirwa v. Rwandan State case*). In *Gone Fishin' v. Rwandan State* (and also in *Munyampirwa v. Rwandan State case*), because Government of Rwandan had cancelled the privatisation contract due to breach of contract (non execution of important activities planned under the contract), the complainant introduced a case before court for review of that decision. The complainant claimed to be the owner under private law, whereas government argued that the contract was administrative. The Supreme Court, in its ruling, rejected the submissions of the complainant, because privatisation contracts are administrative in character.³⁰

These cases highlight the difference between public and private law in their application to contracts. Under private law, a contract aimed at the transfer of land or property ownership automatically leads to unimpeachable

²⁹ *Société Générale d'Entreprise (SOGEE) & Succession Sebera v. Banque Nationale du Rwanda*, Supreme Court, RCAA 0017/06/CS, 02/08/2007.

³⁰ *Gone Fishin' v. Rwandan State*, Supreme Court, R.Ad.A 0006/07/CS, 19/02/2008 (unpublished). The same rule was confirmed in *Munyampirwa v. Rwandan State* (Supreme Court, R.Ad.A 0010/07/CS, 06/06/2008, in <http://www.supremecourt.gov.rw/06admunyampirwa2.pdf>, accessed October 16th, 2009).

ownership.³¹ However, under administrative law, for the protection of the public interest, if the other contracting party fails to fulfil the undertakings in a privatisation contract, the state has a right to repossess the transferred property, basically because such privatisation contracts contain a clause vesting the administration with the power to end the contract and repossess the privatised property, in case of failure to comply with the operational plan.

For example in the contract between Rwandan State (Ministry of finance and economic planification) and Maïserie Mukamira, a maize factory, it was provided under article 13, par. 1 that “[i]n case the buyer breaches the contract, in particular the investment plan and after two notices without a positive response, the government reserves the prerogatives to terminate the contract and without any conditions, repossess the assets of the maïserie”³². This is one characteristic prerogative amongst the various prerogatives and privileges that the administration enjoys, including among others the power to control, vary or terminate contracts in light of the public interest.

These broad powers also permit the administration to inflict punishment on the other contracting party, if that party does not comply with the terms agreed upon in the contract. This punishment may take various forms, such as being temporarily or permanently prohibited from participating in the tendering process (debarment³³) or engaging in employment contracts (e.g. suspension or automatic resignation³⁴), or being charged a certain sum of

³¹ This is guaranteed under the provisions of article 44 of Rwandan Civil Code - Book II relating to property law

³² Contract of 18/05/2004 entered into between Rwandan State (Ministry of finance and economic planification) and Maiserie Mukamira, a Maize Factory for maize operational activities.

³³ Art. 18 of Law n° 12/2007 of 29/03/2007 on Public Procurement (in *O.G.* n° 8 of 15/04/2007) provides: “After reasonable notice to the bidder involved, and reasonable opportunity for that bidder to be heard, the Rwanda Public Procurement Authority shall have the power to exclude a bidder from participation in public procurement”.

³⁴ Art. 119 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service (*O.G.* n° 17 of 01/09/2002) states: “Automatic resignation is a deed by which the authority competent in the field of Public Service decides to expel definitively an employee from the Government staff”.

money for having delayed in execution of the contract³⁵. However, as A. Basomingera explains it, public contracts should not always be governed by public law, because the administration does not always need broad powers when tendering or controlling the execution of these contracts: “Once it happens that the administration does not use its broad powers in a category of contracts it enters into, then those contracts should become ordinary contracts of the state”.³⁶

A good example is found under public procurement contracts. If all public procurement contracts in Rwanda are governed by public law, not all public contracts have an inherent element of public interest. A close examination shows that most low value contracts, such as purchase of papers, re-installation of louvers in windows, or hire of a car for a day, are all administered by public law, despite there being no clearly discernable public interest to preserve. Then according to Basomingera, these categories of contracts ought to be governed by private law.³⁷

Then when looking into the procedures for public contracting in Rwanda together with the implementation of the administration’s powers, one can observe that these can have a negative effect on the effectiveness the contracts, particularly by causing delay in the performance of public contracts, due to numerous procedures which must be followed before the contracts are awarded, or to different variations which must be made to them during their execution. They can also have a negative effect on the other contracting party. That party often will not be able to determine its legal position with any degree of certainty due to the various powers which

³⁵ Article 109 of Law n° 12/2007 of 29/03/2007 on Public Procurement provides: “Unless it results from reasons provided for by this Law, the successful bidder shall incur a penalty equivalent to one thousandth (1/1000) of the value of the uncompleted activities for each day of delay. Such penalty shall not exceed ten per cent (10%) of the value of the tender. If the penalties reach ten per cent (10%) of the value of the tender, the contract shall automatically be cancelled.”

³⁶ Interview with A. Basomingera, Former lecturer of administrative law at the National University of Rwanda and former director of legislation department in the Ministry of Justice, currently Lawyer, conducted on March 31th, 2008.

³⁷ A. Sebazungu (Assistant deputy attorney of State in charge of State’s courts litigations) and J.P. Kayitare (Assistant Deputy Attorney of State in charge of legislation) are also of the same view (see *infra*, 4.3.2).

may be invoked by the administration in the name of public interest (a concept whose full limits are not easily assessed).

The nature of the problem identified above shows us three things. Firstly, there exists a serious imbalance between public and private law in the sphere of public contracts in Rwanda. An examination of the system of public contracting shows that this field is mainly governed by public law, and private law only plays a minimal role. Such an imbalance may affect the effectiveness of the administration's contractual arrangements and the other contracting party's performance.

Although we acknowledge the merits of the application of public law to public contracts, and the advantages of vesting the administration with certain prerogatives and privileges in this context, this discussion examined the negative consequences which result from the mere application of public law to public contracts. Moreover, it questioned whether a 'mixed approach' could be adopted with regard to public contracts, applying public law and private law in combination. This study is therefore questioning whether public law ought to predominantly regulate public contracts, especially where a clear public interest is not readily discernable. This discussion attempted to understand the reason for regulating public contracts in the same way as administrative decisions are governed (i.e. through the use of public law). To do so, this study examined the degree to which public interest is invoked in order to classify a public contract as administrative or private in nature, and simultaneously granting jurisdiction over any litigation arising from that contract to the administrative chamber of court or civil courts.

Secondly, the administration during the public contracting uses prerogatives and privileges, in order to preserve the public interest (these constitute the classical principles of law applied to public contracts in Rwanda). This study observes that, though the administration vests itself with broad powers and makes use of preventive measures and penalty clauses in the name of public interest, it is not clear that such use always effectively ensures the proper execution of public contracts. An exploration of a different approach to the regulation of public contracting, which might yield fruitful results, is then suggested, i.e. the use of the principles of good governance, as an alternative to an approach mainly based on the classical principles of law. In doing so, this study shows that in some situations these broad powers are not always

needed during the public contracting, in some other situations these powers might frustrate the principles of good governance, if they are misused.

Thirdly, Rwanda has recently acceded to the East African Community.³⁸ Even if Rwanda inherited its rules of public law from countries with a history of civil law, this development requires a review of the Rwandan legal system in order to ensure consistency with the legal systems of other community members. The legal systems of most members, e.g. Uganda, Kenya and Tanzania, originate from the common law.

The process of law reform is already ongoing. For example, a Commission for business law reform was created, which drafted a number of laws aimed at facilitating doing business in Rwanda.³⁹ A more general law reform

³⁸ Treaty of accession of the Republic of Rwanda to the East African Community (EAC), signed in Kampala, in Uganda, on 18/06/2007, *O. G.* n° special of 28/06/2007. Authorization of ratification by Law n° 29/2007 of 27/06/2007. Ratification by the Presidential Order n° 24/01 of 28/06/2007, *O.G.* n° special of 28/06/2007. , The Treaty for establishment of the East African Community entered into force on 7/7/2000, with three original member states (Kenya, Uganda and Tanzania). Rwanda and Burundi acceded to the EAC Treaty on 18/06/2007, and became members of the EAC with effect from 1/7/2007 (see “East African Community”, in <http://in2eastafrika.net/east-african-community/>)

³⁹ Here is the list of laws already passed by Parliament, in relation to doing business and facilitating East African Community companies and other foreign companies to invest in Rwanda:

- Law of contracts: Law n° 45/2011 of 25/11/2011 relating to contracts, *O.G.* n° 4 bis of 23/01/2012;
- Company law: Law n° 07/2009 of 27/04/2009 relating to companies, *O.G.* n° special of 14/05/2010;
- Law on commercial recovery and insolvency: Law n° 12/2009 of 26/05/2009 relating to commercial recovery and settling of issues arising from insolvency, *O.G.* n° special of 26/05/2009;
- Labour law: Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, *O.G.* n° 13/2009 of 27/05/2009;
- Law establishing commercial courts: Organic Law n° 59/2007 of 16/12/2007 establishing the commercial courts and determining their organisation, functioning and jurisdiction, *O.G.* n° 5 of 01/03/2008;
- Law on arbitration, mediation and conciliation: Law n° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters, *O.G.* n° special of 06 mars 2008;
- Law governing secured transactions: Law n° 10/2009 of 14/05/2009 on mortgages, *O.G.* n° special of 15/05/2009; Law n° 11/2009 of 11/05/2009 on security interests in movable property, *O.G.* n° special of 15/05/2009;

commission - the National Law Reform Commission - has been established to follow up the development of laws and their reform,⁴⁰ and to also deal with all issues in relation to harmonisation of the laws in the context of East African Community integration.⁴¹ This accession logically necessarily entails the adaptation of the Rwandan law of public contracts in order to attain a certain degree of integration with other member states. That will, in turn, remove boundaries which exist between the different legal systems within the community, and simplify contractual transactions.

This adaptation shall involve the introduction, not only of new binding norms to public contracts, but also of new legal principles, bearing in mind that the use of principles of good governance can alleviate the unfairness of rules granting unilateral privileges to the administration. Rwanda may wish to retain its civil law infrastructure. However, if it wishes to engage in public contracts with legal persons originating in other East African community members (which may be a consequence of the expansion of the Rwandan market to encompass other East African community members), the law on public contracts may have to become more closely aligned with that in other member states. In particular, in member states with a common law background, the overriding tendency is to regulate public contracts according to private law.

-
- Law on condominiums: Law n° 15/2010 of 07/05/2010 creating and organizing condominiums and setting up procedures for their registration, *O.G.* n° special of 14/05/2010;
 - Law governing negotiable instruments: Law n° 32/2009 of 19/11/2009 governing negotiable instruments, *O.G.* n° 52 bis of 28/12/2009;
 - Law relating to electronic transactions: Law n° 18/2010 of 12/05/2010 relating to electronic messages, electronic signatures and electronic transactions, *O.G.* n° 20 of 17/05/2010.
 - Law relating to competition and consumer protection : Law n° 36/2012 of 21/09/2012 relating to competition and consumer protection, *O.G.* n° 46 of 12/11/2012

Another law is still on draft:

- Public-Private Partnerships bill.

⁴⁰ Art. 5 of Organic law n° 01/2010/OL of 09/06/2010 establishing the National Law Reform Commission, *O.G.* n° 28 of 12/07/2010.

⁴¹ Interview with J.P. Kayitare, Assistant Deputy Attorney of State in charge of legislation, conducted on 15/02/2012.

In conclusion the central discussion of this study, as described below, is to examine and assess, from a classical view of legality, the power vested in the public authorities to enter into public contracts, the binding legal rules and legal principles used to them, and the jurisdiction of courts over litigation in that context. Then, from a modern broad view of legality, an alternative approach to the regulation of public contracts, the possibility of using a system consistent with the principles of good governance, is considered.⁴²

In this regard, legality of public contracts in Rwanda is analysed looking into the growing impact that ‘good governance’ has on the rule of law in general, but particularly on ‘legality’ which is part of the rule of law. The purpose is then to look into the legality of public contracts from a good governance perspective, examining how best to ensure a proper, transparent, effective, human rights oriented, participative and accountable management of the public contracts in Rwanda. It is however to be noted that in this study this new way of thinking legality is applied to public contracts only, not to other aspects of the administrative action such as how decisions of public authorities in general are taken.

1.2 Questions under discussion

The central question of this study is: How the principle of legality is applied and how the principle of legality in relation to principles of good governance should be applied to public contracts in Rwanda?

We are working on this question by developing our ideas on the legality of public contracts, and on how legality is linked to the principles of good governance. In this regard, there exist several levels in which we are asking the question:

- The conceptual (abstract) level describing how legality, considered as one of the components of the rule of law, impacts on the categorisation of public contracts;

⁴² If the administration’s decision is made in accordance with a certain pre-determined legal rule (more likely with the support of its special powers), that refers to the classical or narrow view of legality. Where the decision is made, surely in accordance with the law, but in line with the relevant principles of good governance, that denotes the modern or broad view of legality.

-
- The level of the legal base (concrete level), in which the legal rules and principles applied to the public contracting and also the link of legality to principles of good governance during the process are examined; and
 - The level of jurisdiction of courts over public contracts litigation.

This question raises a number of sub-questions, which can be formulated as follows:

1. What are the different categories of public contracts in Rwanda?
 - Which public contracts are categorised as administrative contracts?
 - Which public contracts are categorised as private contracts?
2. Which law is applied to the system of public contracting in Rwanda?
 - Which law empowers the public authorities to enter into contracts?
 - Which legal rules are applied to public contracts?
 - What are the legal principles of law applied to public contracts
 - What are the classical legal principles applied to public contracts?
 - If public contracting in Rwanda is rooted in the application of legal principles granting privileges to the administration, can the administration ever be treated the same way as an ordinary citizen when contracting with private individuals?
 - How can the principles of good governance be applied to the process of public contracting?
 - Would an application of public law, in combination with private law and with the support of principles of good governance, lead to greater effectiveness in public contracting?
3. Which court has jurisdiction over public contracts?
 - What is the reason behind jurisdiction of the administrative chamber of courts over public contracts?
 - Can public contracts fall within the jurisdiction of ordinary courts?
 - If not, then can public contracts with a high level of public interest be subject to the jurisdiction of the administrative chamber, and other contracts subject to the jurisdiction of the ordinary courts?

1.3 Methodological approach

Methodological departure of this study

In order to answer the central question mentioned above, this study is:

- Verifying the existence of an imbalance between the application of public and private law to public contracts, and discovering the reason for this;
- Analysing the advantages and disadvantages of predominantly applying public law to public contracting, by comparing the Rwandan system with systems which characteristically contain an imbalance between the application of public and private law to public contracts (e.g. France, Belgium and England) and those which characteristically balance the application of these types of law (e.g. The Netherlands);
- Examining public contracts from a good governance perspective, by assessing the applicability of principles of good governance to public contracts in Rwanda;
- Making appropriate recommendations as to how public contracts in Rwanda may be governed by a balance of public and private law, using the modern broad view of legality (supportive of the principles of good governance) as an alternative to the classical legality concept (supportive of privileges to the administration).

Examination of the legal rules and principles applied to public contracts

The study examines the binding legal rules and principles of law which govern public contracts in the selected countries. It then discusses the extent to which public law or private law apply to public contracts, and also the extent to which principles supportive of granting privileges to the administration in contracting, or principles supportive of good governance, ought to be employed. This is necessary to discover the rationale which justifies the particular legal regime applicable to public contracts in the selected country, the relevance of the principles of good governance to public contracting and the likely consequences of implementation of those principles.

The legality of public contracts is then analysed from the perspective of good governance, and those principles essential for the proper, transparent, effective, accountable and fair administration of public contracts are set out.

Review of the literature and case-law in relation to public contracts

This study examines the theories underlying the legal rules and principles which have been developed in relation to public contracts, and enjoy

exposition in academic writing and case law. It reviews literature from textbooks as well as journal articles and internet sources, and treats it as a description of the knowledge that has been established by accredited scholars and experts in the field of the study. The literature was chosen from selected countries where there has been *divergence* between public law and private law when applied to public contracts (such as Rwanda, France and Belgium), and countries where there has been *convergence* between public law and private law in this context (such as England and The Netherlands).

There was also a review of the relevant case law, which constitutes an account of the interpretation of the relevant rules and norms by judges from the selected countries.

Connection of outcomes of this study with interviews

For the purpose of this study, interviews were carried out in order to collect different views on the topic of public contracts and good governance. These interviews were used to supplement the information obtained from the literature and case law, and to arrive at certain conclusions and recommendations. More particularly these interviews were highly needed in the Rwandan context because in the country, differently from the Northern countries, there is a lack of relevant literature, especially in the field of public contracts. A careful selection of key legal scholars and practitioners, capable of scientifically assessing the applicability of public or private law to public contracts, was then done.

In many cases, these interviews involved personal conversations with key legal scholars and practitioners from the relevant countries, with the help of a pre-formulated written set of questions for discussion. Where personal conversation was impossible, questions and answers were sent via e-mail. The interviewees were informed that some of the information they had given would be quoted verbatim and attributed to them.

Comparative approach

A comparative approach has proved useful to arrive at certain conclusions in relation to the public contracts law in Rwanda, a country which is currently in the process of legal transition and is undergoing a law reform in different

sectors of activity, due to its recent membership to the East African Community. It is worth noting that the other three members of the East African Community, i.e. Kenya, Uganda and Tanzania adhere to the common law system and in principle uses the private law approach to public contracts, whereas Rwanda and Burundi still follow the civil law system and public law approach to public contracts. It involved comparison of the Rwandan law of public contracts with the French and Belgian laws (which use the 'public law' approach), and with countries which belong to the 'common law family', by reference to England (which uses the 'private law' approach). The purpose of this comparison was to model a 'mixed approach' to public contracts which could be adopted in Rwanda, a blend of the public and private law approaches, similar to that which already exists in the Netherlands. Thus, in addressing the question "which legal rules and principles should govern public contracts in Rwanda?", we consider that the countries under comparison represent the key scenarios for comparison with the public contracting in Rwanda.

The study interests are focused on a comparative discussion of the five legal systems which show that:

- Firstly, public contracts may be regulated using public law, as is the case in Rwanda, France and, to some extent, Belgium;⁴³
- Secondly, public contracts may be regulated using private law, as is the case in England, and;
- Thirdly, public contracts may be regulated using a mixed approach, as appears to be the case in the Netherlands.

The study interests are also, and more particularly, focused on the shift from a classical view of legality (vesting the administration with broad powers) to a modern view of legality (whereby the principles of good governance serve as a mechanism for legal development in this field). This explains the title of this discussion, *"Good governance and public contracts. A comparative perspective on the balance between public and private law in Rwanda"*. It is aimed at analysing the way legality is used with the support of principles of good governance, and how that can be introduced into the sphere of public

⁴³ This shall be done by a retrospective examination of the developments of the Belgian public procurement law, because in applying Decree-Law of February 25th, 1959 cited above, Rwanda somewhat inherited the Belgian public procurement Law. However, it later developed in a way quite different to the Belgian public procurement law.

contracts, to enable the striking of an effective balance between public law and private law in this field.

However, this study is concerned with the fundamentals. It does not, in a functional way, consider the details of each and every public contract in countries under comparison. An exploration of the five legal systems was done with the aim of understanding the legal rules and principles underlying the application of public law, or private law, or a combination of the two.

This study also aims to avoid the situation where legal rules and principles are inaccurately transposed from another legal system into the Rwandan legal system. The new development of the Rwandan legal system is characterised by remarkable energy and creativity,⁴⁴ allowing the moulding of a legal system that fits the Rwandan context. As S. Rugege points out: “Rwanda is not sticking to the civil law or moving towards the common law or mixed system; rather, it is trying to develop a legal system that is best for the Rwandan context, and that fits the circumstances of Rwandese people”⁴⁵.

Scope of the study

This study pays close attention to the public contracting on national level, in selected countries (i.e. Rwanda, France, Belgium, England and the Netherlands). France and Belgium (countries of the civil law system) were chosen because of their closeness to the Rwandan legal system, as part of the colonial history; England (a country of the common law system) because of its closeness to most of the East African Community member states (Kenya, Uganda and Tanzania), also as part of the colonial history; and The Netherlands because of its peculiar public contracts legal system, which is in between the civil and the common law systems.

For comparative purposes, this study is using a vertical approach (from country to country), to facilitate an easy understanding of each and every legal system under comparison. It also utilizes a consistent structure (power

⁴⁴ Interview with J. Busingye, President of the (Rwanda) High Court, conducted on August 18th, 2010.

⁴⁵ Interview with S. Rugege, President of the (Rwanda) Supreme Court. Interview was conducted the time when he was Deputy Chief Justice, on August 17th, 2010.

of the public authorities to contract; rules and principles of law applicable to public contracts; and jurisdiction of courts over litigation arising out of public contracts) to ease parallelisms between the different national legal systems of public contracts.

Moreover, this study does not cover the international aspects of public contracting, such as the rules of the Government Procurement Agreement (GPA). Certainly trans-national or global rules on public contracts (in relation to the different global sectors of public procurement such as water, energy, transport, communication, etc.) serve to improve national legal frameworks⁴⁶ in a more converging way, hence lessening the public-private divide. However, their impact is not yet at the level of having substituted the public law way as used in France or the private law way as used in England. Rather the tendency is that of applying a more and more mixed law way, as already done in the Netherlands and, to some extent, Belgium.

1.4 Remarks on the terminology in this study

Within this study, several key words are used frequently. These are explained, to enable those who read it to understand what is implied by using such words, and also because they may have an alternative meaning in the context of other legal systems, for instance in France or England. Additionally, the words are explained because the law in Rwanda has been heavily influenced by Belgian and French law. Most legal terms were copied from Belgian and French and then translated into Kinyarwanda (the Rwandan language). Accordingly, some of their meaning may be lost by the subsequent translation into English. Moreover it is possible that if certain words were used outside the legal context, for instance in political speeches which were broadcast by the media, they were not meant in their strict legal sense.

In this document, however, words are used according to their legal meaning, specifically in the administrative law, in relation to public contracts. Without

⁴⁶ "Taken together, the global provisions individually traceable to various sources (agreements, conventions, guidelines, etc.) collectively modify the traditional law by which the national legality of contracts concluded by domestic administrations is measured" (H. Caroli Casavola, "Global rules for public procurement", in R. Noguellou & U. Stelkens (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 27-61, p. 60.

necessarily excluding the specific terminology for each and every legal system under comparison, for uniformity in their meaning, the words used throughout this study, reflect the definitions given here below. These words are specifically orientated towards the administration and the powers of the public authorities, other words go in line with the contracts the administration enters into, and other words are based on the legal rules and principles used to control these contracts and also with the court having jurisdiction on litigations arising from the public contracts.

Definition of important terms for clear understanding

We will begin with the general term “administration”. It is important to note that the word refers firstly to the public institutions and entities as a whole. The central administration is comprised of those entities operating at a central level, whereas the local administration consists of those entities functioning at a local level. The term “administration” is also used to mean ‘government’, that is, the management of public affairs.⁴⁷ It is thus used to describe the “activity of a government in the exercise of its powers and duties”.⁴⁸ In this study, the word “administration” will usually refer to the public institutions.

As regards specific terms, when we speak of a “public institution” or “public entity”, this can include any entity (whether a part of the central or local administration, or a public establishment) that performs its duties, and exercises its powers, in the interest of the public, as opposed to private, gain. The term “public institution” has been used to refer to the legal entity in question, whereas the term “public body” has been used to mean the administrative entity of the institution. A “public establishment” is an institution that enjoys legal personality and is managed in accordance with the laws which govern public service⁴⁹ sector organs. It is funded by the

⁴⁷ E.A Martin & J. Law, *Oxford Dictionary of Law*, Sixth Edition, Oxford, University Press, 2006.

⁴⁸ Addink H., Anthony G., Buyse A., & Flinterman C., *Human rights & Good governance*, Sourcebook, Utrecht, SIM Special 34, 2010, p. 20; see also G.H. Addink, “Principles of good governance”, in D.M. Curtin & R.A. Wessel, *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005, pp. 21-48, p. 28.

⁴⁹ A public service is a service for public benefit, under control of the administration.

State to carry out specialized activities which are in the public interest. A “national company” or “government company” refers to a public enterprise or corporation which is profit oriented. It may act individually or cooperatively with other public or private entities.

The term “administrative authority” is used according to its meaning in the Dutch General Administrative Law Act. It is a legal person governed by public law, or any other person or body which is vested with public power.⁵⁰ Depending on the context, ‘public authority’ might also have been used to mean ‘administrative authority’.

“Acts of the administration” are ways in which the administrative authorities exercise their powers, towards the fulfilment of their duties. Some acts are of a general nature, and others are of an individual nature. Accordingly, in some instances acts of the administration are general (general acts), and in others they are particular (individual acts). An “individual act” or “decision” can be defined as a conclusion reached by an administrative authority and addressed to an individual, based on a certain public power. Examples are the grant of a permit or the order of a parking fine. When the administration performs an act which concerns a category of the citizens, or the entire population, that act is a “regulation” or an “order”.⁵¹

The phrase ‘public contracts’ is used to describe the various contracts made by public institutions for services, supply of goods or work, or indeed any other purpose, such as privatisation contracts, employment contracts, concessions contracts, or insurance contracts. In Rwandan law, they encompass both the ‘administrative contracts’ and the ‘private contracts’ entered into by the administration. “Administrative contracts” are defined as legally binding agreements entered into by public bodies or on behalf of public institutions, but governed by public law. They include contracts such as public procurement contracts, concession contracts, privatization contracts and employment contracts. A “private contract”, made by a public institution,

⁵⁰ See Art. 1.1(1) of the General Administrative Law Act (GALA), accessed in <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009.html>, visited on October 23rd, 2012.

⁵¹ Ph. Foillard, *Droit administratif*, Orléans, Paradigme, 2008, p. 192 ; see also J. Chorus, P. Gerver & E. Hondius (eds.), *Introduction to Dutch Law*, Fourth revised edition, Alphen aan den Rijn, Kluwer Law International, 2006, pp. 345-346.

refers to an agreement entered into between the administration and an individual or company, which is governed by private law.

The words “prerogatives and privileges” or “special powers” denotes any powers vested in the administration to make binding decisions in relation to public contracts, without the need to obtain consent from the other contracting party, or any prior intervention by a judge.⁵²

“Principles of good governance’, in the context of public contracts, are principles which underscore the manner in which the administration can in a proper, transparent, accountable, effective, participatory and human rights oriented, utilize its means and resources during the public contracting to reach the aim of good governance.

An application for “administrative review”, addressed to the immediate superior authority, is a form of recourse which is sought against the administrative authority that made the decision, in order to obtain reconsideration of the decision. This application is prerequisite to any action for judicial review of an administrative decision.⁵³ “Judicial review” of decisions made by administrative authorities (in particular those concerning public contracts) is considered to be the principal means by which the Court having jurisdiction exercises supervision over public authorities in accordance with the doctrine of *ultra vires*.⁵⁴

In the case of a “breach of contract” by the administration or the other contracting party, in Rwanda the most important means of seeking redress is the action initiated by a statement of claim before the Administrative

⁵² G. Braibant & B. Stirn, *Op. cit.*, p. 202; Ph. Foillard, *Op. cit.*, p. 186.

⁵³ Art. 336, par. 2 of Law n° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, O.G. n° 29 of 16/07/2012.

⁵⁴ E.A Martin & J. Law, *Op. cit.*, 2006.

Chamber of the Court, which has the power⁵⁵ to hear and decide cases in relation to public contracts governed by both public law and private law.⁵⁶

Clarification of the terms ‘public contracts’, ‘public interest’, ‘legality’, ‘good governance’

Public contracts

Use of the phrase ‘public contracts’ is common in academic work. For instance, the term is used by the research network on ‘Public contracts in legal globalisation’ to describe all contractual undertakings in the public sphere.⁵⁷ Certain regulations in England and Wales also use such a vocabulary to refer to “a public services contract, a public supply contract or a public works contract”.⁵⁸

Davies suggests an alternative terminology. She argues that contracts made by public institutions are properly labelled ‘government contracts’, instead of ‘public contracts’, in the following excerpt:

“When I called the book ‘The public law of government contracts’,⁵⁹ it was a deliberate choice of wording. I deliberately talked of ‘government contracts’ referring to contracts to which government is party, instead of public contracts, because the latter may raise some discussion

⁵⁵ In this book, when reference is made to the jurisdiction of courts, the phrases “the court is competent”, “the court has jurisdiction”, or “the court has the power to hear”, are interchangeably used.

⁵⁶ The administrative chambers of Intermediate Courts shall hear the actions relating to administrative contracts, administered under public or private law (art. 83 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, *O.G Special n° of September 10th, 2008*).

⁵⁷ The research network “Public Contracts in Legal Globalization”, in <http://www.public-contracts.net>, visited on April 7th, 2010.

⁵⁸ Art. 2 of the Public Contracts Regulations 2006, England and Wales, in http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf, last visited on April 6th, 2010.

⁵⁹ A.C.L. Davies, *The public law of government contracts*, Oxford, Oxford University Press, 2008.

about public law and private law distinction, which I did not want to discuss in the context of English law.”⁶⁰

The concern is that the phrase ‘public contracts’ might be interpreted as referring solely to the administration’s public actions. The adjective ‘public’ suggests that the administration will always be implicitly permitted to utilise its public powers throughout the duration of the contract. If we acknowledge that any contract entered into by a public body is a tool by which public power can be exercised, this undermines the aim of balancing public and private law norms when regulating contracts made by public institutions.

However, not all actions of the administration are necessarily public. There are two strands to this argument. Firstly, when a public body enters into a contract, a certain public goal is not always pursued. A private goal may be sought instead. This is illustrated by the fact that the current categorisation of public contracts includes private contracts as well as administrative contracts. Secondly, if the administration can develop appropriate legal and technical means to protect the public interest using public law, the same means can also be developed using private law.

The phrase ‘government contracts’ is also inappropriate for this study because when the word ‘*gouvernement*’ (French) is translated into the Rwandan language it reads ‘*guverinoma*’. This word has a strong connotation of ‘cabinet’, the council of ministers, instead of ‘government’ as traditionally understood.

Accordingly, there is reason to adopt a word with fewer connotations, which encompasses all contracts entered into by public bodies, whether they are governed by public or private law. One could use simple phrasing, such as “contracts made by public institutions”, which does not obscure the power which public institutions possess during the contracting process. This phrase meets the first objection to the term ‘public contracts’, as ‘contracts made by public institutions’ includes contracts governed by both public and private law. The phrase “contracts of the public institutions” can also help bridge the gap which currently exists between public law and private law in all

⁶⁰ Interview with A.C.L. Davies, Professor of Administrative law, Oxford University, 24/03/2010.

contractual relations in the public sphere, and to solve the problem posed by the tendency to constantly utilise public law powers on the basis of public interest justifications. This more neutral characterisation stresses the need to go beyond public law in the quest to protect the public interest, and to consider private law as also being capable of protecting the public interest during the course of administrative contracting. However, this study is based on a comparative approach, and the wording “contracts of the public institutions” might also be contested. In some countries, private entities might also enter into contracts of public character.

In the interests of convenience, the phrase “public contracts” was chosen to describe contracts made by public institutions. Therefore in the following text, the phrase “public contracts” (and sometimes “contracts made by public institutions”) is used to refer to any kind of contractual undertaking made by an administrative entity or administrative authority. This choice of definition is not intended to represent any unanimous consensus among the academic literature. The intention is solely to use this term as a simple instrument to achieving the intended goals, not to impugn the use of other terms such as “government contracts” or “contracts of the public institutions”.

Thus in this study, the term ‘public contracts’ refers to those contracts which relate to the management of State property or any other acts or services performed or supplied in the public domain. Likewise, ‘public contracting’ means the process of entering into a public contract. Accordingly, contracts are ‘public’ only because they are entered into by or on behalf of a public body, or the related acts or services are performed or supplied in the public domain.⁶¹

Public interest

The basis for the Rwandan administration’s argument that public law rules ought to apply during the course of its contractual arrangements is the idea that every single public action, including public contracts, ought to be regulated in an attempt to preserve the public interest. One thing to widen the meaning of this rule is to acknowledge the fact that the administration is

⁶¹ See P. Vincent-Jones, *The new public contracting: Regulation, responsiveness, relationality*, Oxford, Oxford University Press, 2006, p. 26.

no more than a composite of ever-alternating recruited and appointed leaders and employees, who might be required to follow a number of public law rules to reach the 'public interest' goal. This study will closely analyse the term "public interest", a conception which is always advanced in support of the administration's actions.

When speaking about the "public interest" motivating the administration's actions, we refer to the administration's aspiration to create a platform of welfare for the public and to preserve it, during the course of its activities. From this simple description, let us consider the definition of 'public interest', to understand its full legal meaning. Theoretically and normatively, the term 'public interest' is used to refer to general well-being as an aim. But when examined from a practical perspective, 'public interest' means something (some activity or task) in which the community at large has some interest.⁶² It is in the practical sense that the word 'public' is used, with reference to the public as a community welfare or interest.

For more precision, attention shall be focused on the public-private distinction as a backdrop to this definition. According to the dictionary of legal theory, the public-private distinction is considered in two different contexts: "the private marketplace of goods and labour versus the political regulation of certain limited matters of public interest; and market (public) versus home/family (private)."⁶³ In the context of public contracts, our point of discussion is mainly concerned with the first context, the private marketplace of goods and labour versus the political regulation of certain limited matters of public interest.

Hence, the approach to determining the meaning of public interest would observe a comparable but not similar preoccupation with public interest. Primarily, a public interest view of the administration places great emphasis on the achievement of community welfare. From an administrative law perspective, if the main aim of the administration is to improve community welfare, public law should also be developed and used to attain this aim. This includes any regulation of contractual undertakings, which should also attempt to reflect this ideal. Subsequently, a public interest view of society

⁶² H. C. Black, *Black's law dictionary*, St Paul, Minn., West Publishing Co., 1990, p. 1229.

⁶³ B.H. Bix, *A dictionary of legal theory*, Oxford, Oxford University Press, 2004, p. 173.

would place great emphasis on activities which are of general concern to the public, and are to be achieved by the administration: "Public interest is a common concern among citizens in the management and affairs of local, state, and national government. (...). A public utility is regulated in the public interest because private individuals rely on such a company for vital services."⁶⁴

In this study, 'public interest' is conceived in this way. However, it is to be observed that this conception can lead to some difficulties in categorisation of public contracts, as private entities can also perform activities of general concern to the public. This is one of the challenges which this study addresses. Decisively, the term 'public interest' hereinafter refers to matters (for instance the public contracting) bringing about the general interest of the community, which the administration closely follows up and regulate, using administrative law rules.

Legality

In this study, the word 'legality' of public contracts is identified in terms of submission of the administration to the law (i.e. to written legal base)⁶⁵ in the making and execution of public contracts. In this sense, "the principle of legality requires that every administrative act that affects the rights and freedoms of an individual has a statutory basis".⁶⁶

To start with, the 'principle of legality' is one of the four pillars of 'rule of law', i.e. principles of legality, separation (or balance) of powers, independent judiciary and human rights protection. These four elements are interrelated, because 'rule of law' in a formal sense, means that the administrative authority needs legal authorization to act, but in a substantive sense, exercise of his power should not wrongfully or unfairly interfere with

⁶⁴ West's Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc. All rights reserved.

⁶⁵ L. Vinx, *Hans Kelsen's pure theory of law. Legality and legitimacy*, Oxford, Oxford University Press, 2007, p. 84; see also J. Rivero & J. Waline, *Droit administratif*, 21st edition, Paris, Dalloz, 2006, p. 229.

⁶⁶ J. Chorus, P. Gerver & E. Hondius, *Op. cit.*, p. 343.

rights and freedoms of any involved individual, and in case of wrong or unfair exercise of the power he should be held accountable before the judge.⁶⁷

Rule of law in a substantive sense thus includes the rules as well as principles of law, to guarantee justice and fairness of administrative decisions and acts: “[t]he application of such principles will often require the court to have recourse to considerations of substantive justice or fairness which go beyond the formal conception of the rule of law”.⁶⁸ These principles also include the principles of good governance: “[T]he substantive rule of law [requires] laws to be compatible with principles of equality, to protect fundamental rights, to adhere to principles of procedural fairness and natural justice and to comply with obligations deriving from international law”.⁶⁹

Mutatis mutandis, a distinction should be made between the narrow and the broad legality. Narrow legality refers to compliance with formally enacted legal rules (as in hierarchy) which in the context of public contracts determines the power of contracting authorities and how this power is implemented for the making and execution of public contracts. Legality in a broad sense refers to both written and unwritten norms which govern decisions and acts of the administration. Even if decisions or acts may be formally authorized and performed in accordance with the written legal rule, unwritten norms are also relevant in the context of public contracts, i.e. principles of administrative law (such as the principle of protection of public interest, the prerogative of unilateral modification or termination of contract in the public interest, privilege of prior compliance and the privilege of forced execution with no recourse to the judge) or principles of private law (such as the principles of fairness and reasonableness).⁷⁰

However this way of looking into legality is challenged by the substantive view of rule of law (as explained above), which requires decisions and acts of the administration to be, not only legally justified (in a narrow or broad sense

⁶⁷ A.L. Young, “The Rule of Law in the United Kingdom: Formal or Substantive?”, in *ICL Journal (Vienna Journal on International Constitutional Law)*, Vol. 6, 2/2012, 259-280, p. 261

⁶⁸ P. Craig, “Formal and substantive conceptions of the rule of law: an analytical framework”, *Public Law*, Vol. 21, 1997, pp. 467-487, p. 467ss.

⁶⁹ A.L. Young, *Loc. cit.*, p. 261.

⁷⁰ L. Vinx, *Op. cit.*, p. 84, see also J. Rivero & J. Waline, *Op. cit.*, p. 229

of legality), but also substantially correct (broad view of rule of law). As Vinx puts it, “a legal decision can be both procedurally and materially correct without being uniquely determined by higher-order legal norms that condition its legality”.⁷¹ This requirement of material rule of law hence justifies the application of principles of good governance to the public contracting process which will undoubtedly have, in contrast to classical principles of administrative law or private law, the effect of increasing the material effectiveness of public contracts, and so lessening (or substituting) the need for use of classical general principles of law.⁷²

Good governance

It is important, in setting out the principles of good governance which are relevant to the public contracting, to clarify the meaning of the terms ‘governance’ and ‘good governance’.

The term ‘governance’ can be properly understood as

“(…) the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and co-operate action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests”.⁷³

⁷¹ L. Vinx, *Op. cit.*, p. 84.

⁷² In this study, it was necessary to make a bridge between the legality approach, characteristic of the civil law system which puts an emphasis on the application of written and unwritten norms to form the basis of administrative decisions and acts (since Rwanda belongs to this system), and the rule of law approach characteristic of the common law system with an emphasis on the protection of rights and freedoms of individuals (which definitely has influence on the Rwandan legal system because of its membership to the East African Community to which most of countries (such as Uganda, Kenya and Tanzania) adhere to.

⁷³ Commission for Global Governance, *Our Global Neighbourhood*, Oxford, Oxford University Press, 1995, p. 2, cited by D. M. Curtin & I. Dekker, “Good Governance: The concept and its application by the European Union”, in D.M. Curtin & R.A. Wessel (eds.), *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005, pp. 3-20, p. 9.

However legally speaking, the term 'governance' is frequently associated with the adjective 'good', to refer to 'good governance'.

The concept 'good governance' requires administrative structures to be organised in a way that ensures an effective and efficient performance of their actions.⁷⁴ If literally "good governance" refers to good management of public affairs, the proper sense of the term is that it could be considered as the framework providing procedures for dealing with problems in the functioning of public institutions. Most of the time, good governance is examined as opposed to maladministration which, if literally it denotes bad management of public affairs, refers to the malfunctioning of the public institutions.⁷⁵ It is in this sense that UN-ESCAP represents 'good governance' as "(...) the process of decision-making and the process by which decisions are implemented (or not implemented)".⁷⁶

Back to its historical roots, 'good governance' is seen as one of the three cornerstones of any modern state, i.e. the 'rule of law', 'democracy' and 'good governance'. As they started at different moments in history - 'good governance' being the last in its manifestation, it is worth giving a short definition of the three terms:

"The *rule of law* is, basically, the idea that any government's exercise of power shall be conditioned by law and that its subjects are not to be exposed to the arbitrary will of rulers. (...).

Democracy is about the influence of the people on the policies and the activities of the government and is carried out either directly by the people (direct democracy) or by means of elected representatives of the people (representative democracy. (...).

⁷⁴ From a functional approach, a distinction is made between 'good governance' as part of public law and 'corporate governance' as part of private law (see H. Addink, G. Anthony, A. Buyse & C. Flinterman, *Op. cit.*, p. 19).

⁷⁵ G.H. Addink, "Principles of good governance", *Loc. cit.*, p. 37.

⁷⁶ United Nations Economic and Social Commission for Asia & Pacific (UN-ESCAP), "What is good governance", in <http://www.gdrc.org/u-gov/escap-governance.htm>, accessed September 23rd, 2009.

Good governance is a norm for the government and a right for the citizen. (...) Elements of good governance are: properness, transparency, participation, effectiveness, accountability and (economic, social and cultural) human rights.”⁷⁷

These elements of good governance, under administrative law, form the foundation of the so-called ‘principles of good governance’, referring to those principles which highlight the best way in which the administration can use its means and resources to achieve the goal of good governance.

Understanding the concept of ‘good governance’ requires us, as stated by G.H. Addink, to place it in three dimensions, the conceptual, the concrete and the implementation dimensions. On a conceptual dimension or abstract level of thinking the concept, good governance is analysed in reference to other two concepts, i.e. rule of law and democracy, which it serves to complete, supplement and develop. Any modern state is thought of being governed under the rule of law (a concept introduced in the 19th century), democracy (a concept introduced in the 20th century) and good governance (a very recent concept, introduced in the 21st century). These concepts have positive effects on the national legal systems, but more particularly, talking of good governance, on the effectiveness of the administration’s actions.⁷⁸ Therefore, in a certain legal system like Rwanda, if good governance is set as a right for citizens, the right to good governance, it can assure modernisation of the Rwandan legal system, administrative law and law of public contracts in particular. On a concrete level dimension or concrete level of thinking ‘good governance’, the term refers to the codified principles of good governance, such as principles of properness, transparency, participation, effectiveness, accountability. Relating rule of law, democracy and good governance, both rule of law and good governance are concerned for example with the prohibition of abuse of power in the decision making and legality of public authorities decisions and actions; likewise, both good governance and democracy are concerned with the principles of transparency of information and decisions, and participation of citizens in the decision-making process. On a practical implementation dimension or level of thinking practical

⁷⁷ H. Addink, G. Anthony, A. Buyse & C. Flinterman, *Op. cit.*, pp. 12-14.

⁷⁸ In this sense, see Rh. Boust, *Essai sur la notion de bonne administration en droit public*, Paris, L’Harmattan, 2010, pp. 431-454.

implementation of good governance, the judiciary and office of the ombudsman, through case-law or decisions based on principles of good governance, can control the administration's actions.⁷⁹

Specifically (but in short), the 'principles of good governance' includes six categories of principles:

- (1) the *principles of properness*, including the prohibition of misuse of power, the prohibition of arbitrariness, the principle of legal certainty, the principle of legitimate expectations, the principle of equality, the principle of proportionality, the principle of due care, and the principle of justification;
- (2) the *principle of transparency*, for availability of information and clarity of decisions by the administration;
- (3) the *principle of effectiveness and efficiency*, for the administration to set accurate objectives and to provide necessary means to use in order to attain the intended goals;
- (4) the *principle of human rights*, seeking - and requiring the administration - to protect the inherent dignity of each and every individual;
- (5) the *principle of participation*, which relates to the public participation in the activities of the administration; and
- (6) the *principle of accountability* required for the administrative authorities to answer for their actions.⁸⁰

In this study, if the public law and private law guiding principles underlying the making and execution of public contracts are examined, a special attention is paid to the principles of good governance. Then, the "principles of good governance" are in reality analysed in the administrative law context, with a specific focus on the public contracting process.⁸¹ However, when

⁷⁹ H. Addink, G. Anthony, A. Buyse, & C. Flinterman, *Op. cit.*, pp. 23-24.

⁸⁰ G.H. Addink, "Principles of good governance", *Loc. cit.*, pp. 23-24.

⁸¹ In developing countries, including Rwanda, effective structures and principles to enhance the administration's actions and accountability are urgently needed: "The operation of the state in national and to some extent, international, economic activity in developing countries must be through effective governing structures and processes, or what is generally referred to as 'good governance'" (F. N. Botchway, "Good governance: The old, the new, the principle, and the elements", *Florida Journal of International Law*, Vol. 13, pp. 159-210, p. 160). Here is another reason for undertaking a study on the application of the principles of good governance to the public contracts in Rwanda.

applied to the public contracting, only some principles are critically analysed in light of good governance.

For example, a special regard is given to some principles of properness, i.e. the principle of equality, the principle of justification, the principle of prohibition of misuse of power during the contacting process, and the principle of guaranteeing the legitimate expectations, more so because the administrative authorities are vested with the so-called broad powers allotting them an exceptional discretionary authority over the public contract, which may be exercised in such a way to disrupt the legitimate expectations of the other party to the contract.

Again, a special attention is attracted by the principle of transparency, which is seen as a guarantee for the release of all information relating to making and award of the public contract. Added to transparency is the principle of effectiveness and efficiency to support the administration's effort in achieving the planned objectives. Finally, an analysis of the principle of accountability is made in order to consider the way the administration's machinery shall account for the public contracts and how the principle of fairness may be implemented to ensure fairness of the administrative redress procedure.⁸²

Therefore in this study with a special focus on public contracts, the term 'good governance' refers to the proper use of the administration's powers in a transparent, participative, effective, accountable and human rights oriented way during the public contracting process.⁸³

⁸² For more details, see *infra*, 8.2.2. Principles of good governance to all public contracts.

⁸³ See H. Addink, G. Anthony, A. Buyse & C. Flinterman, *Op. cit.*, p. 19.

2 Categorisation of public contracts reflecting the public-private law divide

The categorisation of public contracts may be conceived in many dimensions, one being the intended goal dimension, the other being the functional dimension of the contract, and the last being the legal relationship dimension.

Where categorisation takes into account the intended goal pursued by government while contracting, public contracts might be of two categories: contract used as a means of exchange and contract used as a technique of regulation of public utilities or services. This has been the classification of public contracts by S.H. Baily, who distinguishes between contract 'as a medium of exchange' and contract 'as a technique of government or regulation'.⁸⁴

When one considers the function of the contract itself, then categorisation will consider the purpose of each and every particular contract, such as procurement of goods or works or services, employment, concession or privatisation of public utility or service or public-private partnership in the exploitation and delivery of public utility or public service. In this line, A.C.L. Davies gives the following typology of government contracts: employment, contract for the provision of goods and services, the Public Finance Initiative and Public-Private Partnership, the licensing and franchising, and internal contracts.⁸⁵

Another way of categorising public contracts is through the weighing of the legal relationship between the administration and the contracting partner, which might lack reciprocity or be reciprocal. If the contractual relationship is vertical, meaning that it lacks reciprocity, the contract is categorised as a public power or administrative contract; if the relationship is reciprocal or just horizontal, the contract is categorised as a private power or (simply) private contract. In this sense, J. Morand-Deville for example gives the following categorises public contracts as follows: the administrative contracts

⁸⁴ S.H. Bailey, *Cases, Materials & Commentary on Administrative Law*, Fourth Edition, London, Sweet & Maxwell, 2005, p. 62.

⁸⁵ A.C.L. Davies, *Op. cit.*, pp. 2-16.

(*contrats administratifs*) and the private contracts (*contrats de droit commun de l'administration*).⁸⁶

As the legal framework of this study is more related to the legality of public contracts, their categorisation has been directed towards the analysis of the relationship between the administration and the other party in a contractual relationship. Such a kind of categorisation then reflects the public-private law divide which exists in determining the applicable law to public contracts because, as a matter of law, where the relationship is vertical, public law applies, and where the relationship is just horizontal, private law applies. Thus, a short examination of this divide between public and private law is needed, in order to clearly discern the distinction made between the administrative and the private contracts of the administration.

In many (if not all) legal systems, there has traditionally been a divide between public and private law. Theoretical discussion regarding this divide has raised a number of questions as regards the distinction between the two categories, specifically when determining what law is applicable to certain acts of the administration. In determining the law applicable to public contracts, some countries, such as Rwanda, France and Belgium, still maintain a distinction between public and private law. Other countries, such as England and the Netherlands, are trying to go beyond the limits of such a distinction.

This chapter distinguishes between countries in which there is a *divergence* between public and private law, and countries where there is a *convergence*, in the context of public contracts. Accordingly, the various types of public contracts in each country are not described functionally, but rather by reference to the public-private law distinction.

Countries where public law and private law diverge means countries where a clear demarcation is established,

- firstly between the 'administrative contracts' entered into by public entities and the 'private contracts' for private entities (or the public bodies when they stand as any private entity);

⁸⁶ J.Morand-Deville, *Cours de droit administratif: Cours, thèmes de réflexion, commentaires d'arrêts avec corrigés*, 8th edition, Paris, Montchrestien, 2003, pp. 389-391.

- secondly between the applicable law to these contracts, since administrative contracts are governed by public law whereas private contracts are governed by private law; and
- thirdly there is a distinction of courts dealing with litigations arising from these contracts, i.e. administrative courts for administrative contracts and ordinary courts for private contracts.

This is the reason for placing Rwanda, France and Belgium in countries of divergence between public law and private law because these countries, with bit of variation, fulfil the three criteria.

Contrary to these, countries where public law and private law converge means countries which lessened the boundaries between public law and private law, and where the two fields of law, i.e. public law or private law, interact with each other. This means, under the law of public contracts, that

- the distinction between administrative contracts and private contracts is minimised;
- then the differentiation between the applicable law to these contracts is also lessened, with the acceptance of private law application to private contracts as well as administrative contracts;
- finally there is no distinction of courts dealing with litigations arising from these contracts, the only courts competent being the ordinary courts.

This is the reason for placing England and the Netherlands in countries of convergence between public law and private law. Typically English law of public contracts fulfils these criteria. In the Netherlands, a minimal distinction still exists, because the law of public contracts distinguishes between the public power, the patrimonial and the mixed contracts, but still the law has gone beyond such a distinction in accepting the application of private law and also the competence of ordinary courts to those contracts.

Therefore in this chapter, categorisation of public contracts – taken as instruments for realizing the intended goals through contracts, is done basing on the relationship which exists between the public entity and the contracting entity in a contractual relationship. If the relationship is vertical, meaning reflecting the public powers to making and controlling execution of the contract, the contract is an administrative or public power contract. If the relationship is just horizontal, without any special public powers vested in the public body, the contract is a pure private or patrimonial contract.

However, as a footnote, categorisation here in this chapter has a more indicative function than full descriptive function. Not all categories of public contracts are described in a functional way, but rather we have mainly distinguished between the administrative (or public law power contracts) and the private (or private law power) contracts. Therefore, if some examples of contracts in each category have been given in a functional way, they only serve the purpose of illustration.

2.1 Categorisation in countries of divergence between public and private law

In countries where there is a divergence between public and private law (namely, Rwanda, France and Belgium) the public contracts are usually divided into two categories - the 'administrative contracts' governed by public law and the 'private contracts' governed by private law.

2.1.1 Types of public contracts in Rwanda

In Rwanda, the administration may enter into many contracts governed by public law (the so-called 'administrative contracts') and a few governed by private law (the so-called 'private contracts'). The administrative contracts include, *inter alia*, procurement contracts, concession contracts, privatization contracts, employment contracts for civil servants and subsidy contracts. The private contracts consist of contracts made by the national companies, or those contracts governed by a combination of private law and public law rules, such as labour contracts and insurance contracts.

Administrative contracts

The criteria for determining whether a contract is administrative in nature have recently been set out by the case-law.

Prior to 2008, the criteria for determining whether a contract was 'administrative' were not properly defined in Rwandan administrative law. However, in the recent case of *Gone Fishin' v. Rwandan State*, the Supreme Court confirmed that three conditions must be satisfied if a contract is to be termed 'administrative':

- Firstly, a public institution must be present as a contracting party. This is known as ‘the organic criterion’, and it means that if a public entity is a party to the contract, then that contract is administrative in character, and public law is applicable. If no public entity is a party to the contract, private law is applicable.
 - Secondly, the contract must involve the performance of a public service (in that performance of the contract is in the general interest of the public).
 - Thirdly, the contract must make use of special clauses, giving the administration special powers which are not found in the ordinary law.
- The first condition is essential, but the second and third conditions can be applied in the alternative (alternative criteria).⁸⁷

In *Gone Fishin’ v. Rwandan State*, the Supreme Court ruled as follows:

“We found, as recommended by legal specialists, that administrative contracts are characterized by three elements:

- the first is concerned with the contracting parties, that is to say that one of the contracting parties must be a public institution;
- the second is concerned with the aim of the contracts – that aim must be the general interest of the public (execution of a public service);
- the third is concerned with provisions within the contracts - the contract should show some special provisions that do not appear in other agreements between ordinary individuals, that allow the administration to be placed above its contractor using special clauses.

The first requirement must always appear, whereas the last two can appear in the alternative (alternative criteria).”⁸⁸

⁸⁷ *Gone Fishin’ v. Rwandan State*, cited above. This conclusion was reached from the following French literature: J.-M. de Forges, *Droit Administratif*, University Press of France, third edition, 1995, pp. 30-31, R. Chapus, *Droit administratif général*, Tome 1, Paris, Montchrestien, fourth edition, 1988, pp.356-373, cited in *Gone Fishin’ v. Rwandan State*.

⁸⁸ *Gone Fishin’ v. Rwandan State*, cited above. The case received further application in *Munyampirwa v. Rwandan State*, cited above, par. 69-70.

From these criteria, we can see that a wide range of contracts fall under the category of administrative contracts. The principal sub-categories of administrative contracts are described below (note that this list is not exhaustive).

The first group consists of public procurement contracts. Up to the time of writing, the Rwandan administration has been the largest purchaser of goods and hirer of services and works, performed by both private suppliers or contractors and state officials, using procurement contracts.⁸⁹ Since the public institutions in Rwanda are the most important source of funds, they have to enter into ordinary transactions with private parties. Such transactions are often only for trifling sums, such as the purchase of office materials and equipment, or the hire of taxi or bus transport for service missions. But the administration also engages in a wide range of higher value transactions, such as contracts for the construction of national roads or administrative buildings.

This means that often public contracts are governed by public procurement law, which sets out guidelines for expenditure on goods, services and works, and for the use of funds set out in the budget. Public procurement law also sets out guidelines on the correct procedures to follow when implementing the contract and controlling expenditure. For example, it lays down certain rules relating to the tendering process which public institutions engage in, a process which may be better analysed from a procedural, rather than substantive law, perspective. These procedures were first set out in the decree-law of February 1959 implementing the royal decree of 26 June 1959 on public procurement of work, goods and transport.⁹⁰ The decree-law did not, however, clarify procedures relating to procurement of services not related to transport. This decree-law was replaced by law n° 12/2007 of 29/03/2007 on public procurement,⁹¹ which considered the three types of public procurement, procurement of goods, works and services. This law, by setting out pre-determined rules and guidelines to be followed in the

⁸⁹ Interview with O. Biraro, Deputy Auditor General, conducted on January 10th, 2008.

⁹⁰ Decree-Law of 25/02/1959 relating to public procurement of works, goods and transport, *Official Gazette*, 1959.

⁹¹ Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

entering of contracts, helps to avoid the embezzlement and misuse of public funds.

The second sub-category of administrative contracts encompasses the privatisation contracts. The State has recently embarked on a strategy of privatisation. A number of reasons lie behind this strategy, such as the characteristic maladministration of many public establishments, and pressure on the country from the Bretton Woods institutions to establish an environment conducive to economic development,⁹² by reducing state expenditure on provision of certain services of which the private sector is perceived to be a better provider.

The privatisation process is governed by Law n° 2 of 11 March 1996 on privatisation and public investment,⁹³ which provides in article 3 that:

“(...) the State can liquidate, let, restructure, or partially or totally cede a public establishment and/or other public enterprise or State service by way of presidential order or the law used for its creation:

- if management of the enterprise has been failing;
- if the State wants to be free from a commercial or industrial enterprise;
- if the goal or purpose for which the enterprise was created has been fulfilled. (...)”.

The privatisation process was primarily implemented through the liquidation of public establishments, public enterprises or public services. Some public

⁹² Enhancement of economic development in developing countries was introduced by the Bretton Woods Institutions through the so-called “Structural Adjustments Programs”. In that line, Government of Rwanda was summoned to “continue efforts to consolidate macro-economic stabilisation and carry out the reforms programme to its conclusion, in particular those relating to the privatisation of state-owned enterprises” (African Development Fund, Rwanda - Structural Adjustment Programme (Sap II), Completion Report, February 2007, in <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2007-43-EN-RWANDA-PCR-STRUCTURAL-ADJUSTMENT-PROGRAMME-SAP-II.PDF>, accessed on November 17th, 2010.

⁹³ Law n° 2 of 11/03/1996 relating to privatisation and public investment, in *O.G.* n° 6 of 15/03/1996.

businesses have been liquidated and sold to private entities, such as public hotels, tea firms and plantations.⁹⁴

However, privatisation was also implemented through the lease or cession of public enterprises to achieve economic benefit. For a long time it was believed that public services, or services provided in the public interest, should be organised and managed by the State. However, the provision of public services by the State in Rwanda has been plagued in the past by poor and deficient administration. Moreover, even if private bodies have not, to the present day, performed markedly better than the State in the provision of these services, experience from other countries suggests that private management of entities which provide public services can, in certain circumstances, lead to better results.⁹⁵ Thus some public establishments and enterprises were leased, or their management was ceded, to experienced private bodies.

Thirdly, administrative contracts also include 'concession of public domain or public utility or public service' contracts. The concession of public assets (domain) is governed by Law n^o 2 of 11 March 1996, relating to privatisation and public investment,⁹⁶ which provides in article 4 that "the State can cede a public establishment or other public enterprise, having a social or agripastoral purpose, on the condition that the cessionary continues to strive for the goal initially set out for the public institution or public enterprise". 'Concession of public domain' is similar to 'utilities concession' or 'public service concession', a kind of contract that delegates powers to a private body to run and manage a public utility or public service.

In both cases, the private institution shall be remunerated by profits arising from exploitation the public domain, the utility or the public service, or by customers who are required to pay a certain fee for the acquisition or use of services. For example, the exploitation of RWANDATEL (Rwanda Telecommunication Company, a public establishment for landline telephones and internet services) and the management of ELECTROGAZ, rebranded as

⁹⁴ See *infra* 8.1.1, table 1: Implementation of privatisation contracts from the year 2005 to 2008.

⁹⁵ Example of the PFI in England.

⁹⁶ Law n^o 2 of 11/03/1996 relating to privatization and public investment, cited above.

EWSA (Energy, Water and Sanitation Agency, a public establishment for supply of electricity and water and also for sanitation) were conceded to private bodies.⁹⁷

The state can also cede the total management of mines. Mines belong to the state, but the total management and exploitation of a mining company can be ceded to a private company which is duty bound to pay a license fee.⁹⁸

Although concession of public domain or public service is common to the concession contracts, it should be mentioned that the so-called 'Public-Private partnership' (PPP)⁹⁹ contracts are emerging in Rwanda. Even though the bill on Public-Private Partnerships is not yet finalised, some projects have been undertaken by the Rwanda Development Board (RDB) within the framework of Public-Private Partnership. For example, the Hilton hotel group and the Eco-lodge in Volcanoes National Park have acquired land under the Public-Private Partnership (PPP).¹⁰⁰

⁹⁷ Concession of Rwandatel: Contract of 26/10/2007 between Rwandan State (Ministry of Infrastructures) and Libyan Arab Portfolio (LAP) Green; Concession of Electrogaz: Contract of 15/08/2003 between Rwandan State (Ministry of Infrastructures) and Lahmeyer International (a German management consultants firm).

⁹⁸ Law n° 11/82 of March 1982 relating to protection, preservation and utilisation of the soil, *O.G.*, 1982, p. 334.

⁹⁹ According to the Public-Private Partnership Bill, a "Public Private Partnership' or 'PPP' shall mean a long term arrangement between a Public Authority and a Private Partner which involves risk sharing and fiscal impact, and involves financing, design, construction, renovation, management, operation and/or maintenance or management of public infrastructure and/ or facilities and/or the provision of a public service or service that provides a benefit to the public. PPP shall include arrangements involving existing infrastructure and/ or facilities as well as new or greenfield facilities and concessions. It shall include projects where: (a) ownership of the Infrastructure Facilities is transferred to the Contracting Authority at the end of the Project, such as a build operate transfer (BOT) or refurbish operate transfer (ROT) arrangements; (b) transfer of ownership of the Infrastructure Facilities to the Public Authority at the end of the Project is not contemplated, such as a build own operate (BOO) arrangement; and (c) the Public Authority retains ownership interest in the Infrastructure Facilities throughout the Project."

¹⁰⁰ S. Ruburika, "After restructuring, a more efficient RDB emerges", *The Rwanda Focus*, accessed in <http://focus.rw/wp/2010/10/after-restructuring-a-more-efficient-rdb-emerges/>, on 21/02/2012.

The fourth subcategory of administrative contracts encompasses subsidy agreements. Subsidies in Rwanda are two-folded, they may be granted by means of public decision or agreement. Firstly, there are subsidies which are granted by the government to public entities (and exceptionally to private entities), by way of public decision. Such subsidies typically involve the sponsoring of some indicated projects, to support districts or public enterprises, or to achieve a certain public interest goal such as environmental or educational development, under the procedure of subventions. Secondly, when subsidies are granted to private entities (and exceptionally to public entities) by means of agreement, the agreement takes the form of a public contract. For example in *Agro-Consult sarl v. Rwandan State (Ministry of Agriculture)*,¹⁰¹ before the High Court of Commerce, it fell to be decided whether the contract was private or administrative in nature. Basing its ruling on *Gone Fishin' v. Rwandan State*, the court ruled that subsidy contracts are administrative in nature.¹⁰²

Administrative contracts also include employment contracts between the administration and its civil servants. In law of 2002 on General Statutes for Rwandan Public Service,¹⁰³ article 1(a) stipulates that a person “[i]s considered as a Government employee, [if he or she is] carrying out a job in the form of a working post within the Rwanda Public Service, and is paid out of funds [set aside] for public interest”.

The definition shows that these contracts are considered to be administrative on the basis of two conditions. The first requirement is that employees must be working in the Rwandan public service, on central or local level, in various public institutions. The second requirement is that they be paid using money meant for public civil servants carrying out public services, which indicates that the tasks which they must perform as part of their employment are in the public interest.

¹⁰¹ Agro-Consult is a private company, providing consultancy in agricultural matters.

¹⁰² *Agro-Consult sarl v. Rwandan State (Ministry of Agriculture)*, High Court of Commerce, RCOM A0126/08/HCC, 27/11/2008 (unpublished).

¹⁰³ Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

Private contracts

Although in principle the acts of most public entities are governed by administrative law, the so-called ‘national companies’, that is, the public corporations or government businesses, are governed by private law.¹⁰⁴ Therefore, the contracts concluded by these entities will be governed by private law.

The term ‘national company’ refers to a public enterprise, to which the state contributes and whose capital is determined by presidential regulation.¹⁰⁵ For example, the *Société Nationale d’Assurances au Rwanda* (SONARWA)¹⁰⁶ was created as a national company, as its name suggests,¹⁰⁷ designed to work within the framework of a limited company. However, there exists a modern trend towards the privatization of public establishments, rather than their transformation into national companies administered by private law.¹⁰⁸

The other group of private contracts consists of ordinary labour contracts made with the government, and insurance contracts governed by private law but which have a public law element.

As regards labour contracts, while the repealed Decree-Law of 19/3/1974 (relating to public civil servants) classified government employees into two categories (employees under statute, whose contracts are governed by public law, and employees under contract, whose contracts are governed by private law) the new law is silent on the issue of employees governed under private

¹⁰⁴ Art. 5, par. 3 of Law n° 2 of 11/03/1996 relating to privatization and public investment, cited above.

¹⁰⁵ These national companies differ from the public establishments (or state enterprises without lucrative goals), composed of government institutions with a social or administrative mission and in general these institutions are not profit oriented. And even if they are production oriented, this orientation is done following the profit in a different dimension or perspective, but not as their principal motive.

¹⁰⁶ SONARWA, *Société Nationale d’Assurances au Rwanda*, was rebranded as the *Société Nouvelle d’Assurances au Rwanda*.

¹⁰⁷ *Société Nationale* is the French translation of national company.

¹⁰⁸ In 2006, a total number of 95 public establishments were planned to be privatized.

law.¹⁰⁹ Government employees are simply classified as civil servants, a body of employees whose contracts are governed by public law. Although article 1 of this law means that the contracts of all the employees termed ‘civil servants’ will be governed by public law, there are other employees whose service the government seeks only for short periods, and occasional employees, for whom a substantial part of their contract is governed by private law. However, as the procedures for their recruitment are in accordance with the public procurement law and the court’s jurisdiction is that of the administrative chamber of court, these contracts are governed under a combination of private and public law.¹¹⁰

As regards insurance contracts, it is notable that formerly the administration was not required to insure its cars, provided that the administration would be liable for any damage caused by its vehicles. According to Decree-Law n° 32/75 of 07/08/1975, relating to obligatory insurance of cars, article 13 states: “The administration and its public establishments were exempted from concluding insurance contracts for cover of any damage that may be caused by its cars, provided that the administration, if held responsible, will pay all damages”.¹¹¹ It is only recently that law n° 02/2002 of 17/01/2002, modifying Decree-Law n° 32/75 of 07/08/1975,¹¹² repealed this provision, requiring all public bodies which owned vehicles to take out ordinary obligatory insurance. From then on, all the vehicles owned and operated by the administration were insured under the ordinary obligatory car insurance scheme.

Other insurance contracts, such as insurance of buildings and equipments against damage or loss, took the form of ordinary damage insurance contracts. For example, an ordinary insurance policy was taken out to

¹⁰⁹ Law n° 22/2002 of 09/07/2002 on general statutes for Rwanda public service, cited above.

¹¹⁰ See *infra* 4.4.2, jurisdiction of courts over public contracts litigations.

¹¹¹ Art. 13 of Decree-Law n° 32/75 of 07/08/1975 relating to the compulsory civil liability insurance with regard to automotive vehicles, *O.G.*, 1975, p. 544.

¹¹² Law n° 02/2002 of 17/01/2002 modifying Decree-Law n° 32/75 of 07/08/1975 relating to the compulsory civil liability insurance with regard to automotive vehicles, *O.G.* n° 6 of 15/03/2002, p. 30.

safeguard against loss or damage suffered by the Rwanda Revenue Authority's buildings and equipment.¹¹³

Notably, insurance contracts are generally governed by private law, save only for the tendering procedures which must be followed before these contracts are entered into. The administrative court will have jurisdiction over any litigious matters concerning tendering issues.¹¹⁴ Other litigious matters involving compensation for damage are within the remit of the civil court, because they concern (a) the insurer, whose actions are governed by private law, and; (b) the plaintiff-victim, whose actions are normally governed by private law.¹¹⁵ However, where the plaintiff or defendant is a public body (for example, if the case involves the payment of premiums by the administration, or compensation for damage caused to an insured government building or car), the administrative chamber of the court has jurisdiction over the matter.¹¹⁶

For example in *Mutuyeyezu v. Ministry of Defense*, a litigation arose out of a contract which was entered into between the Ministry of Defense and J.B. Mutuyeyezu for lease of a caterpillar. What happened was that, on completion of the task, the Ministry of Defense, using its own truck, transported back the caterpillar. On its way to destination, the caterpillar fell from the truck, and got seriously damaged. The owner of the caterpillar introduced a case against the insurer of the truck, which rejected its cover for the case, because insurance for cover of injury or damage to third parties, does not involve cover of inner party or what is in or on the car. Then the owner introduced the case as a case of administrative character before the

¹¹³ Contract n° 104934 of 20/01/2009 entered into between the Ministry of infrastructure and SONARWA, for cover of the Rwanda Revenue Authority building and equipments against any damage or loss.

¹¹⁴ The public procurement law is used for selection of the insurer (Interview with L. Munyandirikira, Legal advisor, *Société Nouvelle d'Assurances au Rwanda* (SONARWA), conducted on 26/02/2009).

¹¹⁵ Interview with A. Rugira, Head of legal department, *Société Nouvelle d'Assurances au Rwanda* (SONARWA), conducted on 10/03/2011.

¹¹⁶ Contracts of public institutions, whether subject to public law or private law fall under the jurisdiction of the administrative chamber of the Intermediate Court (up to the level of districts) or High Court, as the case may be (see *infra*, 4.4.2, Jurisdiction of courts over public contracts litigation).

High Court against the Ministry of Defense, and the case was received, recorded in the registry of administrative cases and judged as such.¹¹⁷

¹¹⁷ *Mutuyeyezu v. Ministry of Defense*, High Court, RAD 0105/09/HC/KIG, 01/04/2011 (unpublished).

2.1.2 Types of public contracts in France

One of the significant features of Rwandan public contracting is its similarity to the French law of public contracts (see above). Accordingly, an analysis of the various public contracts made in France serves a useful comparative purpose.

In France, contracts made by public entities fall under two main categories, administrative contracts and private contracts.¹¹⁸ Legislation and the relevant case law have provided rules and principles which help to differentiate private and administrative contracts. Where these rules and principles state that the contract is administrative, the contract shall be categorized thus, and accordingly any litigation which arises from the contract falls within the jurisdiction of the administrative court. When a given kind of contract is designated as private according to these rules and principles, such a contract will be subject to the jurisdiction of the civil court.

Administrative contracts

The 'administrative contracts' are those public contracts which are regulated by a specific body of public law rules and which are within the jurisdiction of the administrative court.¹¹⁹ Several decisive criteria have been set out, based on legislation or case-law, which determine the designation of a contract made by a public institution as administrative or otherwise. In principle, even if the primary source of administrative principles is supposed to be the Code and other legislation, many other factors have been deduced from the case-law ('*jurisprudence*').¹²⁰

¹¹⁸ L. Richer, *Droit des contrats administratifs*, 8th Edition, Paris, LGDJ, 2012, pp. 28-29 & 95-96.

¹¹⁹ J. Morand-Deville, *Op. cit.*, p. 389 ; see also S. Braconnier, *Précis de Droit des marchés publics*, Paris, Editions Le Moniteur, 2007, p. 84.

¹²⁰ So many general principles of administrative law were developed by the *Conseil d'Etat*, which in France is the only competent court of high authority to deal with administrative litigious matters (L.N. Brown and J.S. Bell, *French administrative law*, Oxford, Clarendon Press, 1998, p. 217).

Determination of administrative contracts using the organic criterion

The first criterion to determine whether a contract entered by the administration is administrative or private comes from the *jurisprudence*, and states that an organ or body of the State must be a party to the contract (the organic criterion). In differentiating between administrative and private contracts, we must regard the organic criterion as the most important one when determining whether a contract is administrative or not.¹²¹

Accordingly, the mere involvement of an administrative entity in contractual undertakings should lead to characterization of the contract as administrative. Gaudemet puts it this way: “An administrative contract usually is a contract concluded with a public entity; or, in other words the presence of a public entity in the contract is the primary condition for a contract to be identified as an administrative contract.”¹²² Of course, this does not mean that public institutions cannot be involved in contracts governed by private law, but the designation of such contracts as private would be the exception rather than the rule.

Therefore, under French law, the organic criterion helps to determine whether a contract is administrative or private in nature - it states that the status of the ‘organs’ which are party to the contract informs the nature of that contract. In principle, the mere presence of a public organ as party to a contract is sufficient to render that contract administrative. Thus, if a contract was concluded between two private entities (no public entity was involved), by applying the organic criterion we can conclude that private law should apply.

This organic criterion makes it relatively easy to determine if a given contract is administrative or private. In this respect, the principle which originates from the *Union des Assurances de Paris (UAP)* case, is that “a contract entered into between public institutions is ‘presumed’ to be administrative in character, and within the jurisdiction of the administrative courts in case of

¹²¹ M. Degoffe, *Droit administratif*, Paris, Ellipses, 2008, p. 286; see also G. Dupuis et al., *Op. cit.*, p. 424; J. Sayah, *Droit administratif*, 2nd ed., Levallois-Perret, Studyrama, 2007, p. 88.

¹²² Y. Gaudemet, *Droit administratif*, 18th ed., LGDJ, Paris, 2005, p. 277 (translation from French).

dispute, except in some circumstances when the contract, having regard to its subject-matter, creates private relationships between the parties”.¹²³

Moreover, when a contract is concluded between a public entity and a private entity, basing on the organic criterion, it falls within the category of administrative contracts: “The presence of a public institution as a party to the contract is a necessary (...) indication that the contract is administrative.”¹²⁴ According to this criterion, it would not matter whether the contract involves two public entities or one public entity for the contract to be administrative in character.

Determination of administrative contracts using the material criterion

The courts have introduced an additional criterion, the material or substantial criterion, which in some cases is challenging the organic criterion. It states that the nature of a contract depends on the type of service rendered. If the purpose of a contract is in the public interest, more particularly when it is for the performance of a public service, then public law applies, regardless of whether the performer is a public or private body (the ‘performance of a public service’ criterion).¹²⁵ Thus, a public or private entity is deemed to hold public powers whilst it carries out an activity serving the public interest.

- Administrative contracts in the presence of a public institution

From the foregoing excerpt, the courts have constantly decided that a contract between two public entities will undoubtedly be concerned with the performance of a public service. In the ‘*CROUS Académie de Nancy-Metz*’

¹²³ *Union des Assurances de Paris [UAP] et autres assureurs du centre national pour l’exploitation des océans [CNEXO] v. Ministre des P. et T.*, Tribunal des Conflits, March 21st, 1983, in *Recueil Dalloz Sirey*, 1984, Jurisprudence, I, p. 33; See also J. Morand-Deville, *Op. cit.*, p. 393).

¹²⁴ J. Morand-Deville, *Op. cit.*, p. 392 (translation from French).

¹²⁵ L. Richer, *Op. cit.*, pp. 106-114; see also M. Degoffe, *Op. cit.*, pp. 274-285 and Ch. Guettier, *Droit des contrats administratifs*, Paris, PUF, 2004, p. 94-115.

case,¹²⁶ applying the UAP case,¹²⁷ it was held that where two public entities enter into a contract for the performance of a public service, that contract is administrative in character: “A contract entered into between the CROUS and the OPHLM, both public offices, is an administrative contract because it has one goal, the provision of a public service - i.e. accommodation for students – and therefore does not create any private law relationships between the parties”.¹²⁸

Again, if a contract between a public entity and a private entity involves direct participation in the performance of a public service, such a contract, is administrative in character and is governed by administrative law. But if a contract involves the performance of an activity which is purely private in nature, such a contract is private in nature and is governed by private law.

For example in the *Therond* case, M. Therond entered into a concession contract with the Montpellier municipality, under which he was obliged to capture stray dogs in the municipality, and to remove dead animal bodies from its streets. After a period of time, Mr Therond brought a claim for damages, alleging that the municipality had breached the contract.¹²⁹ When determining whether the contract was public or private in nature, the court held that M. Therond’s performance constituted provision of a public service (ensuring the maintenance of high standards of hygiene and sanitation).

¹²⁶ In this case (*‘CROUS Académie de Nancy-Metz’*), a long lease agreement was entered into between the OPHLM (*Office public d’habitations à loyer modéré*) of Moselle Department, a public office, and the CROUS (*Centre régional des œuvres universitaires et scolaires*) of Nancy-Metz Academy, also a public office, for the renovation and use of 270 rooms, including student accommodation and some office rooms. A dispute arose, and a case brought before the administrative court. The issue of jurisdiction was contested, and it fell to the Council of State to decide whether the contract was governed by private law (falling within the jurisdiction of the ordinary courts) or administrative law (falling within the jurisdiction of the administrative courts). Based on the substance of the agreement, the Council held that the contract did not create any relationships based on private law between these public institutions, because the goal of the contract was the provision of a specific public service (namely, accommodation for students) (*CROUS Académie de Nancy-Metz v. Office public d’habitations à loyer modéré du Département de Moselle*, CE 7 octobre 1991).

¹²⁷ *Union des assurances de Paris* (UAP), TC, March 21st, 1983, cited above.

¹²⁸ J. Morand-Deville, *Op. cit.*, p. 394 (translation from French).

¹²⁹ *Thérond*, CE 4 march 1910, in http://www.lexinter.net/JPTXT2/arret_therond.htm, accessed on October 8th, 2010.

Accordingly, the contract was administrative, simply because of the link between performance and provision of a public service.¹³⁰

- Administrative contracts in the absence of a public institution

In France, generally a different type of law is applied to private legal persons on the one hand and public legal persons on the other. In principle private law governs the acts of private legal persons (these acts include the formation, performance and termination of contracts) and any related disputes fall within the jurisdiction of the private courts. Likewise, administrative law normally governs the acts of public institutions and any related disputes fall within the jurisdiction of the administrative courts.

However when the administration wishes to perform an activity which is in the public interest, it does not need necessarily that the activity be done by the administration itself. It may be the case that a private body could perform that activity instead, and achieve the same or a more efficient outcome. In that case and in order to be able to perform such an activity, the private institution will be vested with public law powers.

In France, private bodies entrusted with public law powers in certain specific fields are known as 'mixed persons'. Alongside their usual private activities, they can be vested with the power to manage an activity which is in the public interest: "The activities of these bodies are generally governed by private law, but this may be set aside because, to some extent, they resemble legal persons whose activities are governed by public law."¹³¹ In this respect, associations, foundations, and companies of mixed economy (in which some of the shares belong to private investors and others to government entities) have been created to facilitate the performance of work, or the supply of services, which is in the public interest. This is done to achieve greater efficiency than what the public entities alone could have attained.

These measures have been justified on the basis that they improve value for money in public service provision. Even though the procedural rules required for the public decision-making go together with many advantages, for

¹³⁰ *Thérond*, CE 4 march 1910, GAJA, p. 126, in L. Richer, *Op. cit.*, p. 107.

¹³¹ G. Braibant & B. Stirn, *Op. cit.*, p. 49 (translation from French).

example that of easily controlling the administrative action, the empowerment of private entities for the performance of a public service can help to avoid some of the disadvantages deriving for example from the tardiness of public decision-making. The reason for delays in the decision-making include lengthy procurement procedures, during which the administration does not have complete freedom to act, and certain compulsory procedural rules must be followed in the interests of proper administration.¹³² Alternatively, these problems may be down to more general restraints which affect the administration, such as the extensive bureaucracy characteristic of the public sector.

An example of this in France is the ‘concession of public service’, a method of running a public service using a private entity, usually on the condition of payment of a certain fee to the administration:

“A ‘concession of public service’ is a method of providing a public service, whereby a public entity, the conceding party, grants a private entity, the concessionary, the power to provide a service for a certain period, generally on a long term basis, along with an obligation to pay all costs related to the provision of that service, and the right to be reimbursed by users of the service.”¹³³

Likewise, if a contract is concluded between two private entities for the performance of a public service, it ought to fall within the category of administrative contracts. This rule was the subject of much controversy in France, especially when (for example) the main aim of a contract was the performance of a public service.

In the “*Société Interlait*” case,¹³⁴ it was suggested by counsel that such contracts ought to be administrative, since they involve the performance of a

¹³² J. Rivero, *Op. cit.*, 1990, p. 155.

¹³³ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 209 (translation from French).

¹³⁴ The *Société Internationale du Lait et de ses dérivés (Interlait)* was created pursuant to the decree of 30 September 1953 (relating to the status, organization and functioning of private corporations aimed at economic intervention),¹³⁴ in order to stimulate the market for dairy products. During the performance of its regular activities, the *Interlait* corporation refused to buy, sell or store butter or cheese which came from the SAPIEM (*Société de participation dans l’industrie alimentaire*), another private corporation. Because of this refusal, SAPIEM

public service. However, the court disagreed and held, basing on the organic criterion, that any contract concluded between two private entities is governed by private law.¹³⁵

However, the courts have mitigated the strictness of organic criterion by varying the way in which it is applied. Certain exceptions have been recognised in the case-law, which take into account the subject matter of the contract - the substantive criterion (*le critère matériel*).

Firstly, the courts have rejected the idea that private law alone is applicable to acts performed by private entities. They considered that if a private entity has a duty to perform an act which is in the public interest, such as performance of a public service, administrative law ought to be applicable to that act, as it is administrative in character: "On the basis of that logic - the material or substantial conception of the administration - it was considered to be 'natural' to confer important public law prerogatives on private entities."¹³⁶

The principle was confirmed in the "*Entreprise Peyrot*" case,¹³⁷ where a contract was entered into between two private entities for the performance

brought a claim for damages before an ordinary court based on Article 1382 of the French civil code (civil liability). However during proceedings before the Court of Appeal in Paris, the *Préfet* (mayor) of Paris raised the issue of jurisdiction. It was argued that the *Interlait* corporation was entrusted with the performance of a public service on behalf of the state (in the interests of agriculture and consumers), and the *préfet* concluded that the dispute should accordingly fall within the jurisdiction of an administrative court. The Tribunal of Conflicts, however, ruled that acts performed by a private company, even if that company is responsible for the provision of a public service, are still private in nature if they are performed for commercial purposes (*Interlait*, TC 3 March 1969, Soc., *AJDA* 1969, 307).

¹³⁵ J. Morand-Deville, *Op. cit.*, p. 392.

¹³⁶ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 212.

¹³⁷ The "*Entreprise Peyrot*" case concerned a company formed to construct a highway, *Société de l'Autoroute Estérel - Côte d'Azur* (SAE), a company of mixed economy whose actions were governed by private law (*société d'économie mixte* (SEM)). It entered into a concession contract with the State to enable it to perform the construction of the highway *Esterel - Côte d'Azur*. SAE offered a subcontract to *Entreprise Peyrot* (EP), a private company, but later on began behaving fraudulently so as to discourage EP from participating in the undertaking. EP brought a damages claim against SAE, and the issue of jurisdiction was raised – the question was whether the Administrative Court of Nice or the Court of Appeal at

of public work (*travaux publics*) in the public interest (the construction of highways). The court held that the contract should be subject to public law, notwithstanding the fact that a public entity was not party to the contract, because the law of 18 April 1955 required the application of public law in this case:

“(…) public works contracts entered into by a highway construction company, under the rules of the law of April 18th, 1955, are governed by public law, without any distinction between construction undertaken directly by the state, or exceptionally by a concessionary, or by a legal person subjected to public law, or by a company under mixed economy, notwithstanding its character (that of a legal person governed by private law).”¹³⁸

Secondly, the courts have relaxed the strictness of the organic criterion in cases where a private entity acts on the mandate of a public body. If a contract is entered into by a private entity on the basis of an express or implied mandate from an administrative authority, then that contract is seen as an administrative contract. This principle was applied and extended in several cases. The *SERM* and *Commune d’Agde* cases were both decided in 1975, and both clearly show that if a contract is concluded by a private body, acting within the parameters of an implied contract with a public body, the public body ought to be considered to be the true contracting party and the contract ought to be governed by administrative law.¹³⁹

The *SERM* case (*Société d’équipement de la Région Montpelliéraine*) concerned a company which was awarded a concession contract for highway

Toulouse (an ordinary court) could hear the case. The Conflicts Tribunal, seised of the case, ruled that the subcontract was governed by public law, because there should be no distinction between contracts awarded directly by the state (or by a legal person subject to public law) or by the concessionary (or any company under mixed economy), notwithstanding the fact that the concessionary may be a legal person subject to private law (*Entreprise Peyrot v. Société de l’autoroute Estérel-Côte-d’Azur*, TC 8 July 1963, in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETAT EXT000007604220&fastReqId=1646919724&fastPos=1>, last visited on October 5th, 2010).

¹³⁸ J. Morand-Deville, *Op. cit.*, pp. 394-395 (translation from French).

¹³⁹ *SERM*, CE 30 May 1975 and *Commune d’Agde*, TC 5 July 1975, cited by J. Morand-Deville, *Op. cit.*, p. 395.

construction by the municipality of Montpellier. SERM then entered into a further contract with *Entreprise Roussel*. SERM delayed in performance, and *Entreprise Roussel* brought a successful claim for damages in the administrative court. SERM were dissatisfied with this result, and sought nullification of that decision on the ground that the case did not fall within the jurisdiction of the administrative court. Even though the contract was concluded between two private companies (*SERM* and *Entreprise Roussel*), the Council of State considered that the contract had the character of a contract for public work, as SERM had received subsidies for highway construction which the municipality would have been entitled to, and had acted on behalf of the municipality. Accordingly, it ruled that the contract between *SERM* and *Entreprise Roussel* was administrative.¹⁴⁰

In another case, the *Commune d'Agde* case, the Agde municipality awarded a concession contract to a company of mixed economy, *Société d'équipement du Biterrois et de son littoral* (SEB), granting it control of a station used for tourism. SEB then entered into a contract with some private entities, which required those entities to construct a network of pipes for water supply and sewage treatment. In due time SEB handed control of the station back to the municipality. Some time later, one of the sewage pipes was found to have deteriorated badly, and the municipality tried to have SEB declared liable, on ground that private law prescribed a ten-year period of responsibility for work done. The administrative court of Montpellier heard the case at first instance and rejected jurisdiction, holding that the contract was private. However, the Conflicts Tribunal considered that since the company was entitled to subsidies which the municipality would otherwise have obtained for the project, the contract was administrative in character. The company was not acting on its own behalf, but on behalf of the municipality.¹⁴¹

¹⁴⁰ *Société d'équipement de la région Montpelliéraine (SERM) v. Entreprise Roussel*, CE 30 may 1975, in http://archiv.jura.uni-saarland.de/france/saja/ja/1975_05_30_ce.htm, accessed on October 6th, 2010.

¹⁴¹ *Commune d'Agde v. Société d'équipement du Biterrois et de son littoral*, TC 5 July 1975, in http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETAT_EXT000007604728&fastReqId=463060367&fastPos=67, last visited on October 5th, 2010.

Determination of administrative contracts using the ‘special clause’ criterion

The other criterion known as the ‘special clause’ criterion, which is used in the situation of contracts between a public entity and a private entity, is linked to the idea of broad powers exercised by the administration during performance of a contract.¹⁴² According to Ph. Foillard, the idea of special clause covers many different scenarios. It might refer to the situation where, in the course of a private contract, the contracting party and the administration might have agreed upon an unusual clause, for example for relief from the payment of tax. It might also refer to cases where the administration reserves some public power prerogatives when it contracts, such as a clause of unilateral cancellation of the contract or a clause granting the right of control.¹⁴³

Determination of administrative contracts using the legal criterion

Notwithstanding the above mentioned criteria, it is worth mentioning that in French administrative law, the law has little by little substituted case law (usually considered as the major source of administrative law rules in France) for determination of applicable rules and principles in certain areas, especially in the specific area of administrative contracts.¹⁴⁴

For example, the following contracts are by law considered as administrative:

- the contracts entailing transfer of public domain assets are governed by the code on public domain (consolidated version of June 21st, 2010);¹⁴⁵
- the contracts of delegation of public service by the law of 29 January 1993;¹⁴⁶

¹⁴² L. Richer, *Op. cit.*, pp. 97-106 ; see also M. Degoffe, *Op. cit.*, pp. 274-285 and Ch. Guettier, *Op. cit.*, p. 94-115.

¹⁴³ Ph. Foillard, *Op. cit.*, p. 226; see also M. Degoffe, *Op. cit.*, p. 275; L. Richer, *Op. cit.*, pp. 100-101.

¹⁴⁴ J. Morand-Deville, *Op. cit.*, pp. 391-392 ; see also Ch. Guettier, *Op. cit.*, p. 73; L. Richer, *Op. cit.*, pp. 116-117; J. Fougerouse, *Le droit administratif en schémas*, Paris, Ellipses, 2008, p. 158.

¹⁴⁵ Code of State’s Property (*domaine de l’Etat*), consolidated version of 21/06/2010.

¹⁴⁶ Decree n° 93-471 of 24/03/1993 relating to the application of art. 38 of law n° 93-122 of January 29/01/1993 governing advertisement of delegation of public service contracts, in

- the contracts on public procurement by Decree n° 2006-975 of August 1st, 2006;¹⁴⁷
- the contracts of partnership by Law n° 2008-735 of July 28th, 2008 governing contracts of partnership;¹⁴⁸
- the concession of public works contracts by Ordinance n° 2009-864 of July 15th, 2009¹⁴⁹ and law n° 2005-809 of July 20th, 2005 relating to concession of installations and works operations (*contrats d'aménagement*);¹⁵⁰
- the contracts for delegation of public service by Decree n° 93-471 of March 24th, 1993 governing the application of article 38 of Law n° 93-122 of January 29th, 1993 relating to publicity of delegation of public service;¹⁵¹
- the contracts for sale of state's immovable property by the Code on State Property.¹⁵²

application of art. 38 of Law n° 93-122 of 29/01/1993 relating to prevention of corruption and transparency of the economy and public procedures.

¹⁴⁷ Decree n° 2006-975 of 01/08/2006 on public procurement (as amended), *JORF* n°179 of 04/08/2006 p. 11627.

¹⁴⁸ Article 1 of Law n° 2008-735 of 28/07/2008 governing contracts of partnership defines a contract of partnership as " an administrative contract whereby the State or a public institution enters into a contract with a private entity (for a determined period which depends on the modalities of remuneration for the delivered services or facilities) for a general task of financing, constructing, transforming, maintaining, exploiting, managing infrastructures or equipments or services needed by the public". As Guademet puts it, "Partnership contracts include among others, contracts for the execution of various activities for a long duration, such as contracts for scientific research, supply, maintenance and servicing" (Y. Gaudemet, *Op. cit.*, p. 283-284; see also J. Fougerouse, *Op. cit.*, p. 158).

¹⁴⁹ Ordinance n° 2009-864 of 15/07/2009 relating to concession of public works contracts.

¹⁵⁰ Law n° 2005-809 of 20/07/2005 relating to concession of works and equipments installation and maintenance operations.

¹⁵¹ Decree n° 93-471 of 24/03/1993 governing the application of article 38 of Law n° 93-122 of 29/01/1993 relating to publicity of delegation of public service. Delegation of public service occurs whenever the public body wants a specific activity of public interest to be executed by another public body or a private body, in the expectation of excellent results, and the operation is governed by the law of 29/01/1993 (*Loi Sapin*) (Art. 38 of Law n° 93-122 of 29/01/1993 relating to prevention of corruption and transparency in the economic life and public procedures).

¹⁵² Code of State's Property (art. L54), consolidated version of 21/06/2010.

Private contracts

Not every contract entered into by the administration is necessarily administrative, since the administration also has the power to make private contracts: “[T]he mere fact that the administration is a party to a contract does not necessarily make it an administrative contract.”¹⁵³ A contract entered into by a public institution may therefore be governed by public or private law, and if it is the latter, all the rules from the civil code, in particular the provisions of article 1134 and the subsequent articles relating to contracts, will apply.¹⁵⁴

Many public contracts in France are administrative.¹⁵⁵ However, public contracts which are ‘private’ do exist. J.B. Auby describes the situation as follows: “There is a totally different conception of public contracts when compared to other legal systems. Considering the French legal system, nowadays a large majority of public contracts are governed by public law; only a minority of public contracts are governed by private law”.¹⁵⁶

One result of the dominance of administrative law over private law in the field of public contracts (a notable characteristic of French law) is that public and private bodies do not enjoy the same freedom and equality, even in areas which are usually private in nature, such as contracts and civil liability. For example, a public body’s freedom to contract depends on the kind of contract envisioned. Where the contract is private, its freedom to contract appears to be extensive whereas, for administrative contracts, many barriers to freedom of contract have been set in place by legislation and the case law.¹⁵⁷

¹⁵³ L. N. Brown & J. S. Bell, *Op. cit.*, p. 141.

¹⁵⁴ Art. 1134ss of the French Civil code, in http://195.83.177.9/upl/pdf/code_22.pdf, accessed on 2/5/2010.

¹⁵⁵ The legislative qualification of public procurement contracts (which represent a large number of public contracts) as administrative, in fact, entails that the vast majority of public contracts is made up of public law ones.

¹⁵⁶ Interview with J.B. Auby, Professor of Administrative Law, University of Paris II, conducted on 20/11/2008 in Paris.

¹⁵⁷ Interview with R. Noguellou, Professor of Public law, , University of Paris Est – Créteil, conducted on 20/11/2008 in Paris; see also J. Rivero, *Droit administratif*, 1st edition, Paris, Dalloz, 1990, p. 154..

It is difficult to give examples of private contracts made by the public institutions without referring to the activities of these institutions which relate to private matters or their property. These activities concern the private contracts of the public entities, which are governed by the ordinary (common) law (*contrats de droit commun de l'administration*), the private law.

These include, amongst others, contracts relating to the private patrimony of the state, such as contracts of ordinary lease and rural leases,¹⁵⁸ and contracts deriving from relationships between the Post and its customers, its suppliers and third parties¹⁵⁹. They also include some private law based activities such as commercial activities relating to industrial economic activity, or services such as cleaning activity; etc.¹⁶⁰

The use of private law becomes still more noticeable if we consider the contracts of employment entered into between individuals and public bodies. In France there are two categories of employees, 'statutory' and 'non-statutory' (or 'contractual'). All the employment contracts of statutory employees are governed by public law, as are the contracts of contractual employees who are working to execute a public service. Hence, if all employees of private entities are governed by labour law even when the private entity performs an activity for the public interest, it is also the case that contracts of employment for civil servants, whether statutory or non-statutory, are in principle governed by public law.

However, the employment contracts of contractual employees who are not working to execute a public service are governed by private law.¹⁶¹ In this respect, the public institutions have a right, in specific spheres of activity, to use contractual workers whose contracts are governed by labour law,¹⁶² and

¹⁵⁸ J. Morand-Deville, *Op. cit.*, p. 391; see also J. Fougerouse, *Op. cit.*, p. 158.

¹⁵⁹ See Post and electronic telecommunications Act, consolidated version of July 25th, 2010.

¹⁶⁰ Interview with J.B. Auby, cited above.

¹⁶¹ G. Braibant & B. Stirn, *Op. cit.*, p. 395; see also L. Richer, *Op. cit.*, p. 725.

¹⁶² L. Richer, *Op. cit.*, p. 725.

this has also extended to contracts of 'employment-assistance'¹⁶³ or 'employment-youth' which, under ordinary criteria from the *jurisprudence*, should be considered administrative, but which are, by law, private.¹⁶⁴

¹⁶³ Contracts of 'employment solidarity' were created in 1990 for the help of workless people in finding a job. This category of contracts was suppressed in 2005, giving way to new forms of contracts for employment assistance
<http://www.legifrance.gouv.fr/affichSarde.do?reprise=true&page=1&idSarde=SARDOBJT000007110247&ordre=null&nature=null&g=ls>, accessed on September 30th, 2010)

¹⁶⁴ J. Morand-Deville, *Op. cit.*, p. 391.

2.1.3 Types of public contracts in Belgium

As mentioned earlier, because of its colonial history much of Rwanda's written law evolved from Belgian Law. Therefore, it is useful, from a comparative perspective, to examine the way public contracts are dealt with by Belgian law.

There are two types of public contract in Belgium. Firstly, we have the administrative contracts, which consist of public procurement contracts and administrative contracts *stricto sensu* (a distinction exists between public procurement contracts and other types of administrative contracts, although these contracts may be governed by the same laws). Secondly, we have the ordinary contracts, which public institutions create in the same way that private individuals do.¹⁶⁵

Administrative contracts

Administrative contracts in Belgium have been divided into two categories, public procurement contracts and pure administrative contracts.

Public procurement law in Belgium is divided into two categories, procurement of works and of goods on the one hand, and procurement of services on the other.¹⁶⁶ The justification for this will now be examined.

¹⁶⁵ It is worth noting that in Belgium, as Ph. Flamme states it (Ph. Flamme, "Monographies nationales/National reports, Belgique/Belgium", in R. Noguellou & U. Stelkens, *Op. cit.*, pp. 403-404), there exist two schools for determination of the legal regime applicable to public contracts. One school considers that the public contracts are governed under the rules of a specific legal regime, the 'administrative law' (in this sense, P. Goffaux, *L'inexistence des privilèges de l'administration et le pouvoir d'exécution forcée*, Bruxelles, Bruylant, 2002, pp. 137ss). Thus, this way of thinking public contracts would lead to categorising public contracts as administrative contracts (and eventually private contracts of the administration). The second school considers the 'administrative law' as an exceptional legal regime alongside the regime of ordinary (common) law, i.e the civil code (in this sense, M.A. Flamme, *Droit administratif*, Bruxelles, Bruylant, 1989, p. 65). The latter school would then simply categorise public contracts as contracts of government. In this study, we adhered to the first school which, to a major extent, influenced the public contracts legal regime in Rwanda.

¹⁶⁶ Law of 04/06/1963 relating to public procurement of works, goods and services; Law of 14/07/1976 relating to public procurement of works, goods and services (repealed); Law of 24/12/1993 relating to public procurement of works, goods and services (repealed) ; Law of

Flamme,¹⁶⁷ compares the similarities and differences between procurement of public works and procurement of goods. He sees the difference between them as one of substance: while procurement of public works concerns the tender process for immovable property, procurement of goods concerns movable property. Therefore, the similarity between procurement of goods and procurement of public works is that both are means by which the state acquires things or goods, movable and immovable.

This helps to us to better understand the procurement of public works. Within this category we find such activities as the construction and repair of roads, bridges, buildings, water pipes, electricity cables and phone lines.¹⁶⁸ Procurement of goods is also easy to understand. The procurement of goods might aim at, for instance, the acquisition of movables such as water,¹⁶⁹ gas¹⁷⁰ or electricity,¹⁷¹ or tools such as office machines,¹⁷² printing books,¹⁷³ fuel,¹⁷⁴ vehicles,¹⁷⁵ uniforms¹⁷⁶ and other purchasable objects.¹⁷⁷

15/06/2006 relating to public procurement of works, goods and services, in *Moniteur Belge*, 15/02/2007, p. 7355.

¹⁶⁷ M.A. Flamme, *Traité théorique et pratique des marchés publics*, Tome I, Bruxelles, Etablissements Emile Bruylant, 1969, p. 174. It should be said his book is fairly dated.

¹⁶⁸ M.A. Flamme, *Op. cit.*, p. 174; see also P. Thiel & V. Dior, *Le nouveau régime des marchés publics, Principales innovations introduites par les lois des 15 et 16 juin 2006*, Waterloo, Kluwer, 2007, p. 30.

¹⁶⁹ Decree of 07/03/2001 relating to the Wallonie Company for Water Distribution (*Société Wallonne des Distributions d'Eau SWDE*), in *Moniteur Belge*, 17.03.2001 - Ed. 2, p. 8512; see also Decree of governing the Flemish Company for Water Distribution (*Société Flamande de Distribution d'eau SFDE*), *Moniteur Belge*, 01-12-1983, p. 14836; see also Ordinance establishing the framework for water policy, *Moniteur Belge*, 03/11/2006 - Ed. 2, p. 58772.

¹⁷⁰ Law of 29/04/1999 relating to gas market, *Moniteur Belge*, 11/05/1999 - Ed. 2, p. 16278.

¹⁷¹ Law of 29/04/1999 relating to electricity market. *Moniteur Belge*, 11/05/1999 - Ed. 2, p. 16264.

¹⁷² In *COBESMA (Compagnie Belgo-Suédoise de machines) v Belgian State (Ministry of Communications)*, the company had submitted a tender for supply of typing machines at lower price, but it was not awarded the tender on the grounds of administrative discretion. *COBESMA* introduced a case before the Council of State to repeal decision to award contract to the *Tondelier* company which offered a higher price. The court, which declared itself competent to judge such a case, quashed the administrative decision (*COBESMA (Compagnie Belgo-Suédoise de machines) v Belgian State (Ministry of Communications)*, CE, 10/08/1951, *Pasicrisie Belge*, 1952, p. 100); see also Law of 15/06/2006 relating to public procurement of works, goods and services, cited above.

The procurement of services is analysed differently, depending on the service involved.¹⁷⁸ Some examples are contracts for transport services (concerning the transportation of goods and services for the government or its organs, including transport for public schools, and contracts for the transport of rubbish from municipalities),¹⁷⁹ technical and technological oriented contracts (such as contracts for the maintenance of public airplanes, vehicles and office tools, the installation and maintenance of heating systems in houses and the cleaning of houses and vehicles), contracts involving fine art and culture (such as making a sculpture or a long film for a given public enterprise), contracts with architecture and expertise firms (*bureaux d'études*) which undertake special projects for the state, and consultancy contracts. Further contracts include social-oriented contracts (such as

¹⁷³ Law of December 1862 granting government the power to procure printing and binding facilities for ministerial departments for a five-year term, *Moniteur Belge*, 23/12/1862, p. 5833; see also Circular of the Wallon Government of June 3rd, 2009 relating to purchase of papers for copying or printing, in *Moniteur Belge*, 22/06/2009, p. 43296.

¹⁷⁴ CE, 7 décembre 1961, Gilbeer, *RJDA*, 1962, p.119.

¹⁷⁵ In *Auto-Camion Bruxellois v Belgian State (Ministry of Interior)*, the company had submitted a lower tender for supply of heavy pumper trucks to security office in charge of civilians. As the contract was awarded to the *Baume and Marpent* company which submitted a higher price, *Auto-Camion* introduced a case before the Council of State, for cancellation of the contract. The court decided to quash the decision (*Auto-Camion Bruxellois v Belgian State (Ministry of Interior)*, CE, 22 décembre 1955, *Pasicrisie Belge*, 1956, p. 20); See also Circular 307^{quinquies} of July 13th, 2009 relating to purchase of government vehicles and vehicles of governmental institutions acting for public interest, *Moniteur Belge*, 03/08/2009, p. 51882.

¹⁷⁶ See for example Ministerial Order of September 3rd, 1971 relating to attributes, signs of uniforms of military courts judges and clerks and members of the General military prosecution Secretariat, *Moniteur Belge*, 08/07/1998, p. 22295 and Ministerial Order of December 10th, 2002 relating to supply of uniforms and accessories to the employees called for dressing uniforms - Division of exploitation in the General Division of Wallon Ministry of Transport, *Moniteur Belge*, 17/01/2003, p. 1579.

¹⁷⁷ M.A. Flamme, *Op. cit.*, p. 174; see also P. Thiel & V. Dior, *Op. cit.*, p. 34.

¹⁷⁸ M.A. Flamme, *Op. cit.*, pp. 175-176.

¹⁷⁹ Railways and tramways transport are excluded from those contracts because they are regulated by specific laws (i.e. Law of 04/12/2006 relating to use of railways infrastructure, *Moniteur Belge*, 23/01/2007).

education and training contracts, made for workers who study through distance learning).¹⁸⁰

Belgian legislation and case-law also provides for another category of public contracts which are undoubtedly administrative in character, the 'pure administrative contracts'. Flamme splits these into five categories (of course the list is not exhaustive).

Firstly, we have contracts made between public institutions.¹⁸¹ For example, this would include contracts made between the state and a public enterprise which is responsible for the management of public services, such as the contract of 8 April 2003 made between the State and A.S.T.R.I.D (a public investment enterprise) for the management of contracts relating to rescue and security.¹⁸² Another example is the contract of 31 March 2004 made between the State and ETNIC (*Entreprise publique des Technologies Nouvelles de l'Information et de la Communication*) for the management of new information and communication technologies.¹⁸³ This category also includes contracts made between municipalities to provide certain public services,¹⁸⁴ contracts made between the state and commissions charged with helping the

¹⁸⁰ For more details, see M.A. Flamme, *Op. cit.*, pp. 175-176; see also P. Thiel & V. Dior, *Op. cit.*, pp. 34-36.

¹⁸¹ A clarification must be made as regards the so-called 'in-house' contracts. These are contracts which are concluded between municipalities and their departments or services (the latter do not have legal personality). In this case, the contract cannot be referred to as a procurement contract. However, if a municipality enters into a contract with any individual or organisation, public or private, which has legal personality, it will be governed by public procurement law (Circular of 11/07/2006 relating to contractual relationships between procurement entities (*relations contractuelles entre pouvoirs adjudicateurs*), *Moniteur Belge*, 13/10/2006, p. 54834).

¹⁸² Royal Decree of 12/12/2005 modifying Royal Decree of April 2003 governing second contract for management by ASTRID, in *Moniteur Belge*, Ed. 2, 23/01/2006, p. 3673.

¹⁸³ Government (French Community) Decree of 31/03/2004 relating to approbation of the management contract with ETNIC, *Moniteur Belge*, Ed. 2, 25/05/2005, p. 40512.

¹⁸⁴ Art. 18 of Law of 01/03/1922 relating to the association of municipalities for a public interest goal (*association des communes dans un but d'utilité publique*), *Moniteur Belge*, 16/03/1922, p. 2282.

needy,¹⁸⁵ and contracts between public institutions to provide water, gas and electricity.

Secondly, there are contracts made between private individuals and state enterprises which carry out industrial works or trade.¹⁸⁶

Thirdly, there are 'concessions or leases of public domain' contracts, which allow autonomous entities to privately use public domains. These are contracts between the state and an individual or company, made on condition of an annual rent payment, to personally hold and exploit a public domain. Examples of such contracts include the lease of a beach with areas designed for swimming, sun bathing, and games,¹⁸⁷ the lease of public installation such as a canal or dyke, the lease of recreation halls, swimming pools, newspaper kiosks, lakes or seas where people can go fishing, or graveyards.¹⁸⁸

'Concessions or leases of public services' contracts form a fourth subgroup of 'pure' administrative contracts. These are concluded between the state and an individual or company, which allow the private party to manage a public service. Rent must be paid by the private party to the administration, but the private party can charge users of the service a certain fee. Examples of such services include the provision of parking spaces and garages, road side parking, public toilets, recreation and sports halls, the distribution of gas and electricity, the transportation of people via tramway, and the repair of roads. This category also includes contracts for the concession of public works, where an individual is charged with the repair of certain public works for a given period of time. The individual is paid by service users, which implies that he is managing the execution of public works. This can be distinguished from the ordinary procurement of public works, as in that case a contractor obtains a tender to repair houses and is remunerated by the state.¹⁸⁹

¹⁸⁵ CE, 28 October 1953, CAP de Schaerbeek, *RIDA*, 1954, p.12.

¹⁸⁶ M.A. Flamme, *Op. cit.*, pp. 130-134.

¹⁸⁷ Law of 30/04/1958 relating to concession of beach spaces to municipalities neighbouring the ocean (*concessions de plages aux communes du littoral*), *Moniteur Belge*, 30/05/1958.

¹⁸⁸ M.A. Flamme, *Op. cit.*, pp. 130-134 ; See also M. Herbiet & A.L. Durviaux, *Droit public économique*, Bruxelles, La Charte, 2008, pp. 67-68.

¹⁸⁹ M.A. Flamme, *Op. cit.*, pp. 130-134.

Closely related to concessions, in Belgium the category of Public-Private Partnerships is a new conception, defined as “a contractual technique by which a public body involves a third party in (i) building or substantially renovating and exploiting an infrastructure for public utility (ii) by means of private funds (exclusively or principally) calculated according to the payments to be made for that facility (iii) at its own risk”¹⁹⁰. For example, municipalities in *Flandre* may implement these contracts under the provisions of the Flemish Decree of July 18th, 2003 governing the public-private partnerships.¹⁹¹

Finally, contracts which concern the release of treasury bonds by the government, by which the government undertakes to repay long term debt with interest, are also administrative in character.¹⁹²

Private contracts

State organs can also enter into contracts of the same type as those used by ordinary citizens, and which are governed by private law. Flamme explains that these include contracts concerning the private domain of the state, contracts for purchase of private property and insurance contracts.

Thus, if a state organ owns property which is in the private domain, it can enter into contracts concerning that property which are governed by private law, such as letting or selling it. Accordingly, the state can lease its houses or other properties in the private domain based on the ordinary laws governing leases, after negotiations and agreement on clauses of the contract with the

¹⁹⁰ P.E. Noël, "Le partenariat public-privé (PPP), technique de réalisation et de financement des équipements publics", in *J.T.*, 2005, n° 2, p. 370, cited by P. Nihoul & D. Philippe (eds.), *Les contrats de partenariat entre secteur public et secteur privé en Belgique*, Séminaire de droit des contrats publics et privés, Université Catholique de Louvain, Mai 2006, p. 9, accessed in http://www.philippelaw.com/files/Contrats_partenariat.pdf, on 31/01/2012.

¹⁹¹ Flemish Decree of July 18th, 2003 governing the public-private partnerships, in *M.B.*, *September 19th, 2003*.

¹⁹² M.A. Flamme, *Op. cit.*, pp. 130-134.

lessee. What is more, the sale of such property, movable or immovable, is also governed by the ordinary laws.¹⁹³

Furthermore, when the administration buys or leases small to medium quantities of immovable property from individuals,¹⁹⁴ these contracts are governed by ordinary private law as they are not concerned with large amounts of property. In such cases, it is clear that the state can negotiate a price as any other individual might.

The insurance contracts are also governed by private law. These include all contracts made by public bodies with insurance companies to insure their property. Such contracts are considered to be ordinary, private contracts.¹⁹⁵

¹⁹³ See M.A. Flamme, *Op. cit.*, pp. 130-134; see also Circular of July 20th, 2005 governing sale or acquisition of immovable properties by the communes, provinces or the CPAS and also emphytheosis right or superficy right, in *Moniteur Belge*, 03/08/2005, p. 34152; see also P. Thiel & V. Dior, *Op. cit.*, p. 35.

¹⁹⁴ Circular of July 20th, 2005 governing sale or acquisition of immovable properties by the communes, provinces or the CPAS and also emphytheosis right or superficy right, in *Moniteur Belge*, 03/08/2005, p. 34152.

¹⁹⁵ See Law of 25/06/1992 governing terrestrial insurance contract, *Moniteur Belge*, 20/08/1992, p. 18283; see also Law of 09/07/1975 relating to control of insurance companies, *Moniteur Belge*, 29/07/1975.

2.2 Categorisation in countries of convergence between public and private law

In two of the countries under comparison there is a convergence between the public and private law approaches to public contracting - England and the Netherlands.

2.2.1 Types of public contracts in England

For categorisation of public contracts in England, as this study is directed to a fundamental - as opposed to functional - analysis of public contracts, we have chosen to follow the classification system of Bailey. He considers that contracting by the State is multi-faceted, but can broadly be classified under two main categories, depending on the intended goal. Either the State may enter into a contract as a means of exchange (private contracts), or for the regulation or transformation of public services (policy contracts): "There are many dimensions to government contracting. A broad distinction can carefully be drawn between contract 'as a medium of exchange' and contract 'as a technique of government or regulation'."¹⁹⁶

Private law based contracts: Private contracts

Like any individual, State entities are capable of entering into private transactions in order to meet their practical needs (such as obtaining office equipment, employees, etc.). The State (that is, state organs, services and entities) may be obliged to contract with many different private parties on a regular basis in order to do this. A contract for the supply of goods or services therefore becomes a medium for ordinary acts of exchange: "As to 'contract as a medium of exchange', government bodies of all kinds need to enter contracts for the provision to them of the goods and services they require to perform their functions. The suppliers may themselves be from the public or the private sector."¹⁹⁷

In that respect, disregarding the fact that some specific mandatory rules might govern special contractual arrangements (for example those relating to

¹⁹⁶ S.H. Bailey, *Cases, Op. cit.*, p. 62.

¹⁹⁷ S.H. Bailey, *Cases, Op. cit.*, p. 62; see also A.C.L. Davies, *Op. cit.*, pp. 4-8.

the public procurement regime¹⁹⁸ or accountability measures¹⁹⁹), in England there exists no special body of law which governs the contracting activity of public bodies. Accordingly, this simply falls to be governed by the ordinary law. Likewise, leaving aside some statutory arrangements granting specific rights to, or imposing specific duties upon, certain public sector workers,²⁰⁰ employment contracts made with civil servants are also governed by private law.²⁰¹

Emergence of public law based contracts: Policy contracts

Even though in England the contracting process of State bodies is not regulated by any special body of law, some recent policy rules have emerged from a situation in which the State had to regulate new forms of interactions. In doing so, it embraced the regulation of social and economic activity, by way of privatisation or contracting-out of public utilities or services: “The use of contract as a technique of government or regulation is a much more recent phenomenon. It has played a key role in the transformation of the ways in which public services are provided.”²⁰²

¹⁹⁸ Directive 2004/17/EC of the European Parliament and of the Council of 31/03/2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors (accessed in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:EN:NOT>, last visited on 24/02/2013) and Directive 2004/18/EC of the European Parliament and of the Council of 31/03/2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts (accessed in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT>, last visited on 24/02/2013).

¹⁹⁹ “Central government purchasing is subject to detailed external oversight from the National Audit Office; local government purchasing is overseen by the Audit Commission” (A.C.L. Davies, *Op. cit.*, p. 8).

²⁰⁰ For example, the Trade Union and Labour Relations (Consolidation) Act 1992, s. 280(1) excludes the police from collective labour law; again, the Criminal Justice and Public Order Act 1994, s. 127 creates a statutory duty not to induce a prison officer to withdraw his or her labour.

²⁰¹ A.C.L. Davies, *Op. cit.*, pp. 2-8.

²⁰² M. Freedland, “Government by contract re-examined – Some functional issues”, in P. Craig & R. Rawlings (eds.), *Law and administration in Europe: Essays in honour of Carol Harlow*, Oxford, Oxford University Press, 2003, pp. 123-137, p. 124.

If we consider whether administrative decision making in England is more contractualised or more bureaucratic, we can see that the system tends towards the contractualisation of the businesses of the State with the aim of being able to offer the services of the State via a contractual mechanism.²⁰³ For that reason, policy rules have been developed, in the form of standard-form contracts, which public bodies are encouraged to use when they contract:

“[T]he contractualisation of the public sphere through the New Public Contracting involves the deliberate attempt by the state to structure social behaviour - within government, in the economic organisation of public services, and in state-citizen relationships - through regulatory arrangements that harness the contract norms for the attainment of particular policy purposes.”²⁰⁴

The State may use its contractual powers to achieve particular collateral goals of social or economic policy, and to change or redefine the ordinary contractual process.²⁰⁵ This goes together with entering into new forms of arrangement, which take the form of legally binding contracts, between public bodies and the private sector through the Private Finance Initiative or Public Private Partnerships,²⁰⁶ and the use of contractual (or contractual-

²⁰³ P. Vincent-Jones, *Op. cit.*, p. 34.

²⁰⁴ *Idem*, p. 30.

²⁰⁵ M. Freedland, “Government by contract re-examined - Some functional issues” in P. Craig and R. Rawlings (eds.), *Op. cit.*, p. 124.

²⁰⁶ Private Finance Initiative (PFI) is an initiative involving private sector participation in supporting and delivering government services or facilities that require substantial assets for their delivery. If traditionally the required assets have been financed up-front by government (which then takes ownership of the assets and uses them to provide the service or facility in question), under PFI the Government engages a contracting partner both to build the asset and to operate it, with the private partner providing the support services during the contract period, which in return is remunerated by payments made, either by the Government itself, by other users of the asset (an arrangement referred to as a concession), or by a combination of the both. Alongside the development of PFI, the [English] Government has increasingly experimented with various types of public/private collaboration in service delivery, including PFI, referred to under the generic heading of “Public-Private Partnerships” (PPPs), an “umbrella term” which has come into prominence because of the “rebranding” of PFI (See S.

type) models for constructing the relationship between government departments and executive agencies, or between different public bodies engaged in the delivery of a service for the provision of hospital services.²⁰⁷ The privatisation process is also governed by policy rules, such as the privatisation of particular public utilities (gas, water, electricity, telecommunications, railways, postal services) and the privatisation of many local government services.²⁰⁸

Overall, “in a broad sense, government by contract has become the dominant paradigm for the provision of public services”²⁰⁹. This should be understood to cover not only the process of government procurement, but also “the creation and operation of the institutional structure within which contractual or contract-like arrangements for the provision of public services may take place”.²¹⁰

The administration’s preference for governance by contract has, of course, raised a number of issues concerning the relative efficiency and effectiveness of different modes of public contracting.²¹¹ However, the lack of an adequate legislative basis for some of these recent developments has been solved by the provision of standard-form contracts, which are associated with certain principles of good governance, such as efficiency and effectiveness, transparency, accountability, prevention of abuse of public power, responsive regulation, and fairness.²¹² In the same vein, certain standard form contracts

Arrowsmith, *The law of public and utilities procurement*, London, Sweet & Maxwell, 2005, pp. 26-31).

²⁰⁷ A.C.L. Davies, *Op. cit.*, pp. 8-10.

²⁰⁸ See Local Government Act 1988, in <http://www.legislation.gov.uk/ukpga/1988/9/contents>, last visited on November 12th, 2010; Local Government Act 1999, in <http://www.legislation.gov.uk/ukpga/1999/27/contents>, last visited on November 12th, 2010.

²⁰⁹ For more details, see M. Freedland, “Government by contract re-examined - Some functional issues” in P. Craig and R. Rawlings (eds.), *Op. cit.*, p. 124.

²¹⁰ *Idem*, p. 125.

²¹¹ S.H. Bailey, *Op. cit.*, p. 62-63.

²¹² P. Vincent-Jones, *Op. cit.*, pp. 26-29.

set out mandatory rules which staff at City Councils must follow when purchasing goods, works or services.²¹³

As P. Craig argues, even if the rules drawn up under the Standard-Form Contracts (SFC) are not formally legally binding, the issues addressed in these model contracts will be issues addressed in every contractual relationship, especially with regard to contract formation, consideration, capacity of public bodies, mistake or misinterpretation, payment, default in performance and damages. Every major issue which arises within the contractual framework will, in effect, be regulated by the SFC.²¹⁴

²¹³ See for example, Plymouth City Council standing orders, in http://www.plymouth.gov.uk/procurementfaqs#what_are_standing_orders, accessed on October 20th, 2010; Newport City Council standing orders, in http://www.newport.gov.uk/stellent/groups/public/documents/policies_and_procedures/n_010930.pdf, accessed on October 20th, 2010; Sheffield City Council standing orders, in <http://www.sheffield.gov.uk/your-city-council/council-meetings/cabinet/agendas-2007/agenda-14th-march/contracts-standing-orders>, accessed on October 20th, 2010.

²¹⁴ Interview with P. Craig, Oxford University, 12/04/2010.

2.2.2 Types of public contracts in the Netherlands

In the Netherlands, three types of public contracts can be distinguished. Firstly, there are property contracts which, as they deal with issues relating to the ownership of property, are in principle governed by private law. Secondly, there are competence contracts, where the government regulates the extent, or the use, of one of its competences, by way of contract. Thirdly, there are mixed contracts, which are a combination of the first two categories. These are contracts where the government uses a property contract and competence contract simultaneously.

Different scholars analyse these contracts in varying ways, but all arrive at the same general conclusion. For example, G. ten Berge and R. Widdershoven distinguish between contracts based on their object. This is a distinction to which we have already referred, the distinction between (a) the '*patrimonial contracts*', which relate to the purely private law actions of the administration when exercising its patrimonial rights; (b) the '*public law contracts*', concluded by the administration, which are agreements about the exercise of public law powers; and (c) the '*mixed contracts*', contracts which combine both patrimonial and public elements.²¹⁵

Private law based contracts: Patrimonial or property contracts

In The Netherlands, as in any other country, public bodies frequently contract with private suppliers for the supply of material, equipment, or services. When the public body enters into such a contract, no special or specific public law rules govern the contract. It acts like any private legal person concluding a purely private contract. The buying of a computer or car does not require special rules which differ from the ordinary private-law rules of sale. Therefore, many contracts entered into by public bodies are governed by ordinary private law, especially the substantial elements of the contracts.

²¹⁵ G. ten Berge & R. Widdershoven, "The principle of legitimate expectations in Dutch constitutional and Administrative law", in *Netherlands reports to the fifteenth international congress of comparative law / Rapports néerlandais pour le quinzième congrès international de droit comparé*, Antwerp/Groningen, Intersentia, 1998, pp. 421- 452, p. 448, accessed in <http://igitur-archive.library.uu.nl/law/2010-0518-200300/b22.pdf>, last visited on January 30th, 2012.

Such contracts, referred to as patrimonial contracts,

“(…) relate to the purely private law actions of the administration, i.e. actions of the kind that can also be performed by private individuals (sale and purchase, lease, and contracts of employment). When a patrimonial contract is concluded, the administrative body concerned exercises the patrimonial rights of the authorities. In formal legal terms, it is always the legal entities that constitute the administration (i.e. the state, provinces and municipalities) which conclude the contract. They are, after all, the holders of the patrimonial rights.”²¹⁶

Accordingly, when the public entity behaves as a private organ, the principle of equality of bargaining power between the public body and the third party prevails. Any public power which the administrative entity possesses cannot be exercised, rather the principle of ‘freedom of contract’ by free determination of reciprocal duties’ applies.

Public law based contracts: Competence or public law contracts

Whenever a public institution enters into a contract with a private entity regarding the use of public power, this is known as a competence contract. The public body makes a contract concerning its competence. In this respect, the administration and the third party enter into a contractual relationship with regard to the exercise of public power in certain circumstances.

In Dutch academic writing, a contract determining public contractual powers is referred to as ‘a competence contract’ or ‘a public law contract’ of the public body: “[A] *public law contract* consists of arrangements regarding the exercise of public law powers (e.g. the issue of a permit or subsidy). Such contracts are concluded by the administrative authorities themselves because they are the holders of the public law powers.”²¹⁷ From the writing of the two scholars transpires that the administration and the third party are not only aware of the extent of the public law power to be exercised, but they are also both interested in the outcome of such an exercise. The

²¹⁶ *Idem*, p. 448.

²¹⁷ *Idem*, p. 448.

administration, in backing up the third party with public support, hopes to protect the public interest; the third party, in gaining public support, hopes to perform more efficiently.

Thus, the public body may enter into contractual undertakings, binding itself to the fulfilment of obligations relating to its public law powers. For example, the public body may enter into a subsidy contract with a company for the construction of an airport in a remote area, where the population are in dire need of air transport. The parties to the contract, including the public body, undertake to perform certain actions, and at the same time define in a written document the limits of the public powers of both parties in relation to the management and control of the airport.

Mixed contracts

The third type of public contract in the Netherlands is the mixed contract. The same writers explain that these contracts are a combination of property contracts and competence contracts. They are classified as 'mixed' because they do not create direct bilateral contractual relationships. Rather, the administration and private entity separately but simultaneously undertake to perform specific duties.²¹⁸

For instance, a private entity may be willing to perform a given entrepreneurial action, such as the construction of an airport, which in principle will be for the benefit of the entrepreneur. However, such construction is also in the public interest. In such a case, if the owner of the airport agrees to pay an annual fee, the public body may undertake to extend a public road and railway to the airport, to facilitate ease of access. Ownership of the land and buildings where the airport is located remains private. However, the parties each simultaneously undertake a binding duty, the owner to pay a given annual fee, and the public body to build a public road and railway going to the airport.

²¹⁸ *Idem*, p. 448.

2.3 Conclusions of this chapter

In conclusion, it is worth highlighting the similarities and differences between the legal systems of public contracts in the different legal systems under comparison, in the context of the classification of public contracts.

The most significant similarity between the systems (which can be seen in all five) is that when the administration is acting 'privately' (in a private capacity), it enters into private contracts. All of these countries have a category of private contracts, although in Rwanda, France and Belgium the category of contracts which are private law based, which the administration may enter into, is small. The most important differences can be seen when the administration is acting 'publicly' (in a public capacity), for it is in this situation that the contracts differ from country to country.

The countries in which the contracting of public institutions is largely governed by public law (Rwanda, France and Belgium) have developed a category of 'administrative contracts' specific to the administration, to which public law applies. The phrase 'administrative contracts' has been used to highlight that public law increasingly governs public contracts. However, in these countries, there still are a few cases where the contracts made by public institutions are governed by private law, thus adding a category of 'private contracts' to the contracts entered into by the administration.

In England, contracts which are public law based are insignificant, or at least less significant than contracts which are private law based in this field. This explains why the English law of public contracts is largely concerned with private law issues. In this country, the contractual interactions of public and private entities both fall within the scope of ordinary contract law. The same contractual rules apply to all entities, public and private. This means that the administration does not enjoy any privilege or prerogative in its contractual interactions. However, although this rule is well established, the administration has a tendency to use contractual arrangements to achieve particular policy purposes, which means that certain contracts entered into by public institutions have some public law elements.²¹⁹

²¹⁹ It is however important to notice the emerging relevance of public law in the public contracting sphere, as highlighted by A.C.L. Davies in her book entitled "The public law of

In The Netherlands, although the main aim is to ensure the applicability of private law to most public contracts, the administration does not ignore public law norms when contracting, and some contracts are designated as public or mixed in character. Accordingly, in the Netherlands, the contractual relationships of public entities are more balanced between private and public law. In this country, most public contracts are governed by private law norms, hence private in character. However, as it shall be explained in chapter 6, the rules of private law apply in such a way so as not to frustrate the operation of public law.²²⁰

Thus, we can see that when the government acts in a public capacity, different types of law are applied to public contracts in the different countries. After analysing the different categories of public contracts from different perspectives, the key question is what lessons can be taken from this survey which could improve the public contracting process in Rwanda. Of course, one must also bear in mind the need to ensure the pursuit of public goals, and to respond to concerns about the effective management of public funds, especially with regard to anti-corruption measures.

Our recommendation is (and this will be elaborated upon further in the final chapter) that Rwandan law ought to adopt a more balanced approach to the application of public and private law rules and principles to public contracts, whilst also taking into account the need to use principles of good governance as a minimum-standard ‘safety net’, guaranteeing the effectiveness of the system of public contracting.

government contracts” (cited above) and P. Vincent-Jones in his book entitled “The new public contracting: Regulation, responsiveness, relationality” (cited above).

²²⁰ The rule was established by the Supreme Court in the *Willdmill* case, explained further below in 6.2.1 (see *Dutch State v. Windmill*, HR 26 January, AB 1990, 408; NJ 1991, 383).

3 Normative framework: An evolving view of the legality of public contracts from a good governance perspective

The central aim of this study is not to present the legal dimension in which the contents of the public contracts are viewed; rather, it is to study them within a normative framework of legality as analysed in its evolving meaning (as it shall be worked out in this chapter), a framework which encompasses the legal rules, the principles of law in general and principles of good governance in particular, applicable to public contracts.

The study turns around the question of whether the practice of predominantly applying public law to public contracts in Rwanda is in accordance with the goal of good governance, or whether, from a legal perspective of good governance, a balance between public and private law would be more appropriate in the current Rwandan political, legal and economic situation. In the specific context of public contracts, the public-private law divide in other countries (France, Belgium, England, and the Netherlands) is compared with the legal situation in Rwanda, and a new categorisation of public contracts is suggested.

In this respect, this study is based on the idea that public contracting in Rwanda should be conducted, not within the limits of the classical concept of legality regarding how the legal base for public contracts is defined, but rather within the new thinking about legality and its development from a good governance approach. In a modern era of business market and labour market competitiveness, between private companies, all together with government institutions and companies, applying the principles of good governance to the public contracting will certainly lead to fewer restrictions to public contracts and less prerogatives to government, but more and more to less complications in the public contracting because of a proper, transparent, effective and accountable process.

This arise three levels of approaches: the abstract level of thinking of legality, the narrow view of legality, and the new approach to legality extending to the principles of good governance. The three approaches consider the implementation of the administrative action from different views. With the first approach (abstract level), legality is analysed as a subset of the rule of law, whereby the primary meaning of the rule of law is compliance with the

law. The second approach (narrow view of legality) looks at legality in terms of conformity to the law, with the help of certain prerogatives and privileges vested in the administration, in order to defend the public interest. The third approach (modern view of legality) readdresses the manner in which the administrative action is conducted, by demonstrating that its effectiveness will depend on compliance with the law, with the help of principles of good governance. This third approach will form the shape of the normative framework.

3.1 Legality embedded in the ‘rule of law’ concept

On the most abstract level, legality is understood as a subset of the ‘rule of law’. The ‘rule of law’ encompasses the principle of legality itself, the principle of the separation of powers, the principle of the independence of the judiciary, and the principle of human rights protection. These principles need to be explained in greater detail.

3.1.1 General concept of the rule of law

In the different countries under comparison, the use of the term ‘rule of law’ has evolved from a different designation²²¹:

- the term ‘*rechtsstaat*’ is used in the Netherlands (and also in Germany);
- the term ‘*Etat de droit*’ is used in France, in Belgium and in Rwanda (‘*Leta igendera ku mategeko*’ or ‘State governed by the rule of law’)²²²;
- the term ‘rule of law’ is used in the United Kingdom.

The key pillars of the rule of law - i.e. legality, separation of powers, independent judiciary and human rights protection - are the same in these countries, with a variation in emphasis on each of the pillars (as described below).

²²¹ P. Costa, “The rule of law: A historical introduction”, in P. Costa & D. Zolo (eds.), *The rule of law: History, Theory and Criticism*, Dordrecht, Springer, 2007, pp. 73-149, p. 73; L. Gaba, *L’Etat de droit, la démocratie et le développement économique en Afrique Subsaharienne*, Paris, L’Harmattan, 2000, pp. 32-33.

²²² Art. 9, Rwanda Constitution of June 4th, 2003.

Meaning of ‘*Rechtsstaat*’ in the Netherlands (and in Germany)

The concept of ‘*Rechtsstaat*’ in Germany and also in the Netherlands requires that the State’s immense power should be limited and directed using the law. As Foster and Sule explain, “[t]he term itself – *Rechtsstaat* – indicates the supremacy of law (*Recht*) within the state (*staat*). Thus all state power is bound by the law. This principle is meant to offer protection from the abuse of power by the state.”²²³ In the same sense, P. Costa states that the rule of law is assumed to be “grounded in the need to curb the overwhelming and unbridled strength of power (a terrible and threatening power, though at the same time necessary for the creation and preservation of order)”.²²⁴

The classical German and Dutch view of *Rechtsstaat*, which emphasises both the need for state power to be limited by the law, and the duty of the government to act according to the law,²²⁵ is implemented in several ways. These include the separation of state powers (separation of powers²²⁶), the ascertainment of administrative decision (legal certainty and the ban on retroactive legislation²²⁷), the respect of individual rights and freedoms (*Verfassungsstaat*), and legal redress by an independent judge.²²⁸

²²³ N. Foster & S. Sule, *German legal system and laws*, Fourth Edition, Oxford, Oxford University Press, 2010, p. 178.

²²⁴ P. Costa, *Loc. cit.*, p. 75.

²²⁵ R.C. van Caenegem, *An historical introduction to Western constitutional law*, Cambridge, Cambridge University Press, 1995, p. 15.

²²⁶ “The principle of the rule of law – as applied to the government – is best expressed by the separation and division of powers (...)” (J. Zekoll & M. Reimann, *Introduction to German Law*, Second Edition, The Hague, Kluwer Law International, 2005, p. 58).

²²⁷ “Administrative decisions, in which an individual is awarded benefits (e.g. a license, social benefit, or subsidy) can be modified or repealed *ex post facto* only under certain, legally defined conditions, even where the administrative authority may have reason to believe that its earlier decision was legally unsound” (J. Zekoll & M. Reimann, *Op. cit.*, p. 57).

²²⁸ R.C. van Caenegem, *Op. cit.*, p. 15; see also C. A.J.M. Kortmann & P. P.T. Bovend’Eert, *Constitutional law of the Netherlands: An introduction*, Alphen aan den Rijn, Kluwer Law International, 2007, p. 24.

Meaning of '*Etat de droit*' in France, in Belgium and in Rwanda

The French and also the Belgian and Rwandan '*Etat de droit*' recognizes the supremacy of law, and requires the State to abide by it (the 'legality principle').²²⁹ French scholars explain that if the *Etat de droit* is properly implemented, the State has moved from a system of arbitrary rule (where the state is a police state, and all government action is permitted) to a system where the state, confined within the boundaries of the law,²³⁰ can only act if it has a legal basis to do so.²³¹

In France, Belgium and Rwanda, the principle of '*Etat de droit*' establishes the supremacy of the law, a hierarchy of publicly-available legal rules.²³² The executive power, for implementation of state's actions, should be thought of as subject to the 'law', not only in abiding by the legal rules expressly enacted, but also by respecting individual rights and freedoms during fulfilment of its duties. However, the whole structure of the law can only be effective if legal redress can be sought before an independent judiciary (the power of people vested with the authority to enforce the law).²³³

Meaning of 'Rule of law' in England

The term 'rule of law' is "founded on the principle that the law is above all"²³⁴ and, according to Dicey, means "the absolute supremacy of the law or predominance of regular law as opposed to arbitrary power".²³⁵

²²⁹ Ph. Foillard, *Op. cit.*, p. 132; see also G. Dupuis et al., *Op. cit.*, p. 88.

²³⁰ Ph. Ardant & B. Mathieu, *Institutions politiques et droit constitutionnel*, 21st Edition, Paris, LGDJ, 2009, p. 54 ; see also A. Laubadaire, J.C. Venezia & Y. Gaudemet, *Traité de droit administratif*, Tome 1, 14th Edition, Paris, LGDJ, 1996, p. 593 ; see also R. Chapus, *Droit administratif général*, Tome 1, 15th Edition, Paris, Montchrestien, 2001, p. 23.

²³¹ F. Hamon & M. Troper, *Droit constitutionnel*, 31st Edition, Paris, LGDG, 2009, p. 72.

²³² L. Gaba, *Op. cit.*, pp. 33-34.

²³³ Ph. Ardant & B. Mathieu, *Op. cit.*, p. 54 ; see also J. Chevalier, *L'Etat de droit*, Paris, Montchrestien, 1992, p. 160, cited by D. Turpin, *Droit constitutionnel*, Paris, PUF, 1992, p. 95.

²³⁴ L. Webley & H. Samuels, *Public law, Text, Cases, and Materials*, Oxford, Oxford University Press, 2009, p. 83.

²³⁵ R.C. van Caenegem, *Op. cit.*, p. 16, referring to A.V. Dicey in his *Introduction to the study of the law of the constitution*, 1885; see also G. Hogan, *Constitutional and administrative law*,

In England, besides the necessary threefold division of labour between a legislator, an administrative official, and an independent judge,²³⁶ the rule of law is designed to prohibit the government from making secret or arbitrary laws (or retrospective penal laws), to limit its discretionary powers (thus protecting the populace and their rights) and to do so before the same courts, irrespective of the class, gender, race, wealth or official position of the citizen.²³⁷ The term thus places great emphasis on the protection of human rights, where it is believed that, notwithstanding the supremacy of the law, laws should be just, their content should be morally sound, substantive rights should be protected within society.²³⁸

3.1.2 Four key pillars of the rule of law

The current conception of the rule of law consists of four key components: legality, separation of powers, independent judiciary, and protection of human rights. These four components are all recognised in the different countries under comparison, but with differences in emphasis from country to country.²³⁹

Principle of legality

The principle of legality states that an administrative authority is obliged to abide by the law when fulfilling its duties or when carrying out the activities

London, Sweet & Maxwell, 2008, p. 8; J. Alder, *Constitutional and administrative law*, Fifth Edition, Hampshire, Palgrave Macmillan, 2005, p. 127.

²³⁶ L. Webley & H. Samuels, *Op. cit.*, p. 123.

²³⁷ H. Barnet, *Constitutional & Administrative Law*, Sixth Edition, Oxon, Routledge-Cavendish, 2006, pp. 82-84; see also L. Webley & H. Samuels, *Op. cit.*, p. 83.

²³⁸ D. Feldman, *English public law*, Second edition, Oxford, Oxford University Press, 2009, p. 601.

²³⁹ See H.W.R. Wade & C.F. Forsyth, *Administrative law*, Tenth Edition, Oxford, Oxford University Press, 2009, p. 17; A. Laubadaire, J.C. Venezia & Y. Gaudemet, *Op. cit.*, p. 1011; H. Bocken & W. de Bondt, *Introduction to Belgian law*, Bruxelles – The Hague, Burylant – Kluwer, 2001, p. 59; L. Besselink, *Constitutional Law of The Netherlands*, Nijmegen, Ars Aequi Libri, 2004, p. 149; S. Fredman, *Human rights transformed, positive rights and positive duties*, Oxford, Oxford University Press, 2008, p. 1.

of the administration. This definition has been described by the European Ombudsman as setting out the narrow view of 'legality', identifying it exclusively in terms of conformity to validly enacted legal texts or rules, with no need for debate or discussion.²⁴⁰ H.W.R. Wade & C.F. Forsyth view the principle of legality in the same way, when they argue that the primary meaning of the rule of law is that everything must be done according to the law.²⁴¹

We can gain two important insights from this narrow view of the principle of legality. First, the principle of legality has significance in the context of administrative law because it refers to the idea of government by law.²⁴² This means that an administrative authority should always look for legal grounds on which to base its actions:

“Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man’s land), or which does some act which infringes a man’s liberty (as by refusing him planning permission), must be able to justify its action as authorized by law – and in nearly every case this will mean authorized directly or indirectly by Act of Parliament.”²⁴³

Second, by subjecting the administration to the legality rule, it requires the decisions and acts of the administration to conform to hierarchically superior legal rules. Conformity in this sense refers to government under law,²⁴⁴ and requires acts of the administration to be in accordance, or compatible, with

²⁴⁰ P. Nikiforos Diamandouros - the European Ombudsman, “Legality and good administration: is there a difference?”, Speech at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, in <http://www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>, accessed October 7th, 2009, p. 3.

²⁴¹ H.W.R. Wade & C.F. Forsyth, *Op. cit.*, p. 17.

²⁴² J. Alder, *Op. cit.*, p. 126.

²⁴³ H.W.R. Wade & C.F. Forsyth, *Op. cit.*, p. 17; see also G. Dupuis et al., *Op. cit.*, p. 88; A. Demichel, *Le droit administratif, Essai de réflexion théorique*, Paris, LGDJ, 1978, pp. 89.

²⁴⁴ J. Alder, *Op. cit.*, p. 126.

these predetermined legal rules.²⁴⁵ In that sense, if government's decisions or actions have legal consequences (such as issuing a licence or permit) or even factual consequences on citizens (such as the construction of a hospital or renovating the sewage system along streets), these actions should be done according to the law.

However, if one examines the development of the legality principle, it is clear that it is no longer confined to its classical meaning (i.e. the strict legal basis for any public action {*soumission des gouvernants au droit*}). Rather, the principle has evolved to take into account how the law is implemented, and how the principles of law might assist such implementation.²⁴⁶

In its new form, legality is not confined to a mere examination of the law in its strictest sense. It refers not just to legal rules meant to assist (and at the same time to constrain the discretion of) those in authority when exercising their power, but also to the legal means that are used during the decision-making process, in order to attain their intended goals. As the European Ombudsman puts it, "[a] broad view of legality expands the range of relevant material to include general principles of law such as equality, proportionality, and fair procedure".²⁴⁷ It is in that sense that principles of good governance are considered as an addition to the legal norms used to justify the public contracting process in Rwanda.

Principle of separation of powers

The 'rule of law' is linked to the idea that the state's powers should be dispersed among a number of authorities when carrying out its actions. Such a subdivision of powers is called the 'separation of powers' (*trias politica*), a principle which recommends that government authorities be both specialised and mutually independent.²⁴⁸ The normal division of powers is into executive, legislative and judicial branches: "This threefold division of labour between a

²⁴⁵ A. Laubadaire, J.C. Venezia & Y. Gaudemet, *Op. cit.*, p. 1011.

²⁴⁶ This is an expression of the shift from the classical view of legality to the modern view of legality (See *infra*, 3.2.2, Growing view of legality).

²⁴⁷ P. Nikiforos Diamandouros, *Loc. cit.*, p. 3.

²⁴⁸ G.A. Bermann & E. Picard (eds.), *Introduction to French law*, Alphen, Kluwer Law International, 2008, p. 4.

legislator, an administrative official, and an independent judge is a necessary condition for the rule of law in modern society, and, therefore, for democratic government itself".²⁴⁹ In practice, the principle of separation of powers still underpins many legal systems, including Rwandan constitutional law: "The branches of government are the following: the legislature, the executive and the judiciary. (...)." ²⁵⁰

Montesquieu, in analysing such a separation into the legislative power (legislature), the executive power (executive), and the judicial power (judiciary),²⁵¹ suggested that the three branches be independent from each other, and to some extent, that the executive and the judiciary be subservient to the legislature. It is unsurprising, however, that the end result in some countries, including African countries, has been that the legislature and the judiciary have become, to some extent, subservient to the executive.

However, the idea of the separation of powers has evolved into a modern concept, the 'balance of powers'. On a national level, the concept of the balance of powers requires that the distribution of power between specialised branches of the state, which share common interests in the attainment of a common goal and which are able to control and influence each other (through the use of checks and balances),²⁵² should be done in a balanced way. H. Bocken & W. de Bondt put it this way: "[T]he separation of powers is not absolute. There is an interdependence - and even a collaboration - between public authorities."²⁵³ This is also what the Rwandan Constitution expresses through the provisions of article 60, where it states that "[t]he three branches are separate and independent from one another but are all complementary".

²⁴⁹ L. Webley & H. Samuels, *Op. cit.*, p 123, referring to E.G. Henderson, *Foundations of English Administrative law - Certiorari and Mandamus in the Seventeenth Century*, Cambridge, Mass: Harvard University Press, 1962, p. 5.

²⁵⁰ Art. 60 of the Constitution of the Republic of Rwanda as amended, O.G. n° special of 04/06/2003.

²⁵¹ Ph. Ardant, *Institutions politiques et Droit constitutionnel*, 13th Edition, Paris, LGDJ, 2001, p. 46, referring to Montesquieu, *Spirit of the laws*, 1758; see also A. Demichel, *Op. cit.*, p. 43.

²⁵² C. A.J.M. Kortmann & P. P.T. Bovend'Eert, *Op. cit.*, p. 57.

²⁵³ H. Bocken & W. de Bondt, *Op. cit.*, p. 59.

Certainly the duties and actions reserved for each of the three branches might differ - for instance the legislature, in setting up the legal structure to be followed by the others, might in the law-making process need more powers than the others; or the administration, in having many tasks to be done, might in their fulfilment need more powers than other branches -, but the idea of 'balance of powers' serves to avoid the situation in which one branch of the state commands the others or interferes with the discharge of their duties.

As public contracts are one of the means used by the administration to realize its policies and actions, this study examines the way in which the three powers might collaborate in the making and implementation of public contracts, from a good governance perspective. The role of the administration, in implementing the principles of good governance through its treatment of public contracts, shall be considered in conjunction with that of the legislator in codifying those principles, and that of the judiciary in reviewing their application.²⁵⁴

Principle of independent judiciary

Montesquieu theorised that the judge is the mouthpiece of the law,²⁵⁵ but he argued that his role could only be fulfilled if he enjoys real independence in controlling the executive: "A third meaning of the rule of law, though it is a corollary of the first meaning, is that disputes as to the legality of acts of government are to be decided by judges who are independent of the executive."²⁵⁶ This view is shared by the Rwandan constitution, where it is provided (under article 140, paragraph 2) that "[t]he Judiciary is independent and separate from the legislative and executive branches of government."²⁵⁷

When analysed in relation to public contracts, the chief effect of this conception of an independent judiciary is to extend its power of judicial

²⁵⁴ See *infra*, 3.3.1.

²⁵⁵ G.A. Bermann & E. Picard (eds.), *Op. cit.*, p. 8, referring to Montesquieu, *Spirit of the laws*, 1758, Bk. 11, Chap. VI.

²⁵⁶ H.W.R. Wade & C.F. Forsyth, *Op. cit.*, p. 18.

²⁵⁷ Art. 140 of the Rwandan constitution 2003, cited above.

review to the review of decisions on public contracts. Consequently, if the principles of good governance are established as legal norms, the judiciary would be endowed with the power to review any decision in relation to public contracts which had been taken in violation of these principles.²⁵⁸

So we can see that the classical position of an independent judiciary is in two ways challenged. Firstly, when looking at the practical ways in which the judiciary seeks to control the power and actions of the administration (in addition, of course, to classical parliamentary control),²⁵⁹ it is noticeable that this controlling power has been distributed amongst several other public authorities, i.e. the Offices of Ombudsman²⁶⁰ and Auditor General²⁶¹, which some scholars do not hesitate to identify a 'fourth power'²⁶². This situation resulted from the division of the task of controlling the government between numerous public authorities vested with the constitutional capacity to control government (parliament, judiciary and the fourth power bodies).

Secondly, independence of the judiciary is also challenged by the way 'accountability' is conceived in the justice sector. Nowadays, in a mediatised world, the public in general and civil society in particular demand, not only that the administration, but also the judiciary, substantiate their decisions and actions. This conceptualisation of judicial independence maintains

²⁵⁸ See *infra*, 3.3.1.

²⁵⁹ "The Chamber of Deputies shall employ the following methods to obtain information and exercise oversight of activities of the government: 1° oral questions; 2° written questions; 3° hearings before Committees; 4° Commissions of inquiry; 5° interpellation" (Art. 128, Rwandan constitution 2003).

²⁶⁰ Among the responsibilities of the Office of the Ombudsman there is that duty of receiving and examining complaints from individuals and independent associations relating to acts of civil servants, state organs, and private institutions and to mobilise such civil servants and institutions in order to find solutions to such complaints if it finds they are well founded (Art. 7(3°), Law n° 25/2003 of 15/08/2003 establishing the organisation and functioning of the Office of the Ombudsman, *O.G* Special n° of 03/09/2003).

²⁶¹ The Office of the Auditor General of State finances shall among others audit and report on accounts of all public offices, local communities and public establishments and projects (Art. 3 of Law n° 05/98 of 04/06/1998 establishing the Office of the Auditor General of the state finances, *O.G.* n° 17 of 01/09/1998).

²⁶² G.H. Addink, "The Ombudsman as the fourth power", in F. Stroink & E. van der Linden (eds.), *Lawmaking and administrative law*, Antwerp - Oxford, Intersentia, 2005, pp. 269-291.

judicial autonomy from the executive and the legislative, but does not preclude judges from being held accountable for their decisions or actions by civil society.

Principle of human rights protection

A society under the rule of law is a society whose members have recognised rights. Of course, one must then ask which rights should enjoy recognition.²⁶³

At the outset of the human rights era, civil and political rights, constituting the first generation of human rights, were set out as the most important fundamental human rights which were protected by the State. These include a certain number of classical rights, with reference to the old distinction between the rights of man (civil rights) and the rights of the citizen (political rights).²⁶⁴ J. Bell explains the classical rights or freedoms as those which include individual freedom, freedom of expression, freedom of religion, freedom of peaceful assembly, right to property, principle of equality, and so on. In a collective societal context, these extend to include, *inter alia*, freedom of the media, freedom of association, trade union rights, freedom of enterprise and the right to strike.²⁶⁵ L. Besselink further explains that these classical rights, because they tend to proscribe certain behaviour on the part of public authorities, can potentially be immediately invoked by citizens, as they need no further articulation before they can be applied in practice.²⁶⁶

Then the rule of law requires that rights and freedoms are guaranteed: "Human rights are based on a much richer view of freedom, which pays attention to the extent to which individuals are in a position actually to exercise those rights."²⁶⁷ This means that the more authoritarian the State, the more restricted the rights of the people, and, conversely, the more the

²⁶³ Under Rwandan constitutional law, there is a range of human rights which are granted people (Art. 10-51, Rwandan Constitution 2003).

²⁶⁴ L. Besselink, *Op. cit.*, p. 149; see also J. Bell et alii, *Principles of French law*, Oxford, Oxford University Press, 1998, p. 157.

²⁶⁵ J. Bell et alii, *Op. cit.*, p. 157.

²⁶⁶ L. Besselink, *Op. cit.*, p. 149.

²⁶⁷ S. Fredman, *Op. cit.*, p. 1.

power of the state is restricted, the wider the sphere of liberty afforded to the people.²⁶⁸ Thus, at least in so far as civil and political rights are concerned, no respectable government can claim to be unwilling or unable to enforce them.²⁶⁹ “The rule of law means that rights must be protected by law, independently of the will of the ruler. Individual rights and freedoms are to be protected against any manifestation of arbitrary power by public authorities.”²⁷⁰

The economic, social and cultural rights appeared in human rights instruments at a later stage, as a second generation of human rights. These include rights in the sphere of work, such as the right to work, to enjoy just and favourable conditions of work, to rest and leisure, to form and join trade unions, to strike, to social security and to special protection for the family. They also cover rights aimed at the fulfilment of an adequate standard of living, such as the rights to food, clothing and housing, physical and mental health, education and scientific and cultural life.²⁷¹

The third generation of human rights came as a complement to the second. “[It] comprises the so-called collective or solidarity rights, in particular the rights to development, to peace and to a clean and healthy environment.”²⁷²

As far as economic, social and cultural rights (and eventually the third generation of human rights) are concerned, true enjoyment and exercise of these rights would mean that;

- (a) authorities are prohibited from denying access to available food, work, education, health services, and so forth;
- (b) individuals are entitled to protection from the state if third parties interfere with the right to use available goods and services; and

²⁶⁸ G. A. Bermann & E. Picard (eds.), *Op. cit.*, p. 16.

²⁶⁹ U. Oji Umozurike, *The African Charter on Human and Peoples’ Rights*, The Hague, Martinus Nijhoff Publishers, 1997, p. 29.

²⁷⁰ M. Sepúlveda et alii, *Human rights reference handbook*, Ciudad Colon - Costa Rica, University for Peace, 2004, p. 30.

²⁷¹ R. Clayton QC & H. Tomlinson QC, *The Law of Human Rights*, Second edition, Volume 1, Oxford, Oxford University Press, 2009, p. 25.

²⁷² W. Kälin, L. Müller & J. Wyttenbach, *The face of human rights*, Baden - Switzerland, Lars Müller Publishers, 2004, p. 23.

(c) the state is obliged to take concrete measures to progressively improve the overall situation within its territory regarding unemployment, food security, health services or education in order to reach a level which allows everyone to fully enjoy these rights.²⁷³

In that sense, the second and third generations of human rights call for definite action, forward planning and the expenditure of resources to make the enjoyment of these rights possible.²⁷⁴

The administration in the fulfilment of its actions, is then in duty to respect, safeguard and fulfil human rights.²⁷⁵ We mentioned earlier that, from a good governance perspective, the administration is in duty to use its powers in a proper, transparent, participative, effective, accountable and human rights oriented manner. Good governance and Human rights are therefore linked to each other, because many human rights require activities from the government, and activities of government require good governance principles: “In most of the situations, the implementation of human rights can only be realised by way of the principles of good governance”.²⁷⁶

A conception of public contracts which is compatible with the principles of good governance would therefore take into account the respect, protection and fulfilment of human rights from the commencement, and for the duration, of the contracts. It is clear that public contracting is mainly concerned with the use of public funds for the public benefit or the rights of the co-contracting party. An administrative authority cannot hope to fulfil its duties if, during the process of contracting, the wellbeing of the population, including their rights and freedoms, and the rights of the co-contracting party, are not taken into account.

A pertinent example from Rwanda concerns the right of disabled people to access all public infrastructures. In Rwanda, most of the roads and public infrastructures are not equipped so as to ensure that disability access is maximized. If one examines the ‘procurement of works’ contracts into which

²⁷³ *Idem*, p. 23.

²⁷⁴ U. Oji Umozurike, *Op. cit.*, p. 46.

²⁷⁵ H. Addink, G. Anthony, A. Buyse & C. Flinterman, *Op. cit.*, p. 112.

²⁷⁶ *Idem*, p. 114.

the administration enters into each year, can it be assumed that such a right is discussed before the contract is awarded? The Institute of Research for Development and Peace, in assessing the situation in Rwanda, said that

“[t]he state should avail equipments and infrastructures to enable people with disabilities to access all public or private services. A notable example relates to the construction of public roads or public and commercial buildings; sidewalks or elevators should be technically built to allow disabled persons with wheelchairs to use them”.²⁷⁷

Human rights therefore play an important role in the system of good governance, not only with regard to civil and political rights, but also, and more particularly in the case of public contracts, to economic, social, cultural, environmental and developmental rights.

3.2 Understanding legality in relation to public contracts

It is worth mentioning that the concept of legality has evolved from an older form to one which is more modern. Now, legality not only refers to conformity to the legal base *stricto sensu* (narrow view of legality), but also to the principles of law which support that legal base (broader view of legality),²⁷⁸ and, more particularly in the field of administrative law, to the principles of administrative law in general and principles of good governance in particular.

Public law or private law, when applied to public contracts within the limits of the narrow view of legality, has certain disadvantages. An understandable response to these is for the administration to utilise the modern conception of legality, using the principles of good governance to counterbalance to the unsoundness of general principles of administrative law (i.e. the unilateral contractual privileges granted to the administration) or incompleteness of general principles of private law. In Rwanda this could be done by

²⁷⁷ Institute of Research and Dialogue for Peace (IRDP), *Op. cit.*, pp. 92-93 (Translated from French).

²⁷⁸ J. Rivero & J. Waline, *Op. cit.*, p. 229.

incorporating the principles of good governance into the legal framework for public contracting, which will be demonstrated in the final chapters.

3.2.1 Narrow view of legality: Analysis of three approaches

Whilst the French, Belgian and Rwandan laws have treated public law as the main means of regulating the legality of public contracts, the English law has favoured private law and the Dutch has entwined private law with public law, in order to do this. These quite opposite approaches explain the different views on the government's prerogatives and privileges in these countries. In countries with a strong public law tradition, these are vital for the execution and termination of public contracts. However, in countries which adhere to the private law tradition, such prerogatives and privileges do not have any tangible or have less importance in the public contracting process.

Legality of public contracts guaranteed by public law

For a long time in Rwanda, public interest protection was vital, which explains the public law application to public contracting. Thus, the application of public law has come to be justified in terms of protection of the public interest, in order to guarantee the legality of the contractual undertakings. For that reason, when the administration enters into public contracts, public law rules apply and the administration is normally granted some important privileges, known as the 'privileges attached to the powers of the administration', i.e. the '*power of unilateral action*', the '*privilege of prior compliance notwithstanding complaint before court*', and the '*privilege of immediate execution*'.

The first privilege which plays a major role in Rwandan administrative law is the power of unilateral action, which gives the administration the power to unilaterally change any regulation or decision of a general or of a particular nature, without any recourse to any other authority, or to the interested parties.²⁷⁹

Another very significant privilege granted to the administration is the extent to which it can force compliance with its decisions without any recourse to a

²⁷⁹ G. Braibant & B. Stirn, *Op. cit.*, p. 202.

judge (*privilège du préalable*). A decision made by the administration stands independently as the basis for any forced compliance, notwithstanding complaint before court.²⁸⁰ “[A]dministrative authorities do not need to have recourse to a judge before issuing an act that can legally bind the persons to whom it applies.”²⁸¹

The final privilege designed to give the administration precedence over other contracting parties is the ability to effect to its own decisions, in such a way as to force immediate execution, with the possibility of using public force against the disobedient party.²⁸² “The privilege of ‘*décision exécutoire*’ requires persons to whom such acts are addressed to obey them, subject to the legal sanctions provided, even though they have not been judicially enforced.”²⁸³

The problem now is one which arises in certain situations or actions (such as some categories of public contracts) where the administration is not able to show any *public interest*. Even if the term is interpreted broadly, the administration will find it difficult to identify a clear public interest in, for instance, a contract for the purchase of pens for office work, and then will not be able to easily justify the application of rules and principles of public law to that category of contracts. This is the major reason for introducing some private law governed contracts in the field of public contracts. Most of the cases public law accepts rules and principles of private law to apply to public contracts, even to the administrative contracts.

Legality of public contracts guaranteed by private law

To move to a legal system at the other end of the spectrum, it is clear that “English law does not cope with the wider public interests which might be at stake in government contracting.”²⁸⁴ This a corollary of the application of

²⁸⁰ A. Laubadaire, J.C. Venezia & Y. Gaudement, *Op. cit.*, p. 712.

²⁸¹ G. A. Bermann & E. Picard (eds.), *Op. cit.*, p. 66.

²⁸² A. Laubadaire, J.C. Venezia & Y. Gaudement, *Op. cit.*, p. 713.

²⁸³ G. A. Bermann & E. Picard (eds.), *Op. cit.*, p. 66.

²⁸⁴ A. C.L. Davies, “English law’s treatment of government contracts: The problem of wider public interests”, in M. Freedland & J.B. Auby, *The public law/Private law divide: Une entente cordiale?*, Oxford and Portland, HART Publishing, 2006, p. 128.

private law to public contracts in England. This approach has its roots in Dicey's approach to legality. He argued that people's rights are better served under ordinary law than public law: "(...) the rights of the governed against the governors are better protected by the common law than by a statutory or constitutional bill of rights."²⁸⁵

This effort to keep public law distant from the public contracting, noticeable in England, reflects the spirit of granting the public bodies a certain degree of freedom in their contractual relationships. It is only when the contract is unreasonable that the judge will be allowed to intervene. This means that the ordinary law is to guarantee the legality of public contracts, but the making of such contracts by the authority ought to be subject to a test of reasonableness. Unreasonableness or 'Wednesbury unreasonableness' is "used to describe the state of a decision that is so unreasonable that no reasonable authority could have decided that way".²⁸⁶ A decision in relation to public contracts would be considered *Wednesbury* unreasonable if an administrative authority under similar circumstances would not reasonably have made it: "A decision on the matter is "so unreasonable that no reasonable authority could ever have come to it"²⁸⁷.

Legality of public contracts guaranteed by a combination of application

From the above described approaches to legality of public contracts, it is clear that;

²⁸⁵ P. Cane, *Administrative law*, Fourth Edition, Oxford, Oxford University Press, 2004, p. 415, referring to A.V. Dicey in his *Introduction to the study of the law of the constitution*, 1885 (cited above).

²⁸⁶ The term 'Wednesbury unreasonableness' was first used in *Associated Provincial Picture Houses v. Wednesbury Corporation*: "The term derives from 'Associated Provincial Picture Houses v. Wednesbury Corporation' [1948] 1 KB 223, where the court stated that it would only intervene to correct a bad administrative decision on grounds of its unreasonableness if the decision was (...) so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" (*Associated Provincial Picture houses v. Wednesbury Corporation*, [1948] 1 KB 223).

²⁸⁷ Words of Lord Greene in the *Wednesbury* case, quoted by H. Delany, *Judicial review of administrative action*, Second edition, Thomson Reuters, Dublin, 2009, p. 92.

1. the mere application of public law or private law is not always sufficient to guarantee legality of public contracts;
 2. an abrupt shift from a more public law oriented governance of public contracts to a more private law oriented governance might not be easily recognized by the legal scholars, the legal practitioners and the users of the law of public contracts in Rwanda;
- so that a compromise might be more appropriate and fruitful to the Rwandan context, as shall explained further below.²⁸⁸

This meets the other approach to the legality of public contracts, i.e. the Dutch approach. In the Netherlands, in principle private law and private law principles apply to public contracts. However, apart from the requirements of reasonableness and fairness,²⁸⁹ private law rules are denied their application to public contracts, whenever they are contrary to the rules of public law”.²⁹⁰

3.2.2 Growing view of legality when applied to public contracts

Legality with the support of principles of good administration

From the perspective of public administration, the development of the legality principle (stimulated by concern for good administration) moved from legal formalism (a classical view of legality, supporting the grant of privileges of the administration) to legality with the support of principles of good administration (the modern view of legality, which pays more attention to the principles such as lawfulness, equality, proportionality, participation, transparency, etc.).

As the European Ombudsman puts it, the reasoning underlying the narrow view of legality is that the process of administration is the application of law to specific cases. This entails that, at least in principle, there exists only one correct legal result in each case, and the task of the administrator is to

²⁸⁸ See further below, 8.2 A combined application of public and private law to public contracts.

²⁸⁹ Art. 6:2, 6:248 & 6:258 of the Dutch Civil Code (Book 6) (See *infra*, 6.2.3, “requirement of reasonableness and fairness of private law norms”).

²⁹⁰ Art. 3:14 of the Dutch Civil Code.

achieve that result through a concrete formulation of the law.²⁹¹ The European Ombudsman has also noted that the narrow view of legality supported the vesting of certain prerogatives and privileges in the administration, in order to protect the public interest: “[The classical] model also recognizes and protects the freedom of the administration to identify and pursue the public interest when making policy choices. To this limited extent, the model makes room for administrative discretion.”²⁹²

The Ombudsman, in noticing significant uncertainty as regards the content of the classical legality principle, also criticised this narrow view of legality. He argues that it is unrealistic to assume that, on the basis of the principle of legality, every foreseeable outcome was within the consideration of the legislature. “The need for administrative judgment and choice arises from incompleteness of legal rules”.²⁹³ If, at the lower level of legality, one may assert that, to a specific case an ascertained legal provision should be applied, one may also assert that not everything can be defined by the law. It is logically comprehensible to affirm that not every situation would have been foreseen under the law. The legal response to that failure to regulate any situation has been to reformulate legality in another way, taking into account the fact that the law should be implemented together with principles of good administration, which will reduce the need for legality, or will help in compensating the lack of legality.²⁹⁴

In this line of thinking Rhita Boustia, while stating that norms of good administration are still considered in terms of internal rules of good administration, accurately recommends the inclusion of these rules in the

²⁹¹ P. Nikiforos Diamandouros - The European Ombudsman, *Loc. cit.*, p. 3.

²⁹² *Idem*, p. 3.

²⁹³ *Idem*, p. 3.

²⁹⁴ See Council of Europe, Recommendation CM/Rec(2007)7 of the Committee of Ministers to member States on good administration, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers’ Deputies, in [http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_&_Documents/Conv_Rec_Res/Rec\(2007\)7_en.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_&_Documents/Conv_Rec_Res/Rec(2007)7_en.pdf) accessed on 15/10/2009; M. Niemivuo, “Good administration and the Council of Europe”, in *European Public Law*, 2008, 545-563, p. 559-561; J. Wakefield, *The right to good administration*, Alphen aan den Rijn, Kluwer Law International, 2007.

legal framework governing the administration, not simply as internal norms set for the functioning of the administration, but most importantly as legal binding norms to the administration.²⁹⁵ And this is our position in this study, that "recognition of the rules of good administration in terms of legal binding norms amounts to the evolving view of legality".²⁹⁶

The principles of good administration were drawn up to set out a clear framework within which public authorities, in their relations with private persons, could work in order to make better administrative decisions.²⁹⁷ The core principles - to use the categorization of the Council of Europe, in Recommendation CM/Rec(2007)7 - are nine in number: the principles of lawfulness, equality, impartiality, proportionality, legal certainty, taking action within a reasonable time limit, participation, respect for privacy, and transparency.²⁹⁸

The principle of lawfulness requires the public authorities to act in accordance with the law (including domestic law, international law and the general principles of law governing the organisation, functioning and acts of the authorities), and the rules defining their powers (created in order to avoid the making of arbitrary decisions, even when the authority acts within the bounds of its discretion {article 2}).

The principle of equality compels public authorities to treat private persons who are in the same situation in the same way (unless a difference in treatment is objectively justified), and to avoid discriminating between

²⁹⁵ Rh. Boustia, *Op. cit.*, pp. 418-420, 424-426 & 445.

²⁹⁶ *Idem*, p. 418 (translated from French).

²⁹⁷ Council of Europe, *Loc. cit.*; see also M. Niemivuo, *Loc. cit.*, p. 559.

²⁹⁸ Recommendation CM/Rec(2007)7, cited above; see also the Code of good administrative behaviour by the European Ombudsman, in <http://www.ombudsman.europa.eu/resources/code.faces> (this code gives details on many principles, including inter alia the following principles: lawfulness (art. 4), absence of discrimination (art. 5), proportionality (art. 6), absence of abuse of power (art. 7), impartiality and independence (art. 8), objectivity (art. 9), legitimate expectations, consistency and advice (art. 10), fairness (art. 11), courtesy (art. 12), rights of defense (art. 16), reasonable time limit for taking decisions (art. 17), duty to state the grounds of decisions (art. 18), indication of the possibilities of appeal (art. 19), transparency (art. 22, 23)).

private persons on grounds such as sex, ethnic origin, or religious belief or conviction (article 3).

The principle of impartiality requires public officials to carry on their duties in an impartial manner, only having regard to relevant matters, and to avoid acting in a biased manner (article 4).

The principle of proportionality requires public authorities to balance any adverse effects which their decision has on the rights or interests of private persons against the purpose which they are pursuing. Any measures taken by them should not be excessive. They should only impose measures on private persons which affect their rights or interests where necessary, and even then only to the extent required in order to achieve the aim pursued (article 5).

The principle of legal certainty states that public authorities may not take any retroactive measures, except in legally justified circumstances, and they may not interfere with vested rights or situations where a legal result has been finalised, except where it is imperatively necessary in the public interest. In certain cases, in particular where new obligations are imposed on private parties, public officials must make transitional provisions, or allow a reasonable time to pass before these new obligations to enter into force (article 6).

Good administration also requires public authorities to perform their duties within a reasonable time. They are required to take action within a reasonable time limit (Article 7).

The principle of participation requires public authorities to provide private persons with the opportunity to participate, through appropriate means, in the preparation and implementation of administrative decisions which affect their rights or interests (unless action needs to be taken urgently) (article 8).

The principle of respect for privacy requires public authorities to refrain from revealing, removing or altering any personal data or files. When public officials are processing personal data, particularly by electronic means, they are compelled to respect the privacy of individuals (article 9).

The principle of transparency states that public authorities must ensure that private persons are informed, by appropriate means, of the actions and decisions of public authorities. Notwithstanding those secrets which are protected by law, the authorities must respect the right of access to official documents (article 10).

These principles, recommended for implementation by administrative authorities in the European Union member states, can offer insight to other countries, such as Rwanda. If this model is utilised, it becomes clear that the necessity of giving the administration extraordinary powers and privileges during the public contracting process is significantly reduced. Evidently, the principles of good administration only apply to the administration's structure, including the administration of the judiciary and the administration of the parliament, but not including parliament or the judiciary as other powers of the State.

Legality with the support of principles of good governance

At the administrative level, the role of the politician, and the administrator in particular, has been to construct a normative structure where one may find the principles of good administration. The role of the legal scholar has been to convert the principles of good administration into legal principles, with the aim of setting out a legal structure for the principles of good governance.²⁹⁹

In the administrative law context, then, the concept of legality has changed from 'legality with the support of the principles of good administration' to 'legality with the support of the principles of good governance'. Six principles of 'good governance' have been identified as being both legally explicable, and also useful in setting out solutions to some of the problems with the classical conception of legality. Likewise, the same principles also reduce the need for the administration to use extraordinary powers and privileges in its ordinary dealings with the citizens. The six principles, introduced to supplement the classical legality principle, have been expressed as follows:

²⁹⁹ The Swedish Agency for Public Management, "Principles of Good Administration in the Member States of the European Union", Survey on transforming principles of good administration into legal principles, 2004, accessed in <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, on December 1st, 2010.

principles of proper administration, democratic administration, transparent administration, human rights administration, accountable administration and effective administration.³⁰⁰

These principles potentially have a very broad scope of application. They are not confined to the national administration, but can also apply to all public institutions, (including the three state powers - executive, parliament and judiciary), national organisations, and even international organisations, at regional³⁰¹ and international level.³⁰²

In the context of this study, legality of public contracts is analysed, not exclusively in its strict sense of the legal base to public contracts, but more particularly in its broader meaning, which allows it to have wider contents, covering at the same time the legal base and the principles of good governance in support of the legal base, which ought to form part and parcel of the legality of public contracts.

3.2.3 A new conception of legality, another way to approach public contracts

When looking into the situation in Rwanda, there are important factors to justify the application of principles of good governance. The Government of Rwanda, in creating the 'Rwanda Governance Board' (RGB),³⁰³ has already undertaken the path to good governance. The eight key indicators of good governance are the following: rule of law, political rights and civil liberties,

³⁰⁰ See G.H. Addink, "Principles of good governance", in D.M. Curtin & R.A. Wessel, *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005, pp. 21-48.

³⁰¹ Commission of the European Communities, *European governance*, White Paper COM (2001) 428 Final, Brussels, 2001, p. 10; see also J. Wouters & C. Ryngaert, "Good governance: Lessons from international organizations", in D.M. Curtin & R.A. Wessel, *Op. cit.*, pp. 69-104, p. 102; D. M. Curtin & I. Dekker, *Loc. cit.*, p. 5.

³⁰² D.C. Esry, "Good governance at the World Trade Organisation: Building a foundation of administrative law", in *Journal of International Economic Law* 10(3), 509-527, pp. 513-526.

³⁰³ The 'Rwanda Governance Board' is "a public agency with legal personality, administrative and financial autonomy" (Art. 1, par. 2 of Law n° 41/2011 of 30/09/2011 establishing the Rwanda Governance Board and determining its mission, organisation and functioning, cited above).

participation and inclusiveness, transparency and accountability, safety security, investing in people, anti-corruption, service delivery and easiness of doing business and private sector advocacy.³⁰⁴ Amongst these indicators are some of the principles of good governance to apply to the public contracting in Rwanda, i.e. rule of law, political rights and civil liberties, participation and inclusiveness, transparency and accountability.

Therefore, if the concept of legality has evolved, this suggests that the approach to making public contracts in Rwanda can also change, so as to better facilitate the public contracting process, with a view to rendering the administration more transparent, effective and accountable. In considering the new conception of legality, it is suggested that the justification for the legality of public contracts in Rwanda be broadened from the narrow conception of legality, to encompass the modern conception (a legality with the support of principles of good governance)³⁰⁵. The new way of conceptualising legality can also provide another way to apply the law to public contracts (a more balanced application of public and private law)³⁰⁶.

3.3 Principles of good governance used as legal norms

3.3.1 Different powers in respect of the principles of good governance

In Rwanda, the Government has taken good governance to refer to the exercise of political, economic and administrative authority in the handling the nation's affairs and cultivating mechanisms, relationships and institutions. Good governance as well spreads cultures of leadership, through which citizens and groups articulate their interests, exercise their civil liberties, fulfil and receive their obligations, and mediate their differences.³⁰⁷

³⁰⁴ D. Gakuba, "Rwanda Governance Advisory Council releases key governance indicators", in Rwanda Bureau of Information and Broadcasting (ORINFOR), 02/09/2010, accessed in <http://www.orinfor.gov.rw/printmedia/topstory.php?id=1248>, on 16/02/2012.

³⁰⁵ See *infra*, 8.2 Compatibility of the new categories of public contracts with the principles of good governance.

³⁰⁶ See *infra*, 7.2 Grounds for adopting a mixed approach to the law of public contracts, from a good governance perspective.

³⁰⁷ A. Semarinyota, "Good governance in Rwanda, Highlights", Paper presented at a Conference on Good governance in Rwanda, held at Palace Hotel, 05/10/2004, p. 1.

In view of that policy, it is arguable that public contracts, considered as one of the means by which the administration implements its actions, can be examined within the new legality framework, which encompasses the principles of good governance, from the level of the legislature to the level of the administration and judiciary. The three state powers have clearly defined positions in this new framework of legality. Addink argues that the legislator has a codifying position (ensuring that legislation is compatible with these principles), the administration holds an instrumental position (steering the use of these principles in practice), and the judiciary holds a review position (a power to judicially review acts of the administration in case of misuse or misinterpretation of power).³⁰⁸

Power of the legislature to codify principles of good governance

A distinction is made in administrative law, especially with regard to the powers of the administration to make orders, decisions and contracts, between imperative delimitation of administrative powers and the discretionary exercise of those powers.

The idea that the powers of the administration shall be imperatively delimited and discretionarily exercised has its roots in the classical view of the principle of legality. It is clear that the administration possesses inherent statutory powers to act,³⁰⁹ but the legislature should clearly set out the fields in which exercise of the administration's powers is within the limits of the law, and the fields where it would be beyond those limits.³¹⁰ Likewise, if principles rely on rules so they can function, it is arguable that constructing the legal framework where one may find the principles of good governance is a duty of the legislature. As law maker, the legislature has the role of clearly specifying the rules and procedures through which the principles of good governance operate.

³⁰⁸ G.H. Addink, "Principles of good governance: Lessons from Administrative Law", *Loc. cit.*, p. 37.

³⁰⁹ See *infra* 4.1, Powers of the administration.

³¹⁰ See further below the position of the administration

In Rwanda, although the idea of good governance has sparked interest in the political sphere, the legislature is still in the process of formulating the principles of good governance. What in reality has significantly taken place is an articulation of the principles in political discourse, presumably so that central and local government authorities can be seen to be accountable.³¹¹ Moreover, for promotion of the principles of good governance and good monitoring purposes, an autonomous institution, the 'Rwanda Governance Board (RGB)', was set up with an overall mission of promoting the principles of good governance, monitoring good governance practices in public and private institutions and conduct research related to governance for achieving good service delivery, sustainable development and prosperity.³¹²

In the context of Rwandan law, the normative position with regard to the principles of good governance is not yet clear, since no specific law on good governance or its principles has been passed by Parliament. Thus, a concrete legal move towards codification of the good governance principles has yet to be undertaken. Nevertheless, certain aspects of these principles have been indirectly assimilated into Rwandan law, to direct administrative practices. They may have been formulated in legal or non-legal terms in the various laws where they are situated, but their meaning reflects the idea of the principles of good governance. For instance, article 4 of the law on public procurement provides for six fundamental principles to guide the public procurement process, namely transparency, competition, economy, efficiency, fairness and accountability.³¹³

³¹¹ In the Ministry of Local Governance, a direction for Good governance exists for the purpose of directing on good governance issues and controlling implementation by local government authorities. Added to this, a centre for good governance (Rwanda Governance Advisory Council) has been instituted, under supervision of the Presidency, to analyse and inform on governance issues (see further below).

³¹² Art. 3 of Law n° 41/2011 of 30/09/2011 establishing the Rwanda Governance Board and determining its mission, organisation and functioning, *O.G.* n° 46 of 14/11/2011. This institution was instituted to replace the Rwanda Governance Advisory Board, which had the general mission to "conduct research into governance as practiced in public, corporate and civic domains, and to provide information products as input to policy design for the purpose of achieving prosperity and sustainable development" ("Rwanda Governance Advisory Council (RGAC)", in (<http://www.rwanda-gac.org/>, accessed on September 22nd, 2010).

³¹³ Art. 4 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

This trend to using principles of good governance in Rwanda lends support to the argument that these principles are necessary as an essential tool for good governance in general, and specifically for the good governance of public contracts. This seems to be a convincing way to explain the use of good governance principles in the preparation and implementation of the public contracts as a means of good governance. This study aims to advocate the necessity of the principles of good governance in the Rwandan legal framework, to clear away any obstacles to the good governance of the public contracts and to establish a coherent and effective framework of principles for public contracting.

Power of the administration to give practical effect to these principles

Rwandan law, as mentioned above, has derived many of its principles from Belgian and French law, and among these principles are those relating to the powers of the administration. In some cases, the administrative authority is compelled to discharge its duties within the limits of his powers (*compétence liée*). In other cases, the administrative authority is given a certain latitude by the law to use its discretionary powers in order to achieve the intended goals (*pouvoir discrétionnaire*).³¹⁴

This means that the principle of legality operates alongside the powers of the administration. The principle indicates that although the administration occupies a position of power, in making orders and decisions and entering into contracts, this has to go hand in hand with certain controls over its powers, which constrain their exercise according to the limits of the law. It would be a clear case of maladministration if an administrator failed to properly exercise his discretion, and made an unlawful order or decision, or terminated a contract, without valid reasons. The administrative authority is not granted a subjective discretion. Rather, its powers are exercised within the limits set out by the law, in pursuit of a legally recognised aim.

At this stage, the key question is what stance the administration ought to take as regards good governance principles, if they are elaborated in a systematic way. It would be easy to implement these principles into the ordinary procedures of the exercise of executive power, to put into action the

³¹⁴ J. Sayah, *Op. cit.*, p. 228.

provisions of the laws, through its administrative and labour force. As Wakefield puts it, “[a]dministrative practice and rules of good administration have developed in the employment area, and it may be expected that the principles will acquire more general application”.³¹⁵

From Wakefield’s statement we can infer that if the Rwandan Government tries to implement a system of good governance, of which the principles of good governance are a core aspect, this will evolve into general application of these principles throughout public institutions.³¹⁶ Therefore, politically and logically speaking, these principles should be applied to support the actions of the administration. The suggestion here is that developments in public contracting law require the implementation principles of good governance, in order to support the preparation, implementation and enforcement of public contracts. The ‘principles of good governance’ can help to increase the effectiveness of public contracting.

These principles are essential if one wishes to achieve a system of ‘good governance’ in public contracting. ‘Good governance’ in this context requires the criteria behind decisions on public contracting, such as the award of a procurement contract, or the appointment of an employee, or the agreement of a concession contract, should be both clear and unquestionable.

These principles operate in two important ways. Firstly, they will help the public authorities to accurately assess their powers in relation to the decision of awarding a contract, so as to avoid a situation in which the decision may be subject to a successful judicial review challenge. Secondly, if the principles of good governance are employed correctly for the duration of the contract, it is unlikely that the public authorities would make a decision of unilateral modification or termination which could be impugned.

Generally, when the administration makes changes to, or escapes, a contract using unilateral powers, this considerably reduces the level of trust between the government and the other contracting partner.³¹⁷ But if the administration implements the principles of good governance, the other

³¹⁵ J. Wakefield, *Op. cit.*, p. 129.

³¹⁶ A. Semarinyota, *Loc. cit.*, p. 1.

³¹⁷ A.C.L. Davies, *Loc. cit.*, p. 125.

contracting party may be more receptive to modification or termination of the contract. Accordingly, what would have been perceived as an authoritarian exercise of commanding power by the administration may become less disputed, if the administration correctly puts the principles of good governance into practice.

Power of the judiciary to review principles of good governance

The position of the judiciary will not be analysed in situations where the relevant act of the administration was within the limits of its powers. Where the law clearly sets the limits of the administration's powers, an act which exceeded those powers would be open to challenge by judicial review.

In Rwandan procedural law, the courts do not encounter any difficulty in asserting jurisdiction over litigation arising from public contracts. A legal basis was set out to enable the specialized administrative chambers of the courts to deal with matters arising from public contracts, whether governed by public or private law.³¹⁸ While the administration must play an active role in implementing the principles of good governance, if it acts in contravention of those principles this would be sufficient to ground a claim before the courts for judicial review. This has been described as the 'reviewing position' of the judiciary, who have the power to review any wrongful procedural decisions made by the administration. Thus, the law should articulate with clarity what is regarded as an abuse of the position of the administration as regards to the principles of good governance, which will allow the judiciary to review the administration's decisions in general, and specifically in relation to public contracts.

For example, the ECAN case reflects the reviewing position of the judiciary, in relation to the principle of proportionality. ECAN, a construction company, entered into a contract with the City of Kigali, for construction of road Nyarutarama-Kagugu. While ECAN was accomplishing its task, it realized that there were some incorrect data in the preparation of the tasks, whereby water drainage was not covered under the contract. On realizing that mistake, Kigali and ECAN Company verbally agreed to continue the works,

³¹⁸ Art. 83 Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

with the inclusion of drainage. On partial completion, ECAN claimed revision of the contract and adjustment of remuneration thereto related, but the City of Kigali refused such an increase of price. The point at stake therefore was proportionality between what was required from ECAN (entailing increase of costs) and remuneration that the City did not want to adjust. In its ruling, the High Court decided that the contract had to be revised for increase of works along with adjustment of remuneration.³¹⁹

The recognition that the principles of good governance form a part of the modern conception of legality entails the use of other mechanisms of dealing with the public contracts. The aim of this study is therefore to determine whether the courts may deal with litigation arising from public contracts according to the modern conception of legality, encompassing the principles of good governance.

3.3.2 Relevance of the principles of good governance to public contracting

In this part, a short description of the principles of good governance relevant to the public contracting will be provided. These can be organised into four categories: the principles of properness, the principles of transparency, the principle of effectiveness and efficiency and the principle of accountability.³²⁰

The principles of properness in public contracting

In considering the various mechanisms which guarantee the correct implementation of the principles of good governance during the public contracting process, the principles of properness are the most useful. They include a range of principles which can be aimed at moderating the discretionary powers of the administration in contract-making, and assuring that the administration assumes certain responsibilities in relation to its contractual undertakings.

One important principle of properness prohibits the misuse of power, which can be applied to the public contracting process. As a general rule, the

³¹⁹ *City of Kigali v. ECAN Company*, High Court, 0106/HC/KIG, 14/01/2011.

³²⁰ G.H. Addink, "Principles of good governance: Lessons from Administrative Law", *Loc. cit.*, p. 43.

functioning of the administration is tied to its discretionary powers, which give it the authority to make decisions of any kind, in whichever manner it chooses, and also to enter into contracts. The administration is, therefore, privileged in the decision-making process, because it alone has the power to decide on what is necessary in contract-making, as it has the power to direct and oversee public contracts. Thus, from a classical perspective, it has been reasoned that, in its functioning, the administration should amass many public powers, to oversee and safeguard the public interest. But, if we look at the issue from a good governance perspective, it is clear that unfettered exercise of these powers may constitute a threat to individual rights.

A means of moderating the exercise of the administration's discretionary powers is the prohibition of misuse of power: "The principle of prohibition of misuse of power (*défense de détournement de pouvoir*³²¹) means that an administrative body or other legal entity may not use its power (according to public law) for a purpose other than that for which it was granted".³²² Three important aspects of this principle fall to be considered. Firstly, the legislature is required to state as clearly as possible the purpose pursued when the administration exercises a discretionary power.³²³ Secondly, the administrative authority is prevented from using its powers to make an order for a purpose other than that for which it was conferred (*défense de détournement de pouvoir*),³²⁴ or to use its powers in a way which goes beyond the prescribed purpose. Thirdly, the judiciary can review decisions to ensure that they do not go beyond the limits of the power conferred (judicial review).

³²¹ Under French administrative law, the principle of *défense de détournement de pouvoir* means that, "where an administrative authority is by law vested with some powers, that is always done in the pursuit of a specified goal. Inobservance in the use of such powers within the pre-set limits may make good a claim of misuse of power (M. Degoffe, *Op. cit.*, p. 259).

³²² Ph.M. Langbroek, "General principles of proper administration in Dutch Administrative Law", in B. Hessel & P. Hofmanski (eds.), *Government Policy and Rule of Law. Theoretical and practical aspects in Poland and The Netherlands*, Bialystok - Utrecht, Published by Uniwersytet w Białymstoku / Universiteit Utrecht, 1997, pp. 83-107, p. 93.

³²³ J. Wakefield, *Op. cit.*, p. 61.

³²⁴ Ph.M. Langbroek, *Op. cit.*, p. 93.

It is important that the administration retains a certain level of discretion when dealing with public contracts. However, in order to ensure that they are administered correctly, it has been argued that any discretionary power granted to the administration ought to be strictly limited, so as to avoid misuse. Principles of this type, known as negative principles, encompass those which prohibit the administration from misusing its powers, as well as those which compel the administration to substantiate its decisions in relation to public contracting.

Thus, the aforementioned principle of prohibition of misuse of power is coupled with a duty to justify decisions made in relation to public contracts. The principle of justification requires administrative orders or decisions to be explained and substantiated,³²⁵ so that the implementing actors, or those affected by the order, can attach a value to it and abide by it. That is what Langbroek stresses when he states that “[p]eople should be enabled by the administration to understand what they lawfully are obligated or permitted to do or to omit, and what they are obliged or permitted not to do or not to omit pursuant to an administrative order”.³²⁶ Therefore, the principle of justification is directly related to the principle of legal certainty.³²⁷ The principle of justification is a procedural principle, which safeguards the procedural certainty of interested parties. The principle of legal certainty is a substantial principle, which safeguards the material consequences experienced by the interested parties.³²⁸

Another ‘substantial’ principle of proper administration requires the administration to treat all people as being equal before the law (*le principe d’égalité devant la loi*³²⁹). “The principle of equality is easily stated: equal

³²⁵ *Idem*, p. 98.

³²⁶ *Idem*, p. 98.

³²⁷ The principle of legal certainty or certainty of law, in its substance, entails that the administration should ascertain the rights of people. When vested, the administration should not interfere with them, by modifying them or taking retroactive measures, without having legal justification. For that purpose, the contents of any individual or collective decision should be clearly defined: “Legal certainty as a [principle of good governance] requires that the meaning of an administrative order [or contract] is clear from its content” (Ph.M. Langbroek, *Op. cit.*, p. 100).

³²⁸ Ph.M. Langbroek, *Op. cit.*, p. 100.

³²⁹ Art. 16, Rwandan Constitution 2003.

cases should be treated equally.”³³⁰ This is an egalitarian general legal rule, which requires the administration, in all spheres of its activity, to consider persons in similar situations as having the same rights at law. This principle is aimed at the prevention of arbitrary distinctions, and the avoidance of differences in treatment without reasonable grounds.³³¹ Two important points flow from this.

Firstly, the principle of equality is the basis for actions alleging discrimination. In legal terms, ‘discrimination’ in administrative law refers to any acts of the administration which may deprive a person of certain rights, when other persons in a similar situation are not deprived of those rights. Thus, equality before the administration means that the administration should not base its orders, decisions or awards of contracts on predetermined criteria, nor on stereotypes (‘negative discrimination’), nor on affirmative action (‘positive discrimination’). Anyone whose rights are denied or violated through discriminatory actions by the administration may bring a claim for judicial review.

Secondly, the principle of equality is linked to the principle of impartiality or, in other words, the prohibition against bias. This states that all people should be treated equally before the law, and that partial treatment which is not objectively justified may be challenged on the ground that it is an infringement of the general principle of equality.³³² However, as Langbroek puts it, “[t]he difficulty [lies], of course, [in determining] which cases are equal and in what relevant aspects do similar cases differ.”³³³

Another principle of properness is the prohibition of arbitrariness. The obligation, imposed on the contracting party, to fulfil the obligations which arise from a contract, has a parallel obligation towards the administration. The administration also agrees to be bound by the same contract. Hence, no arbitrary modification or termination of that contract should be legally accepted. This is the ‘prohibition of arbitrariness’ principle, which also

³³⁰ Ph.M. Langbroek, *Op. cit.*, p. 101.

³³¹ *Idem*, p. 101.

³³² J. Wakefield, *Op. cit.*, p. 71.

³³³ Ph.M. Langbroek, *Op. cit.*, p. 101.

emanates from the general principle of legal certainty. “The principle of prohibition of arbitrariness means that administrative orders [or contracts] should result from a balancing of interests which obviously is not unreasonable.”³³⁴

However, the principle of legal certainty may itself be seen to be a principle of legal theory, as Popelier has observed:

“Whether an expectation is legitimate and how strong its weight is, depends on the concrete situation and the possibilities of adaptation. Technical and factual possibilities and the concrete need for certainty in the law is not always considered to be of the upmost importance. Many decisions are taken daily without any consideration of the law, and, for a great part, irrespective of the legal consequences.”³³⁵

Therefore, “[t]he use of this principle by a court implies a limited review of the administrative order or other legal act in hand. As a consequence, only severe mistakes by administrative bodies or other legal entities will compel a court to nullify the legal act subjected to review”.³³⁶

Another principle of properness is the principle of legitimate expectations. This principle, derived from the general principle of legal certainty,³³⁷ states that “(...) the law must offer certainty and constancy so that individuals can direct their actions accordingly. For this purpose laws are established and binding decisions are taken, and since these laws and decisions create legitimate expectations in the minds of individuals they cannot arbitrarily be amended or repealed later on”.³³⁸

The administration, by entering into a contract, creates certain expectations in the mind of the other contracting party known as ‘legitimate expectations’.

³³⁴ *Idem*, p. 94.

³³⁵ P. Popelier, “Legal certainty and principles of proper law making”, in *European Journal of Law Reform*, 2000, Vol. 2, no. 3, pp. 321-342, p. 339.

³³⁶ Ph.M. Langbroek, *Op. cit.*, p. 94.

³³⁷ *Idem*, p. 101.

³³⁸ Gio ten Berge & Rob Widdershoven, *Loc. cit.*, p. 448.

Once a contract is entered into, the legitimate expectations of the contracting parties are paramount. Logically, parties to the contract have to comply with its provisions, in the way which they understood them - presumably the correct way.

Finally, the principle of fairness is of paramount importance because it helps the contracting party, who might have suffered the consequences of erroneous decisions of the administration when using its broad powers, to seek redress from the administration, which should be accorded fairly.

Transparency in the public contracting

In the context of administrative law, the principle of transparency has not yet been clearly defined. However, as it is currently understood, it consists of three elements - clarity of decisions, accessibility of documents, and availability of information. Firstly, transparency means that the administrative authorities who perform different administrative functions are required to make clear what the contents of their decisions and orders are. Secondly, they must also allow interested parties to access all relevant documents which they hold in their office. Finally, they should be keen to make as much information relevant to their duties available as possible.

The three features of the transparency principle are properly illustrated by UN-ESCAP in the following terms:

“Transparency means that decisions taken and their enforcement are done in a manner that follows rules and regulations. It also means that information is freely available and directly accessible to those who will be affected by such decisions and their enforcement. It also means that enough information is provided and that it is provided in easily understandable forms and media”.³³⁹

Effectiveness and efficiency in public contracting

The words “effectiveness and efficiency” are used together, because it has been acknowledged that an ‘effective administration’ is one which, for the

³³⁹ UN-ESCAP, *Loc. cit.*, 2009.

sake of public good, is using the resources allocated to it in an efficient manner, which is focused on attaining the intended goals. So what are these concepts of effectiveness and efficiency, and why are they linked together?

Whilst effectiveness is concerned with the extent to which the administration successfully achieves its planned goals, efficiency is concerned with the means and resources used in order to achieve those goals. In concrete terms, effectiveness requires the administration to set accurate objectives in order to attain the intended goals, and efficiency requires the administration to provide necessary means to use in order to attain the intended goals.³⁴⁰ In other words, an 'efficient administration' is one which uses the means and resources allocated to it in an efficient manner for the good of the public.

Efficiency as an economic principle is then assumed to play a vital role in the achievement of targets (effectiveness) aimed at enhancing the social welfare of the population: "(...) another attraction of the concept of efficiency is that it captures an important aspect of community welfare. When the economy is operating efficiently, economic waste is avoided."³⁴¹

The notion of 'efficiency', in the good governance framework, requires the administration to best use its assigned resources, particularly (for the purposes of this study) those in relation to public contracts, in order to achieve its principal goal (namely, the enhancement of the welfare of the population). "Good governance means that processes and institutions produce results that meet the needs of society while making the best use of resources at their disposal."³⁴²

³⁴⁰ « [The administration], simultaneously, has to minimize the level of tariffs or amount of costs, maximize the quality of services or works and make sure that the prompting mechanism to that effect established shall not have side effects for the economy » (Th. Kirat (ed.), *Economie et droit du contrat administratif*, Paris, La documentation française, 2005, p. 83) (translated from French).

³⁴¹ K. Yeung, "Competition law and the public/private divide", in M. Freedland & J.-B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006, p. 142.

³⁴² UN-ESCAP, *Loc. cit.*, 2009.

Accountability in the public contracting

The concept of accountability in administrative law is a principle of good governance which requires administrative authorities to provide an account of their actions. There are different ways to analyse accountability, and these can be conceptualised as four different *fora*. As regards political accountability, the key players are the elected representatives, political parties, voters and the media; as regards legal accountability, the key players are the courts; as regards administrative accountability, the key players are the ombudsman, the auditors, inspectors and controllers; and as regards social accountability, the key players are the interest groups, charities and other stakeholders.

The first forum, political accountability, is an important mechanism by which elected representatives provide an account of their actions to voters at election time. In many cases, the present government will also be held to account by the forum of political parties, and the media are gaining power as informal forum for political accountability.³⁴³ This is exactly the aim of the democratic rule of law that was mentioned previously, described as an important tool for the administration to enhance participation and transparency of decisions and orders.

The second forum relates to legal accountability, which plays an important role in holding the administration to account before the courts, by reference to the legality principle. Legal accountability is usually based on specific responsibilities, formally or legally conferred upon authorities,³⁴⁴ that the judge scrutinizes to assess whether actions of the administration were flawed.

The third forum relates to administrative accountability, which works with the courts to exert financial control over the State, independently of the government: “These new administrative forums vary from [the] ombudsman and audit offices, to independent supervisory authorities, inspector generals,

³⁴³ M. Bovens, “Analysing and assessing accountability: A conceptual framework”, in *European Law Journal*, Vol. 13, No. 4, July 2007, pp. 447-468, p. 455.

³⁴⁴ *Idem*, p. 456.

anti-fraud offices, and chartered accountants. (...). These administrative forums exercise regular financial and administrative scrutiny, often on the basis of specific statutes and prescribed norms.”³⁴⁵ In Rwanda, most of these positions have been recently created, and thus far the Ombudsman’s office, the Auditor General’s office and the Rwanda Public Procurement Authority have been established.

The fourth forum relates to social or public accountability: “Agencies and individual public managers should feel obliged to account for their performance to the public at large or, at least, to civil interest groups, charities and associations of clients.”³⁴⁶ The word ‘accountability’ here is used to imply responsibility or answerability of the administration to the public in general, but in particular to stakeholders who will be affected by its decisions and actions: “In general an organization or an institution is accountable to those who will be affected by its decisions or actions.”³⁴⁷ The observation of UN-ESCAP, that “[a]ccountability is a key requirement of good governance”,³⁴⁸ is clearly accurate.

In this study, two significant fora in relation to accountability have a particular relevance in the field of public contracting, the legal accountability forum (the courts) and the administrative accountability forum (the Ombudsman’s Office and the Auditor General’s Office, in conjunction with the Prosecution Office and the courts).³⁴⁹

3.4 Conclusions of this chapter

The normative framework of this study, with regard to good governance and public contracts revolves around the principle of legality, a valuable component of the rule of law. In its narrow sense, legality refers to the legal rules attached to decision making in the public sector. However when

³⁴⁵ *Idem*, p. 456.

³⁴⁶ *Idem*, p. 457.

³⁴⁷ UN-ESCAP, *Loc. cit.*, 2009.

³⁴⁸ *Idem*.

³⁴⁹ See *infra*, 8.2.3 Principles applied to litigations over public contracts.

analysing legality in a broader view, the rules governing decision making extend to the principles of law which are used to support the legal provisions.

As this study is specifically focused on public contracts, the relevant legal rules are analysed together with the principles of law which underlie the creation, performance, modification and termination of public contracts. In this respect, under Rwandan law, the legality of public contracts refers to the administrative law rules and principles granting the administration certain prerogatives and privileges, such as the prerogative of unilateral cancellation of contract, the privileges of prior compliance notwithstanding complaint introduced by the contracting party and forced execution without any prior authorisation by the judge.

These classical principles of law are rooted in the idea of preservation of the public interest. The results of this approach to governance of public contracts, of rigidly regulating and unilaterally controlling the public contracts using public law rules and principles, are that there might be unexpected distortions of the contract.

This study then aims firstly at comparing the public contracting in Rwanda,

- with other legal systems of a similar governance framework to public contracts, i.e. French and Belgian, where it is believed that the application to public contracts, of the rules and principles of public law (mainly but not exclusively), i.e. administrative law rules and principles, might safeguard the public interest; and
- with other legal systems, i.e. English, where it is believed that the effectiveness of the public contracting depends on the application of private law rules, i.e. the law of contracts, a field of law which, while allowing the co-contracting parties to self-govern their public contract relationship, might cause less distortions of the contract.

For properness and effectiveness of the public contracting in Rwanda, this study, after showing the advantages and disadvantages of each of the opposite approaches, ascertains the need to use a more balanced approach to legality of public contracts, i.e. a balance between public and private law for governance of public contracts. The experience of the Netherlands is taken as a reference for a legal system where a combination of application of private law rules and public law rules might have good results, an approach

which permits the application of the law of contracts to public contracts, consistently with the rules of public law.

The study secondly aims at demonstrating the move from a legality based on rules and principles of law vesting the administration with prerogatives and privileges (classical principles of law applied to public contracts in Rwanda), to the approach to a legality based on rules and principles of law in general and principles of good governance in particular, which might better cater for both the public interest and the expectations of the co-contracting parties.

This evolving view of the principle of legality principle, applied with the support of the principles of good governance (which are also part of legality, in its broader meaning), is highly significant in the framework of administrative law in general, and in particular in the context of public contracting. The principles of good governance encompass principles applicable to the pre-contractual, contractual and post-contractual stages of the public contracting process.

At the pre-contractual stage, for instance, the principle of equality between bidders or applicants and the principle of transparency of documents and information are relevant. During the contractual stage the principles of prohibition of misuse of power and arbitrariness, the principle of effectiveness and efficiency and the principle of legitimate expectations are relevant. At the post-contractual stage, the principle of accountability applies to the contracting authorities and the principle of fairness is relevant when making decisions as regards litigation arising from public contracts.

4 Legality of public contracts in Rwanda: Primacy of public law

This chapter will examine the power of administrative authorities in Rwanda to make contracts, how legal rules and principles of law are applied to them and which courts have jurisdiction over public contracts litigation. As shall be explained below, public law applies to almost all the actions of the administration with regard to contracts. The quality and quantity (the subject matter of the contract may be little worthy, as it may entail immense expenditure) does not make any difference for the application of public law rules to public contracts.

4.1 Power of administrative authorities to make contracts

First and foremost, it is unquestionable that under Rwandan law, the State in general and public institutions which are endowed with legal personality have, through their legal representative authorities, the power to enter into contractual relations,³⁵⁰ as any physical person (who has attained majority and has not been deprived of legal personality) or any legal person is entitled to.³⁵¹ This rule is affirmed in the Rwandan Constitution. Article 2, paragraph 1 vests the State with legal personality, which is essential for the performance of all acts with legal implications. It states that the “Rwandan State is empowered with all the power that it derives from the people”.³⁵² This means that the overall constitutional power of the State includes the power to enter into contractual relations.

Decentralised entities, that is the provinces, districts and public establishments, are not all empowered in the same way. Some of them enjoy

³⁵⁰ This study is not concerned with the power of the administration to make regulations or orders.

³⁵¹ In Rwanda the civil majority is fixed at the accomplishment of 21 years; at such age, a person is capable to perform all acts of civil life, except those that are prohibited by law (art. 431 of Law n° 42/1988 of 27 October 1988 instituting preliminary title and the first book of Civil Code); a company holding legal status is also endowed with the powers to perform acts. A company registered under the Law relating to companies shall be a company with a separate legal status and with the name by which it is registered (...) (art. 18 of Law n° 07/2009 of 27/04/2009 relating to companies).

³⁵² Art. 2, par. 1 of the Constitution of the Republic of Rwanda, cited above.

separate legal personality, whereas others simply represent the State. Accordingly, these will be examined separately.

Firstly, the province does not enjoy legal personality. Article 2 of Law n° 01/2006 of 24/01/2006 sets out the organisational structure and capabilities of the province, as a unit of government. It states that the provincial administration merely represents the authority of State, and only has autonomy in executing its budget.³⁵³ Thus, the provincial administration can enter into contracts on behalf of the state, but not in its own capacity.

Secondly, the district enjoys legal personality. This is clear from the provisions of article 2 of Law n° 08/2006 of 24/02/2006, which sets out the organisational structure and capabilities of the district. It states that “[t]he District is an autonomous administrative entity with legal personality, and administrative and financial autonomy”.³⁵⁴ Thus, it is clear that the district administration can enter into contracts in its own right.

Thirdly, public establishments enjoy legal personality. Article 2 of Law n° 06/2009/OL of 21/12/2009, which sets out the general rules governing public establishments, provides that a public establishment³⁵⁵ is an institution which enjoys legal personality and is managed in accordance with laws governing Public Service sector organs, to which the State allocates funds so they can carry out specialized activities in the public interest.³⁵⁶

Public establishments can enter into contracts in their own right. They are not merely meant to achieve development in areas where the private sector lags behind, but are also profit-oriented, such as Rwandatel (a government telecommunications business), EWSA (the Electricity, Water and Sanitation

³⁵³ Art. 2 of Law n° 01/2006 of 24/01/2006 establishing the organisation and functioning of province, *O.G.* n° special of 28/01/2006.

³⁵⁴ Art. 2 of Law n° 08/2006 of 24/02/2006 determining the organisation and functioning of the district, *O.G.* n° Special of 24/02/2006.

³⁵⁵ In the English version, the Law used the word “institution”, instead of establishment, but other versions (the Kinyarwanda and French versions) specifically mention public establishments (Organic Law n° 06/2009/OL of 21/12/2009 establishing general provisions governing public institutions, in *O.G.* n° special of 30/12/2009).

³⁵⁶ Art. 2 of Organic Law N° 06/2009/OL of 21/12/2009 cited above.

Agency, formerly Electrogaz, which is a government business concerned with the supply of electricity and water) and OCIR (a government business which deals with exportable crop).

Thus, we can see that Rwandan administrative law grants the State, districts and public establishments, through their representing administrative authorities,³⁵⁷ the power to act bilaterally, by entering into contracts, or unilaterally by making decisions over public contracts. These bodies also have the support of public powers to guarantee the enforcement of any duties owed to them.

4.1.1 Power to make administrative contracts

If every person endowed with legal personality can enter into contractual relations with any other legal person of his choice, then the various organs of the administration (from central government and local government to public establishments) hold that same right to enter into contractual relations, whenever they are legal persons, as explained above. The administration can therefore enter into the various public contracts including on the one hand contracts governed by the public law rules (the administrative contracts), which principally include procurement contracts, concession contracts,

³⁵⁷ The administrative authority representing the public institution, on behalf of the public institution, has the power to enter into contracts and also the power to make decisions over public contracts, which shall be binding upon the institution. In this regard, the President of the Republic is the Head of State; he exercises the executive power, together with the Cabinet (comprised of the prime minister, ministers and ministers of state) and any other executive agency (Art. 97, 98 & 116 of the Rwandan Constitution). "The Province is administered by a Governor who is appointed by a Presidential Order upon approval by the Senate" (Art. 8 of Organic Law n° 29/2005 of 23/12/2005 determining the administrative entities of the Republic of Rwanda, *O.G.* n° Special of 23/12/2005). The District Mayor has the specific function to represent the District before other organs (article 80(1) of Law n° 08/2006 of 24/02/2006 determining the organisation and functioning of the district, cited above). The public establishment is managed by a deliberative assembly called "Board of Directors" or another denomination (Art. 4, par. 1 of Organic Law n° 06/2009/OL of 21/12/2009 establishing general provisions governing public institutions, cited above), but the daily management of the institution is the responsibility of a management team or Institution Director, appointed by the relevant organ; the Director is accountable to the deliberative assembly for the implementation of its decisions as well as for the management of activities and services of the public institution (Art. 4, par. 1 of Organic Law n° 06/2009/OL of 21/12/2009).

privatization contracts and employment contracts with civil servants, and on the other hand the contracts governed by private law rules (the private contracts), such as the labour contracts, insurance contracts and contracts of the government corporations.

However, what differentiates the public contracts from those made by other legal persons is that the most of the public contracts, in particular the administrative contracts, are under Rwandan law assimilated to administrative decisions.³⁵⁸ Normally in contracts between private persons, each side has equal status, whether in entering into the contract, abiding by it, varying its terms or terminating it.³⁵⁹ On the contrary, the administration has certain powers to formulate the way in which these contracts are made and to vary or control them. This power can unilaterally be exercised at any time throughout the contract's duration, usually under proof of a specific or concrete public interest justification. The basis for these 'excessive powers' enjoyed by the administration (which can be exercised by setting up the modes of creation of public contracts, use of the right to vary them and even the right to terminate them) can be found in certain public law rules, which grant the administration certain prerogatives and privileges, as shall be explained below.³⁶⁰

4.1.2 Power to make private contracts

It is not common in Rwanda for the administration to contract without reserving to itself special powers, but in certain specific cases the administration enters into contracts which are governed by ordinary private law. For instance, public institutions may enter into ordinary labour contracts and insurance contracts, which are private in nature, but which under

³⁵⁸ Article 94 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts (cited above) is formulated as follows: "The High Court shall examine whether the decisions, contracts or administrative acts within its jurisdiction were done according to law. In case it is done contrary to law, it may nullify and order payment to an aggrieved party any compensation arising out of damage by such acts."

³⁵⁹ Art. 33 of the civil code Book III provides: "The contract has *inter partes* the force of law. It can only be revoked by their mutual consent." (Art. 33 of Decree of 30/07/1888 bearing the Civil Code Book III in relation to contracts and conventional obligations, in *Official Bulletin*, 1888, p. 109.

³⁶⁰ See *infra*, 4.2.2 Additional rules for the application of administrative contracts.

Rwandan law are regulated by private and public law rules in combination.³⁶¹ In addition, all the contracts made by the national corporations are private in character.³⁶² We should mention that a government corporation or national company is “a public enterprise submitted to private laws and whose capital is determined by presidential regulation, which is made up of actions subscribed by the state together with or without other public entities, and having commercial or industrial goal or vocation”.³⁶³

4.2 Legal rules and principles applicable to public contracts

The Rwandan legislature and case law have given public law primacy over private law in its approach to public contracts, as the following section makes it clear.

4.2.1 Rules and principles applicable to the making of public contracts

The Rwandan law of public contracts, whether the law governing public procurement contracts or privatization contracts or employment contracts, all provide for competition as a core principle for the making of contracts. The law on public procurement and the law governing privatisation and public investment instruct contracting authorities to engage in procurement on a competitive basis.³⁶⁴ Again, the law governing public civil servants in its article 26 and 27 shows clearly that the giving out of jobs is done in a competitive way.³⁶⁵

More usefully in Rwanda is transparency, an important feature for the making of public contracts. With respect to this principle, many legal provisions are directed towards disclosure of information to those entitled to

³⁶¹ See *infra*, 4.2.3, Rules for the application of private contracts.

³⁶² *Ibidem*.

³⁶³ Art. 5, par. 3 of Law n° 2 of 11/03/1996 relating to privatization and public investment, cited above.

³⁶⁴ Article 17 of Law n° 12/2007 of 29/03/2007 on Public Procurement (cited above) and Law n° 2 of 11 March 1996 relating to privatisation and public investment (cited above).

³⁶⁵ Articles 26-27 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

it. The law governing public procurement obliges the contracting authorities to use transparent procedures for tendering.³⁶⁶ Besides the procurement field, which forms the largest category of public contracts, the law on general statutes for Rwanda public service under the provisions of article 1(4°) and article 24, shows sign of transparency that should be characteristic of the employment contract.³⁶⁷

These legal rules of public law apply to the making of administrative contracts and the private contracts as well. The contractual freedom in this sense is guided by the above mentioned compulsory rules in the selection of the contracting party (tender procedures, competition procedures, public notice and notification requirement, etc.).³⁶⁸

4.2.2 Rules and principles applicable to execution of administrative contracts

The legal rules and principles of law applicable to the administrative contracts are further clarified here below.

Public law based rules applicable to administrative contracts

‘Administrative contracts’, which constitute the majority of public contracts in Rwanda, are governed by public law, as explained below. The public procurement contracts, privatisation contracts, subsidy contracts and employment contracts are good examples of public contracts which in principle resort to the application of public law rules.

Firstly, public procurement contracts in Rwanda are in the category of administrative contracts. These are governed by public law since the

³⁶⁶ For example article 5 of the law governing public procurement law states that “[t]he law, orders, standard bidding documents and contracts shall be made available to the public”; in the same sense, Art. 72 of the same law provides: “[a] copy of the decision of the Independent Review Panel shall be promptly made available for inspection by the general public (...)”.

³⁶⁷ Art. 1 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

³⁶⁸ F. Ziginshuti, “Monographies nationaux/National reports”, 859-886, in R. Noguellou & U. Stelkens (eds.), *Op. cit.*, pp. 871-872.

procedures followed are provided for by the laws governing public procurement,³⁶⁹ and also because very often the administration awards itself broad powers (extraordinary powers) which, in the public interest, allow it to monitor the preparation and execution of such contracts, even to the extent of varying the terms of the contract or terminating it.³⁷⁰

However, if amongst the prerogatives the public procurement law recognises the prerogative for the administration, using its powers, to prescribe additional activities to the contractor if that is so required, the contracting party has also a privilege of getting additional payment corresponding the additional work.³⁷¹ In *City of Kigali v. ECAN Company* (explained above), the High Court confirmed this rule by deciding revision of remuneration in case of extra works.³⁷²

Secondly, privatisation contracts, including concession contracts, are also governed by public law. In *Munyampirwa v. Rwandan State*,³⁷³ it was made clear that privatization contracts cannot be assimilated to ordinary private contracts. Rather, these contracts are administrative in character because under the privatisation scheme, the state reserves for itself certain powers to oversee and control the activities of the purchaser, a clear case of 'extraordinary powers' which are the hallmark of the public law approach to administrative contracts.³⁷⁴

³⁶⁹ Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above; Ministerial Order n° 001/08/10/MIN of 15/01/2008 establishing regulations on public procurement and standard bidding documents, *O.G.* n° 2 of 15/01/2008.

³⁷⁰ See further below, additional rules for the application of administrative contracts.

³⁷¹ Art. 93, par. 1 & 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement (cited above) provides: "The procuring entity may prescribe additional activities to be executed under the same conditions as those of the main tender except for the execution period which may be extended. The value of such additional activities shall not exceed twenty per cent (20%) of the main tender and shall be subject to an additional contract".

³⁷² *City of Kigali v. ECAN Company*, cited above.

³⁷³ *Munyampirwa v Rwandan State*, cited above.

³⁷⁴ Art. 3 of Law n° 2 of 11 Mars 1996 relating to privatisation and public investment, cited above.

Thirdly, subsidy contracts are governed under administrative law. In *Agro-Consult Sarl v. Rwandan State (Ministry of Agriculture)*,³⁷⁵ the High Court of Commerce rejected its jurisdiction in favour of the Administrative Court, based on the fact that subsidy contracts are administrative in character and accordingly outside its jurisdiction.

Fourthly, employment contracts made under the civil servants statute are governed by public law. The statute³⁷⁶ explains the rights and duties of all employees, and also how the powers of the public entity can be exercised as regards the contract of employment. Using the powers granted by the statute, the administration usually allots to itself the power to take all decisions relating to the contract, including the power to suspend or dismiss the employee.³⁷⁷

Principles of law used as additional rules

As mentioned above, the administration can make contracts governed by public law. Now the principles which must be adhered to when making and executing these administrative contracts will be examined, as they are found in the legislation or case law of Rwanda.

Classical principles reflecting the administration's prerogatives

Any conception of administrative contracts grants the administration (from central to local administration) sufficient capacity to use its powers to protect the public interest, and to do so without the authorization of a judge. This is done in order to prevent the administration from being impeded in the achievement of its goals. Using the power granted to it by the law, the administration can stop every detrimental situation that can originate from reckless performance, mishandling of contractual obligations or delays in the execution of contract. Thus, two principles of law emanates from this

³⁷⁵ *Agro-Consult sarl v. Rwandan State (Ministry of Agriculture)*, cited above.

³⁷⁶ Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

³⁷⁷ Art. 66-68 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service.

situation, the principle of public interest protection and the principle of vesting the administration with broad powers.

Contracts made between an individual and the administration, and governed by administrative law, are always deemed to have been created in the public interest. If that public interest is undermined, the administration can modify or terminate the contract unilaterally, without necessarily needing the opinion or consent of the other contracting party.

This principle was confirmed in *Munyampirwa v. Rwandan State*. In that case, a businessman bought the Kibuye Guest House from the State as part of a privatization transaction, and obtained the title deed. However, the state determined that his continued ownership of the Guest House would be detrimental to the public interest, and so it cancelled the contract without obtaining his prior consent. This was upheld by the courts as being lawful.³⁷⁸

For the state to protect the public interest, it is vested with special powers, the so-called broad powers, including the power for modification or termination of the contract, and the power to impose a penalty to the defaulting party.

From what we have observed, in all its activities the Rwandan state is vested with sufficient power to ensure that the public interest is protected. This has been confirmed in the case of *Munyampirwa v. Rwandan state* (stated above), where the judge held (paragraph 71):

“In matters which relate to the contracts made by public bodies, eminent lawyers assert that if someone enters into such a contract with the state and does not perform his or her obligations, the state can compel performance execution or impose penalties on that individual; that is in line with the explanation of Jean Rivero and Jean Waline (...),³⁷⁹ who argue that: ‘when anybody who has contracted with the state is negligent, does not do what he was supposed to do or causes delays, the state will adopt

³⁷⁸ *Munyampirwa v. Rwandan State*, cited above.

³⁷⁹ J. Rivero & J. Waline, *Droit administratif*, 15th edition, Paris, Dalloz, 1994, p.101, cited by the Supreme Court in *Munyampirwa v. Rwandan State*, cited above.

certain penalties, which are different from those applied to ordinary contracts”³⁸⁰.

Classical principles reflecting the administration's privileges

As regards administrative contracts, administrative authorities are vested with legal powers which are more extensive than those granted to citizens. Authorities can use their powers to make decisions about administrative contracts, without the prior consent of the other contracting party or the authorization of a court (*privilège du préalable*). Such decisions should be executed without obstacle, including decisions to compel performance (*exécution d'office*).

This has been affirmed in the case law. It was found in *Munyampirwa v. Rwandan State*, at paragraph 72, that: “the state can make decisions regarding contracts it has entered into without the authorisation of a judge, which is one of the characteristics of the state's powers. (...) the state is compelled to apply such powers and, unless the case is unusual, the judge cannot prevent it from using those powers if a breach of contract occurs.”³⁸¹

Thus, it is clear that the administration can act differently from the citizens. This is so because under private law, if two private individuals contract with each other, they have no power to make unilateral decisions concerning the contract without mutual consent; in the case of misinterpretation or breach of contract, all that can be done is to renegotiate the terms of the contract or commence proceedings in court. On the contrary under administrative law, the administration has the power to unilaterally vary the terms of the contract or terminate the contract.

This means that, if in the public interest the circumstances changes or if the administration realizes that the other party does not intend to honour the contract, it may decide to modify or terminate the contract (despite the fact that this may be disadvantageous to the other party) or impose a penalty clause, if this clause was provided for in the contract (usually for easy enforcement, the contract goes together with the provision of a security

³⁸⁰ *Munyampirwa v. Rwandan State*, cited above.

³⁸¹ *Idem*.

bond from the other party,³⁸² for guarantee of performance. In case of delay or breach of contract, the security bond may be used to satisfy the penalty clause).

However, although the government is granted privileges, this does not mean the other contracting party is entirely deprived of his rights. If an individual fulfils his contractual obligations, but the state makes a decision in violation of the contract, this can be reported to a judge. Thus, although the state has preconditioned privileges accompanied by executory powers, this does not deprive the other contracting party of their right to commence proceedings in court to obtain redress for an arbitrary decision made by the state.

This is what the court decided in *Munyampirwa v. Rwandan state* case.³⁸³ Although the state had utilised powers granted to it by law to expel the businessman from exploitation of a privatised guest house, the judge awarded damages against the state which amounted to all the expenses which the businessman had incurred through management of the Guest House. The value of the building had been increased, and equipment for the building had been bought. Thus, although the State's powers were used to protect the public interest, the judge did not allow the state to become unjustly enriched.

4.2.3 Rules and principles applicable of execution of private contracts

Under the law of public contracts in Rwanda, an alternative stance on the subject of how the legal rules and principles are applied to private contracts is hereinafter explained; the private contracts governed by a combination of public and private law, and the private contracts simply governed by private law.

³⁸² Art. 31 of Law n° 12/2007 of 29/03/2007 on Public Procurement (O.G. n° 8/2007 of 15/04/2007) provides: "All tender proceedings conducted under open competitive bidding and restricted bidding shall request for a bid security".

³⁸³ *Idem*.

Private contracts governed by private and public law in combination

The case law shows that often, in the context of Rwandan public contracts, the courts apply a combination of private and public law rules to private contracts made by public entities. This is often done to determine which law is applicable, or which judge is competent to hear the case. Examples of this can be found in cases concerning government labour contracts and insurance contracts.

As regards labour contracts, in theory the contracts of all government employees under contract (in contrast with those under civil servants statute) are governed by ordinary private law. The government considers them to be normal workers, and that the employer/employee relationship is governed by labour law,³⁸⁴ which explains why their contracts are substantially governed by private law. However, it is notable that all labour disputes which concern government employees are directed to the jurisdiction of the administrative chamber of the Intermediate Courts and High Court.³⁸⁵ An example is the case of *Habimana D. et alii v. ISAE Busogo*,³⁸⁶ a dispute between ISAE Busogo (a government higher learning institution) and thirty-three of its employees, who were employed on the basis of ordinary employment contracts.

These employees had formerly worked for the institution until 1998, when it was moved from Musanze District to Kigali City. ISAE retained some of its employees after the move, but some were left behind. Six years later, these workers instituted proceedings before the administrative chamber of court and demanded payment of their salaries from the time of their tacit dismissal in 1998 till the time when they were formally told that they were stopped from duty in 2004; this means the claiming of salary of 72 months and compensation for being unfairly dismissed from work. The High Court (on appeal) discovered that ISAE Busogo's refusal to give certain of its employees jobs at its new location indicates that their contracts were terminated on the basis of tacit dismissal. However, as ISAE had not given those employees any

³⁸⁴ Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, in *O.G.* n° special of 27/05/2009.

³⁸⁵ See *supra*, 4.4.2, Jurisdiction of courts over public contracts litigations.

³⁸⁶ *Habimana D. et alii v. ISAE Busogo*, High Court of the Republic, RAD 0004/06/HC/MUS, 30/11/2007 (unpublished).

written notification of the termination, or any justification for it, this could give rise to a claim under Article 26 of the labour law. That article states that if an employment contract is unfairly terminated, a damages award may be made which does not exceed the employee's salary for 6 months, including monthly allowances and any other benefits.³⁸⁷ The High Court ruled that ISAE Busogo had to pay the workers damages which amounted to 6 months' salary.

This case concerns labour contracts made by the administration. The complaining parties had signed labour contracts with a public institution, and these were accordingly governed by labour law. The administrative chamber of High Court had jurisdiction over the matter, but the judge applied ordinary labour law to decide the case. It is worth mentioning at this point that the administrative court in Rwanda can apply private law as well as public law when deciding a case.³⁸⁸

As regards insurance contracts, there is one substantial difference between insurance contracts entered into by the administration and ordinary insurance contracts made between private parties. The procedures which public bodies must follow when awarding insurance contracts are set out by public procurement law. Thus, public law governs the pre-contractual phase, whilst the substantial part of the contract is governed by private law. Finally, it is worth noting that unless the matter relates to the decision of the public body to enter into the insurance contract, any litigation arising from a contract of insurance is heard in the civil court. This is because the victim has a direct claim against the insurer,³⁸⁹ a claim which is clearly within the remit of private law.

³⁸⁷ Art. 26 of Law n° 51/2001 of 30/12/2001 establishing the labour code, *O.G* n° 05 of 01/03/2002 (repealed and replaced by Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, in *O.G.* n° special of 27/05/2009).

³⁸⁸ *Habimana D. et alii v. ISAE Busogo*, cited above.

³⁸⁹ Art. 37 of Law of 20/06/1975 relating to insurances provides: "The third party victim has a direct action against the insurer for liability of damage (...)" (Law of 20/06/1975 relating to insurances, in *O.G.*, 1975, p. 449).

Contracts of the government corporations governed by private law

Contracts which government (or national) corporations (or companies) enter into with other people are governed by private law. As regards such companies, what is clear is the fact that they must have a commercial or industrial purpose, and all their actions are governed by private law.³⁹⁰ They are state enterprises with lucrative goals, aiming at production, and the business of these companies is primarily profit oriented. As they only have commercial goals, the actions of these companies which are taken in pursuit of those goals are governed by private law.³⁹¹

However, depending on the specific issues of private law which are engaged, the case may be heard in the ordinary civil court, the commercial court or the social chamber of court.

For example where a client makes a claim against a national company, the ordinary civil judge will have jurisdiction over the case. The case of *Nyiranduhuke, Munyarukiko & Nsabimana v. SCAR represented by SONARWA s.a.* (the latter being an insurance company in which the government owns a minority of shares) arose from a car accident. Those entitled to damages brought a claim against the insurer in the ordinary court (the Intermediate Court) which applied private law to the case.³⁹²

In *J. Mbarirende v. SONARWA s.a.*³⁹³, a labour law case, the complainant brought a claim against an insurance company damages for illegal dismissal. From 8 March 1976 to 26 November 1997, he was employed by the company. In 1997, by revealing to a victim all the ways in which one could claim damages against the company, he committed what the company considered to be a serious fault, because of which he was dismissed. He

³⁹⁰ Art. 5, par. 3 of Law n° 2 of 11 Mars 1996 relating to privatization and public investment, cited above.

³⁹¹ Interview with L. Munyandirikira, cited above.

³⁹² *Nyiranduhuke, Munyarukiko & Nsabimana v. SCAR represented by SONARWA s.a.*, Intermediate Court of Rubavu, RC0034/07/TGI/Rbv - RC0035/07/TGI/Rbv - RC0037/TGI/Rbv, 11/04/2010 (unpublished).

³⁹³ SONARWA s.a., an insurance company, is a national company in which the government owns a minority of shares.

brought an action against his employer, which he lost at first instance and in the Social Chamber of the High Court. What is interesting about this case is that it confirms that labour disputes which arise from contracts between national companies and their employees fall within the jurisdiction of the civil court, and particularly the social chamber of that court (in this case, the social chamber of the High Court). This explains the application of labour law to this case.³⁹⁴

In another case, *Bank of Kigali v. M. Umupfasoni*, the Bank of Kigali (a government company in which government owns a majority of shares) brought a claim against its client, M. Umupfasoni, for repayment of a loan which had been made to the client worth 7.537.870 Fr, as well as any interest which had accrued. At the time agreed upon in the contract for repayment, the client could not repay the money. The judge in the Commercial Court of Kigali found the client to be in breach of contract, and consequently liable to pay the money. The Bank of Kigali, a national company in which the government owns a majority of shares, brought the case before a civil court, specifically the commercial court.³⁹⁵

Having examined the rules applicable to the public contracts at the time of their preparation, conclusion and execution, this study suggests that the law governing public contracts in Rwanda is ripe for reform, so that greater balance between public and private law can be attained. The possibility of a new approach, the 'balanced approach', will be considered in the final part of this study.³⁹⁶ This approach will be examined in combination with the application of the principles of good governance, which help to ascertain whether this new approach is regular and credible.

³⁹⁴ *Mbarirende v. SONARWA*, High Court, R.SOC.A 0262/06/HC/KIG, 07/11/2008 (unpublished).

³⁹⁵ *Bank of Kigali v. M. Umupfasoni*, A. Anastase & National Commission for Human Rights, Commercial Court of Nyarugenge, R.Com 0069/09/TC/NYGE, 16/04/2010 (unpublished). In an interview with A. Bahizi, Head of Legal Department, Bank of Kigali, conducted on 24/03/2011, he confirmed that litigations arising out of government commercial businesses fall under the jurisdiction of commercial courts.

³⁹⁶ See *infra*, 8, New legality inferring new categorisation of public contracts.

4.3 Jurisdiction of courts over public contracts litigation

Rwandan courts ordinarily are subdivided into different courts based on hierarchical levels starting with Primary Courts, Intermediate Courts, the High Court and the Supreme Court. There are other specialized courts, such as commercial courts and military courts. There are no specialized courts which deal with government matters.³⁹⁷ However, in certain ordinary courts, administrative chambers have been created. These have been created in the Intermediate Courts, so that judges can preside over cases governed by administrative law up to the district level, and also in the High Court, so that cases involving the provincial and central administration can be heard.³⁹⁸

4.3.1 Jurisdiction of courts over administrative contracts

In Rwanda, litigation arising from administrative contracts is dealt with at first instance by the administrative chamber of the relevant court (the intermediate courts for cases concerning public contracts up to District level, and the High Court for cases concerning public contracts from provincial to central level).³⁹⁹

Application for administrative review, prerequisite for jurisdiction of courts

In the course of award and execution of public contracts, the administrative authorities can make decisions, which may affect the co-contracting party. Generally in Rwanda, when it is incumbent upon an administrative authority to make a decision on a public contract, the decision-making process is solely within the competence of the authority, and the co-contracting party usually has no input, because the administration will not normally seek for their participation. Such decisions are unilateral, and compliance may be ensured through the use of compliance actions.⁴⁰⁰

³⁹⁷ See Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

³⁹⁸ Art. 83(4), 94 and 95 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts.

³⁹⁹ Art. 83(4), 94 and 95 of Organic Law n° 51/2008 of 09/09/2008 cited above.

⁴⁰⁰ See *supra*, 4.2.1 Additional rules for the application of administrative contracts.

The problem which may arise in this context of public contracts concerns the situation for example when the administrative authorities are not using that power in a careful or reasonable way or when they are misusing it, hence threatening the rights of the co-contracting party and enforcing their decision by using the compliance actions. In that case, the first way to obtain redress is to request the judge to change or nullify the decision, through the 'action for annulment of decision' (*recours en annulation*), also called 'judicial review procedure'.

What should be mentioned here is the fact that, under Rwandan law, before filing a claim for annulment of decision before courts, it is absolutely an obligation to the aggrieved party who is against the administrative decision to first initiate debates with the administration.⁴⁰¹ The procedure for such an application for administrative review, which would arise from any decision on public contracts, consists of the application offered to the aggrieved party for legal remedy, introduced before the immediate superior authority *vis-à-vis* the one which directly made the impugned decision (administrative review procedure). In case of non satisfactory answer from that authority, then the aggrieved party shall introduce a judicial review, analysed in the application before the competent court for legal relief (judicial review procedure).⁴⁰² Judicial review should therefore be undertaken on the failure of the administration to give a satisfying remedy. It is only on that condition of a prior application for administrative review that the aggrieved party would be accepted to commence a claim before the administrative chamber of court having jurisdiction over the public contracts.

The rule of prior application for administrative review was confirmed by the Supreme Court in *Kayiranga v. Rwandan State et alii*.⁴⁰³ In this case the

⁴⁰¹ Art. 336, par. 1 & 2 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure (cited above) provides: "The action for annulment shall be accepted only if it relates to an explicit or implicit decision of an administrative authority. Before filing a claim, the aggrieved party who is against the administrative decision shall be required to first lodge an informal appeal with the immediate superior authority *vis-à-vis* the one who took the concerned decision."

⁴⁰² Art. 336, par. 2 of Law n° 21/2012 of 14/06/2012, cited above.

⁴⁰³ *Kayiranga v. Rwandan State et alii*, Supreme Court, R.Ad.A 0007/07/CS, 29/02/2008, in <http://www.supremecourt.gov.rw>, last visited on March 12th, 2012.

complainant, before the High Court, asked judicial review of an administrative decision to dispossess him of certain lands. He was dismissed, basing on the fact that, prior to the judicial review claim, he did not undertake an administrative review procedure.⁴⁰⁴ The applicant, on appeal to the Supreme Court, focused on the distinction between the private and public property of the State. Referring to article 14 of organic law n° 08/2005 of 14th July 2005 determining the use and management of land in Rwanda,⁴⁰⁵ he argued that the complainant's land fell within the category of state private property, and so there would have been no valid ground upon which to seek administrative review. That article states that "state private land is composed of all state land that is not held in the general public interest, does not include the lands owned by the districts of Kigali City and is not held for private individuals".⁴⁰⁶ However, the Supreme Court found that individual decisions taken by the administrative authorities, even if they relate to a private law issue such as land ownership or a public contract, are governed by administrative law.

Nevertheless, two important elements of the judicial review procedure need a clarification. Firstly, the courts deal with cases relating to decisions taken on the last instance.⁴⁰⁷ This means that the aggrieved party should seek for judicial review of a decision made final by the competent administrative authority. Under the law of public contracts, that would be the authority which has the power to enter into the contract.

Thus, application for judicial review offers the would-be contracting party the possibility to challenge a decision made by the administrative authority in relation to the making of contract itself (such as a violation of tender

⁴⁰⁴ *Kayiranga v. Rwandan State et alii*, High Court, n° R.Ad 0082/05/HC/RUH, 10/4/2007, quoted in *Kayiranga v. Rwandan State et alii*, Supreme Court, R.Ad.A 0007/07/CS, 29/02/2008, accessed in <http://www.supremecourt.gov.rw>, last visited on March 12th, 2012.

⁴⁰⁵ Organic law n° 08/2005 of 14th July 2005 determining the use and management of land in Rwanda, O.G. n° 18 of 15/09/2005.

⁴⁰⁶ Art. 14 of organic law n° 08/2005 of 14/07/2005 relating to land law, O.G. n° 18 of 15/09/2005.

⁴⁰⁷ Art. 93(1°) of Organic Law n° 51/2008 of 09/09/2008 (determining the organisation, functioning and jurisdiction of courts, O.G. Special n° of 10 September 2008) provides that the court shall have jurisdiction only for cases requesting for removal of decisions taken on the last instance.

procedures, unfair exclusion from competition or arbitrary award of contract). The court, judging on the merits of the complaint, can decide for cancellation of tender and re-advertisement of a contract, re-competing the contract on the basis of the existing tender or reconsideration of an award. Judicial review application also extends to decisions on the execution of the contract (such as those concerning unilateral modification or termination of the contract). As a general rule, the administrative chamber of court has jurisdiction in such claims, as described here below.

However, as mentioned above, administrative review precedes any judicial review application. For the purpose, the immediate superior authority to the contracting authority has the power of administrative review.⁴⁰⁸ But in some cases, special procedure for administrative review was instituted. For example, if a decision relates specifically to the award of a public procurement contract, special panels for administrative review have been by public procurement law created. On the first instance, an independent review panel (district level) and an Independent review panel at the national level are empowered to do so; on appeal level, the Independent review panel at the national level is empowered to examine decisions of the Independent Review Panel at the district level.⁴⁰⁹ The decision of the Independent Review Panel at the national level is final. It can only be reviewed through judicial review.⁴¹⁰

Secondly, in *Social Security Fund & Rwandan state v. Janvier Hino Karekezi*,⁴¹¹ the Supreme Court ruled that the requirement for administrative review procedure concerns administrative decisions and does not extend to cases for claim of damages arising out of a public contract. In this case concerning damages for illegal dismissal of an employee (a civil servant employee) by his employer (Rwandan State through Social Security Fund), the Supreme Court granted damages to the former employee for illegal dismissal, despite the

⁴⁰⁸ Art. 336, par. 2 of Law n° 21/2012 of 14/06/2012, cited above.

⁴⁰⁹ Art. 21, 70 & 71 of the Law on public procurement, cited above.

⁴¹⁰ Art. 71 of the Law on public procurement (cited above) provides: “The decision of the Independent Review Panel at the national level shall be final unless judicial proceedings are on set”.

⁴¹¹ *Social Security Fund & Rwandan state v. Janvier Hino Karekezi*, Supreme Court, R.Ad.A 0008/08/CS, 26/06/2009, par. 58.

fact that he did not challenge the decision of dismissal through an application for administrative review.⁴¹²

Jurisdiction of the administrative chambers

This subsection is analysed from an historical perspective, so as to clearly portray the administration's behaviour regarding decisions on administrative contracts or non-fulfilled contractual obligations which arose from public contracts. In the past, there was only one court which could change or nullify decisions made by administrative authorities over public contracts, the 'Council of State' (*Conseil d'Etat*) which was part of the Supreme Court.

In an interview with a former president of the Council of State, we were informed that the 'Council of State' had never adjudicated a case in relation to public contracts. The reasons behind such a situation are that this area of law was underdeveloped, and trying to determine if the administration was contractually liable in a given situation was complicated and tedious. Again because of the administration's power to unilaterally modify or terminate contracts, the other party to the contract was often left in a disadvantageous situation, with no forum in which to air his grievance. Besides, many people were unable to access its location in the main city of Rwanda (Kigali), and most were unaware of how to seek its help.⁴¹³ As a result of these ineffective avenues of recourse, people simply endured decisions on public contracts, instead of instituting judicial claims.

For this reason, the law has been reformed so that the citizens can institute proceedings against decisions which they wish to challenge in the administrative chamber of the Intermediate Courts and the High Court,⁴¹⁴ which are located in close proximity to most of the population.⁴¹⁵ Nowadays,

⁴¹² Interview with J.B. Mutashya, Judge to the (Rwanda) Supreme Court, August 30th, 2010.

⁴¹³ Interview with L. Mugenzi, Judge to the (Rwanda) Supreme Court and former President of *Conseil d'Etat*, conducted on June 12th, 2008.

⁴¹⁴ Art. 82-84 & 92-94 of Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts, *O.G.* n° 14 of 15/07/2004 as amended by Organic Law n° 14/2006 of 22/03/2006.

⁴¹⁵ The primary courts are not empowered with the competence to hear cases of administrative nature.

the specialized administrative chambers of the Intermediate Courts and that of the High Court hear cases relating to public contracts, whether they are governed by public or private law.⁴¹⁶

Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts (cited above), under Art. 83(4), provides that the administrative chamber of the intermediate court has jurisdiction to hear actions relating to public contracts, administered under public or private law up to the District level. Likewise, the administrative chamber of the High court enjoys jurisdiction over public contracts from the provincial to central administration's level (art. 95).

These articles were applied by the Supreme Court in *Karangwa v. Electrogaz*.⁴¹⁷ Electrogaz,⁴¹⁸ a public establishment tasked with the supply of electricity and water, entered into a contract with FIDECAR, a newly created tyre-production company. The contract was for the supply of electricity, and obliged Electrogaz to install a 400 KVA transformer on FIDECAR's property. However, on commencement of the contract, Electrogaz took back the transformer, and provided FIDECAR with a lower capacity transformer (50 KVA). This led to a two-year production stoppage at FIDECAR. On first instance, the case was lodged with the administrative chamber of High Court. On appeal, the Supreme Court held that Electrogaz's actions constituted a breach of contract, and awarded damages of 206.976.000 Fr to FIDECAR, taking into account all the loss caused over the course of the two-year stoppage.

By the same token, jurisdiction of courts over tortious liability of public bodies is given the administrative chambers of courts. It is notable that when for example the administration causes damage while performing actions which are in the public or private interest, (1) jurisdiction is of the specialised administrative chamber of court and, (2) besides the usual application of administrative law rules and principles, the administrative chamber has a latitude to make reparations in accordance with private law.

⁴¹⁶ Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

⁴¹⁷ *Karangwa v. Electrogaz*, Supreme Court, R.AD.A 0005/08/CS, 23/01/2009 (unpublished).

⁴¹⁸ Electrogaz was rebranded as EWSA (Electricity, Water and Sanitation Agency)

In fact in Rwanda, before organic law n° 07/2004 of 25/04/2004, there was no specific law dictating that the administration had to pay compensation for damage it caused, either intentionally or incidentally, such as when its activities lead to harm despite being in the public interest. This led to some confusion over the tort liability of the administration, and it was not clear whether it was the same as that of its citizens, based on article 258 of the 1888 civil code book III (which states that « [a]ll acts done by a person which cause damage to another person oblige the person at fault or causing damage to pay damages or reparation to that particular person to whom damage has been caused »), or whether it had a different legal basis.

The history the administration's behaviour in Rwanda can provide some clues as to why the basis of its tort liability was unclear for so long. In the past, as explained above, the population believed that most of what the administration did was benevolent, useful and important to many, or all, of its citizens. Therefore, most people, including legal experts, believed that the actions of the administration, because they were done in the public interest, were not to be questioned.

Nevertheless, more recently an investigation was carried out to determine in which forum issues concerning the tortious liability of the administration had been decided in the past, whether in the Council of State (applying administrative law) or the ordinary courts (applying private law). That investigation discovered that the administration had never been brought before any court on an issue of tort liability (Interview with L. Mugenzi, former President of the Council of State and judge of Supreme Court, cited above). However, things changed when organic law n° 07/2004 of 25/04/2004 was instituted (Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts, cited above). This dictated that the administrative chamber of court had jurisdiction over any tortious claims which arose in relation to acts of the administration which had been performed in the public interest.

Article 83, paragraph 2 and article 93 of organic law n° 07/2004 of 25/04/2004 stated that in administrative matters, the specialized chamber of Higher instance courts and the High Court of the Republic (on the appeal level): "shall have powers to hear (...) actions relating to damages based on

grounds other than those which are contractual or quasi contractual, if the damage is as a result of an act or omission of the administration or due to acts carried out in public interest. The court may order that such acts are void, and that payment of compensation to an aggrieved party should be made if they suffered damage by way of those acts.” This law has been modified, but the provisions of Article 83(3) and 93(3) of the new organic law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts reflect the same principles. These articles provide that the administrative chambers of intermediate courts (up to the District level) and the High Court (from the Provincial and Kigali City level to that of the President of the Republic) have jurisdiction over actions for damages arising from extra-contractual liability, which arises from the actions of government agents and its parastatals wrongdoings.⁴¹⁹

4.3.2 Jurisdiction over private contracts litigation

Litigation arising out of public contracts of private nature is adjudicated in one of the following two ways: either the administrative chamber of court has jurisdiction, or the civil court is competent.

Jurisdiction of the administrative chambers over private contracts litigation

As a rule, administrative contracts and private contracts made by public institutions are both within the jurisdiction of the administrative chamber of the courts. It is clear why the administrative chambers of the Intermediate and High Courts have jurisdiction over administrative contracts. However, it is less clear why they ought to have jurisdiction over public contracts which are

⁴¹⁹ This rule was borne out by the case-law in *Mutuyeyezu v. Ministry of Defense* (cited above). This case concerns a litigation which resulted from a contract for lease of a caterpillar entered into between the Ministry of Defense and J.B. Mutuyeyezu, where the driver of a truck of the Ministry of Defense, while transporting back the caterpillar, negligently let it fall down, causing damage to the caterpillar. In its ruling, the High Court (Administrative chamber) decided that this act constitutes a tort at fault of the driver of the truck. Thus the court imposed on the Ministry of Defense, by way of vicarious liability for its employee’s tort, payment of damages amounting to 101.159.665 Rwandan Francs (In application of art. 258 and 260 of the 1888 civil code Book III relating to damages for tort by negligence). This compensation covers, not only material loss due to damage, but also loss of opportunities by the owner, who would have used it the two years duration of repairs.

governed by private law. This issue will be analysed by looking at recent developments in this area in Rwanda.

Returning to Organic law n° 07/2004 of 25/04/2004,⁴²⁰ if articles 93(4) and 95 are compared we can see that cases arising from public contracts governed by private law (that is, *inter alia*, contracts entered into by national companies, labour contracts and insurance contracts) ought to be decided by the civil chambers of the ordinary courts. However, this law did not clearly distinguish between public contracts which were administrative, and those which were private. This issue caused much debate amongst judges and practitioners, and finally was referred to the Supreme Court in *Gone Fishin' v. Rwandan State*. The Court set out a test for determining whether a public contract was administrative, composed of three limbs:⁴²¹

- firstly, one of the contracting parties must be a public institution;
- secondly, the contract must be in the general interest of the public (performance of a public service);
- thirdly, the contract should contain special clauses which are not usual to the ordinary law.

The first limb of the test must be fulfilled, but the second and third can be applied in the alternative.⁴²²

This definition influenced the new provisions of Organic Law n° 51/2008 of 09/09/2008, which contained a Code on the organisation, functioning and jurisdiction of the courts.⁴²³ Articles 83(4), 94 and 95 provide that the administrative chambers of the Intermediate Courts (up to the district level) and the High Court (from provincial and City of Kigali to central administration level) have jurisdiction to decide cases which concern public contracts governed by both public and private law.⁴²⁴ This new rule places all public contracts within the jurisdiction of the administrative chambers of

⁴²⁰ Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts, cited above.

⁴²¹ Interview with A. Sebazungu, Assistant deputy attorney of State in charge of State's courts litigations, conducted on 16/08/2010.

⁴²² See *supra*, *Gone Fishin' v. Rwandan State*, cited above.

⁴²³ Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

⁴²⁴ Art. 83(4), 94 and 95 of Organic Law n° 51/2008 of 09/09/2008, cited above.

Courts, and encompasses all contracts governed by private law, including contracts made by the state, the districts and various public establishments. The only exception to this rule concerns contracts made by government companies, which shall be heard before a civil judge.⁴²⁵

According to the assistant deputy Attorney of State A. Sebazungu, the implementation of this legal rule has created a lengthy and rigorous procedure for dispute resolution, beginning with an application for reconsideration of an administrative decision (administrative review), and ending with the introduction of a claim in the administrative chamber of the courts. Such a procedure may discourage foreign companies from investing in Rwanda, and they may instead favour neighbouring countries with a legal environment that is much more conducive to commercial success. In this regards, private institutions which deal with the state can be suspicious of this rule, particularly those from East Africa (e.g. Kenya, Tanzania, Uganda) who are not used to rigid administrative law rules. Such institutions often believe they have been decisively placed without good reason, under the subjugation of administrative law.⁴²⁶

A. Sebazungu articulated the severity of administrative law rules by saying that even commercial cases are being redirected to the administrative chambers of the courts. In *AGRO-CONSULT sarl v. Rwandan State (Ministry of Agriculture)*,⁴²⁷ a case brought before the High Court of Commerce was rejected because even though the contract of subvention entered into between the parties was commercial oriented, jurisdiction properly belonged to the administrative chamber.

Labour contracts concluded between the administration and private individuals are also within the jurisdiction of the administrative chambers.⁴²⁸

⁴²⁵ See further below, Jurisdiction of the ordinary judge over contracts of the government companies.

⁴²⁶ Interview with A. Sebazungu, cited above.

⁴²⁷ *AGRO-CONSULT sarl v. Rwandan State (Ministry of Agriculture)*, cited above.

⁴²⁸ The administrative chamber of court (within the remit of their jurisdiction), have the power to hear actions relating to labour disputes between individuals and the State or any public institution governed under public law (Art. 81(2°) & 93(4°) of Organic Law n° 51/2008

As mentioned above, certain employees' contracts are governed by a specific statute on civil servants. All disputes arising from such agreements fall automatically within the jurisdiction of the administrative chambers. There are also other employees who are given labour contracts, which are similar to those contracts concluded between private employers and their employees, governed on the basis of labour laws (ordinary laws) with regard to the substantial part of the contract.

However how these contracts are supposed to be altered or terminated is done basing on administrative law, because the administration would have no excuse whatsoever for not applying laws which give it broad powers to enforce these contracts. This is the reason the Organic Law n° 51/2008 of 09/09/2008, articles 81(2°) & 93(4°), states that actions relating to labour disputes between individuals and the State or public institutions governed under public law are within the jurisdiction of the administrative chambers of the court.⁴²⁹

For example, in the case of *Habimana D. et alii v. ISAE Busogo*,⁴³⁰ (where 33 employees under labour contract sued ISAE Busogo, a public higher learning institution, in the Intermediate Court of Musanze), the clerk of the court recorded the case as being administrative in nature. Even during the appeal to the High Court of Musanze, the clerks continued to record the case as being heard in the administrative chamber. The case was clearly within the jurisdiction of the administrative chamber of the court.

It is at this point that the problem of balance between public law and private law, which bedevils the field of public contracts, comes into sharp focus. There is no clear justification for hearing litigation which arises from almost all public contracts in the administrative chamber of the courts. As stated by J.P Kayitare,⁴³¹ there are not necessarily special rules of administrative law

of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above).

⁴²⁹ Art. 93(4) of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

⁴³⁰ *Habimana D. et alii v. ISAE*, cited above.

⁴³¹ Interview with J.P. Kayitare, Assistant Deputy Attorney of State in charge of legislation, conducted on January 17th, 2008.

which can be applied to all cases of public contracts litigation. Often, whilst considering aspects of the public interest which the administration claims to be attempting to safeguard, the judge must seek aid from the ordinary private law.

Therefore, this study argues that in principle all public contracts litigation ought not to be directed to the administrative chambers of the courts, because most public contracts are not substantially different from ordinary contracts (such as sale of goods, lease of services, works, employment).

Jurisdiction of civil courts over litigation on contracts of government corporations

As mentioned above, national companies are private, profit-oriented entities, either created by the government to perform commercial or industrial activities, or in which government holds shares.⁴³² These businesses are private companies, and subject to private law. Accordingly, contracts which they enter into during the course of performance of their activities shall be within the jurisdiction of the civil courts. Here the word “civil court” should be interpreted extensively, to include commercial courts (which have jurisdiction to hear commercial, financial and tax matters),⁴³³ the social chamber of court (which has jurisdiction over labour disputes), and the ordinary court (which has jurisdiction over other private disputes).

This means that disputes arising from contracts made by national companies (such as SONARWA, a mixed company for insurance activities or the Bank of Kigali, a mixed government banking business) shall be heard before a civil court – the commercial court, in cases concerning commercial disputes, the social chamber in cases concerning labour disputes or the ordinary court in cases concerning other private disputes.

⁴³² See *supra*, 2.1.1 Types of public contracts in Rwanda, Private contracts.

⁴³³ Art. 36 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

4.4 Conclusions of this chapter

This chapter examines the power of the public authorities to make contracts, the rules and principles of law applicable to public contracts and the jurisdiction of courts over public contracts in Rwanda.

It is to be articulated that the administration from central to local level has a public power and a private power to enter into contracts. Thus, the State in general (made up of public institutions on central administration level), through the competent contracting authorities, has the power to enter into contractual relations.

Decentralised institutions, including the provinces, districts and public establishments, are not all empowered in the same way. The provincial administration can enter into contracts on behalf of the state, but not in its own capacity. Districts and public establishments are endowed with legal personality, they can enter into contracts on their own behalf.

This power, derived from the law, permits the administration to make both the administrative contracts (i.e. the type of public contracts in principle governed by public law rules and principles) and the private contracts (explicitly the type of public contracts in principle governed by private law rules and principles). The administrative contracts are in principle governed by administrative law, from the making to termination, and the administrative chambers of the Court have jurisdiction to decide disputes arising from them.

The first stage of the contracting process being the pre-contractual phase, administrative law rules and principles have played an increasingly significant role in the procedures which govern entry into administrative contracts, such as public procurement law⁴³⁴ (governing the procedures for entering into public procurement contracts and privatisation contracts). This indicates that not only is the contracting administrative authority vested with a public law power to enter into administrative contracts (subject to public law and required to follow the procedures required by public law), but also that the other contracting party has a duty to comply

⁴³⁴ Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

with the requirements of public law as they apply to that particular public contract.

This stage culminates in award of the contract. The ability of the administrative authority to accept or reject an application reflects the discretionary power which it has to decide on the award, based on the selection criteria set out in the preparatory phase. This study however shows that even though the other contracting party cannot participate in the selection process, they can initiate administrative or judicial review proceedings against the administration if the contract is awarded arbitrarily or unfairly.

The second stage of the contracting process is the contractual phase, which culminates in completion of the planned activities and termination of contract. In order to control the execution and also to avoid maladministration of the administrative contracts, the law has, usually in the pursuit of the public interest, empowered public institutions, providing them with a range of prerogatives and privileges which entail the power to make decisions about administrative contracts, without the prior consent of the other contracting party or the authorization of a court and the power to compel execution of such decisions without the authorization of a court.

These prerogatives come as no surprise to the other contracting party, who is aware of the disproportionate powers held by the administration, which can be exercised in the public interest. This imbalance between the administration and co-contracting party is important for the administration, allowing them to closely control the performance of administrative contracts, using public law rules and principles.

The third stage of the public contracting process, which may not be a feature of all public contracts, is the post-contractual phase. This stage is concerned with litigation which arises out of breach or poor execution of the administrative contract. Jurisdiction over such litigation is granted to the administrative judge, who is able to apply administrative law rules and principles in the public interest. In contrast with the administrative contracts, the private contracts made by the administration are in principle governed by private law. This is especially the case for all contracts made by the government companies, which from the pre-contractual to the post-

contractual phase are entirely governed under the rules and principles of private law. The power of these government corporations to make contracts, the execution and also jurisdiction of courts over their contracts, are governed by private law.

However for some of the private contracts, the law has introduced a combination of application between private law and public law. For example in the case of labour contracts and insurance contracts, the only phase governed by private law is the contractual phase. The other phases (the pre-contractual and award phase, the post contractual phase) are governed by public law, in the sense that procedures for the making and award are regulated under public law (meaning for example that the competition rule and public procurement law procedures is designed to apply to them), and disputes arising from them are also decided by the administrative chambers of the Court.

This shows how dependent on public law are most of the public contracts in Rwanda. This study will thus examine whether a preponderance of public law rules and principles is the best approach, by looking at other legal systems which adhere to the public law approach to public contracts (France and Belgium). Also, alternatives to the predominant application of administrative law rules and principles will be examined, by examining the private law approach to public contracts which can be observed in England, and the balanced approach adopted in the Netherlands.

This issue will be analysed in the following chapters (legal rules and principles applicable to public contracts in France, Belgium, England and The Netherlands), and also in the final two chapters of this study where an analysis of how administrative law and private law can be balanced during the public contracting process shall be conducted.

5 The origins of public contracts law in Rwanda traced to countries where public and private law diverge

Historically, the 'public law' approach to public contracts in Rwanda, of applying public law, as opposed to private law, to these transactions, originated in the Belgian and French legal systems.⁴³⁵ These countries have strong public law traditions, particularly France, and their lawyers have been inclined to the view that applying public law to public contracts can better protect the public interest. The tendency to apply public law to public contracts was also adopted by Rwanda. Because of the similarities with Rwanda, it is appropriate to assess developments in the law of public contracting in France and Belgium, countries in which there exists a characteristic divergence between public and private law.

5.1 Legality of public contracts in France: Primacy of public law

In France, it is a fact that imperative rules have been created to help administrative institutions in carrying out their executive function. As a rule, acts performed by the administration (including contracts) are governed by administrative law, and the administrative courts are competent to deal with litigations which arise from those acts: "[T]he acts of public authorities are normally subject to the *droit administratif* and are justiciable in the administrative courts."⁴³⁶ It shall however be explained below that the French administrative law does not preclude the private law from applying to cases where the public institutions may carry out an activity of pure private character, such as a private contract.

It must be pointed out that the French administrative law developed much from the case law, and includes legal rules and principles which directly or impliedly have an effect on the exercise of the administration actions. Hence, because of the multiple legal rules and principles created by the case-law and the various statutes and regulations which were later on enacted to govern some specific fields of administrative law, it is not easy to get an overall picture of the public contracting in France.

⁴³⁵ For more than forty-five years, Rwanda was under Belgian colonial rule.

⁴³⁶ L. N. Brown & J. S. Bell, *Op. cit.*, p. 141.

The following description begins with an explanation on how the power to make public contracts is conferred to public authorities. Then, an analysis of the legal rules and principles applicable to public contracts is made. Thereafter, an account is given on how jurisdiction of the courts over public contracts is exercised.

5.1.1 Power held by administrative authorities to make contracts

In France, the recognition of a public institution as having legal personality empowers the representing public authorities to make decisions, which may be of granting rights or creating obligations (including those originating from contracts).⁴³⁷

In essence, such a power excludes the requirement to call for prior assent to that decision, on the part of the beneficiaries or the performers. For example, the administrative authority may set a new urban planning policy and lay down a new regulation on the allocation of plots of land, or decide on changing of the taxation system, without any prior consent of the beneficiaries or contributors. However, in some other cases, the beneficiary's consent may be solicited, not as a matter of requirement, but as a matter of efficiency, such as the appointment of a director of a public institution. Thus the act remains of unilateral character, because the existence of such a juridical act is not subordinated to that prior consent. Even for the public contracting process, the consent of the co-contracting party is not a requirement for the contract to be awarded or modified.⁴³⁸ But of course for the contract to be entered into, the consent of the other party is required.

The power to make administrative and private contracts

In France, only those public institutions vested with legal personality are capable of entering into contracts, and so if the particular public institution in question does not have legal personality and attempts to enter into a contract, this is done on behalf of the State. As mentioned above, administrative authorities are vested with the power to represent public

⁴³⁷ R. Chapus, *Droit du contentieux administratif*, 12th edition, Paris, Montchrestien, 2006, pp. 446-450 ; G. Braibant & B. Stirn, *Op. cit.*, pp.47-56.

⁴³⁸ L. Richer, *Op. cit.*, p. 62.

institutions, and are in a position to enter into contracts on behalf of those public institutions.⁴³⁹ The administrative authority representing the public institution vested with legal personality may therefore enter into contracts which are administrative or purely private.

However what is interesting about France is that administrative contracts are a type of public decision, and accordingly are governed by public law as opposed to private law. Public contracts law applicable to the administrative contracts supersedes contract law in this field, an example of public law gaining supremacy over private law.⁴⁴⁰ Thus the term 'administrative contract' indicates that this is a type of public decision and is subject to public law, but where the administration enters into private contracts, it is compelled to abiding by the rules and principles of the ordinary contract law, as explained below.

Power delimited by law and discretionary power

Whatever type of power the administrative authority wields, that power can be exercised in one of two ways. The power may simply involve a clear application of the law (*compétence liée*), or the authority may have a discretion which it can exercise (*compétence discrétionaire*).

If the power of the administrative authority is by law delimited, it must not disregard the unquestionable nature of the law during the decision-making process and must reach a concrete decision: "What is important to mention when the margin of appreciation is delimited by the prescriptions of the law is that the administrative authority is not only duty bound to act in accordance with the law, but also compelled to reach a certain determined decision. In other words, his margin of subjective appreciation is limited."⁴⁴¹

It is therefore a legal requirement that, where the power of the administrative authority is by law delimited, any public contract entered into must be based on a rule from a legal text, or a rule from the case law: "The

⁴³⁹ R. Chapus, *Op. cit.*, pp. 446-450.

⁴⁴⁰ A quite opposite situation to the English case where public contracts fall under the governance of private law.

⁴⁴¹ Ph. Foillard, *Op. cit.*, pp. 168-169 (translation from French).

competent authority is not always free to enter into any agreement of private or administrative character: a legal text must compel him to make use of an administrative contract for precise categories of undertakings.”⁴⁴² For example, the Code of public procurement provides binding rules to be applied by the administrative authorities during the public procurement contracting.⁴⁴³ However, it would be an exaggeration to state that the administrative authority, when by law delimited, has no margin of appreciation at all. In certain cases, the authority is given a reasonable period of time to reach its decision, and therefore has control over the time when the decision comes into effect.⁴⁴⁴ However, the authority does not have control over the outcome of the decision making process, and accordingly its margin of appreciation is low.⁴⁴⁵

The exercise of power by an administrative authority may also be discretionary in nature (*compétence discrétionnaire*). In this case, the authority has more liberty throughout the decision-making process. It has a choice about whether to make the decision in the first place, and also has the freedom to decide on which outcome is appropriate, in light of the context and any contemplated objective.⁴⁴⁶ When the administrative authorities have a discretionary power, they are less restricted by the law. One can say that “an administrative authority is granted discretionary powers if, during the decision-making process, the law gives the authority a certain liberty to reasonably decide which outcome to adopt”.⁴⁴⁷ For example, Braibant & Stirn give the example of naming the streets or deciding on the height of buildings (in the frame of an urban plan) as decisions emanating from discretionary powers.⁴⁴⁸ If for example the public procurement contract for construction of an office building is governed by the public procurement code, choice of the

⁴⁴² J. Rivero, *Op. cit.*, 1990, p. 155 (translation from French).

⁴⁴³ Code of public procurement (2006 edition), consolidated version of 01/01/2012 (accessed in <http://www.legifrance.gouv.fr>); see also S. Braconnier, *Op. cit.*, p. 22.

⁴⁴⁴ *Idem*, pp. 168-169.

⁴⁴⁵ J. Sayah, *Op. cit.*, p. 228.

⁴⁴⁶ Ph. Foillard, *Op. cit.*, pp. 168-169.

⁴⁴⁷ *Idem*, p. 169 (translation from French).

⁴⁴⁸ G. Braibant & B. Stirn, *Op. Cit.*, p. 285.

site where to build it, and eventually choice of the height of the construction are discretionary to the administrative authority.

5.1.2 Which legal rules and principles apply to public contracts?

In France, public institutions are in principle subject to public law. The public administration is made up of an assembly of institutions, ranging from the central administration to the territorial administration, the various public establishments and institutions acting in the public interest (*groupements d'intérêt public*). These institutions are required to act in the public interest and this is the reason why their actions are in principle governed by public law.⁴⁴⁹

Thus, administrative acts in France are not governed by the private law, but rather by administrative law. This, and the consequent provision of prerogatives to the administration, is justified on the basis that administrative acts are done in the public interest. If private law was applied to the actions of private individuals and public institutions alike, this would bring equality amongst unequal legal persons, and, from a traditional viewpoint, would have the potential to hamper the progress of administrative activity.

Therefore, as R. Noguellou notes it, rules and principles of administrative law, of case-law and legislation origin, govern the administrative contracts. But contracts of the administration which fit in the category of private contracts remain subject to the regime of private law.⁴⁵⁰

Rules and principles guiding the making of public contracts

The competitive procedure, characteristic of the French law of public contracts, gives open opportunity to candidates to aspire and compete for any proposition of public contracting. It offers the aspirants interested in any

⁴⁴⁹ *Idem*, p. 49.

⁴⁵⁰ R. Noguellou, "National reports, France", in R. Noguellou & U. Stelkens (eds.), *Op. cit.*, pp. 676-699, p. 685.

public contract the possibility of trying their chances, this without any distinction between the administrative or private contracts.⁴⁵¹

For this principle to be fully achieved, other core principles have been codified under legislation, to enhance effectiveness of the competition rule. These essentially include the principles of public notice and free access, transparency of procedures and equality,⁴⁵² which make the making of public contracts phase a public law governed phase.

Rules and principles guiding the execution of administrative contracts

Administrative activity in France is governed by a special body of law, administrative law, applied by special courts, the administrative courts: “These rules form an autonomous province of French law and French legal writers can truly talk of *l’autonomie du droit administratif*”.⁴⁵³ In particular, administrative contracts in France are mainly governed by administrative law.

Primacy of administrative law rules

All the specific rules concerning the formation, substance, execution and termination of the administrative contracts stem from administrative law. The administrative courts, in applying administrative law to public contracts, have created a particular category of ‘administrative contract law’, distinct from ordinary contract law.

In interpreting administrative law, the administrative courts laid down rules and principles to guide the creation, performance and enforcement of contracts, which are different from the rules and principles found in private law. The main body of rules on administrative law were created by the

⁴⁵¹ R. Noguellou, *Loc. cit.*, pp. 685-686.

⁴⁵² See Art. 1, Code of public procurement (cited above); see also art. L1411-1 (for contracts of delegation of public service) & D1414-1 to D1414-3 (for contracts of partnership), General Code of territorial entities, consolidated version of 22/02/2013, accessed in <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070633>, on 26/02/2013.

⁴⁵³ A.V. Dicey, *Introduction to the study of the Law of the Constitution*, London, Macmillan & Co Ltd, 1961, p. 479.

courts, and legislation followed in a piecemeal fashion, to regulate certain specific matters (such as urbanization, public procurement, and the organisation and functioning of the public administration, etc.). This is highlighted by Rivero and Waline, who note that the French legislator has developed administrative law by enacting fragmentary laws, often motivated by urgent concerns, without creating comprehensive principles of law intended for general application.⁴⁵⁴

Principles of law used as additional rules

If we examine closely the way in which administrative contracts are created, performed and terminated, certain principles become apparent which underlie the entire process, namely the ‘umbrella principle of legality’ and the ‘general principles of law’.

Umbrella principle of administrative legality

In France, because the administration is governed by the “*état de droit*”, the law has the same impact on the administration as it does on citizens. The administration is subject to the law – the law is not subject to the administration. The administration must obey the law and comply with the principle of legality in the same way as its citizens must.⁴⁵⁵ The idea at the heart of this legality principle is that all acts performed by the administration are subject to the law. Accordingly, legality is the basis upon which citizens can claim protection from arbitrary acts, incoherent measures or ineffective action, because these are prohibited by law.⁴⁵⁶

To truly comprehend the meaning of the legality principle, one must see it applied in context – here, we will look at its application in the context of administrative contracts. As a rule, and to protect citizens’ rights, administrative authorities do not have an unrestricted power to make and enforce administrative contracts. In other words, any administrative act, including any contractual act, should not be contrary to the law which

⁴⁵⁴ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 7.

⁴⁵⁵ Art. 34 of the French Constitution (Constitution of 04/10/1958, consolidated version of 01/12/2009).

⁴⁵⁶ J. Morand-Deville, *Op. cit.*, p. 234-235.

governs the matter, and if it is, then it should be dismissed as illegal. Thus, if an administrative authority wishes to create an administrative contract, this must be done in accordance with the relevant law, or the contract will be legally invalid.

General principles of administrative law

The general principles of administrative law are principles, not documented in any official legislative instrument or administrative document, which have been discerned by the judges as underlying common practice, and have been accepted as law by the administration when it performs its activities.⁴⁵⁷ It is remarkable that general principles of law are as binding upon the judge as any statute or legal decree. Indeed, Morand-Deville goes further than this, and describes them as ‘supra-statutory’— all decrees must be consistent with these general principles of law.⁴⁵⁸

In France, general principles of administrative law have been recognized by the *Conseil d’Etat* for half a century. As a source of law, they have only come into being recently, and they must be complied with if the administration is to act consistently with the law.⁴⁵⁹

In reality, first of all there are two principles which are particularly relevant to public contracts - firstly, the principle that the administration has the power to unilaterally rescind or modify a public contract, and secondly, the principle that the administration is vested with the power to enforce its decisions through the *privilège du préalable* (privilege of prior compliance) or the *privilège de l’exécution d’office* (privilege of unhindered forced execution), both of which can be implemented alongside various administrative penalties. Thus, the administration in France has always had the power to unilaterally rescind or modify administrative contracts, and even in cases where the contract is silent on this issue, the administration cannot renounce that power.⁴⁶⁰ There are various grounds upon which the

⁴⁵⁷ G. Braibant & B. Stirn, *Op. cit.*, pp. 265-268.

⁴⁵⁸ J. Morand-Deville, *Op. cit.*, p. 262.

⁴⁵⁹ *Idem*, p. 260.

⁴⁶⁰ *Association Eurolat*, CE 6 mai 1985, *RDP*, 1986, 21, note Llorens, cited by L. Richer, *Op. cit.*, pp. 264-265.

administration can modify⁴⁶¹ or resilie from a contract; for instance, this may be required in the public interest, or if the other contracting party has committed a fault or acted in breach of contract, or solely on the basis of an unexpected change of circumstances (for example, if a recent technological development means that the other contracting party can no longer cope with new operating systems⁴⁶²).⁴⁶³

However when exercising the power to modify or resilie, the government must not only compensate the other contracting party if they are not at fault,⁴⁶⁴ but (in specific circumstances) this power can also be limited (for example, in the case of concession contracts, this power shall be exercised under the condition of re-purchase).⁴⁶⁵

The administration also has the power to enforce its own decisions. This means that those subject to administrative decisions must comply with them, notwithstanding the fact that an appeal may be possible (*privilège du préalable*). This power is complemented by the additional power which the administration has, to force the execution of any of its decisions (*privilège de l'exécution d'office*), by using all the legal means available to it, without any prior recourse to a judge for authorisation. These privileges are associated with the administration's power to inflict penalties on a party in default. However, this is not a broad power, since any penalties inflicted must be in

⁴⁶¹ In *Union des transports publics*, the Council of State unquestionably affirmed the rule that the power of unilateral modification is part and parcel of the « general rules applicable to administrative contracts » (*Union des transports publics*, CE, 2 february 1983, RDP 1984, 212, note Auby, cited by L. Richer, *Op. cit.*, p. 279).

⁴⁶² For example in *Compagnie nouvelle du gaz de Deville-les-Rouen*, the Conseil d'Etat decided that substitution of electricity hitting and eclairage system to gaz hitting and lightning system is one important illustration of public service innovation, thus leading to the application of the principle of modification or termination of contract (*Compagnie nouvelle du gaz de Deville-les-Rouen*, CE 10 january 1902, Gaja, p. 57 ; S. 1902, 3, 17, note Hauriou).

⁴⁶³ L. Richer, *Op. cit.*, pp.264-282.

⁴⁶⁴ L. Richer, *Op. cit.*, p. 268 ; see also *Paul Dupont*, 17 mars 1864, *D.*, 1864, 3, 87 ; *Gargiulo*, CE 9 décembre 1927, *Rec.* 1198 ; *Distillerie de Magnac-Laval*, CE 2 mai 1958, *AJDA* 1958, II, 282 ; *Société TV6*, CE Ass. 2 fevrier 1987, *Rec.* 29 (cited by L. Richer, *Op. cit.*, pp. 264).

⁴⁶⁵ L. Richer, *Op. cit.*, p. 265-266.

accordance with the law, to avoid situation where penalties and individual freedoms are in conflict.⁴⁶⁶

However, although these aforementioned principles come from the case law, there exist other principles which were deduced from legislation through a process of interpretation. The first category brings together principles which stem from the Constitution, or are derived from the French liberal political tradition which values human rights protection, such as the principles of liberty (liberty of movement, liberty of commerce and industry), equality (equality before public charges, equality in accessing public services, the public domain, justice, and employment of civil servants). Principles in the second category originate from procedural law, such as the right to appeal, the right to a defence, the right to be heard, and the non-retroactivity of administrative acts.⁴⁶⁷ The third category appears to originate from what the English legal system calls 'natural law', a collection of ideas based on justice and equity, which urge the administration to be fair and just in its dealings with the citizens, and emphasise the principles of 'fairness, openness and impartiality'.⁴⁶⁸

Privileges and obligations for the public authorities

In France, specific rules concerning the administrative contracts do not only provide the administrative authorities with privileges, they also impose on them some constraints. For example, in choosing the contracting party, the administrative authority is compelled to abiding by the rules and procedures of objective selection, such as the requirement of tender procedures and competitive procedures; equality of the would-be contracting parties; tender, competition and award of contract made on the basis of transparent procedures.⁴⁶⁹

The administrative law yet again imposes on the administration the obligation to compensate the contracting party in case of unexpected events

⁴⁶⁶ J. Rivero & J. Waline, *Droit administratif*, 20th edition, Paris, Dalloz, 2004, pp. 354-358.

⁴⁶⁷ L. N. Brown & J. S. Bell, *Op. cit.*, p. 218; J. Morand-Deviller, *Op. cit.*, p. 261-262..

⁴⁶⁸ L. N. Brown & J. S. Bell, *Op. cit.*, p. 218.

⁴⁶⁹ R. Noguellou, *Loc. cit.*, pp. 686-687.

resulting in disrupting the financial balance of the contract in a negative way (*imprévision*⁴⁷⁰). It is to be noticed, as R. Noguellou stresses it, that the theory of *imprévision* only applies to the administrative contracts. The ordinary judge refused to accord such an advantage to the contracting party under private law, considering the contract immutable, unless the parties agree otherwise.⁴⁷¹

Rules and principles guiding the execution of private contracts

In France, most public contracts are administrative in character: “Considering the French legal system, nowadays a large majority of contracts made by the administration are governed by public law; only the minority are governed by private law”.⁴⁷² However, although administrative law governs administrative activity, this does not necessarily mean that administrative law alone is applicable to acts of the administration. Some administrative acts may be governed by private law rules, as noted by Rivero and Waline,

“the principle that acts of the administration are subject to the law (*soumission de l’administration au droit*) does not necessarily require the existence of an administrative law, in the sense of special rules applicable only to the administration. Acts of the administration may be governed by the same rules which govern the actions of ordinary people. In that case, the administration must act according to the law, but not necessarily *administrative law*”.⁴⁷³

⁴⁷⁰ In *Compagnie générale d’éclairage de Bordeaux v. Municipality of Bordeaux*, the company contracted a concession with the municipality for supply of gas. As a result of the 1st world war, coal used as raw material for fabrication of gas excessively increased in price. Consequently the company claimed increase of remuneration, for unexpected reasons (*imprévision*). The *Conseil d’Etat* decided for revision of price in favour of the company, because of such an unforeseen bad event (*Compagnie générale d’éclairage de Bordeaux v. Municipality of Bordeaux*, CE, 30/03/1916, Rec. Lebon, n^o 59928).

⁴⁷¹ R. Noguellou, *Loc. cit.*, p. 692.

⁴⁷² Interview with J.B. Auby, Professor of Law at the University of Paris II, conducted on 20/11/2008.

⁴⁷³ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 5 (translation from French).

Furthermore, if one looks at the application of private law to public institutions, one can find the most remarkable confirmation that the borderline between public law and private law has become narrowed, in a way which was driven by modern economic development. The idea that public institutions were subject to public law was perceived to have a negative impact on the liberal economic model, which France's economy was based on (an economy based on the free exchange of technology and goods). Public institutions could not venture the market economy in its variety, without trying new enterprise mechanisms, of which the public institutions of commercial and industrial character and those for cultural cooperation⁴⁷⁴ were created.⁴⁷⁵

Those government companies are governed by the same rules of private law as private institutions which undertake the same activities: "The administration has recourse to private law based management (*gestion privée*) when it is applying ordinary law to its activities".⁴⁷⁶ Thus, the theory of an autonomous administrative law, solely applicable to the activities of public institutions, is no longer wholly accurate, since some government companies must abide by ordinary rules without any particular protection from the administrative law.

In this regard, it should be noted that the French courts have set out certain rules which govern two different kinds of contractual relationships. They differentiate between contracts made between two public entities and contracts made between private entities and public entities.⁴⁷⁷ When a

⁴⁷⁴ Law n° 2002-6 of 04/01/2002 relating to the creation of public establishments for cultural cooperation.

⁴⁷⁵ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 44.

⁴⁷⁶ *Idem*, p. 6 (translation from French).

⁴⁷⁷ "There are two categories of legal persons identified as legal persons governed under public law base; on one hand, the State, and on the other hand the other categories of legal persons governed by public law, which include two categories: public entities at local level and public establishments, to which in recent years groupings of public interest were assimilated. A final category - the so-called mixed legal persons -, which are situated in the borderline between public law and private law, are the private entities endowed with the power to perform a public service; they represent a category of legal persons governed by private law to position aside, because they resemble legal persons governed by public law" (G. Braibant & B. Stirn, *Op. cit.*, p. 49) (translation from French).

contract involves two public entities, it falls into the first category. It is in principle clear that a contract is administrative if both parties are public entities.⁴⁷⁸ However, it seems that an exception to the rule has been carved out, which applies where the contract in question creates a private relationship between the two public institutions. If a contract creates a purely private relationship between the two parties, then that contract will be governed by private law, even if both parties are public entities.

This was confirmed in the *Bureau d'aide sociale de Blénod les Pont-à-Mousson* case, which is another application of UAP: "(...) the contract entered into between the OPHLM and the office of social aid (both public offices) was an ordinary contract, as the office of social aid has been found to be in a situation similar to that of any other private person entering into such a lease contract".⁴⁷⁹ The conclusion reached by the Council of State in *Bureau d'aide sociale de Blénod les Pont-à-Mousson* appears to be completely at variance with the *CROUS* case. The Council held that a contract entered into between an OPHLM (*Office public d'habitations à loyer modéré*) and an office of social aid, both public bodies, for the lease of houses for one year with a renewable term and for a determined rent, creates a contractual relationship governed by private law. The case (which concerned payment of damages arising from the lease contract) was therefore referred to the ordinary courts.⁴⁸⁰

When a public entity contracts with a private entity, the agreement falls within the second category of relationships. The courts have held that the presence of a public entity as a party to the contract will usually lead to the application of administrative law (organic criterion), but this will not always hold true. J. Morand-Deville expressed the idea as follows: "The presence of a public institution as a party to the contract is a necessary, but not always sufficient, indication that the contract is administrative. Another indication, the alternative criterion, may in addition be required".⁴⁸¹ A contract made

⁴⁷⁸ See supra, 2.1.2, *Union des Assurances de Paris (UAP)* case (cited above).

⁴⁷⁹ *Bureau d'aide sociale de Blénod-lès-Pont-à-Mousson v. Office public d'habitations à loyer modéré de Meurthe-et-Moselle*, CE, may 11th, 1980 (translation from French); see also J. Morand-Deville, *Op. cit.*, p. 394.

⁴⁸⁰ *Bureau d'aide sociale de Blénod les Pont-à-Mousson v. Office public d'habitations à loyer modéré de Meurthe-et-Moselle*, cited above.

⁴⁸¹ J. Morand-Deville, *Op. cit.*, p. 392 (translation from French).

between a public entity and a private entity, which involves the performance of an ordinary activity, is considered to be a private contract.⁴⁸²

This proposition is supported by the “*Société des granits porphyroïdes des Vosges*” case, which concerned the supply of paving stones to the Lille Municipality by a private entity. The activity was ordinary in character, and accordingly it was held that the contract was governed by private law. The company contracted to supply paving stones to the municipality, and according to the terms of the contract was liable to pay a penalty of 3,436 Francs if it delayed in performance. The municipality noticed such a delay and claimed the penalty. This was contested by the company, which instituted proceedings before an administrative court. The Council of State held that a contract for the supply of furniture, which does not have any public aspect, cannot be an administrative contract, and it rejected jurisdiction on this ground.⁴⁸³

It is essential to make clear that private contracts are formed when public institutions and private legal persons contract for the performance of an ordinary activity:

“Examples of private contracts made by public entities⁴⁸⁴ include rural leases of public property, contracts for the sale of movable or immovable private property owned by the State, and contracts made between the Post Office and its customers, suppliers and third parties.⁴⁸⁵ Legislation has also specifically provided that ‘employment-Solidarity’⁴⁸⁶ or ‘employment-Youth’⁴⁸⁷

⁴⁸² *Idem*, p. 396 (translation from French).

⁴⁸³ *Société des granits porphyroïdes des Vosges v. Municipality of Lille*, CE, 31 July 1912, in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007634187&fastReqId=1849126865&fastPos=1>, last visited on October 5th, 2010.

⁴⁸⁴ In French, they are referred to as “*contrats de droit commun de l’administration*” (See Y. Gaudemet, *Op. cit.*, p. 277).

⁴⁸⁵ Law n° 90-568 of 02/07/1990 governing the functioning of the public service of posts and France Telecom.

⁴⁸⁶ This category of contracts (contracts of employment-solidarity) was suppressed in 2005 (in <http://www.legifrance.gouv.fr/affichSarde.do?reprise=true&page=1&idSarde=SARDOBJT000007110247&ordre=null&nature=null&g=ls>, accessed on 30/09/ 2010).

contracts are governed by private law, even though they would be administrative if the ordinary criteria from the case law were applied.”⁴⁸⁸

We also mentioned earlier that some of the employment contracts are governed by private law, in particular the employment contracts of contractual employees who are not engaged in the execution of a public service.⁴⁸⁹ However, even if the contract concerns a private activity, it will still be administrative if special powers are granted to the administration (*clauses exorbitantes du droit commun*) over and above those normally granted by private law. This criterion of empowering the administration to oversee the contract may suffice to make a contract ‘administrative’ in character⁴⁹⁰ and lead to the jurisdiction of the administrative court.

5.1.3 Jurisdiction of courts over public contracts litigation

It was famously stated that proper administration can only be achieved if administrative activity can be judicially reviewed (“*Juger l’administration, c’est encore administrer*”).⁴⁹¹ In France, a separate system of courts (administrative courts separate from ordinary courts) was created to exercise control over the administration and ensure that it was held to account as regards its acts. The effects of this system are clear from the decisions reached by these courts, which, in an example of judicial activism, have created guiding rules and principles of administrative law which were subsequently complemented by legislation.⁴⁹²

⁴⁸⁷ Art. L5134-1 of Labour Code.

⁴⁸⁸ J. Morand-Deville, *Op. cit.*, p. 391 (translation from French).

⁴⁸⁹ G. Braibant & B. Stirn, *Op. cit.*, p. 395; see also L. Richer, *Op. cit.*, p. 725.

⁴⁹⁰ L. N. Brown & J. S. Bell, *Op. cit.*, p. 202.

⁴⁹¹ R. Chapus, *Droit du contentieux administratif*, *Op. cit.*, p. 44.

⁴⁹² See *supra*, 2.1.2 & 5.1.2: role played by the case-law in the creation of rules and principles of law applicable to the public contracts.

Jurisdiction of administrative courts over administrative contracts litigation

The administrative courts in France have always had jurisdiction over matters which involve an act performed by the administration (including central administration, local administration and public establishments), as such matters which involve a public body, or raise issues which affect with public interest:

“Judicial functions are distinct and will always remain separate from administrative functions. It shall be a criminal offence for the judges of the ordinary courts to interfere in any manner whatsoever with the operation of the administration, nor shall they call administrators to account before them in respect of the exercise of their official functions.”⁴⁹³

From this we can see that France has duality of courts, which is characteristic of that country. On the one hand there are ordinary courts, from first instance courts at the lowest level to the Supreme Court at the highest level (the ‘judicial courts order’), which deal with ordinary litigation. On the other hand are the administrative courts, from the administrative tribunals at the lowest level to the Council of State at the highest level (the ‘administrative courts order’), which deal with litigation arising from administrative decisions, including administrative contracts made by public institutions.⁴⁹⁴

It is important to see how the jurisdiction of these ‘orders’ is split as regards public acts. In principle, any act performed by a public body, if ‘administrative’ in character, should be within the jurisdiction of the administrative courts. Similarly, any act performed by a public body which is

⁴⁹³ Art. 13 of the Law of 16-24 August 1790, quoted by L. N. Brown & J. S. Bell, *Op. cit.*, p.46.

⁴⁹⁴ The organisation of the ordinary courts is quite complex, because it is levelled from the Instance courts and the Grand instance courts (low level), of ordinary or specialised competence (such as the prud’hommes councils, courts of commerce, social security courts, social security commissions, paritary rural lease tribunals), to the other echelon constituted of appeal courts and Supreme Court (high level). Then again, the country has built up a parallel structure of administrative courts, which are arranged into administrative tribunals on lower level and administrative courts of appeal at appeal level, together with specialised administrative courts, and on upper level the *Conseil d’Etat* (J. Morand-Deviller, *Op. cit.*, p. 517).

‘private’ in character (such acts are rare in France) should be within the jurisdiction of the ordinary civil courts. Therefore, if litigation arises from public acts (including administrative contracts), this normally falls within the jurisdiction of the administrative courts.

Jurisdiction of the ordinary courts over private contracts litigation

In principle, dealings of the public institutions which are purely private and do not involve the exercise of any exceptional powers by the public body, fall within the jurisdiction of the ordinary courts. This includes the sale of private goods (for instance, a house or a car), the lease of land to private persons, and the contractual relationships between the postal service and its customers (concerning matters such as the delivery of letters and packages),⁴⁹⁵ the employment contracts of contractual employees who are not working for the execution of a public service.⁴⁹⁶ This is in accordance with the principles stated above that certain public contracts may in exceptional circumstances fall within the jurisdiction of the civil courts.

However, contrary to the jurisdiction of ordinary courts over litigation arising from public contracts having a private nature, the administration’s tortious liability in France fall within the jurisdiction of administrative courts. Among the peculiar solutions worked out by the administrative courts in France, which are different from ordinary solutions amount to tort liability. In the *Blanco* case, decided by the tribunal of conflicts, it was decided that the administration’s tortious liability must follow the specific principles of administrative law.⁴⁹⁷

⁴⁹⁵ See J. Morand-Deville, *Op. cit.*, p. 391.

⁴⁹⁶ G. Braibant & B. Stirn, *Op. cit.*, p. 395; see also L. Richer, *Op. cit.*, p. 725.

⁴⁹⁷ The *Blanco* case involved an accident at a warehouse belonging to a state company which manufactured tobacco. A five and a half year old girl, the daughter of Blanco, was passing the storehouse when she was injured by a trolley, an injury which eventually necessitated the amputation of one of her legs. Blanco claimed that the state should be liable for the damage caused by its employee who had been carelessly driving the trolley. The court ruled that the state is liable for any damage caused by the fault of its employees, and any litigation arising from this liability falls within the jurisdiction of the administrative courts (*Blanco v. French State*, TC, 8 February 1873, in *1st suppl - Rec. Lebon*, p. 61, accessed in http://www.lexinter.net/JPTXT2/arret_blanco.htm, on October 7th, 2010).

5.2 Legality of public contracts in Belgium: Combination of public and private law

In Belgium, public law usually applies to public contracts. This means that the basis for an administrative authority's creation and management of public contracts can be found in public law. However in some instances public contracts may be governed by private law, at least in so far as the contract creates individual rights.

This part starts with a description of the power to make public contracts, showing how the administrative authorities derive their power to enter into contracts from the law. Then, an explanation is given on how the rules and principles of public or private law are applied to public contracts. After that, jurisdiction of the courts over public contracts is explored.

5.2.1 Power to make administrative and private contracts

In Belgium,⁴⁹⁸ the state is a supreme power, which has sovereignty, and no organ of government has control over its power: "Sovereignty means that the sovereign has no superior leader above it."⁴⁹⁹ Thus, as M. Pâques tells us, when making decisions the sovereign cannot limit itself. Furthermore, if it attempts to place limits on its future actions, nothing prevents it from unilaterally varying these limits. This was explained clearly by Machiavelli, when he stated that: "The sovereign (...) cannot, and its words cannot still

⁴⁹⁸ Starting with the King, even though his constitutional powers are hereditary through the direct, natural and legitimate descent (art. 85 Const.), he may exercise them only if formally attributed to him by the Constitution and by specific laws passed by virtue of the Constitution itself (art. 105 Const.). Again, act of the King can only take effect if countersigned by the relevant minister, who, in doing so, assumes responsibilities for it (art. 106 Const.). The Federal authority in Belgium only has competencies in matters that are formally assigned to it by the Constitution and the laws passed by virtue of the Constitution itself (art. 35 Const.). Provincial and municipal institutions are also regulated by law (Art. 162 Const.).

⁴⁹⁹ M. Pâques, *De l'acte unilatéral au contrat dans l'action administrative*, Bruxelles, E.Story-Scientia, 1991, p. 36.

hold, when the terms of agreement no longer seem relevant, or when the reasons which led to the agreement seem worthless and irrelevant”.⁵⁰⁰

Thus, even after the administration makes a decision, it can always vary or terminate it: “Legally, the sovereign uses unilateral power to give orders and make decisions - it does not create them on the basis of agreement. It may order a person to perform certain duties. The state does not obey orders - instead it gives them”.⁵⁰¹ So who can order the state to change an order or decision that it has made? The answer is no-one. The state possesses all decision-making power, and can vary decisions at will. There is no other organ of government above the state which could request it to review or vary its decisions. Of course, the state itself may conclude that it is appropriate to vary a decision it has made.

The administration enjoys the ability to reach unilateral decisions, and to act bilaterally (for instance, to create contracts). However, for an administrative authority to create a contract, the power to do so must be granted to it by law: “A particular law will stipulate that the administration has the power to make certain types of contract, or a general law will set out the powers which public institutions have to make contracts.”⁵⁰² This explains why administrative authorities are, by law, given the power to enter into contracts. If the law does not grant a power to enter into contracts, the administrative authorities cannot contract on behalf of the public institution: “Actually the administrative authorities, unless by law prevented to do so (explicitly or tacitly), have the power to contract; therefore, administrative authorities which do not have that authority do not have the power to make decisions and cannot, even on their own behalf, enter into contracts.”⁵⁰³

The ways in which public contracts are created can also be restricted by law because of special difficulties of proof which arise in the context of public contracts. Although ordinary contracts are usually concluded on the basis of

⁵⁰⁰ Machiavel, *Le Prince* (cited by L. François, *Introduction au droit social*, Faculté de Droit, d’Economie et de Sciences sociales de Liège, 1974, p. 157-158), cited by M. Pâques, *Op. cit.*, p. 37. (Translation from French).

⁵⁰¹ M. Pâques, *Op. cit.*, p. 38 (translation from French).

⁵⁰² *Idem*, pp. 161-162.

⁵⁰³ *Idem*, pp. 161-162.

consensualism (they can be entered into orally without written proof or with a written proof), it is often difficult to provide evidence of a purely verbal public contract: “Proof might be difficult to ascertain if the contract was not made in writing”.⁵⁰⁴

Accordingly, Belgian case law affirms that no contract for the lease of state property can be tacitly renewed when the tenant continues to occupy the premises after the expiry date for the lease, as ordinary contracts for the lease of property can be,⁵⁰⁵ because it is very difficult to prove that the administration has consented to unwritten contracts.⁵⁰⁶ This is especially true for example for audit purposes – it may be difficult to prove the auditor that a contract was entered into, if no proof of this contract exists.

5.2.2 Legal rules and principles applicable to public contracts

In Belgium, the following analysis reveals that there exists a combined application of public and private law rules to public contracts.

Rules and principles applied to the formation of public contracts

In principle under the law of public contracts in Belgium, the administration is free to choose its contracting partner. However the complex conditions for selection set out by the law renders the public contract more complex than that concluded between ordinary private partners.

This is the case more particularly for public procurement contracts, which strictly follow the European provisions on public procurement,⁵⁰⁷ as

⁵⁰⁴ P. Lewalle, *Contentieux administratif*, P.U.Lg., 1985, p. 164, cited by M. Pâques, *Op. cit.*, pp. 162 (translation from French).

⁵⁰⁵ Art. 1738 of the Belgian Civil code states: “When the term of a written lease contract expires, if the tenant does not want to leave the place and the landlord does not oppose it, there is a tacit renewal of contract on similar conditions and duration”.

⁵⁰⁶ Liège, 20 novembre 1929, *Pas.*, 1930, II, p.20, cited by M. Pâques, *Op. cit.*, p. 162; see also J. Vankerckhove & P. Coeckerlgerghs, *Le louage de choses : Les baux en général*, Bruxelles, Larcier, 2000, p. 207.

⁵⁰⁷ Directive 2004/18/EC and Directive 2004/17/EC, cited above.

interpreted by the European Court of Justice.⁵⁰⁸ For the making of other categories of public contracts, as clarified by Ph. Flamme, there exist no specific rules of public law to constrain the administration. But still, even in their absence, the judge shall make sure that the process is governed under the rules of equality, transparency and proportionality.⁵⁰⁹ Therefore, this phase of public contracting is governed under public law rules, and any decision taken for the making of public contracts remains an administrative decision, detachable from the contract itself (*théorie des actes détachables*), to fall under the jurisdiction of the Council of State.⁵¹⁰

Rules and principles applicable to the execution of administrative contracts

As explained in chapter two, the administration can enter into various administrative contracts, such as contracts for procurement of works, goods and services, contracts for the management of public services, contracts for the carrying out of industrial works or trade, concessions or leases of public domain or public services; contracts for the release of treasury bonds. This subsection will examine the rules applicable to these different categories.

Primacy of private law rules

The administrative contracts, once concluded between parties, are generally subject to the application of private law. In this respect, the law in Belgium states clearly that contracts giving rise to civil or political rights are governed under private law of contracts, as explained here below.

Rules which govern contracts giving rise to civil or political rights

It is a well known principle of Belgian law that public contracts which are concerned with civil or political rights are governed by private law, unless a particular law states otherwise.⁵¹¹ In fact, the rights which arise under

⁵⁰⁸ Ph. Flamme, “Monographies nationales/National reports, Belgique/Belgium”, in R. Noguellou & U. Stelkens, *Op. cit.*, pp. 399-430, pp. 407-408.

⁵⁰⁹ *Idem*, pp. 408-409.

⁵¹⁰ M. Flamme, *Loc. cit.*, p. 419-420.

⁵¹¹ M. Nihoul, *Les privilèges du préalable et de l'exécution d'office*, Bruges, La Charte, 2001, p. 59.

ordinary public contracts are two-fold – they can be civil or political. The constitution provides that litigation which concerns civil or political rights - including public contract litigation which concerns these rights - falls within the jurisdiction of the ordinary courts.⁵¹² Furthermore, as stated by the *Cour de Cassation*,⁵¹³ when dealing with these matters the ordinary courts must apply the ordinary law, namely articles 6⁵¹⁴ and 1134⁵¹⁵ of the civil code.⁵¹⁶

Rules which govern contracts giving rise to any other category of rights

It is clear that all public contracts litigation which does not involve any civil or political rights issues must be heard before the Council of State, which *ipso facto* must apply the rules of public law. If public contracts litigation brought before the Council of State does give rise to civil rights or political rights issues, the Council must declare itself not competent to hear the litigation.⁵¹⁷

The situation for example in which litigation would not give rise to civil or political rights issues would be where two public bodies agree to perform a public service, since only administrative rights would arise from such a contract. Accordingly, these contracts are governed by public law. This was confirmed in *CAP de Liège v. CAP d'Angleur*, a decision of May 30th, 1952. The court decided that a contract made between two public bodies (concerning payment of a hospital's running costs) only conferred administrative rights on the parties, and therefore any disputes concerning the contract were to be heard before the administrative court.⁵¹⁸

⁵¹² Art. 144 & 145 of Belgian Constitution, 17/02/1994, in <http://www.ejustice.just.fgov.be/loi/loi.htm>, last visited on 28/09/2010.

⁵¹³ C.C., 9 December 1833, *Pas.*, 1833, I, p. 183, with regard to a procurement contract for paving, entered into with the provincial administration of Hainaut.

⁵¹⁴ Art. 6 of the Belgian Civil code provides: « In the conclusion of specific contracts, derogations cannot be made from the rules of public order or good morals ».

⁵¹⁵ Art. 1134 of the Belgian Civil code provides: "A contract validly formed binds the parties who entered into to it, and none of them can revoke it except on grounds recognized by agreement of the parties or by law".

⁵¹⁶ M. Pâques, *Op. cit.*, pp. 275-276.

⁵¹⁷ *Idem*, pp. 275-276.

⁵¹⁸ *CAP de Liège v. CAP d'Angleur*, CE, 30 may 1952, *RJDA*, 1952, p. 297ss. cited by M. Pâques, *Op. cit.*, pp. 275-276.

However the *Cour de Cassation* established an exception to the rule. In a case decided on December 21st, 1956, the court held that no peculiar category of individual administrative rights should be created and it decided that the latter should be interpreted as being political rights in nature.⁵¹⁹

For example in *Belgian State (Minister of Finance) v. Trine*, Mr Trine received unemployment benefits amounting to 22,117 Belgian francs, from January 26th, 1947 to June 5th, 1948. However, the Director of the Support Fund for the Unemployed later found out that Mr Trine was not entitled to the benefits because he was self-employed, and the Director claimed back the value of the benefits. This decision was upheld by the Commission for Claims and also by the Committee for Appeals (established by the King to hear such cases). Simultaneously, Mr Trine was subject to criminal proceedings, and the Court of Appeal at Liège convicted him of benefit fraud, but only as regards *some* of the benefits (3,700 Belgian francs, received between January 31st, 1948 and May 31st, 1948). Accordingly, the decisions reached by the Committee for Appeals and the Court of Appeal of Liege were in conflict, as the Committee had found that Mr Trine had received *all* the benefits unlawfully. The administration appealed to the Supreme Court, on ground that the decision reached by the Committee was final, and could not be challenged by the Court of Appeal at Liege. The Supreme Court held that the decision reached by the administration was not *res judicata*, because the King did not have the power to establish courts *proprio motu*. When considering whether the claim was based on administrative rights, the Supreme Court decided that the rights at issue (social rights engaged by non-payment of an unemployment allowance) were political rights, and therefore the case fell within the jurisdiction of the ordinary courts.⁵²⁰

⁵¹⁹ In its decision of December 21st, 1956, the Court of Cassation finally decided that all rights should be organized, either under the category of civil rights, or the category of political rights (M. Pâques, *Op. cit.*, pp. 275-276).

⁵²⁰ *Belgian State (Minister of Finances) v. Trine*, CC, December 21st, 1956, *Pasicrisie Belge*, 1957, p. 431.

Principles of administrative law used as additional rules

In Belgium administrative contracts are subject to two categories of principles of law, the unilateral character of the administrative acts and those principles reflecting the State's privileges.

The unilateral character of the administrative acts

Under Belgian Law, it is important to note that the administration is vested with the power to unilaterally decide the award of contracts with private parties. The same prerogative also vests the administration with the power to unilaterally modify, or even terminate, a contract entered into bilaterally. All public contracts have two characteristic phases, the pre-contractual phase (leading to the award of the contract), and the contractual phase (performance of the contract, and termination). The exercise of such a prerogative affects both of these phases, award and performance.⁵²¹

During the pre-contractual phase, the Belgian administration can unilaterally choose its contractual partners, in accordance with conditions set out by the administration. It then concludes this phase with the award of the contract, the latter being a bilateral act.⁵²²

After awarding the contract, the administration can unilaterally intervene in the performance of the contract by the other party, by varying or terminating the contract. The power to do so may arise from provisions of the specific contract itself, or from general contract law (dealing with issues of consent, capacity, subject-matter, or 'cause').⁵²³ The Belgian Cour de Cassation pronounced on this issue in *Fonds des routes v. Société Anonyme "Aswebo"*. This case concerned a Royal Order made on April 22nd, 1977, (dealing with the public procurement of works, goods and services) which stated in Article 52 that the administration may modify the original terms of a contract if the relevant minister makes a reasoned decision to this effect. The Court held that this Order does not prevent the contracting parties from clearly

⁵²¹ Ph. Flamme, *Loc. cit.*, pp. 405-406 & 413.

⁵²² See M. Pâques, *Op. cit.*, pp. 161-162; see also Ph. Flamme, *Loc. cit.*, p. 405.

⁵²³ *Idem*, pp. 161-162.

determining permissible modifications, which the minister cannot then vary.⁵²⁴

Principles of law reflecting the State's privileges

Historically, Belgian law did not grant the administration privileges when making public decisions or entering into public contracts. However, modern-day privileges can be traced back to the ninetieth century, to the power granted to the administration to force performance of the contract. This allowed administrative decisions to be enforced without any prior recourse to a judge.⁵²⁵ According to M. Nihoul,

“this power allowed administrative acts to be forcibly executed, since the act became the equivalent of an (administrative) judgment at first instance, based on the theory of the Minister- or administrator-judge. The courts were prohibited from interfering with administrative affairs on the basis of the same theory, *a fortiori* from obstructing their execution”.⁵²⁶

At the dawn of the twentieth century, the theory of ‘privileges’ (during the process of administrative decision-making), inspired by French scholars, was first developed by Hauriou.⁵²⁷ According to Hauriou, “it is important as a matter of principle that decisions reached by the administration are not subject to any ‘prior condition’; in other words, ‘prior compliance’ is the rule”.⁵²⁸

In Belgium, two important categories of privilege were imported from French Law, and these privileges developed from the use of prerogatives by the

⁵²⁴ *Fonds des routes v. Société Anonyme “Aswebo”*, CC, 07/05/1982, in *Pasicrisie Belge*, 1982, I, p. 1032.

⁵²⁵ M. Nihoul, *Op. cit.*, p. 741.

⁵²⁶ *Idem*, p. 741 (translation from French).

⁵²⁷ “An influence of French law on the Belgian doctrine in relation to privileges has been prominent. The concepts were imported from French law without any adaptation to the Belgian legal system” (M. Nihoul, *Op. cit.*, p. 738) (translation from French).

⁵²⁸ M. Hauriou, *Précis de droit administratif*, 4th ed., Paris, Larose, 1901, p. 246, cited by M. Nihoul, *Op. cit.*, p. 186 (translation from French).

administration: the *privilège du préalable* (compliance with an administrative decision may be forced notwithstanding a complaint already made before a court) and the *privilège de l'exécution d'office* (forced execution without recourse to the prior authorisation of a judge).

In describing these privileges in Belgian law, Nihoul writes that “the *privilège du préalable* is concerned with the mandatory and lawful character of administrative decisions, whereas the *privilège de l'exécution d'office* is largely a matter of their forced execution”.⁵²⁹ The *privilège du préalable* classically confers a presumption of legality on administrative action. Accordingly, those affected by such action should treat it as valid and act consistently with it, notwithstanding any power they have to make a complaint or bring an appeal against the action before a court. The *privilège de l'exécution d'office* is the basis for administrative enforcement of administrative decisions, without recourse to the prior authorisation of a judge.⁵³⁰ Even though both these privileges are classically available to the administration in Belgian administrative law, some argue that they should not be retained. Two diametrically opposed theories have developed in the literature.⁵³¹

The first theory, advanced by Nihoul, presents the privileges as an important prerogative which naturally attach to the administration.⁵³² Nihoul argues in his book, *'Les privilèges du préalable et de l'exécution d'office'*, that these privileges ought to be retained: “The key idea (*clé de lecture*) was entirely found under the common (ordinary) law rules where privileges should be identified as applicable. In fact, what would be the exact meaning of a privilege if it is not about an advantageous derogation to the common (ordinary) law rules?”⁵³³

⁵²⁹ M. Nihoul, *Op. cit.*, p. 293-294.

⁵³⁰ P. Goffaux, *Op. cit.* p. 105.

⁵³¹ Interview with S. Van Garsse, Director of the Flemish Centre for Public-Private Partnership and part-time lecturer at the University of Antwerp (Faculty of Law), conducted on 14/12/2007.

⁵³² M. Nihoul, *Op. cit.*, 2001.

⁵³³ *Idem*, p. 741 (translation from French).

The second theory, propounded by Goffaux, describes the privileges as an insignificant feature of administrative law that no longer assist administrative action, at least in relation to public contracting.⁵³⁴ P. Goffaux's starting argument, in his book entitled '*L'inexistence des privilèges de l'administration et le pouvoir d'exécution forcée*', is that the privileges of prior compliance and forced execution do not exist, or should not exist, under the Belgian legal system.⁵³⁵

In that sense, Goffaux suggests the following terminology:

"The term 'power of unilateral decision' (*pouvoir de décision unilatérale*) should be adopted instead of 'privilege of prior compliance', and used to describe the power to make any decision and to impose it upon the addressee without his prior consent; and the term 'power of coercion' (*pouvoir de coercision*) should replace 'privilege of unhindered forced execution', to describe the administrative power to ensure execution of its decisions through the use of administrative measures, if the recipients are unwilling to abide by those decisions".⁵³⁶

This discussion supports the idea that classical principles which have applied to the administration's acts, and only safeguard the interests of the administration, ought to be reviewed. As shown by Lust, even if in Belgium the principles of good governance have not been codified in a general law, some principles have already developed through the case law.⁵³⁷ The classical principles should therefore be replaced by principles with a more neutral outlook, such as the principles of good governance, which safeguard in equal terms the interests of the administration and those of the citizens. That argument will be explored in more detail in chapters seven and eight.

⁵³⁴ P. Goffaux, *L'inexistence des privilèges de l'administration et le pouvoir d'exécution forcée*, Bruxelles, Bruylant, 2002.

⁵³⁵ *Idem*, p. 345.

⁵³⁶ *Idem*, p. 346.

⁵³⁷ S. Lust, "Administrative law in Belgium", in R. Seerdon & F. Stroink (eds.), *Op. cit.*, 2002, pp. 5-58, pp. 28-29.

Rules and principles applicable to the execution of private contracts

Where the administration enters into private contracts, they are governed by private law. The public contracts subject to the application of private law are contracts such as those concerning the private domain of the state, the sale or lease of state's private assets, the purchase or lease of private property and the insurance contracts.⁵³⁸ In this perspective, those contracts resort to the application of the relevant provisions from the civil code or related field of private law, such as the private law of contract which underlines the rules from the contract law code, or any other related code of private law such as the code of insurance which reinforces the insurance contract rules.⁵³⁹

Therefore the role of private law is considered in the context of equal freedom of contract from both parties to the contract, meaning that these private contracts made by the administration cannot in any case be influenced by the principles of administrative law - which would normally empower the administration, in the public interest, to modify or resile from the contract, as explained above.

5.2.3 Jurisdiction of courts over public contracts litigation

In Belgium, two orders of courts coexist - the judiciary,⁵⁴⁰ which hears ordinary cases, and the Council of State,⁵⁴¹ which hears administrative cases (including those which concern decisions made by administrative authorities). As Nihoul argues, in Belgium the courts have been organised so that a judge

⁵³⁸ See supra, 2.1.3 Types of public contracts in Belgium.

⁵³⁹ Circular of July 20th, 2005 governing sale or acquisition of immovable properties by the communes, provinces or the CPAS and also emphytheosis right or superficy right, in *Moniteur Belge*, 03/08/2005, p. 34152; Law of June 25th, 1992 governing terrestrial insurance contract, *Moniteur Belge*, 20/08/1992, p. 18283.

⁵⁴⁰ The judiciary in Belgium is ranging from the Supreme Court (Art. 147 Const.) to the High Council of Justice (Art. 151, §2), five courts of appeal (of Brussels, Ghent, Antwerp, Liege and Mons: Art. 156 Const.) and lower courts or courts of first instance on district level (Art. 151 Const.). There are also special courts such as military courts, commercial and labour courts (Art. 151, 157 Const.).

⁵⁴¹ "There is a Council of State for all Belgium (...)" (Art. 160, Belgian Constitution).

who is separate from the ordinary judges has “jurisdiction (...) to judge the administration, so as to take its privileges into account”.⁵⁴²

Courts having jurisdiction over administrative contracts

The Belgian law of public contracts shows the move from a traditional concept of the administrative courts’ jurisdiction over administrative contracts towards the jurisdiction of ordinary courts in cases involving individual rights.

Jurisdiction of ordinary courts over matters giving rise to individual rights

As stated in articles 144 and 145 of the Belgian constitution, the only judges that have jurisdiction over matters which give rise to civil or political rights issues are ordinary judges. Thus, litigation arising from public contracts which create civil or political rights must be brought before ordinary courts.⁵⁴³

If the claim does not concern public contracts which give rise to civil or political rights, it is within the jurisdiction of the Council of State – if it does, the ordinary courts are competent to hear the case.⁵⁴⁴ The latter point is specifically provided for by provisions of the Belgian Constitution, which state that “[l]itigious matters concerning civil rights are within the exclusive jurisdiction of the ordinary courts” (Article 144) and also “[l]itigious matters concerning political rights are within the ordinary courts’ jurisdiction, with the exception of those excluded by law” (Article 145). Thus, as explained earlier, it is important to ascertain whether a contract creates rights which are civil or political.⁵⁴⁵ Consequently, cases which have another aspect fall within the jurisdiction of the Council of State.

This duality of courts’ orders and jurisdiction (between ordinary courts and Council of State) has however given rise to jurisdictional questions, especially with regard to other rights which are not civil or political. The *Cour de*

⁵⁴² M. Nihoul, *Op. cit.*, p. 58 (translation from French).

⁵⁴³ M. Nihoul, *Op. cit.*, p. 59; see also Ph. Flamme, *Loc. cit.*, p. 405.

⁵⁴⁴ F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles, Bruylant, 2000, p. 740.

⁵⁴⁵ M. Pâques, *Op. cit.*, pp. 275-276.

Cassation in Belgian State – Ministry of Interior v. I. held that these are solved by looking to the subject-matter of the claim: “Jurisdiction is determined based on the real and direct subject-matter of the claim. The ordinary courts shall have jurisdiction when the claim introduced relates to an individual’s right (individual right). The latter implies the existence of a specific legal obligation that a person is duty bound to fulfil, and in the performance of which the claimant has a particular interest.”⁵⁴⁶

Therefore, even if administrative rights are different from political and civil rights, an administrative right which is individual in nature would fall within the jurisdiction of the ordinary court. As mentioned earlier, the *Cour de Cassation* decided that no new category of ‘administrative rights’ should be added to the ordinary categories of rights, civil and political.⁵⁴⁷

The same holds true for tortious liability, which also falls under the jurisdiction of ordinary courts. In Belgium, the law on the tortious liability of the administration was not clear until the issue came before the Supreme Court in the case of *La Flandria*, on November 5th 1920. The Supreme Court held that the administration’s civil liability is assessed on the basis of article 1382⁵⁴⁸ of the Belgian civil code.⁵⁴⁹ As stated in the case, “(...) the application of ordinary law (art. 1382 of the Civil code) (...) extends to cases where damage was caused by an illegal act committed by the public administration”⁵⁵⁰. In making this decision, the Supreme Court established that administration’s liability for wrongful acts is to be assessed using private

⁵⁴⁶ *Belgian State – Ministry of Interior v. I.*, C.C., 16/01/2006, in *Pasicrisie Belge*, 2006, I, p. 165.

⁵⁴⁷ See for example *Belgian State (Minister of Finances) v. Trine*, cited above; see also Court of Cassation, December 21st, 1956, a case cited by M. Pâques, *Op. cit.*, pp. 275-276.

⁵⁴⁸ Article 1382 of the Belgian Civil Code corresponds article 258 of the Rwandan Civil Code Book III, which states : « All acts done by a person which cause damage to another person, that person responsible for committing those faults or damage has to pay remedies or reparations to that particular person to whom damage has been caused. »

⁵⁴⁹ P. Goffaux, *Op. cit.*, p. 350.

⁵⁵⁰ *Ville de Bruges v. Société La Flandria* (the so-called *La Flandria* case), C.C., november 5th, 1920, *Pasicrisie Belge*, 1920, I, p. 193 (translation from French); see also “Belgian Court of cassation, First Chamber, 5 november 1920, *La Flandria*”, in <http://www.evematringe.fr/blog/2009/02/06/la-flandria/>, accessed on October 14th, 2010.

law mechanisms, and litigation concerning such liability falls within the jurisdiction of the ordinary local courts, unless special laws provide for an exception.

The decision in *La Flandria* ensures that similar rules are applied to the administration and its citizens. It was articulated that “the State was forced to fall under the jurisdiction of private law, from which it had constantly used to escape”.⁵⁵¹ When the case was referred to the Belgian Cour de Cassation, the court applied the ordinary law (Article 1382 of the Civil code) to the case in the following way: “Whenever any claim for damages is made by a person for violation of his or her civil rights, the ordinary courts shall deal with that claim and eventually decide on the issue of damages, even if the damage was caused by the state, a municipality or any other public body; (...)”.⁵⁵² Therefore, as stated in *Martens v. Centre public d’aide sociale (CPAS) de Bree et Crts*, the general rule is that a claim for the reparation of some moral or material damage, caused by the violation or non-recognition of an individual’s right, will fall within the jurisdiction of the ordinary courts.⁵⁵³

As a footnote, it is worth mentioning that - although the situation is highly unlikely - Article 11, paragraph 1 of the coordinated law on the Council of State provides that if no court claims jurisdiction over litigation concerning exceptional moral or material damage caused by an administrative authority, the Council of State shall declare that it has jurisdiction, and should proceed to impartially decide the case, taking into account matters both in the public and the private interest.⁵⁵⁴

Council of State’s jurisdiction over matters giving rise to non individual rights

As stated earlier, the ordinary court shall only have jurisdiction over a public contract, any time it gives rise to civil rights or political rights or any other

⁵⁵¹ M. Nihoul, *Op. cit.*, p. 59.

⁵⁵² *La Flandria* case, cited above.

⁵⁵³ *Martens v. Centre public d’aide sociale (CPAS) de Bree et Crts*, C.C., November 17th, 1994, in *Pasicrisie Belge*, 1994, I, p. 956; the same was decided in *Cuvelier v. Société Nationale du Logement*, C.C., December 16th, 1965, in *Pasicrisie Belge*, I, 1966, I, p. 513.

⁵⁵⁴ Art. 11, par. 1 of the Coordinated Laws on the Council of State of 12 January 1973, in *Moniteur Belge*, March 21st, 1973, p. 3461.

subjective rights; if not, the case shall automatically be brought before the Council of State.⁵⁵⁵

To say it in other words, in principle there is no other particular judge to adjudicate litigation arising out of public contracts, apart from the ordinary judge since, as M. Leroy states it, “between contracting parties, contracts give rise to individual rights”.⁵⁵⁶ However, the Council of State has jurisdiction over litigation in relation to public contracts which do not create civil or political rights or any other individual rights. For example, if the case concerns a decision to enter into a public contract, any litigation arising from it would instead fall within the jurisdiction of the Council of State. In fact, “the decision to enter into a contract cannot be assimilated to the contract itself and remains an administrative unilateral decision, detachable from the contract which (the latter) has only effects upon conclusion, (...)”⁵⁵⁷ The Council of State decided then to adopt this theory of ‘detachable acts’ (*théorie des actes détachables*), thus extending its jurisdiction, besides its general jurisdiction for judicial review of decisions made by the administrative decisions, to judicial review of decisions made during the process of making of public contracts.⁵⁵⁸

Jurisdiction of ordinary courts over private contracts

If the administration has been engaged in contracting of private nature in the pursuit of private interest, then the resultant contracts would absolutely give rise to civil rights which automatically fall under the jurisdiction of the ordinary court,⁵⁵⁹ as provided by article 144 the Belgian constitution, which

⁵⁵⁵ Articles 144 & 145 of the Belgian Constitution; See also *Belgian State (Minister of Finances) v. Trine*, cited above; see also *Belgian State v Y.*, Court of Cassation, 18/12/2008, *Pasicrisie Belge*, 2008, p. 3002 (in this case, a political right in relation to asylum seeking was introduced before the ordinary court).

⁵⁵⁶ M. Leroy, *Contentieux administratif*, 2nd edition, Bruxelles, Bruylant, 2001, p. 208, cited by M. Flamme, *Loc. cit.*, p. 419.

⁵⁵⁷ *TELENET BIDCO NV s.a. v. Association Intercommunale pour le développement Economique et l’Aménagement du Centre et du Borinage (I.D.E.A. – Hennuyère) et alii*, C.E., n° 177.029, 22/11/2007, accessed in <http://vlex.be/vid/-57913343>, on 25/02/2013 (cited by M. Flamme, *Loc. cit.*, p. 419).

⁵⁵⁸ M. Flamme, *Loc. cit.*, p. 419-420.

⁵⁵⁹ M. Nihoul, *Op. cit.*, p. 59.

states that “[l]itigious matters concerning civil rights are within the exclusive jurisdiction of the ordinary courts”. Therefore, it is worth mentioning that it remains a constitutional rule for any litigation arising out a contact giving rise to individual rights of civil or political character, originating from any of the private and the administrative contracts, to resort to the jurisdiction of the ordinary court, regardless of obvious differences between these two categories of public contracts.

5.3 Conclusions of this chapter

The foregoing analysis of public contracts in countries where there is a pronounced divergence between public law and private law (France and Belgium), has focused on that divergence in the context of public contracts.

When it comes to the administration’s power to create contracts, it is clear that, as in the French legal system, the administration has powers to make and vary its decisions. Public authorities representing institutions which hold legal personality are also empowered with the authority to enter into contracts with other individuals.

The rules and principles applied to public contracts were also discussed. It is clear that in France, norms of public law form the ‘umbrella norms’ which govern public contracts. In that sense, the administration applies public law rules and principles which grant privileges to the state (such as the privileges of prior compliance and unhindered forced execution). Accordingly, the state (and public institutions empowered by law) can, without judicial authorisation, use their powers to protect the public interest, and to prevent harmful situations from arising in the contractual context.

Turning to the jurisdiction of courts over public contracts, in France two orders of courts coexist, the judiciary – which hears ordinary cases including private contracts entered into by the administration– and the administrative courts – which hear administrative cases, the latter including cases concerning a category of public contracts, known as ‘administrative contracts’.

However in France, there is also a category of public contracts having a private character, which is governed by private law and falls within the jurisdiction of the ordinary court.

In Belgium, the law governs the powers of administrative authorities to make contracts, and an administrative authority cannot make them without being granted the power to do so by specific provisions of the law. If they do not by law possess such a power, then they contract on behalf of the state.

In this country indeed there is also a close connection between public law and public contracts which explains the existence of prerogatives and privileges which favour the administration. However in Belgium, private law has begun to play a role in the law on public contracts. For example, although the administration still enjoys the power to modify or terminate the administrative contracts, the potential exercise of such powers was weakened by placing public contracts which give rise to individual rights – namely, civil and political rights – within the jurisdiction of the ordinary judges, who can turn to private law rules instead of giving effect to such powers.

When it comes to the jurisdiction of courts over public contracts, in Belgium (like in France) two orders of courts coexist, the judiciary – which hears cases concerning contracts which are involving civil or political rights’ – and the Council of State – which hear cases concerning ‘contracts which are not involving any civil or political rights or any other individual rights’. Therefore, the peculiarity of the Belgian legal system is that ‘contracts which are involving civil or political rights’ fall within the jurisdiction of the ordinary courts.

These developments in the field of public contracts show that private law rules can work together with public law rules, in order to reach the same goals. Accordingly, when proposing a new way of thinking legality of public contracts in Rwanda, it will be important to show how the public law rules and principles applied to the public contracts can work together with the private law rules and principles.

6 Public contracts law in Rwanda influenced by countries where public and private law converge

In the countries examined in the previous chapter and earlier (Rwanda, Belgium and France) where public and private law diverge, public law is generally applied to public contracts. However, a different approach has been adopted by other countries, which generally apply private law to public contracts instead of public law. This approach will be examined in detail by looking at the law of public contracts in two countries where public and private law have tended towards convergence, England and the Netherlands.

6.1 Legality of public contracts in England: Primacy of private law

The common law, characteristic of English law, played a major role in the development of the legal systems of some of the East African Community member states, i.e. Kenya, Uganda and Tanzania. The accession of Rwanda to this community proves the importance of analysing legality of public contracts England in the context of this study. Actually England has a strong private law tradition, and public law has not been very influential in the development of the law on public contracts.

This chapter will show how in this country private law has been applied to public contracts and the administrative acts which create them, and how in the last few years public law has more and more started to enter the field of public contracting.

6.1.1 The power of the public authorities to make contracts

In general, it is clear that State authorities in England have the power to make 'public' decisions, and also to perform any 'private' act which any natural or legal person is capable of doing. Thus, the Crown, or central government, through its representative authorities, is endowed with a natural power to engage in contracts: "The Crown has an inherent power to place contracts. This means that on central government, there is no need to identify specific statutory authority for contracts (...)"⁵⁶⁰ However, other public authorities can only exercise this power if it is granted to them by

⁵⁶⁰ A.C.L. Davies, *Op. cit.*, p. 86.

statutory provision. The Crown needs no statutory basis to make decisions or act, but other public bodies do require this: "Statute may expressly or implicitly confer power on a public body to enter into contracts in order to enable it discharge its functions."⁵⁶¹

Foulkes gives a clear description of the power which administrative authorities have to enter into contracts: "No doubt the government can bind itself through its officers by a commercial contract, and if it does so it must perform it like anybody else or pay damages for the breach."⁵⁶²

Starting from the central administration, the Crown or central administration, through its representative officers, can enter into contracts, because it has the same ability to enter contractual agreements that any legal person or natural individual possesses:

"The Crown has increasingly placed overt reliance on a doctrine that it has an inherent power to take any action, including the entering of contracts, that a natural person might take, unless prohibited expressly or impliedly by legislation. The doctrine is articulated in the `Memorandum from Granville Ram, First Parliamentary Counsel⁵⁶³ (2 November 1945)`. "⁵⁶⁴

However, one must differentiate between the Crown's power to act and that of the other administrative authorities. The Crown has what scholars call the natural authority or inherent power to contract, a kind of general power to enter into contracts without any restraint: "The Crown also has inherent capacity at common law to conclude contracts without statutory authority. This capacity probably results from the fact that the Crown is a corporation sole or a corporation aggregate, that is, it has legal personality and with it the common law right to enter into contracts like any other person with legal

⁵⁶¹ See Local Government Act, s. 111, as cited by C. Lewis, *Judicial Remedies in Public Law*, Third Edition, London, Sweet & Maxwell, 2004, p. 545.

⁵⁶² D. Foulkes, *Administrative law*, 8th edition, London, Butterworths, 1995, p. 435.

⁵⁶³ Memorandum from Granville Ram, First Parliamentary Counsel of 2nd November 1945, in <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/30122wa1.pdf>, last visited on 30th September, 2010.

⁵⁶⁴ S.H. Bailey, *Op. cit.*, p. 63.

personality.”⁵⁶⁵ As regards other administrative authorities, the power which allows them to enter into contracts is derived from the statute which regulates their existence: “Statutory bodies, such as local authorities, only have power to [enter into contracts] expressly or impliedly authorised by statute. (...). The public body may only enter into contracts where it is specifically or impliedly authorised to do.”⁵⁶⁶

6.1.2 Legal rules and principles applicable to public contracts

In England, as in any other country, the various levels of the administration (from central to local government) have been established by statute.⁵⁶⁷ These expressly or impliedly describe the authority of each institution and set out the limits of its powers.

However, a peculiarity of the English legal system is that although public institutions have the authority to make contracts, they are not above the law. If they fail to abide by the terms of the contract, or the general law of contract, they can be sued before the normal courts in the same way as any British citizen.⁵⁶⁸ The liability of State entities in matters of contract and tort is identical to that of private entities, as the actions of both are governed by the common law:

“The administration has long been subjected, in principle, to the same law as any other British person. Of course in England, as well as in other countries, there exists a body of rules organising the administration, describing its organs and fixing their status. But when it acts, it uses the legal procedures of the common law: its contracts are similar to those of private persons, and they are both liable at common law. In principle, there is no distinctive body of rules peculiar to the administrative action, which might

⁵⁶⁵ C. Lewis, *Op. cit.*, p. 75; see also A.C.L. Davies, *Op. cit.*, p. 87.

⁵⁶⁶ *Idem*, pp. 83-84; see also A.C.L. Davies, *Op. cit.*, p. 87 & 97.

⁵⁶⁷ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 44.

⁵⁶⁸ Interview with M. Trybus, Professor of European Law and Policy, University of Birmingham – Law School, conducted at Stockholm on May 27th, 2010, at a conference on public contracts in the European Union, organized by the University of Sodertorn.

allow the administration to beneficially derogate from the provisions of the common law.”⁵⁶⁹

Private law applied to public contracts

Unlike French law, which (as mentioned earlier) has a specific body of rules which govern public contracts, a fundamental characteristic of English law is the absence of a general specific set of rules peculiar to the public contracts. This means that the English legal system is not interested in distinguishing between which public contracts are ‘administrative’ and which are ‘private’ in nature. Accordingly, state entities need not comply with a particular set of rules which could limit its freedom to contract - rather, public institutions enjoy the same freedom to contract as any private institution or citizen: “The absence of any special body of law of public contracts means that public authorities appear to have the same freedom as the private citizen in deciding with whom to contract and on what terms”.⁵⁷⁰

As no special set of rules exists which governs public contracts, public contracts are governed by private law, as argued by Foulkes: “[a]n account of the law of the contracts of public authorities starts from the proposition that the ordinary rules of the private law of contract apply”.⁵⁷¹ As mentioned earlier, English law, in contrast to French law, does not have a specific body of rules applicable to public contracts. Public authorities entering into contracts do so in their capacity as public bodies, but are not subject to special rules. Thus, private law applies to contracts made by public institutions and private citizens: “A party to an agreement with a public authority which is not incompatible with its public duties will have ‘private law’ contractual rights against the authority.”⁵⁷²

One can therefore see that the organic criterion used in France does not have any application in the English legal system, where the presence of a public

⁵⁶⁹ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 44 (translation from French).

⁵⁷⁰ J. Beatson & M. H. Matthews, *Administrative Law: Cases & Materials*, Second Edition, 1989, p. 599; M. Elliott, *Administrative Law: Text and Materials*, Oxford, University Press, 2005, p. 582.

⁵⁷¹ D. Foulkes, *Op. cit.*, p. 435.

⁵⁷² M. Elliott, *Op. cit.*, p. 582.

institution as a party to a contract does not mean that the common law does not apply: “The fact that one of the parties to the agreement is a public body will not of itself affect the principles to be applied”.⁵⁷³ There is nothing in the presence of a public institution in the contract which conflicts with the rule of private law norms to be applied: “(...) the enforcement of specific contractual rights and the question of the remedies available will be dealt with in accordance with the usual principles applicable to such disputes.”⁵⁷⁴

Private law is applied in cases where state entities enter into dealings with their citizens because it is difficult to justify the application of public law to such cases. Such dealings often are not in the public interest (they have no effect on the population as a whole) but rather are often pursued because they are in the private interest of the state: “When the Crown, in dealing with one of its subjects, is dealing as if it too were a private person, and is granting leases or buying and selling as ordinary persons do, it is absurd to suppose that it is making any promise about the way in which it will conduct the affairs of the nation.”⁵⁷⁵

Restrictions on the application of private law

Although it is clear that public bodies can enter into contracts governed by private law rules, this may not always be the case, because “(...) the fact that one or both of the contracting parties is a public authority may involve some departure from those rules, or the application of special rules”.⁵⁷⁶ Certain public law rules exist which may interfere with the ordinary process of contracting, and including the statutory rules on endowment of power and other statutory restrictions.

As explained below, apart from the *ultra vires* doctrine and the ‘doctrine of executive necessity’, specific statutes, including the Human Rights Act 1998,

⁵⁷³ C. Lewis, *Op. cit.*, p. 545.

⁵⁷⁴ *Idem*, p. 545.

⁵⁷⁵ *Crown Lands Comrs v Page*, [1960] 2 QB 274 at 293, cited by D. Foulkes, *Op. cit.*, p. 442.

⁵⁷⁶ D. Foulkes, *Op. cit.*, p. 435.

may constrain the contracting process.⁵⁷⁷ Also, certain provisions of EU law may limit the application of private law to public contracting in the UK.⁵⁷⁸

Tendency to govern the making of public contracts with public law rules

Firstly, as a rule, if a case concerns the statutory powers of an administrative authority, particularly at local level where powers are usually set out by statute, before an authority enters into a contract it ought to consider whether it is acting *ultra vires*, and accordingly susceptible to a judicial review claim⁵⁷⁹. In most cases, statutes set out the contracting powers which public authorities have. As C. Lewis explains it, judicial review is available to ensure that public authorities perform their statutory duty, and only contract within the limits set out in the statute:

“Statute may expressly or impliedly impose restrictions on the exercise of contractual power by a public body. Judicial review will be available to determine whether a contract violates such statutory restrictions. In this instance, the courts would be performing their public law supervisory role of ensuring compliance with the statutory limitations on the powers of public authorities, and would not be dealing with the private law issue of what the terms of the contract were and whether they had been broken. (...) . If the authority had failed to observe the statutory requirements then judicial review would have been available to force the authority to perform its statutory duty of contracting on the stipulated terms.”⁵⁸⁰

Secondly, European Union countries are required to comply with EU law, in some cases by adopting it at domestic level, and in others by simply complying with EU legislation, and the case law of the European Court of Justice and the European Court of Human Rights. Therefore, the law of the European Union which applies to public contracting is applicable in the UK,

⁵⁷⁷ M. Elliott, *Op. cit.*, p. 582; S.H. Bailey, *Op. cit.*, p. 62.

⁵⁷⁸ A.C.L. Davies, *Op. cit.*, pp. 48-54.

⁵⁷⁹ See *infra* 6.1.3, Judicial review in case of *ultra vires* contract.

⁵⁸⁰ C. Lewis, *Op. cit.*, p. 81.

and in some cases prevents the application of the private law. For instance, the Human Rights Act 1988, which could only be invoked in the European Court of Human Rights⁵⁸¹ was integrated into the English domestic law and it may constrain the contracting process.⁵⁸² Likewise, the English public procurement regulations are nowadays based on the European Union Public Sector Procurement Directive⁵⁸³ and the Utilities Procurement Directive^{584 585}. The Government Procurement Agreement (GPA) may also hinder the application of ordinary private law : “Like the EU rules, the GPA requires purchasers to avoid all discrimination against foreign firms, and insists on transparent procedures in order to secure this goal”.⁵⁸⁶

This leads to the conclusion that nowadays the procedures for the making of public contracts in England, more particularly the public procurement contracts, are basically regulated under the rules of public law, “this because the requirements of the detailed Union public procurement Directives meant that [England] had to change its traditional approach to public procurement regulation and implement a codified national procurement law which is part of public law”.⁵⁸⁷

The execution of public contracts in principle governed by private law

The execution or management of public contracts in England are in principle governed under the rules of private law: “[I]n England (...) the contract management phase is, broadly speaking, subject to the same contract law as the contracts of private parties”.⁵⁸⁸

⁵⁸¹ J. Lightman, “The civil justice system and legal profession – The challenges ahead the 6th Edward Bramley memorial Lecture”, University of Sheffield, 4 April 2003, p.5, page accessed on http://www.judiciary.gov.uk/publications_media/speeches/pre_2004

⁵⁸² M. Elliott, *Op. cit.*, p. 582; S.H. Bailey, *Op. cit.*, p. 62.

⁵⁸³ Directive 2004/18/EC, cited above.

⁵⁸⁴ Directive 2004/17/EC, cited above.

⁵⁸⁵ P. Craig & M. Trybus, “Monographies Nationales/National reports, Angleterre et Pays de Gales/England and Wales”, in R. Noguellou & U. Stelkens, *Op. cit.*, pp. 339-366, pp. 342-343.

⁵⁸⁶ A.C.L. Davies, *Op. cit.*, p. 53.

⁵⁸⁷ P. Craig & M. Trybus, *Loc. cit.*, p. 343.

⁵⁸⁸ *Idem*, p. 342, quoting S. Arrowsmith, *Op. cit.*, p. 9.

However, it is worth noting that if there is a direct conflict between public law and private law on a particular point, the Crown may make use of the “doctrine of executive necessity” to defend itself against an action for breach of contract.⁵⁸⁹ This aspect was raised in *Crown Lands Commissioners v. Page*,⁵⁹⁰ where Devlin L.J. stated:

“When the Crown, or any other person, is entrusted, whether by virtue of the prerogative or by statute with discretionary powers to be exercised for the public good, it does not, when making a contract in general terms undertake (and it may be that it could not even with the use of specific language validly undertake) to fetter itself in the use of those powers and in the exercise of its discretion.”⁵⁹¹

All these show how in England, despite the general application of private law rules, the public contracting is significantly subjected to the application of public law rules: “it can be seen that although the basic common law regime for government contracts is drawn from the ordinary private law of contract, it is overlaid in significant respects with the norms drawn from public law which reflect the government special features”.⁵⁹²

⁵⁸⁹ S.H. Bailey, *Op. cit.*, p. 505.

⁵⁹⁰ In the *Crown Lands Comrs v Page*, “[t]he Crown had, through the Commissioners, granted a lease of premises to Page. The question was whether it could later, through the Minister of Works, requisition those premises under statutory powers. Now where a private person grants a lease, a term will be implied into the lease that he must not act inconsistently with that lease so as to deprive the tenant of his ‘quiet enjoyment’ of the premises. Was such a term to be implied into Page’s lease so as to render the questioning invalid? The Court of Appeal said not” (*Crown Lands Comrs v Page*, , [1960] 2 QB 274 at 293); see also D. Foulkes, *Op. cit.*, p. 442).

⁵⁹¹ *Crown Lands Comrs v Page*, cited above; see also S.H. Bailey, *Op. cit.*, p. 505.

⁵⁹² *Idem*, p. 43.

Principles of law applied to public contracts

Ordinary principles of contract law applicable to public contracts

On the whole, it is clear that public contracts, and all disputes stemming from those contracts (for instance, as regards the interpretation of contractual terms, unexpected events which obstruct the completion of the contract, and breach of the contract), are governed by private law, the law of contracts. Therefore, “[d]isputes arising out of the terms of such contracts or alleged breaches will be settled by the ordinary principles of contract law.”⁵⁹³

Judicial review of ultra vires contracts

In English law, the question of *vires* – the power possessed by administrative authorities - is an important issue which must be considered by contracting authorities⁵⁹⁴ before they enter into contracts. A contract made by a public authority can be described as *intra vires* if it falls within the limits of the statutory powers. Thus, when a public authority exercises its power to enter into a contract, Davies tells us that it must take into account three factors; first, the likelihood of legal challenge; second, the likelihood that, in the event of legal challenge, a court will declare the contract invalid; and thirdly, the likelihood that compensation will have to be paid to the other contracting party in the event of a declaration of invalidity.⁵⁹⁵ Furthermore, an interested party which believes that a public authority has acted *ultra vires* by entering into a contract can institute proceedings for judicial review before the high court, which can potentially result in the contract being declared invalid.

In the context of public contracts, this principle has found recent judicial support in the *Crédit Suisse v. Allerdale Borough Council* decision.⁵⁹⁶ In that case,

⁵⁹³ C. Lewis, *Op. cit.*, p. 545.

⁵⁹⁴ The issue is to be addressed more particularly at local level, because their powers are statutory, to mean they are in principle derived from the law.

⁵⁹⁵ A.C.L. Davies, *Op. cit.*, pp. 111-112 & pp. 124-148.

⁵⁹⁶ *Crédit Suisse v Allerdale BC* [1997] QB 306, in <http://www.oup.com/uk/orc/bin/9780199277285/01student/ch15/03cases/>, accessed on July 22nd, 2010.

“[t]he Council had statutory power to provide recreational facilities. They tried to finance a leisure centre by creating time share accommodation and established a company to carry out the plan, giving a guarantee to *Crédit Suisse* to help finance the company. It all went wrong, the company went into liquidation, and *Crédit Suisse* claimed on the guarantee. The Court of Appeal held that the guarantee was *ultra vires*; the Council’s statutory power to develop recreation facilities did not affect statutory restrictions on its power to borrow.”⁵⁹⁷

Nowadays, the courts still have the power to nullify contracts which are *ultra vires*. Davies continues:

“At present, a court which finds that a contract is *ultra vires* must declare it to be void: *Crédit Suisse v Allerdale BC*.⁵⁹⁸ This is inevitable as the law stands at present - it is impossible for the courts to uphold a contract that the government had no power to conclude. It serves the important purpose of upholding the Rule of Law in particularly strict and unambiguous way, by sending out a strong signal that *ultra vires* contracts cannot be tolerated.”⁵⁹⁹

Reasonableness review of public decisions

Administrative decisions in the UK may also be quashed if they reach a certain threshold of unreasonableness. The leading case on this topic is the *Wednesbury* case. In that case, the Associated Provincial Picture Houses were granted a licence, by the defendant local authority, to operate a cinema on the condition that no children under 15 were admitted to the cinema on Sundays. The claimants sought a declaration that such a condition was unreasonable, and its imposition fell outside the local authority’s power. The court held that it could not overturn an administrative decision simply because it disagreed with it. To have the right to intervene, the court would

⁵⁹⁷ *Idem*.

⁵⁹⁸ *Idem*.

⁵⁹⁹ A.C.L. Davies, *Op. cit.*, pp. 106-107.

have to form the conclusion that the local authority, in making that decision, took into account factors that ought not to have been taken into account, or it failed to take into account factors that ought to have been taken into account, or the decision was so unreasonable that no reasonable authority would ever consider imposing it. The court held that the condition did not fall into any of these categories.⁶⁰⁰

When applied to public contracts, it is important to note that decisions made by public authorities may be quashed by the courts if they reach a certain threshold of unreasonableness. In this regard, there are two different points to be considered by the court before concluding that a contract is *Wednesbury* unreasonable: “Firstly, (...) the decision has to be ‘so absurd that no sensible person would ever dream that it lay within the power of the authority’.⁶⁰¹ Secondly, it is not enough for the decision to be unreasonable; it has to be so unreasonable that no reasonable authority could come to such a conclusion.”⁶⁰²

6.1.3 Private law enforcement of public contracts before courts

The system of courts in the United Kingdom is complex and elaborate, and the courts themselves have jurisdiction over matters ranging from general civil and criminal cases to the very specific matters involving family and administrative law.

There are two parallel hierarchies of courts. For criminal matters, at first instance one has the Magistrates’ Courts and the Crown Court (the latter sometimes hears appeals from the former). Appeals are heard in the High Court, and sometimes in the Criminal Division of the Court of Appeal. For civil matters, the tribunals and County Courts hear cases at first instance. The High Court and the Civil Division of the Court of Appeal hear civil appeals. Important cases heard in any of the courts of appeal, or even the High Court,

⁶⁰⁰ *Associated Provincial Picture houses v Wednesbury Corporation*, cited above.

⁶⁰¹ Words of Lord Greene in the *Wednesbury* case, quoted by L. Webley & H. Samuels, *Op. cit.*, p. 589.

⁶⁰² L. Webley & H. Samuels, *Op. cit.*, p. 589.

may, with permission, be appealed to the Supreme Court⁶⁰³ (formerly known as the House of Lords).⁶⁰⁴

However, it is worth noting that the English legal system has a species of administrative tribunals. They are not considered to be courts, but they act in the same manner:

“These tribunals are enmeshed in the administrative machinery of the state; they are part of an administrative scheme for which a minister is responsible to Parliament, and because the reasons for preferring them to the ordinary courts are administrative reasons. However, they remain independent, whenever they have to decide any case, no minister can give injunction or be held responsible for any tribunal’s decision. In reality, they are judicial rather than administrative, in the sense that the tribunal has to find facts and then apply legal rules to them impartially, without regard to executive policy.”⁶⁰⁵

From 2007, owing to the Tribunals, Courts and Enforcement Act (TCEA) 2007,⁶⁰⁶ the tribunals have been reorganized and consolidated in two main tribunals. Firstly, there is a First-tier tribunal which adjudicates cases on first level; this tribunal is divided into a number of chambers⁶⁰⁷ arranged according to different areas of administrative activity such as environment, health, immigration, freedom of information, education, pensions, etc.

⁶⁰³ The Supreme Court was established by Part 3 of the Constitutional Reform Act 2005 and started work on 1/10/2009 (Statutory Instruments 2009, n° 1604), in <http://www.legislation.gov.uk/ukxi/2009/1604>, accessed on 30/9/2010.

⁶⁰⁴ The Court Structure of Her Majesty's Courts Service (HMCS), in <http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm>, last visited on 30/09/2010.

⁶⁰⁵ S. W. Wade, *Administrative law*, Ninth edition, Oxford, University Press, 2004, pp. 909-910.

⁶⁰⁶ Tribunals, Courts and Enforcement Act, in <http://www.legislation.gov.uk/ukpga/2007/15/contents>, accessed on August 3rd, 2012; see also “Overview of the UK courts and tribunals system”, in http://www.findlaw.co.uk/law/dispute_resolution/courts_system/court_and_tribunals/500115.html, accessed on August 3rd, 2012.

⁶⁰⁷ Section 7 of the said Act.

Secondly, there exists an Upper Tribunal which receives appeals from the First-tier Tribunal.⁶⁰⁸

In the context of public contracts, the ordinary courts have jurisdiction over all matters concerning contract (and tort), regardless of whether the parties to those matters are public or private in nature. In the Crown Proceedings Act 1947, it provides (chapter 44, section 4), that “[w]here the Crown is subject to any liability (...), the law relating to indemnity and contribution shall be enforceable by or against the Crown in respect of the liability to which it is so subject as if the Crown were a private person of full age and capacity.”⁶⁰⁹

In English law, there is no reason to differentiate between public and private entities in the context of civil litigation, including litigation which determines the tortious or contractual liability of public institutions.⁶¹⁰ The picture painted thus far is that of a legal system that does not provide specific administrative courts for the settlement of disputes which arise from public contracts - the ordinary courts are deemed competent to deal with the matter. This is in sharp contrast to French law which has numerous administrative courts (the so-called “*jurisdictions administratives*”), which range from the lower administrative courts to the *Conseil d’Etat*. Thus in England, the ordinary courts have the same competence to decide cases involving contracts made by public bodies as they have if the contract was made by a private body.

⁶⁰⁸ Section 11 of the said Act.

⁶⁰⁹ Crown Proceedings Act 1947, in <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1140084>, accessed on October 13th, 2010.

⁶¹⁰ Interview with M. Trybus, Professor of European Law and Policy, University of Birmingham – Law School, conducted at Stockholm on May 27th, 2010, at a conference on public contracts in the European Union, organized by the University of Sodertorn.

6.2 Legality of public contracts in The Netherlands: Interaction of private and public law

While English law extended the application of private law to public contracts, in the Netherlands such contracts are also governed by private law, but sometimes in interaction with public law rules.

6.2.1 Power of administrative authorities to make acts

Day by day, the administration (central and local) runs public affairs by making multiple decisions and acting in various ways so as to implement the administration's policies. It is important to analyse how the administration does this on a legal level. Before we look at how the administration acts, it is important to highlight an important feature of the Dutch administration for those unfamiliar with Dutch law.

The administration in the Netherlands has two 'faces'. Firstly, when it performs a public act, it has characteristics of a public or administrative authority.⁶¹¹ For instance, if the Municipality of Utrecht (part of the administration) were to order the use of teargas against violent demonstrators (a public act), it acts as a public authority and public law applies to its actions. Secondly, when the administration performs private acts (such as the creation of contracts) it has the characteristics of an ordinary private legal entity. For example, if the Municipality of Utrecht were to enter into a contract for road repair, it acts as an ordinary legal entity (usually through the mayor). Therefore, if the mayor (on behalf of the Municipality) signs a contract for road repair, that act is a mere private act, and private law applies to the contract.

Power of the administrative authorities to perform public acts

The administration may perform unilateral acts, where it makes one-sided determinations in the public interest. The question to discuss here is whether or not the administrative authority is allowed to make a public act, with or without any legal basis which grants it the power to make such an act.

⁶¹¹ Under the provisions of art. 1: 1 (1(a)) of the GALA, « 'administrative authority' means an organ of a legal entity which has been established under public law ».

If we consider the legal framework in place in The Netherlands, it is clear that if the administration wishes to perform a particular public act, a legal basis granting the power to do so is necessary,⁶¹² which is a reflection of the principle of legality. Therefore, the principle of legality does not only require citizens to abide by the law, but also requires the administration to have a legal basis for its actions. However, even if that principle is clear, it raises another underlying question - namely, what is the true meaning of the phrase 'legal basis'. *Prima facie*, we can take it to mean a written law or norm which authorises the act or decision, as articulated by Adriaanse: "Normally, this power will follow from a written legal basis in national public law".⁶¹³

However, if we look at the *jurisprudentie* (case law), it becomes clear that the administration's power to act may also be derived from *unwritten* norms of public law: "It has been recognised in the jurisprudence that, in exceptional circumstances, public powers could also be derived from unwritten general principles of public law".⁶¹⁴ Which unwritten public-law norms may be a valid legal basis? It is clear that the sphere of application is simply incidental because it was narrowed by the enactment of the General Administrative Law Act (GALA)⁶¹⁵ and the subsequent codifications in administrative matters.

There exist certain cases recognised unwritten general principles of public law, which were sufficient to constitute a legal basis for administrative action, and which were later codified in the GALA. For instance, before it was included in the GALA, the legal basis of the power to grant subsidies was

⁶¹² T. Barkhuysen, W. Ouden & Y.E. Schuurmans, *The law on administrative procedures in the Netherlands*, NALL -Netherlands Administrative Law Library, 2009, p.1, in <http://www.nall.nl/tijdschrift/nall/2012/06/NALL-D-12-00004>.

⁶¹³ P.C. Adriaanse, "Application of EU State Aid Law in the Netherlands", in P.F., Nemitz (Ed.), *The Effective Application of EU State Aid Procedures. The Role of National Law and Practice* (International Competition Law Series), 29, Alphen aan den Rijn: Kluwer Law International, 2007, pp. 291-316, p. 297.

⁶¹⁴ *Idem*, p. 297.

⁶¹⁵ General Administrative Law Act of the Netherlands (GALA), cited above.

unwritten.⁶¹⁶ Now, Article 4:23(1) of the GALA provides that “an administrative authority may provide a subsidy pursuant to a provision of law that specifies the activities for which a subsidy may be provided”.. Another example is the power to impose administrative sanctions.⁶¹⁷ Before the enactment of the GALA, this was governed by unwritten norms, but now Article 5:4(1) provides that the “power to impose an administrative sanction exists only if it has been conferred by or pursuant to statute”. It is clear that nowadays there are very few examples of administrative acts which have unwritten norms as their legal basis. However, some remain, such as the power to act to maintain water and roads connections.⁶¹⁸

On the other hand, the administration may act bilaterally, by entering into a contract or other form of agreement. An important question which arises from consideration of such acts is whether the administration can bind itself by contract, if it had no legal basis on which to enter into the contract.

The principle of legality is applied slightly differently in this context. When it comes to private acts, any natural or public entity, endowed with legal personality, is at liberty to act and needs no legal basis for doing so. This is an articulation of the principle of autonomy, and, more particularly, the principle of freedom of contract. The legal personality of public entities is recognised in article 1(1) of the Dutch Civil Code (Book 2), which states that “[t]he State, the provinces, the municipalities, the water corporations and all bodies which under the Constitution have the power to issue regulations possess legal personality”.⁶¹⁹ Consequently, these entities have the power to enter into private law agreements, such as contracts.

⁶¹⁶ Interview with O. Jansen, Institute of Constitutional and Administrative law of Utrecht University, conducted on 12/11/2006.

⁶¹⁷ ‘Administrative sanction’ means an obligation imposed or an entitlement withheld by an administrative authority on account of a violation (art. 5: 2(1)(a) of the GALA).

'administrative sanction' means an obligation imposed or an entitlement withheld by an administrative authority on account of a violation;

⁶¹⁸ Interview with O. Jansen, cited above.

⁶¹⁹ Art. 1(1) of Dutch Civil Code - Book 2, in H. Warendorf, R. Thomas & I. Curry-Summer, *The Civil Code of the Netherlands*, Alphen aan den Rijn, Kluwer Law International, 2009.

Power of the private authorities to perform public acts

When looking at the legal basis of any public act, it is important to ensure that the relevant actor is competent to act publicly. Whilst it is clear that public bodies are competent in this way, it is not at all clear that private entities can do so as well.

However, it is not necessary that a legal actor be an administrative entity in order to act publicly. Some of the main functions of the administrative authorities are the passing of orders and the making of public decisions. Traditionally, these acts could not be performed by private entities, because of the traditional divide between public and private law. Since private entities were not supposed to act in the public interest, they were not given public law powers to act. Therefore for historical reasons, public power was only vested in administrative authorities.⁶²⁰ However, it is nowadays possible to vest private entities with public power for performance of acts of a public nature while acting in public interest.⁶²¹

The question cannot be answered by just differentiating public law from private law, but rather by rethinking the decline of the borderline between public law and private law. In reality, the borderline between public law and private law tends to be permeable in the Netherlands, and private entities are sometimes given the power to perform public acts. For instance, public transport companies were traditionally controlled by the government, and were supposed to act in the public interest. Nowadays, private companies have assumed responsibility for public transport, an activity which is in public interest. If the company decides to change the departure schedule at the station, which will affect all the people using public transport in order to get to work, is that decision purely private? It is arguable that such a decision is in fact public in nature, because of its extensive effect on the general public, as it is the case for any order from a public body which may also by way of public order change the scheduling of departures.

⁶²⁰ Interview with O. Jansen, cited above.

⁶²¹ Article 1.1(b) of the GALA.

Another good example is the allocation of subsidies. Whilst this activity was traditionally performed by the government, nowadays private foundations have taken over much of the responsibility for subsidy distribution.⁶²² This procedure has become common, and now private entities have assumed responsibility for several public services which were traditionally within the competence of the administration. Thus, companies have been granted the power to issue various licenses or permits, such as the car licenses or stay permits (issued to non residents). However, private entities are only granted the power to act publicly for a particular purpose, and can only exercise that power for the furtherance of the purpose. Accordingly, a private entity has no competence to act publicly during the course of its ordinary business activities.⁶²³

What is the justification for granting such powers to private entities? Generally, the government wishes to perform its activities more effectively and efficiently. Many believe that the administration moves slowly when implementing its acts (mostly because of the excessive bureaucracy and procedures which are involved in administrative decisions), which hinders the attainment of an effective outcome. Furthermore, many also believe that a well-trained and experienced private entity may perform better than an old, established public entity, which works on a routine basis and in which inefficiencies may have become ingrained.⁶²⁴

Power of the administrative authorities to make private acts

In the Netherlands, the first explanation for the administration's power to act privately may be found in the law. Since all public decisions must have a legal basis, all private decisions made by the administration must also have their basis in law. In other words, an administrative authority can only act privately if a public regulation empowers it to do so on behalf of the legal entity.⁶²⁵ In cases where no such empowering provision can be found, the courts

⁶²² Article 1.1(b) of the GALA.

⁶²³ Interview with O. Jansen, cited above.

⁶²⁴ See *infra*, 8.2, Principles of good governance applied to all public contracts.

⁶²⁵ O. Jansen, "Administration by negotiation in the Netherlands", p. 17, in http://igitur-archive.library.uu.nl/law/2005-0907-200651/article_print21.html, last visited on October 12th, 2010)

developed a doctrine known as the ‘thwarting-doctrine’ (*doorkruisingsleer*). According to that doctrine, “the use of private law powers by governments will only be allowed as long as that use does not thwart an existing public regulation in an unacceptable way”.⁶²⁶

Historically, much attention was paid to the ‘two-ways’ doctrine, which stated that the administration could choose between two different ways – the private law way or the public law way. It was easy for the public institutions, when confronted with a public act, to choose public law, and if there was a case of private act, to choose the private law. However, in the recent decision in the *Windmill Case*,⁶²⁷ the Supreme Court re-examined the two-ways doctrine and decided to apply a new doctrine, the ‘thwarting-doctrine’. This doctrine limits the choice available to the administration – it may only choose the private law way if this does not frustrate the application of public law.

Use of the thwarting doctrine implies that the open way doctrine is no longer good law. The administration must inquire whether if, by acting privately, this would thwart its obligations under public law; and if it concludes that this would be the case, the administration must act publicly. Thus, “[v]oluntary agreements may not, just not be in conflict with the law, but may not also thwart public law regulatory measures in an unacceptable way”⁶²⁸.

Thus if an act of the administration, which has not been expressly prohibited by legislation, falls to be reviewed, the reviewing court must look at the case from three angles, as indicated by the Supreme Court in the *Windmill* case. Firstly, it is necessary to consider if from the goal of the private act itself,

⁶²⁶ P.C. Adriaanse, *Op. cit.*, p. 297.

⁶²⁷ *Windmill*, a Dutch owner of a factory that produced fertilizers containing phosphates, was under public law granted permission to discharge a certain amount of gypsum into a ship canal (the *Nieuwe Waterweg*), which is the property of the State. The latter refused to grant permission, basing on private law grounds, that *Windmill* had to pay a determined annual fee in order to get such permission. There arose a dispute, on to what basis the state was allowed to oppose a permission granted under public law. In its ruling, the Dutch Supreme Court logically decided that the state, when using the private law approach, should not in an unacceptable way thwart a public law regulatory measure (*Dutch State v. Windmill*, HR 26 January, AB 1990, 408; NJ 1991, 383, in O. Jansen, *Loc. cit.*, p. 17.

⁶²⁸ O. Jansen, *Loc. cit.*, p. 17.

public law will not be frustrated by applying private law to it, and then the public law shall prevail if it was so. Secondly, to examine if the act is more directed to the legal protection of the citizens than the protection of private interest, in which case public law shall also prevail. In the third place, it is important to stick to the results of choosing the private law way; if similarly the public law way and the private law way can achieve the same result, the public law approach shall prevail.⁶²⁹ These three criteria will give the judge an easy way of deciding whether public law applies or not.

6.2.2 Legal rules and principles applicable to public contracts

In principle in the Netherlands, public contracts are governed under the rules and principles of private law. As Gerdy Jurgens and Frank van Ommeren put it, “[t]here is, for example, an extensive body of statutory administrative law which is very distinct from private law, [c]uriously, however, the law on governmental contracts and public authority liability is historically rooted in private law”.⁶³⁰ Nevertheless, as explained below, this application does not preclude the application to public contracts, of private law in interaction with public law rules.

Private and public law rules applied in interaction

In the Netherlands, it is worth noting that no rivalry exists between private and public law. Rather, both fields are coming together. Currently, there is a general opinion that public law and private law are gradually merging in their application to acts of the administration. This opinion has been voiced by M. Scheltema and M.W. Scheltema, in their article on “The relationship between public law and private law (*De verhouding tussen publiek – en privaatrecht*)”.⁶³¹ They highlight two fundamental distinctions between public

⁶²⁹ *Windmill* case, cited by O. Jansen, *Loc. cit.*, p. 17.

⁶³⁰ G. Jurgens and F van Ommeren, “The public-private divide in English and Dutch law: a multifunctional and context-dependant divide”, *Cambridge Law Journal*, 71(1), March 2012, pp. 172–199, p. 177.

⁶³¹ M. Scheltema & M.W. Scheltema, “The relationship between public law and private law”, *Nederlands Juristenblad*, 15 blz 767-822, jaargang 79, 9 april 2004, pp. 768-776; in the same sense, Gerdy Jurgens and Frank van Ommeren, in their article on “The public-private divide in English and Dutch law: a multifunctional and context-dependant divide”, took the position of distancing themselves from a strict separation between public and private law: “We

and private law, before demonstrating how close these two fields of law are to each other.

Firstly, they show that private law codes and public law codes have been enacted for different legal relations (public law for the relations with the public institutions and private law for the relations with private institutions). It is then easy to distinguish between public and private law by distinguishing between the institutions which have the authority to apply those types of law. For that reason, private law and public law as such are independent fields of law. In this line, another way to distinguish between public and private entities is to look at the instruments which they use to implement their legal acts. Public institutions make decisions, whilst private institutions use contracts.

Secondly, one can distinguish between the applicable rules to acts of public institutions and acts of the private institutions. In principle, as public institutions have a public character, they should apply public law to their public acts and private law to their private acts, whereas the private institutions are supposed to apply private law to the private acts they make, and of course public law if they are granted the power to make public acts. Hence, public institutions can in principle apply public, whilst private institutions can in principle apply private law.

However, for a long time in the Netherlands, it has been desirable that both institutions apply the two fields of law in interaction. To that direction, there has been a consensus that, when it comes to the implementation of the private acts, there be a combination of application of both norms, respectively the public institutions in applying public law norms and private law norms, and the private institutions in applying private law norms and public law norms. However, this combination of application must be permitted by law.

Under private law, art 3:14 of the Dutch Civil Code shows the extent to which private law rules must be realistically applied, within the limits of public law,

distance ourselves from an approach in which the public-private divide is considered to be a dichotomy; a divide in which the labels “public” and “private” are exclusive or strictly separated” (G. Jurgens and F van Ommeren, *Loc. cit.*, p. 173).

grounded on the unconditional need to safeguard public policy and the public interest. This article is groundbreaking, as it states that “[a] right which a person has pursuant to private law may not be exercised contrary to the written or unwritten rules of public law”.⁶³² We may then infer that the rule set by the civil code is that for such acts, private law applies, but also public law applies additionally.

Under public law, the reason why the distinction between public law and private law is of diminishing importance in the Netherlands is that it has been generally accepted that public law is suitable for application in private cases. The General Administrative Law Act minimizes the gap between public law and private law, when it states under the provisions of art. 3:1(2), that “[t]he provisions of divisions 3.2 to 3.4 apply *mutatis mutandis* to acts of administrative authorities other than decisions to the extent the nature of the act permits”.⁶³³ This article demonstrates the dynamic interaction between public and private law. When a public body performs an act (other than an order), including acts which are private in nature (such as entering into a contract), public law will be taken into account so that the application of private law does not frustrate public law. It is a clear principle in the GALA that public law must be applied to such acts, as well as private law.

This dynamic interaction deserves more attention. Firstly, in the field of private law, both private and public law rules are applied. In a sense, public law could be considered to be a part of private law, as it contains different rules and may be used in the private law sphere: “private law has considered public law as a field of law which does not hamper its application”⁶³⁴. Secondly, in the field of public law, both public and private law rules apply. This was introduced to compensate for the application of public law rules in the field of private law. In short, neither type of law applies alone, as both fields of law influence each another. Also (we will look at this in more detail below), public courts and civil courts apply public and private law in a flexible manner, which means that the distinction between these two types of law is no longer of crucial importance.

⁶³² Art. 3:14 of the Dutch Civil Code (Book 3), cited above.

⁶³³ Art. 3:1(2) of the Dutch General Administrative Law Act, cited above.

⁶³⁴ Interview with E. Hondius, Professor of Private law, Utrecht University, conducted on December 6th, 2007 at Utrecht.

In a nutshell, M. Scheltema and M.W. Scheltema advocate a mixed approach to the application of public and private law to the acts of public institutions. They show that in the Netherlands, to a certain extent, application of both private and public law is relevant to acts of the administration (including public contracts).

Restrictions on the application of private law

Apart from the ordinary restrictions of private law, the ‘freedom to act’ rule exercised by the administrative authorities has other restrictions, particularly because of the prevalence of the public law over the private law.

Restrictions during the making of public contracts phase

Firstly, private law requires that contracts be concluded and performed reasonably and fairly (i.e. art. 6:2, 6:248, and 6:258 of the Dutch Civil Code, quoted below).⁶³⁵ This imposes restrictions on the ability of the administration to perform private acts where, for example, a contract was unjustly or unfairly negotiated or concluded. In such cases, a judge may cancel such a contract, if he concludes that the negotiation or conclusion was unreasonable or unfair.⁶³⁶

Secondly, public law requires that the administrative authorities be expressly vested with statutory powers to enter into contracts.⁶³⁷ As J. Emaus and T. Zwart put it, “it appears that the public law approach has won the day. (...) administrative authorities are only allowed to enter into contracts if there is express statutory authorisation for them to do so”.⁶³⁸ Furthermore, in the field of public procurement law (like in the English legal system, as explained above), the administrative authorities are required to abide by the European

⁶³⁵ Art. 6:2, 6:248 & 6:258 of the Dutch Civil Code (Book 6) cited above.

⁶³⁶ See *infra*, 6.2.3, “requirement of reasonableness and fairness of private law norms.

⁶³⁷ See *supra* T. Barkhuysen, W. Ouden & Y.E. Schuurmans, *Op. cit.*, p. 1.

⁶³⁸ J. Emaus, “National reports, Pays-Bas/Netherlands”, in R. Noguellou & U. Stelkens (eds.), *Op. cit.*, pp. 741-757, pp. 744-745.

Union directives⁶³⁹ in the area of public utilities contracts and contracts for public works, public supply and public service.⁶⁴⁰

Restrictions during the execution of public contracts phase

Private law cannot be applied in a way which is contrary to rules of public law. Article 3:14 of the Dutch Civil Code states that “[a] right which a person has pursuant to private law may not be exercised contrary to the written and unwritten rules of public law”.⁶⁴¹ Therefore, a judge cannot enforce a private law right if this would constitute an infringement of the existing rules of public law. This has been clarified through use of the thwarting-doctrine, which restricts the ability of administrative authorities to utilise private law powers where that use could undermine the efficacy of an existing public law regulation.⁶⁴²

Principles of law applied to public contracts

The principles of law which apply to public contracts in the Netherlands stem from both legislation and case law. However, formally, private law rules applicable to public contracts are umbrella norms, which have to be applied within the ambit of the principles of reasonableness and fairness enshrined in articles 6:2, 6:248 and 6:258 of the Dutch Civil Code (quoted below). These principles have not yet been developed in a comprehensive manner in the code, but have been unpacked by the judges using case law. However, public law has developed a coherent system of principles of proper administration, not only in the case law, but also in legislation.

Requirement of reasonableness and fairness of private law norms

When applying private law to public contracts, it must be understood that private law requires public bodies to act reasonably and fairly. The provisions referring to the principles of reasonableness and fairness can be found in

⁶³⁹ See Directive 2004/17/EC and Directive 2004/18/EC, cited above.

⁶⁴⁰ J. Emaus & T. Zwart, *Op. cit.*, p. 744-745.

⁶⁴¹ Art. 3:14 of the Dutch Civil Code, cited above.

⁶⁴² See *supra*, 6.2.2, “the thwarting-doctrine”.

several places in the Civil Code, especially (as regards contracts) in article 6:2, which states that:

“1. An obligee and obligor must, as between themselves, act in accordance with the requirements of reasonableness and fairness.

2. A rule binding upon them by virtue of law, usage or a juridical act does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.”

This article is complemented by art. 6:248, which provides:

“1. A contract not only has the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, apply by virtue of the law, usage or the requirements of reasonableness and fairness.

2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to standards of reasonableness and fairness.”

Furthermore, article 6:258(1) provides that;

“[u]pon the demand of one of the parties, the judge may modify the effects of a contract or it may set aside, in whole or in part on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in an unmodified form. (...)”

The Dutch Civil Code did not determine the precise meaning of the words ‘reasonableness’ and ‘fairness’ so as to allow the court to interpret them in accordance with accepted principles of law, in the case-law and academic literature, and various other factors: “In determining what reasonableness and fairness require, reference must be made to generally accepted principles of law, to current juridical views in the Netherlands, and to particular societal and private interests involved”.⁶⁴³

⁶⁴³ Art. 3: 12 of the Dutch Civil Code.

However, from a comparative perspective, it is possible to clarify to a certain extent the meaning of the words ‘reasonableness’ and ‘fairness’ through the use of examples. Starting with fairness or ‘equity’, which means ‘impartiality and righteousness in the making of a decision’, it is clear that a court may nullify a public procurement contract if the choice of the contractor was unfair or impartial. Reasonableness is usually referred to negatively, and the courts have frequently applied a test of ‘unreasonableness’.⁶⁴⁴ According to that test, the courts can quash any decision (for example, in the context of public contracts, the decision to unilaterally modify or repeal a contract) which no reasonable body would have made. Therefore, “the concept of reasonableness and fairness can be relied upon to supplement the agreement, but it can also put limits on what the parties may include in the contract”.⁶⁴⁵

Requirement of compatibility with the general principles of proper administration

In the Netherlands, when a public body enters into a contract they do not have any specific superior position over the other contracting party. However, they must safeguard the general interest. This means that;

“[i]n principle, the general rules of contract also apply to contracts made with the administration (this term is used to indicate both the central administration and other public authorities (...)), but the fact that the administration exercises public tasks and looks after the general interest bears on the position of the administration as a contracting party. Sometimes, as a consequence of this special position, the administration enjoys more freedom, sometimes less.”⁶⁴⁶

The law of contract, especially the law concerning public contracts, is fertile ground for the implementation of the general principles of proper administration:

⁶⁴⁴ See supra, 6.1.3, Principle of reasonableness under private law, in English law.

⁶⁴⁵ J. Emaus & T. Zwart, *Loc. cit.*, p. 749.

⁶⁴⁶ A.S. Hartkamp & M.M.M. Tillema, *Contract Law in the Netherlands*, The Hague, Kluwer, 1995.p. 214.

“From 1915, judicial review of other administrative decisions was gradually developed in the case-law, the courts accepting to review administrative decisions for illegality or for breach of civil law principles of tortious liability. Since 1988, ordinary courts also measure the behaviour of the administration by the yardstick of its compatibility with the general principles of proper administration, not simply for conformity to the strict letter of statute or regulation.”⁶⁴⁷

As a consequence (and as noted by Hartkamp & Tillema);

“When performing juridical acts (either of a public law or of a private nature), the administration must take into account the ‘general principles of proper administration’ (...) which include among other things such concepts as equality, legal security and fair play, the reliance principle, the duty to motivate a decision and the prohibition on ‘*détournement de pouvoir*’”.⁶⁴⁸

These principles are interrelated, and their purpose is to ensure that an administrative authority makes correct decisions which can be justified, based on lawful grounds. If the administration complies with these principles, each party’s obligations can be more readily established. Failure to comply with these principles renders a decision vulnerable to a judicial finding that it is null and void.

The first important principle is equality. It is codified in the Dutch Constitution under the provisions of Article 1, which states: “All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted.”⁶⁴⁹

⁶⁴⁷ *Idem*, p. 214; see also L. Neville Brown, *op. cit.*, pp. 270-272.

⁶⁴⁸ A.S. Hartkamp & M.M.M. Tillema, *Op. cit.*, p. 214.

⁶⁴⁹ Art. 1 of the Constitution of the Kingdom of the Netherlands, accessed in <http://www.legislationline.org/documents/section/constitutions/country/12>, visited on November 25th, 2010.

Obviously this principle goes together with the principle of prohibition of arbitrariness and prohibition of disproportionality. The administrative authority, in making a decision as to which contracting party to employ, or whether to modify or repeal a contract, must carefully take into account all relevant considerations and the interests of any party likely to be affected by the decision, so that no party is put to an unreasonable disadvantage. Correlatively, if the other contracting party is at fault, any measures taken by the administration should be proportional to the gravity of the fault committed.⁶⁵⁰

Public law applies to the procedure by which a contracting party is selected. The administrative body is accordingly under a duty to implement clear and adequate procedures, to facilitate decision making as well as the creation of a participatory process (allowing interested parties to make representations during the decision-making).

As a consequence, any decision made in the context of the public contracts process should have a legal basis, or, if not, it should be appropriately justified. Public contracts are, in most cases, hedged around with measures designed to guarantee that any decision taken complies with the relevant legal requirements, especially when there are many competitors or bidders for a particular contract, or where a contract is modified or cancelled. In any case, any decision made should be properly substantiated to the satisfaction of the contracting party or all the participants⁶⁵¹:

“The principle of justification means that administrative orders should be explained and substantiated. (...) People should be enabled by the administration to understand what they lawfully are obliged or permitted to do or to omit, and what they are obliged or permitted not to do or not to omit pursuant to an administrative order. Therefore, the principle of justification is related to the

⁶⁵⁰ Art. 3:4(2) of the GALA (cited above) provides: “The adverse consequences of an order for one or more interested parties may not be disproportionate to the purposes to be served by the order”.

⁶⁵¹ Art. 3.2, 5:24(2) & 7:26(1) of the GALA, cited above.

gppa [general principles of proper administration] of ‘legal certainty’.”⁶⁵²

The other specific principle relevant in this context demands protection of the legitimate expectations of contracting parties. When a public entity enters into an executory contract with a private entity, each party is entitled to expect that the other will fulfil their obligations under the contract. For instance, the administration can expect the construction of a building or a road; the contractor can expect remuneration for work done. The creation of such legitimate expectations means that neither party is entitled to arbitrarily vary or terminate that contract (in line with the principle of prohibition of arbitrariness) in a unilateral fashion. The administrative authority cannot misuse its public power to the detriment of the other contracting party, because if “(...) decisions create legitimate expectations in the minds of individuals they cannot be arbitrarily amended or repealed later on.”⁶⁵³

6.2.3 Jurisdiction of courts over public contracts litigation

In the Netherlands, a distinction has been established between the ordinary courts (which deal with private and criminal cases), and the administrative courts (which deal with administrative cases).

The Judiciary (Organisation) Act of 1827 (as amended), has established three types of ordinary courts. The first instance court is the *Rechtbank* (District Court); appeals from this court are heard before the *Gerechtshof* (Court of Appeal); and the *Hoge Raad* sits as a Supreme Court to hear appeals from the *Gerechtshof* which concern the legal (not factual) merits of a case.⁶⁵⁴

Before 1994, several options were given the aggrieved party in seeking relief from a wrongful administrative action:

⁶⁵² Ph.M. Langbroek, *Loc. cit.*, pp. 98.

⁶⁵³ G. ten Berge & R. Widdershoven, *Loc. cit.*, p. 421.

⁶⁵⁴ See “The structure of the judicial system” [in the Netherlands], in <http://www.rechtspraak.nl/Information+in+English/English.htm>, last visited on October 11th, 2010; see also “The court system in the Netherlands”, in <http://www.lassche.nl/en/judicial.html>, last visited on November 23rd, 2010.

- The Netherlands used to have administrative courts which could proceed to judicial review. These courts were not organised in a hierarchical structure, rather each of them was standing separately from the others: “there were half a dozen or more administrative courts (...), each sovereign in its own sphere”,⁶⁵⁵ such as social security tribunals, the public service tribunals, the administrative court for trade and industry.⁶⁵⁶
- The ordinary courts could also exercise jurisdiction in some administrative law cases, such as tax cases, assigned to the districts courts, courts of appeal and the Supreme Court,⁶⁵⁷
- The aggrieved party could seek administrative review of the decision, which could culminate in an appeal before the Crown.⁶⁵⁸

Therefore, in most cases, if one was dissatisfied with administrative action, one could appeal to administrative courts, ordinary courts or the Crown for relief.

However in *Benthem v. the Netherlands*,⁶⁵⁹ the European Court of Human Rights held that the Crown is not an independent judiciary within the

⁶⁵⁵ See Introduction par. 5 of the GALA, accessed in http://www.juradmin.eu/colloquia/1998/netherlands_annex.pdf, visited on November 25th, 2010.

⁶⁵⁶ J. Kleijne, *Administrative justice in Europe*, Report for The Netherlands, Research Department of the Council of State of the Netherlands, May 2009, pp. 3-4, accessed in http://www.juradmin.eu/en/eurtour/i/countries/netherlands/netherlands_en.pdf, last visited on October 24th, 2012.

⁶⁵⁷ See Introduction par. 5 of the GALA, accessed in http://www.juradmin.eu/colloquia/1998/netherlands_annex.pdf, visited on November 25th, 2010.

⁶⁵⁸ Administrative Decisions (Review) Act 1976, as amended; see also J. Kleijne, *Op. cit.*, p. 3 & T. Barkhuysen, W. Ouden & Y.E. Schuurmans, *Op. cit.*, p. 2.

⁶⁵⁹ Mr Benthem, a Dutch national, was in 1976 granted a licence to bring into operation an installation for the delivery of liquid petroleum gas to motor vehicles. However, with reference to the Dutch Nuisance Act 1952, the licence issued by the municipality was only provisional until the time when the Crown would confirm or quash it, consideration made of the dangers involved in the operation, in particular of storage and delivery of such products. As some neighbours were not contented with its proximity to their homes, with all risk of fire and explosion, an appeal was lodged to the Crown. The latter quashed the licence, on grounds that the risk could not be eliminated. Therefore the municipality in 1979 ordered Mr Benthem to cease operating his installation. His appeal to the Crown was in 1980 rejected, but the problem was that the decree by the Crown could not be amenable for judicial review before an impartial tribunal. This prompted Mr Benthem to introduce a petition before the

meaning of Article 6 of the European Convention on Human Rights. The Government recognised that Crown was no longer an appropriate reviewing body for administrative action, and an administrative court was established, as part of the Council of State. Thus, the administrative courts system was made up of the several separate administrative courts which could hear cases at first instance, and the Administrative Court of the Council of State which could hear appeals from these courts.

The most important change to the structure of courts in the Netherlands occurred in 1994 with the integration of all administrative courts to deal with administrative law matters in the regular organisation of courts. With the enactment of the GALA in 1994, “[t]he most significant change is that an integration of administrative courts with the regular court organisation has taken place”.⁶⁶⁰ Then, administrative law courts were established at district level (GALA, art. 8:1(1)), which could help in the interpretation and harmonisation of the procedures prescribed by the GALA.

These administrative courts later became broader, on both local and central level, with the emergence of specialised administrative courts. There are few specialised administrative courts, competent to pass judgment on specific matters, i.e. security and civil servants affairs, economic affairs, and Tax law. The Central Court of appeal (based in Utrecht) deals with cases in relation to social security and civil servants affairs, the Board of appeal receives cases in economic affairs (based in the Hague),⁶⁶¹ and the district court has

European Human Rights Court, claiming that the dispute in question was about civil and obligations, and that, contrary to the requirements of article 6 par. 1 of the European Convention on Human Rights, which provides that “[i]n the determination of his civil and obligations ..., everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”, his case had not been heard by an independent and impartial tribunal. Even if the Dutch government claimed that the Crown acted like a court, the Court in 1985 found that the Crown’s decision - which could not be appealed -, was in violation of art. 6 of the Convention (*Benthem v. The Netherlands*, European Court of Human Rights, Strasbourg, 23 October 1985, Application 8848/80, accessed in <http://www.juridischeuitspraken.nl/19851023EHRMBenthem.pdf>, last visited on October 11th, 2010).

⁶⁶⁰ J. Chorus, P. Gerver & E. Hondius (eds.), *Op. cit.*, p. 362.

⁶⁶¹ “The court system in the Netherlands”, in <http://www.lassche.nl/en/judicial.html>, last visited on November 23rd, 2010.

jurisdiction over tax law matters, of which the cases may be appealed before the Regional Court, and the supreme court for appeal in cassation.

If we examine the jurisdiction of administrative courts, it is important to distinguish between the three different ways in which the administration can act:

- Firstly, administrative acts may be purely public - this category is made up of administrative decisions which have consequences in public law ;
- Secondly, administrative acts may be purely private – such acts normally originate from the administration’s private interactions (such as the creation of a contract, or how it deals with property which it owns);
- Finally, the administration may perform factual acts, which *prima facie* do not have any legal consequences (such as cleaning public roads) but which may result in tortious liability.

If an individual disputes the validity of a public decision, the administrative courts have jurisdiction at first instance in the district Court (administrative chamber), and if there is an appeal this is heard before the Administrative Court of Appeal (part of the Council of State). If there is any claim in relation to some questions in civil law and debts of the government, as provided for in Article 112 (1) of the Constitution, “[t]he adjudication of disputes involving rights under civil law and debts shall be the responsibility of the judiciary”.⁶⁶² This means that any litigation which arises from the administration’s purely private acts (such as contracts) or factual acts (such as tortious liability) is heard before the civil courts. Thus, it should be noted that on occasion the Civil Court functions as an administrative court, when it determines the civil law rights resulting from the acts the administration.

In summary, we can see a clear distinction between jurisdiction over decisions or orders of the administration, which fall within the jurisdiction of the administrative courts, and jurisdiction to determine the civil (private law) rights of administrative bodies, such as their ownership rights and contractual and tortious liability, which fall within the jurisdiction of the civil courts. However, although the ordinary courts are, in theory, competent to hear all cases in which civil law issues arise, sometimes certain rights under civil law have a strongly administrative character (such as those rights which arise in

⁶⁶² Art. 112 (1) of the Constitution of the Kingdom of the Netherlands, cited above.

the context of social security and the employment of civil servants), and cases which concern these rights must be heard by a specialised chamber, the administrative chamber of the District Court. A large volume of claims are directed to the ordinary courts, and the rest to the administrative courts.

Jurisdiction of ordinary courts over public contracts litigation

When individuals take legal action against public bodies, they must go through a clearly defined procedure. Firstly they must lodge a complaint with the relevant administrative authority. The authority is then duty bound to respond to the complaint, whether by correcting any mistake made, revising a decision or stating that there are no grounds for complaint. If the individual is not satisfied with the response, they may appeal to the administrative law section of the district court.⁶⁶³ This procedure is valid for all decisions made by administrative authorities, except in areas where jurisdiction was devolved to the ordinary courts (such as matters of contractual and tortious liability).⁶⁶⁴ The ordinary courts have jurisdiction to decide all cases arising from contracts, regardless of whether the parties are public or private institutions.

Historically, the ordinary civil courts in the Netherlands have dealt with administrative matters (as asserted by L. Neville Brown). For example, the Dutch constitution of 1815 provided that the ordinary courts had jurisdiction to decide all disputes between state entities and citizens concerning property and civil law rights.⁶⁶⁵ However, this practice was reversed because the administration discourages complaints before the ordinary courts, preferring instead to utilise dispute resolution methods internal to the administration. Disputes were then decided by the administration itself (the minister was given power to decide as a judge, and was called *Ministre-juge*), with an option of appeal to the Crown if the claimant was not satisfied with the decision.⁶⁶⁶

⁶⁶³“Districts courts”, in <http://www.rechtspraak.nl/Information+in+English/Judicial+system/District+Courts.htm>, last visited on November 12th, 2010.

⁶⁶⁴ Art. 112 (1) of the Constitution of the Kingdom of the Netherlands, cited above.

⁶⁶⁵ See L. Neville Brown, *op. cit.*, pp. 270-272.

⁶⁶⁶ *Idem*, pp. 270-272.

From 1915, the ordinary courts were given competence to judicially review administrative decisions, and developed a body of case-law on various administrative law issues, including the illegality of administrative decisions, and the civil liability of the administration. Nowadays, the ordinary courts have surrendered the power to review individual administrative decisions to the administrative courts. But the ordinary courts retain jurisdiction over contractual and tortious disputes involving public bodies:⁶⁶⁷

“(…) [A] civil law based claim can be brought before the ordinary (civil) court, even if the subject matter concerns public law rights or obligations. Such a civil law action has been made possible by the Supreme Court, that has ruled that the civil court is competent to hear a civil law action, whenever a plaintiff claims that there has been a violation of his civil rights.”⁶⁶⁸

Therefore, the ordinary courts have jurisdiction to decide all cases arising from contracts, regardless of whether the parties are public institutions or private institutions.

Now we will look at the process of public contracting in the Netherlands. There are two important phases to this process: the preparatory phase which culminates in the decision to enter into the contract, and ‘life’ of the contract.

Legally, public contracting has its peculiarities. One of these is that any powers which the administration exercises during the preparatory phase of the contract are public law powers, and are accordingly governed by public law. The administration may not be sued as regards the exercise of such power, as the GALA provides in Article 8.3, that “[n]o appeal may be lodged against an order in the preparation of a juristic act under private law”.⁶⁶⁹ An administrative authority’s decision to enter into a contract is governed by public law, but cannot be appealed before the administrative court (as provided for by the GALA). Therefore, an interested party can introduce a

⁶⁶⁷ *Idem*, pp. 270-272.

⁶⁶⁸ J. Chorus, P. Gerver & E. Hondius (eds.), *Op. cit.*, p. 347.

⁶⁶⁹ Art. 8.3 of the General administrative law act (GALA), cited above.

claim before an ordinary court if it wishes to dispute the validity of such a decision.⁶⁷⁰

After the award of contract we reach the implementation stage of the public contracting process. Public contracts are implemented through use of private law powers, and accordingly the contract is governed by private law and falls within the jurisdiction of the civil courts.⁶⁷¹

Restrictions on the jurisdiction of ordinary civil courts over public contracts

In the Netherlands, special administrative courts have been created to deal with specific matters in relation to decisions of the administrative authorities; normally, these courts apply public law. This will have an effect on public contracts if the law has prescribed a particular administrative procedure for a specific type of public contract. If so, and a litigious matter arises from that contract, the civil court must decline jurisdiction. A.S. Hartkamp & M.M.M Tillema put it this way: “[I]f there is a special administrative procedure available which guarantees a due process, the ordinary courts withdraw.”⁶⁷²

The same opinion, that the competence of civil courts for the public contracts is not exclusive to civil courts jurisdiction, is shared by many scholars in the Netherlands. J. Chorus et al. argue that;

“(…) if the claim can be (or: could have been) submitted to a specialized court or tribunal, for instance an administrative court, a civil law action cannot be admitted (provided, the proceedings before the specialized court are surrounded with sufficient guarantees for a fair trial). In other words, the civil courts have jurisdiction in conflicts that are ruled by administrative law, but the case shall be dismissed, if there is a special remedy that has sufficient quality.”⁶⁷³

⁶⁷⁰ See Art. 8:1 & 8:7 of the GALA (cited above).

⁶⁷¹ J. Chorus, P. Gerver & E. Hondius (eds.), *Op. cit.*, p. 347.

⁶⁷² A.S. Hartkamp & M.M.M. Tillema, *Op.cit.*, p. 30.

⁶⁷³ J. Chorus, P. Gerver & E. Hondius (eds.), *Op. cit.*, p. 347.

For example, cases relating to the employment of civil servants, or social security, even if they involve civil law rights, fall within the jurisdiction of the special administrative courts.⁶⁷⁴

6.3 Conclusions of this chapter

In this chapter, we examined the power that public authorities have to enter into contracts, the legal rules and principles applied in the different phases of public contracting, and the courts which have jurisdiction for the different types of public contracts in England and the Netherlands.

In England, in general, State authorities have the power to make ‘public’ decisions, and also to perform any ‘private’ act which any natural or legal person is capable of doing. The Crown, or central government, through its representative authorities, is endowed with an inherent power to make decisions and engage in contracts. However, other public authorities can only exercise this power if it is granted to them by statutory provision.

With regard to the law and principles which are applicable to public contracts in England, the basic starting point is that ordinary private law rules and principles apply to public contracts. But even if there is no distinct regime between public law and private law applied to public contracts, it is extremely important to notice that public law rules started to have significant effect on public contracts. Furthermore, public bodies developed standard-form contracts (SFC) which other bodies are encouraged to use when they contract with the administration. Of course these SFC may be varied, but they are a good description of the policy considerations which underpin all the contracts entered into by the administration.

In this country, it was indicated that contract law does not distinguish between private and public entities, and all contracts are simply subject to the ordinary law of contract and disputes stemming from those contracts also fall within the jurisdiction of the ordinary court: “In a long-term contract, the parties often build up close, trusting relationships in which they share problems and try to solve them together. It may be difficult for the

⁶⁷⁴ “The court system in the Netherlands”, in <http://www.lassche.nl/en/judicial.html>, last visited on November 23rd, 2010.

government to decide when to abandon this approach and fall back on its legal rights under the contract.”⁶⁷⁵

In the Netherlands, it is clear that public institutions which have legal personality enter into contracts on their own behalf, and those public institutions which do not possess such independent capacity enter into contracts on behalf of the state. The exercise of this power to engage in contracts is determined by laws enacted by legislature (written norms) or derived from unwritten norms (as recognised by the case law), whether those institutions are part of the central government, local government or are public establishments. Thus, although private law entities have the freedom to enter into contracts at will, public authorities in principle require a statutory provision which empowers them to exercise the power.

In the context of legal rules and legal principles applicable to public contracts, in a formal sense, private law norms applicable to public contracts are umbrella norms, covered by the test of reasonableness and fairness, whereas the public law applicable to such contracts has developed a coherent pattern of principles of proper administration. Thus in The Netherlands, private law can be a homogeneous regulatory tool for contract law. The rules necessary for the regulation of the public contracting process are broadly similar to those which regulate private contracting; although in certain limited circumstances the application of public law may be appropriate (private law cannot apply to cases arising from public contracts if they frustrate public law rules).

In The Netherlands, it was also clearly mentioned that the public contracts litigations are in principle enforced before the ordinary courts. Like any other private law based dispute, all disputes arising from public contracts are directed to the jurisdiction of the ordinary courts. However in this country, some of the contracts (such as employment of civil servants or social security disputes) may be appealed before specialised administrative courts.

This approach, of regulating contracts under a combination of private and public law rules and principles, supported by the principles of proper

⁶⁷⁵ A.C.L. Davies, *Op. cit.*, p. 37.

administration, can provide inspiration for development of the Rwandan law of public contracts.

7 A new legality of public contracts in Rwanda from a good governance perspective

The law on public contracting in Rwanda emphasises that public law must apply so that the administration can work to safeguard the public interest. This has been easily accepted for supremacy of public law to private law, taking into consideration the essential constraints for the achievement of the goals set during the public contracting and for the preservation of the public interest.

This is the classical view of legality of public contracts, which first of all justifies the wide-ranging categories of administrative contracts, compared to the few categories of private contracts observed in Rwanda (conceptual level, commanding the administration to abide by the administrative law when contracting and emphasizing the concept of administrative contracts, justified under public law base). This legality also permits the application of public law rules and principles of law vesting the administration with prerogatives and privileges in the course of public contracting (concrete application level, emphasizing the application of rules and principles of public law, and the endowment of special powers to the administration). It also entails the jurisdiction of the administrative chamber of court to public contracts litigation (level of the judiciary, whereby the administration courts competence prevails over the ordinary courts competence).

However this classical legality of public contracts is challenged by the fact that;

- the private institutions in Rwanda, in getting stronger than before, can also defend the public interest the way the administration would do, hence challenging the economic role previously enjoyed by the administration alone;
- public law does not always advantage the administration, because the numerous procedures brought in by public law application to the public contracting might hamper the intended goals of public contracting ;
- Rwanda, in joining the East African Community, is slowly moving from a civil law heritage favouring the application of public law to a mixed legal system which would combine the application of public and private law to the public contracting.

This is the reason of trying a new approach to legality, which we believe can facilitate modernisation of the Rwandan legal system of public contracting. Our suggestion in this respect has been that of legality from a good governance perspective which, while requiring the administration to enter into and implement public contracts in a proper, transparent, effective, participative, accountable and human rights oriented way, can influence the rule of law in general and legality of public contracts in particular. This is what we referred to as the new legality approach, demanding the administration to abide, not only by the legal rules and principles from public or private law, but also by the principles of good governance during the public contracting process.

This new legality approach, when applied to the public contracting in Rwanda, involves a close examination of the degree to which public and private law may apply to public contracts,⁶⁷⁶ looking into the different factors internal or external to Rwanda which may lead to the application of a combination of public and private law rules to public contracts, with the help of principles of good governance to shape up their usefulness. Therefore, the discussion in this study is about the interrelationship which should exist between public or private law and the principles of good governance, emphasizing the fact that these principles shall enhance the attainment of just and correct goals during the public contracting process.⁶⁷⁷

7.1 A 'good governance' approach to public contracts in Rwanda

The analysis below examines how the principles of good governance can be usefully employed, so as to improve standards of administrative action in the field of public contracts in Rwanda. It shows how the principles of good governance - emphasising an already existing move towards good governance in Rwanda - can help the administration to achieve better public contracting results, if these principles are recognised by legislation and case

⁶⁷⁶ See supra in 1.4 Definition of legality and the difference between formal and substantive legality.

⁶⁷⁷ See supra in 1.4 Legality and its link with the formal and substantive rule of law.

law as having legal effect, to the extent of being legally applied by decision-makers and judges.

7.1.1 Recognition of the principles of good governance in Rwanda

There is no general law in Rwanda which contains a detailed analysis of the principles of good governance, yet 'good governance' is an expression frequently used by the administration when performing its activities.

General application of principles of good governance

In Rwanda, many principles of good governance can be found throughout the constitution,⁶⁷⁸ such as the requirement that human rights be protected (Articles 16-44), principles of proper administration (Article 16, equality; Article 34, access to information). Other laws contain some of the principles such as the Public procurement law (Article 4 provides that public procurement shall be governed by the following fundamental principles: transparency, competition, economy, efficiency, fairness, accountability),⁶⁷⁹ the media law⁶⁸⁰ (Article 65, access to information).

These principles are also frequently mentioned in political discourse, but so far no specific general law or code of good administration or good governance has been enacted. However, as good governance is one of the main objectives of the Rwandan government, fifteen indicators of good governance have been developed, within three broad areas;

- Ruling justly :
 1. Security;
 2. National reconciliation and traditional justice;
 3. Rule of law;
 4. Human rights and civil liberties;
 5. Political rights;
 6. Institutions of accountability;
- Government effectiveness:

⁶⁷⁸ Constitution of the Republic of Rwanda, cited above.

⁶⁷⁹ Art. 4 Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁶⁸⁰ Law n° 18/2002 of 11/05/2002 governing the press, O.G. n° 13/2002 of 01/07/2002.

7. Public financial management;
8. Anti-corruption;
9. Decentralization;
10. Public service delivery;
11. Public service reform;
- Investment climate and corporate governance:
 12. Private sector advocacy;
 13. Corporate law and governance;
 14. Ease of doing business;
 15. State business relations.⁶⁸¹

This is to mention that a good governance approach already exists in Rwanda. There exist fifteen indicators linking to three aspects: ruling justly, government effectiveness, investment climate and corporate governance. These indicators show how in the Rwandan legal system there are positive elements of good governance, which need specific application and improvement under administrative law.

That is why these indicators taken as criteria of good governance, can serve to enlighten on the best way of using good governance for the public contracting. In a more general way the indicators provide a framework of orientation for the administration when contracting. Hence from a legal perspective, our duty in this chapter is to interpret them in principles of good governance, specification made in six categories of principles of good governance, i.e. the principles of properness, transparency, effectiveness, participation, accountability and human rights.

Introduction of principles of good governance to the public contracting

If the laws regulating the field of public contracts are analysed, it is clear that three general principles of administrative law apply to them. The three types are as follows;

- firstly, the competition principle, which characterizes all contracts that the administration engages in with people or companies (for example the law on public procurement requires fair competition during public

⁶⁸¹ Rwanda Governance Advisory Council, Governance innovations in local government, in <http://www.rwanda-gac.org/spip.php?rubrique5>, accessed on 1/10/2010.

procurement;⁶⁸² also the Law on General Statutes for Rwanda Public Service provides that recruitment of civil servants has to be done through competition)⁶⁸³;

- secondly, the principle of transparent administration in making contracts (for example the law on public procurement calls for a release of enough information to those who may wish to submit tenders)⁶⁸⁴;
- thirdly, the principle of accountable administration (for example, the creation of an Office of the Auditor General⁶⁸⁵ is a good example of institution leading to compliance with the principle of accountability).

7.1.2 Recognition of the principles of good governance as having legal effect

In Rwanda, the principles of good governance have not yet been distinctively enacted in legislation as forming part of a general law. Nevertheless, the administration is already working with them, since some of them are referred to by the constitution and other legal instruments as values to consider during the administrative action.

However, it is suggested that they be introduced into the administrative law structure as binding legal principles, so that they can be applied and interpreted by national judges.⁶⁸⁶

⁶⁸² Art. 26, par. 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁶⁸³ Art. 26 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

⁶⁸⁴ Art. 26, par. 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁶⁸⁵ Law n° 05/98 of 04/6/1998 establishing the Office of the Auditor General of the state finances, *O.G.* n° 17 of 01/09/1998

⁶⁸⁶ What is clear about the modern legal systems under discussion is that the principles of good governance have been introduced to their administrative action. For example, in England, many principles of good governance are used for regulation of the administrative action, and failure to comply with these principles can be a good ground for judicial review (see H. Delany, *Op. cit.*, pp. 90, 122, 269, 307; P. Vincent-Jones, *Op. cit.*, pp. 26-29; P. Cane, "Theory and values in public law", in P. Craig & R. Rawlings, *Op. cit.*, pp. 3-21, pp. 14-16). In the Netherlands the principles of good governance can be found in different legal instruments, i.e. the equality before the law and the prohibition of discrimination, and the right to submit petitions in writing to the competent authorities, the principle of prohibition of abuse of power and the principle of transparency (Art. 1 & 5 of the Netherlands Constitution; Art. 3.3 of the General administrative law Act; Section 2 of Act of 31 October

Need for a general law codifying the principles of good governance

In Rwanda, there is no general law which codifies the principles of good governance, although certain legal instruments stipulate the application of some principles of good governance to certain specific matters.

For example, the principles of equality before the law and the prohibition of discrimination (Articles 11 & 16) are fundamental constitutional principles.⁶⁸⁷ Other principles can be found in other relevant legal instruments such as the principles of transparency, competition, economy, efficiency, fairness and

1991 containing regulations governing public access to government information). In Belgium, the principles of good governance have developed through the case law, including the duty to give the addressee of a decision a hearing, the right of an addressee to be subject to a fair trial, the principle of impartiality, the principle of justification, the principle of equality, the principle of proportionality, the principle of due care, the principle of legal certainty, the principle of legitimate expectations and the principle of reasonableness (see S. Lust, *Loc. cit.*, pp. 5-58, pp. 28-31), the principle of transparency (Ph. Flamme, *Loc. cit.*, pp. 409-410). In France many principles of good governance play a major role in regulating the administrative decision-making, such as the legality principle, the constitutional principle of equality, the procedural principles of due care and the principles of fairness, transparency and impartiality (see G. Braibant & B. Stirn, *Op. cit.*, p. 231; Ph. Foillard, *Op. cit.*, p. 132).

Even at the regional and international level, principles of good governance are seen as useful principles applied to the administrative action. For example, the European administration at European Union level is using the principles of good governance in the process of decision-making, i.e. the principle of transparency which allows European citizens to have a right to access documents from the European institutions, the principle of accountability related to their responsibility, the principle of effectiveness commanding an effective implementation and enforcement of the rules, and civic participation to improve governance of the European Institutions (A. Tomkins, "Transparency and the emergence of a European Administrative Law", in P. Eeckhout & T. Tridimas, *Yearbook of European Law*, 1999/2000, pp. 217-256, p. 219-220; C. Harlow, *Accountability in the European Union*, Oxford, Oxford University Press, 2002, pp. 172&178; M. Bovens, "Analysing and assessing public accountability", in *European Law Journal*, Vol. 13, No. 4, July 2007, pp. 447-468, p. 454; H.C.H. Hofman & A.H. Türk (eds.), *Legal challenges in EU administrative law – Towards an integrated administration*, Cheltenham/Northampton, Edward Elgar, 2009, pp. 320-321). International institutions like the World Bank and IMF are also using accountability, respect for the rule of law, transparency, the prevention of corruption and respect for human rights as core good governance principles to direct their actions (J. Wouters and C. Ryngaert, *Loc. cit.*, pp. 80-81).

⁶⁸⁷ Rwanda Constitution of 2003, cited above.

accountability contained in the law governing public procurement;⁶⁸⁸ the principle of competition which is also found in the Law on general statutes for Rwanda public service.⁶⁸⁹

However these principles are not referred to as principles of good governance recognised as legal instruments, they are rather prioritised by the constitution and other laws as core values to follow to achieve the administrative goals. Indeed they can be used to guide and also control the administrative action, but if the administration fails to comply with them, there is no clear line of interpretation of these principles in binding norms which can constitute a ground for judicial review of administrative action. Consequently, to develop the use of principles of good governance by the administration in its strive to achieve the goals of administrative action, is to develop a general law codifying them, so that they can have a binding effect for guidance and control of the administrative action and hence can have a legal interpretation through the case law.

In that case, the appropriate principles to be followed when the administration makes decisions would be clearly demarcated by the code, such as the principles of equality, transparency, prohibition of abuse of power. The powers vested in the administrative authorities during the exercise of their activities would also be controlled by legal principles such as the principles of legality, justification, proportionality, prohibition of abuse of power, fairness and accountability. Accordingly, compliance with these principles of good governance will not be assured unless they have a legal 'platform', a basis in the law. It is for this reason that it is suggested that the principles be cast as binding legal norms in the national law, compliance with which is necessary for the proper regulation of public contracts. Once they are transformed into legal instruments, the principles can have a substantial influence on the law of public contracts.

⁶⁸⁸ Art. 4 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁶⁸⁹ Art. 26 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

Prerogatives and privileges relinquished by principles of good governance

It is not an exaggeration to state that the laws implemented in Rwanda during and after the introduction of written law gave excessive powers to the administration. The Rwandan legal system of administration is still implementing these so-called 'prerogatives and privileges' attached to the administrative action, i.e.;

- the authority of unilateral action, which gives the administration the power to make decisions with no requirement of any prior concerted action;
- the authority of forcing compliance with its decisions, without asking permission from the judge; and
- the authority of, if necessary, using its powers to force execution of its decisions, with no requirement of going through the judicial procedures for forced execution.

This was a result of the influence of the Belgian legal system, which itself was based on the French (or more specifically Napoleonic) model, as explained above.⁶⁹⁰

Under the current situation and for reasons of modernisation of the system of public contracting, these prerogatives and privileges need to be promoted by the principles of good governance. In this respect, the question discussed in this study is to what extent exercise of these powers might be maintained or replaced, if good governance is legally introduced in the context of public contracting.

The principles of good governance are easy to explain, but often difficult to apply to administrative action in practice. As the administration in Rwanda currently supports its action through the use of prerogatives and privileges

⁶⁹⁰ Napoleon, in his time, wanted the administration to possess much more power than ordinary citizens, because he viewed the administration as responsible for protecting the interests of the citizens. Even now the division between public law and private law is still prominent in France (M. Freedland & J.B. Auby (eds.), *Op. cit.*, pp. 3-4), where the system of law and courts which deals with government activity is separate to that which deals with the activity of ordinary citizens. The same can be said of Belgium. The laws there grant a lot of power to the administration, and the court where hearings concerning the government can take place is the Council of State. Given Belgium's influence on Rwanda, it is therefore not surprising to discover that, in Rwanda, the law continues to give the administration excessive powers.

beyond those granted to ordinary citizens, it will be reluctant to relinquish those rights, along with the benefits (in terms of implementation and enforcement of administrative action) which they bring.

If the principles of good governance are to be used to improve the public contracting process, the administration must ensure that it complies with these principles each time it enters into *any* contract, and at *each phase* of the contractual process. Furthermore, the prerogatives and privileges which the administration possesses in the field of public contracting must be reduced and the principles of good governance given more importance. Undeniably, where the administration can demonstrate that a sufficient public interest is at stake, specifically with the administrative contracts, it ought to be able to resort to its privileges and prerogatives to support its action. However, where no such public interest is established, i.e. in the mixed and private contracts, then the principles of good governance alone should be used to shape the administrative action, and they must apply to the entire public-contracting process.

Thus, one can see the merits of shifting from an approach which favours unilateral principles, applied by the administration, which only confer prerogatives and privileges on the administration, to one which favours neutral principles, capable of being applied to public contracts governed by both public and private law, and of conferring rights and obligations on each of the contracting parties.

Effect of applying same legal rules and principles in similar factual situations

Procedurally, it would be straightforward for a judge to apply the same or similar principles of law to similar situations, even though some of those situations may involve administrative action.

Based on the previous discussion of a divide between public and private law in the field of public contracts, it is worth mentioning that even today in Rwanda the jurisdiction of various courts and chambers of courts are separated along the public/private divide. In the past in Rwanda, there was a *Conseil d'Etat* Department of Supreme Court, and today we have the administrative chamber, responsible for hearing cases which involve the

administration (including claims in relation to public contracts). Administrative law is applied in these courts so that the public interest is always safeguarded. However, it is questionable whether this separation of courts and chambers is really necessary. State organs, when compared with private institutions, often perform similar activities, and often both will be acting in the public interest in the same way.

For example, if the Independent University of Kigali (a private higher education institution) enters into a contract, and litigation arises therefrom, proceedings will take place before the ordinary chambers of the courts. However, if the National University of Rwanda (a public higher education institution) enters into a similar contract, and litigation arises therefrom, proceedings will take place before the administrative chambers. This suggests that there are many differentiating factors between these universities – however, this is frequently not the case. Thus, in the light of good results from the present privatisation program, from the empowerment of private corporations and from a perspective of good governance, it would be easy for Rwandan judges to apply the same principles of law, i.e. the principles of good governance, to both public and private contracts when involved in similar factual situations.

7.2 Good governance calling for a new legal approach to public contracts

The public/private law divide is well established in most civil law legal systems. As Rwandan law is based on civil law, public law and private law are treated as two distinct branches of law.⁶⁹¹ Contracts are therefore subject to the distinction between public and private law because, in principle, public law is applied to public contracts whereas private law is applied to private contracts.

⁶⁹¹ By definition, public law governs the composition of organs of government and their functions (at both central and local level), the relationship between individuals and the state and relationships between individuals that are of direct concern to the state. Private law governs relationships between individuals that are of no direct concern to the state. Public law includes constitutional law, administrative law, tax law and criminal law; and private law includes family law and the law of successions, the law of property, the law of torts and the law of contracts (E.A. Martin & J. Law (Eds.), *Op. cit.*, 2006).

It is important to look at why in Rwanda public contracts are governed by special rules of administrative law, despite the fact that there is often very little substantive difference between public and private contracts, and from a perspective of good governance how change towards another legal approach to public contracts can be done, including the possibility of introducing a mixed legal regime approach, i.e. the public and private law applied in combination, along with the principles of good governance.

7.2.1 The public law regime less justified for public contracts in Rwanda

It is important, when examining the role of the administration in Rwanda, to reflect on the perception that the administration is in the best position to safeguard the economic interests of the country. In Rwanda, public law was applied to the administration's activity (including the public contracting) to ensure that it could not be challenged by individuals, as such activity was presumed to be in the public interest.

Public contracts presumed to be concluded in the public interest

The organic criterion, borrowed from French law, provides the means by which a distinction can be made between public and private law. It identifies public institutions as public entity organs, and private institutions as private entity organs. The most important consequence of the distinction between public and private law is the assumption that public institutions are presumed to act in the public interest, which justifies the application of public law to their actions. Conversely, private institutions are presumed to act in their own private interest, justifying the application of private law to their actions.

This rule is well established in Rwandan law, and is frequently applied by the Rwandan courts. Litigation involving public institutions is usually heard before the administrative chambers of the courts, whilst purely private litigation can only be heard before the ordinary chambers of the courts. Thus, it is important to mention that there is a general tendency in Rwanda of enclosing the very different public contracts into the frame of public law norms application. This rule benefits the administration, because it is believed that every action undertaken by public institutions furthers the

public interest, even in cases involving trivial expenditure. Public law in Rwanda is thus viewed as an important tool for protecting the public interest and fighting corruption in the public contracting process.

Challenges to the use of public law in defending the public interest

Classically, a sharp distinction was drawn between the collective interest of the community, protected by public law, and the private interest of individuals.⁶⁹² However, two important challenges have been made to the use of public law to safeguard the public interest in the field of public contracts. Firstly, the borderline between public and private law is blurring, and certain items of common concern to both branches of law can be identified. Secondly, the application of the rules of public law to public contracts does not always benefit the administration.

Economic role of the administration relinquished

The first challenge is based on the fact that both private and public entities are capable of performing activities which are in the public interest, as well as in their own private interest, to varying degrees. Although contracts made by private institutions are presumed to be in their private interest, certain private institutions also act (directly or indirectly) in the public interest.

In the past the administration in Rwanda played an important role in initiating development activity which was in the public interest. As a result, the administration's activity was automatically considered to be of value to citizens, whilst citizens' activities were not viewed as having the same positive effect. This explains why the administration's activities were governed by public law and the people paternalistically perceived the administration as a 'parent', whose power should not be weakened. The administration in Rwanda was accordingly sheltered by public law. It had considerable power at the expense of the population, but this was coupled with the responsibility to safeguard the public interest. For a long period of time, no citizen or private institution argued that they should be able to

⁶⁹² J. Harries, *Cicero and the jurists: from citizens' law to the lawful state*, London, Duckworth, 2006, p. 63.

exercise powers equal to those of the administration, as no one assumed that they could perform activities which were similarly in the public interest.

In the last 20 years in Rwanda, no one would have thought that private universities could exist, and perform at the same level as government universities. No one would have thought that a company like MTN (a private telecommunications company) could possess as much communication technology than RWANDATEL (a state institution). No one would have thought that private transport companies could provide transport services similar to those of ONATRACOM, a government company.⁶⁹³ So why should MTN, VOLCANO (a private transport company) or the Independent University of Kigali (a private higher learning institution) make contracts which are governed by the ordinary laws, over which the ordinary courts have jurisdiction, whilst the National University of Rwanda, ONATRACOM and RWANDATEL make contracts governed by administrative law (which favours the administration) and be subject to the jurisdiction of the administrative chambers of the courts?

The issue of public interest protection is extremely topical. An examination of the Rwandan economic landscape shows that the government does not have sole responsibility for safeguarding the public interest, and certain private institutions and companies may also be able to act in the public interest. Accordingly, a balance must be struck between public and private law in situations where public and private institutions are involved in similar activities. This argument is supported by recognition of the fact that individuals often possess a sense of civic duty. A private enterprise – setting aside its private motivation for undertaking an activity – can also act to achieve a goal of common concern.

If we take once more the example of a private higher learning institution, its main concern is the training and development of students. Although it may

⁶⁹³ ONATRACOM (*Office National des Transports en Commun*) or Rwanda Public Transport Authority has a legal personality and it is governed in accordance with the General Statutes for Rwanda Public Service (Art. 1, par. 2 of Law n° 08/2007 of 03/02/2007 determining the responsibilities, organization and functioning of Rwanda Public Transport Authority (ONATRACOM), *O.G.*, n° 6 of 15/03/2007).

also profit from this activity, it is nonetheless in the public interest that such an activity be carried out.

Certain activities are also performed by public institutions which are not in the public interest. Such institutions may focus on their own interests as an institution, not the interests of the community as a whole. The argumentation is that the private interest of public institutions lies on the level of maximizing the chances for generating incomes, in which case it will engage in competition with other companies.

It is problematic to attempt to distinguish between the types of interest which are furthered by a particular action on the basis of the identity of the actor. Both public and private institutions can engage in activities in the public interest and in their own private interest. If private entities act in the public interest, it seems that public law should be applicable to those activities. Similarly, if public entities act in their own private interest, it also seems clear that private law should apply to such activities. If the actions of both public and private institutions are capable of being governed by both public and private law, it seems that public contracts need not be analysed in the 'public law way' – we must find an alternative. As public and private law rules can both work to protect the public interest, then it seems clear that a mixed system, which allows these rules to interact and work together, is desirable.

Public law does not always advantage the administration

The second challenge to the use of public law to safeguard the public interest is based on the argument that the application of public law does not always benefit the administration. It has been shown above that neither public nor private institutions act solely in the public interest. Moreover, even if the administration always claims to act in the public interest, the application of public law rules to administrative action may not always enhance the public interest, as public law rules can be difficult to put into practice.

As Rivero argues, the rules of public law are not always beneficial to the administration:

“In his famous article, Jean Rivero has advanced analysis in this area by making an important remark: ‘In the endeavour to use

special rules of public law, the administration does not systematically benefit. On the contrary, the rules of public law are likely to generate particular constraints upon the administration: For example, compliance with the principle of equality precludes the administration from exercising more freedom in the recruitment process; regulations regarding the public domain restrict the administration from selling its patrimony’”.⁶⁹⁴

In conclusion, looking into the tendency of applying public law to public contracts, and also into the challenges to that application, our suggestion, as clarified below, is that only contracts demonstrating a high level of public interest to protect should remain under the regime of a public law oriented application.

7.2.2 The private law regime to public contracts also acceptable

The Rwandan approach to public contracts, described above, emphasises the importance of public law in helping the administration safeguard the public interest. Thus, public law alone has provided a legal framework within which the public contracts function, to protect the public interest needed during the process.

However, it is submitted that private law could also provide such a framework. Thus, one question raised by the convergence between public and private law is whether private law can also help to further the public interest.

Private law can also protect the public interest

It is far from clear that public law rules alone are capable of safeguarding the public interest. Are private law rules capable of this too? The following is an attempt to answer that question.

⁶⁹⁴ J. Rivero, “Droit public et droit privé”, cited by J.B. Auby, “Le rôle de la distinction du droit public et du droit privé dans le droit français”, in M. Freedland & J.B. Auby (eds.), *Op. cit.*, p. 19 (translation from French).

Although the rule which prioritises public law over private law in the field of public contracts is well established in Rwandan law, in some cases the administration allows public contracts to be governed by private law. This is the essential problem which will be addressed in the following discussions. The public interest can be protected by public law, but we shall look into the possibility of using private law to protect the public interest as well. In this respect, one must transform private law rules into a framework which is capable of governing public contracts. The question is how public contracts, which were hitherto governed by public law rules, can also be governed by private law rules.

The civil code is a good starting point when developing an appropriate framework for the private law governance of public contracts, particularly Article 64 of the law relating to contracts, which states that “[c]ontracts made in accordance with the law shall be binding between parties”.⁶⁹⁵

If private law is used to govern public contracts, administrative law rules will only be applicable in extremely important transactions, where the public interest in the contract is undisputable and significant. This can be seen from a concrete example. If there is an undisputable and substantial public interest involved in a contract (for instance, if the contract is for substantial public works to be carried out, for example for highway construction, and is entered into by the minister for public works), the relationship between the parties is approximately vertical, and the use of certain measures to protect the public interest is appropriate. In this case, the application of public law is appropriate, as it grants the administration certain powers to ensure adequate performance in view of the public interest which is engaged. However, if a public body enters into an ordinary contract (for instance, the purchase of a computer), the relationship with the other contracting party is approximately horizontal. The administration stands as an ordinary counterparty, like any other individual who could negotiate a similar contractual arrangement. Regardless of whether the contract is between two private bodies, or the administration and a private body, private law is the law which ought to govern the contract.

⁶⁹⁵ Art. 64 of Law n° 45/2011 of 25/11/2011 relating to contracts, *O.G.* n° 4 bis of 23/01/2012.

Advantages of applying private law to public contracts

If we look at public contracts from the perspective of good governance, the application of private law to such contracts has three distinct advantages.

Firstly, compliance with the provisions of private law is significantly less onerous than compliance with public law rules. For instance, compliance with the rules which govern public procurement can often result in considerable delay. In order to comply with public procurement procedures, the parties must go through various phases, such as 'planning of tender', 'preparation of bid document', 'invitation to tender', 'receipt of tenders', 'opening of tenders', 'evaluation of tenders', 'acceptance and rejection of tenders', 'award of contract', 'signature of contract' and 'contract implementation'.⁶⁹⁶ All these procedures are time consuming, and would not all be required if private law was applicable to such contracts.⁶⁹⁷

In a lecture given on 27/7/2007, the Vice-Rector for Administration and Finance at the National University of Rwanda, when describing the role which public procurement plays in development initiatives in Rwanda, stated that procurement procedures are one of the major causes for the failure of development projects:

"All the steps of a project must comply with the procurement procedures set out by the donors (for example, the World Bank, the African Development Bank or the European Union) and the public procurement law, and in most cases these projects lack the necessary procurement specialists to properly manage the procurement processes in a timely and effective manner. This is the main reason why some of these projects fail."⁶⁹⁸

⁶⁹⁶ Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁶⁹⁷ Interview with A. Cyanzayire, President of the Rwanda Supreme Court, conducted on 31/08/2010. N.B. In 2011, the term of A. Cyanzayire as Chief Justice came to an end. She was then appointed Chief Ombudsman.

⁶⁹⁸ U. Ndagijimana, "Public procurement in Rwanda: Challenges for managers", Presentation made during a lecture to LLM students in business law, 27/07/2007.

Secondly, the provisions of private law are significantly less restrictive in many respects than those of public law. The following is a comparison of the requirements of public and of private law, which must be met to successfully enter into a contract. Under private law, for a sale contract the civil code requires an agreement (mutual consent) as to the subject-matter and price from both parties (as long as they meet requirements as to capacity).⁶⁹⁹ The creation of a contract of sale is not time consuming, as there are no formal requirements to comply with. However, this can be contrasted with the rules of public law, which set out a number of procedural steps which must be complied with before a procurement of goods contract is considered valid.⁷⁰⁰

Thirdly, basing on the demonstration described above, it should be said that there are good reasons for the introduction of a much more private law governed government contracting. However, the dimension to which private law may apply to public contracts shall time to time call for the public interest preserve. In case the public interest would resort to justification for a given contractual arrangement governed under private law base, then the idea is that principles of good governance will be set in the background, to support protection of the public interest.

Therefore, when examining the legal approach to apply to public contracts, we discovered that, if public contracts in Rwanda were governed by public law and the administration's position was supported by various administrative privileges, the suggested alternative is that public contracts could also be governed by a mixture of public and private law, supported by the principles of good governance.

7.2.3 The mixed law regime more suitable to public contracts in Rwanda

The Rwandan legislature has clearly demarcated the law of public contracts and the law of private contracts. Under private law, a law governing contracts was enacted, to regulate formation, execution and termination of private

⁶⁹⁹ Art. 9 of the Law relating to contracts (cited above) provides: "For the contract formation, each party must manifest assent with reference to the assent of the other".

⁷⁰⁰ Example: The procedural rules required under the Public procurement law (see Law n° 12/2007 of 27/03/2007 on public procurement, cited above).

contracts.⁷⁰¹ Under public law, there is no integrated code of public contracts. However in Rwanda, acts performed by the administration – including contracts entered into by the administration – are governed by administrative law, and the administrative chambers of the courts have jurisdiction to deal with contentious issues arising from such acts. The fundamental principle is therefore that the litigation arising from public contracts fall within the jurisdiction of the administrative chambers of courts,⁷⁰² which means that these contracts are mainly governed under public law base, as it shall be explained further below.

Legality of the administration’s decisions and actions in Rwanda was secured by means of the legal formalism, public law based rules supported by the prerogatives and privileges vested in the administration.⁷⁰³ However, stimulated by the concern of good governance, such a classical legality can evolve into a new legality, which can still emphasize the legal formalism, but

⁷⁰¹ In Rwandan law, private law governs ordinary contracts. The principle of freedom of contract allows private parties to negotiate and enter into contracts, stipulating their own terms. During the implementation of the contract, the parties shall abide by its terms. This is stipulated by Article 64 of the Civil Code, in the part concerning contracts, which provides: “Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith” (Art. 64 of Law n° 45/2011 of 25/11/2011 relating to contracts, *O.G.* n° 4 bis of 23/01/2012). Thus, the contracting parties cannot unilaterally interfere with the contract during its implementation – any modification or premature termination must be done with the consent of both parties. What is more, if litigation occurs, the terms of the contract are used by the parties, the arbitrator or the court to find a solution. Exceptionally, provisions of the civil code may complement the contract, if unclear or obscure language was used in some of the terms (F. Ziginshuti, *Specific private contracts*, Manual for students, Huye, Editions de l’Université Nationale du Rwanda, 2006, p. 2).

⁷⁰² See *supra*, 4.4.2, jurisdiction of courts over the public contracts litigation.

⁷⁰³ It is noticeable that countries with a civil law background have a greater need for principles of good administration to direct the public administration more than those of the common law legal system. Just as Dicey puts it, “the common law judges have a deeply rooted independent capacity to intervene by way of judicial review to secure good administration and restrain the abuse of power, which underlies and precedes their interpretation of power-conferring Parliamentary legislation rather than being dependent upon it” (See Dicey, *Op. cit.*, pp. 337-350, cited by M. Freedland, “The evolving approach to the public/private law distinction in English Law”, in M. Freedland & J.B. Auby (eds), *Op. cit.*, p. 96).

now with the help of another category of principles, the principles of good governance.⁷⁰⁴

This part of the study shall look at how the distinction between public law and private law has had a major impact on the creation, implementation and enforcement of public contracts, and it shall examine the extent to which such a distinction should not be maintained.

Rwanda's civil law heritage lessened

The distinction between public and private law can be traced back to the Belgian colonial period, when written law was first applied in Rwanda, following a Royal Decree issued by the King of Belgium.⁷⁰⁵ The laws which were applied in Congo, deeply rooted in the Belgium legal system which used to distinguish between public law and private law,⁷⁰⁶ were instituted in Rwanda-Burundi.⁷⁰⁷ Then the effect of the application of public law to public contracts cannot clearly be discerned without looking at the original distinction between public law and private law.

Vogenauer, quoting Ulpian, notes that classically “the study of law is divided into two branches; that of public and that of private law. Public law is that which regards the government of the Roman state; private law that which concerns the interest of individuals”.⁷⁰⁸ This explains the dualism present in the French (as well as in Belgian, Congolese, and Rwandan) legal systems, which have been modelled on the Roman approach. Matters which concern the government, including government activity, are governed by public law,

⁷⁰⁴ See Council of Europe, Recommendation CM/Rec(2007)7, cited above; see also M. Niemivuo, *Loc. cit.*, p. 559-561; J. Wakefield, *Op. cit.*.

⁷⁰⁵ See Organic Law of 1925, *supra* footnote 12.

⁷⁰⁶ At that time Belgium applied legal rules which mostly originated from the French legal system, in which public contracts were mostly governed by public law.

⁷⁰⁷ We mentioned above that laws applying to the *Congo-Belge*, which was part and parcel of the Belgian Kingdom, they also applied to Ruanda-Urundi - their neighbouring country, from the time the country stated being ruled under written law (see *supra*, footnote 12).

⁷⁰⁸ Vogenauer, “Series Editor’s Forward”, in M. Freedland & J.-B. Auby (eds.), *Op. cit.*, pp. v-vi.

whilst matters which concern the citizens, including the relationships between citizens, are governed by private law.

In different countries the distinction between public law and private law was not always drawn in the same way. Some countries, such as France and countries whose legal systems were modelled on the French system (including Belgium and Rwanda), viewed this distinction as desirable and maintained a dichotomy between public and private law. This mentality was shared by both academics and practitioners in those countries. However, in some countries, such as England and the Netherlands, the maintenance of a dichotomy between public and private law was seen as undesirable, and accordingly these two types of law began to converge.

The French legal system played an important role in the development of the Rwandan legal system. Vogenauer argues that in France; “communication between French private and public lawyers has become difficult to such an extent that John Bell has convincingly argued that it is futile to speak of ‘the French legal culture’, but that there are, indeed, at least two rather distinct ‘French legal cultures’”⁷⁰⁹.

The existence of two separate legal cultures can also be seen in Rwanda, and has resulted in the formation of laws which have two levels, the private law level and the public law level. But an important difference between France and Rwanda is that, formerly, the Rwandan court structure was modelled Belgian court structure, in which only the Council of State (*Conseil d'Etat*) exercised control over government activity. In France, however a special system of administrative courts exists to deal with administrative disputes, as it is the case nowadays in Rwanda, where the administrative chambers of courts have been granted jurisdiction over contentious issues arising from the administration's actions. The appropriateness of this public/private law dualism is the focus of this study. From a perspective of good governance, it is questionable whether it is realistic for the dichotomy between public and private law to be maintained in situations where the administration contracts with private institutions and individuals.

⁷⁰⁹ *Idem*, pp. v-vi.

An effect resulting from the dichotomy between public and private law which is common to the Rwandan lawyers and legal practitioners is that they often consult Belgian or French legal literature when confronted with a legal problem in Rwandan law which has no clear answer, so as to be able to understand the principles applied in these other legal systems. It is unlikely that many Rwandan lawyers (prior to 1994) would have consulted at English legal literature, or would have used elements of the common law, when faced with a Rwandan legal problem. This can be attributed not just to the fundamental distinction between common law and civil law systems, but also because of the language barrier. Many, if not all, legal practitioners in Rwanda used French, and the laws themselves were written in French and Kinyarwanda (the Rwandan local language) – English was not commonly used.

It is unsurprising, then, that legal practitioners in Rwanda mainly adhered to the French philosophy that the law is divided into two categories (public and private), and that public law trumps private law in matters relating to public contracts.

Under the current situation, English language is also an official language of Rwanda⁷¹⁰ and it has been introduced as the principal medium for teaching from primary school to university. Thus, the lead that was taken by the legal literature in French is now accompanied and will soon be replaced by the legal literature in English, resulting in a close communication between the civil law system privileging public law and the common law system applying private law to the public contracts.

Another reality in the Rwandan legal context is the implied judicial protection of the administration. The Law Faculty at the National University of Rwanda was founded with the support of the Belgian Government in 1973, and the teachers were mainly Belgians teaching the Rwandan students. Accordingly, it is no surprise that students emerged from the university with a Belgian perspective on the law, a perspective which favours a sharp distinction between public and private law.

⁷¹⁰ Article 5 of the Rwanda Constitution of 2003 provides: “The national language is Kinyarwanda. The official languages are Kinyarwanda, French and English”.

The students of law who later became judges knew that the administration, which was involved in activities of the public interest, had supremacy over private institutions and individuals involved in activities of the private interest. Hence, the administration must also be safeguarded in courts if litigation occurs. That is why there was only one court in which the government could be held to account – the Council of State (*Conseil d'Etat*), at the same level of the judicial hierarchy as the Supreme Court. The judges of the *Conseil d'Etat* were selected among the best judges, in order to defend the administration's interests.

Consultation of the archives at the *Conseil d'Etat* revealed that, apart from claims introduced by some of the public servants, other citizens have never brought claims against the administration. In an interview with Mugenzi, a former president of the Council of State,⁷¹¹ he stated that two major reasons explain such a situation. Principally, the public was not aware that they could bring a case against the administration before the *Conseil d'Etat*. Added to this, it was not easy for ordinary citizens to have access to the *Conseil d'Etat* because it was located very far from the local population, and it was at the highest level of the judiciary.⁷¹²

Now that the administrative chambers of court are located closer to the population, and that people are informed of the fact that they can introduce a claim against any public authority misusing its powers, it is likely that the implicit court's immunity that the administration used to enjoy will go reducing.

Moreover, many situations which seem logical *prima facie* may conceal hidden problems which can bring about inequality. An example of such a situation is the privileged status of some top leaders in Rwanda. An analysis of Rwandan law reveals that some leaders are secretly protected from being questioned in the ordinary criminal courts in relation to certain activities. The leaders are given immunity from prosecution for certain crimes by any

⁷¹¹ Interview with L. Mugenzi, cited above.

⁷¹² Nowadays an administrative chamber in each intermediate court, in close proximity to the population, has jurisdiction over disputes involving the administration.

prosecutor other than the prosecutor general, and have been exempted from criminal liability before the courts of lower level.

To provide an existing example, Article 206 of Law n° 13/2004 of 17/5/2004 (relating to the code of criminal procedure) provides that:

“[a] judicial police officer or a public prosecutor who receives or notices a complaint against the President of the Republic, the President of the Senate, the Speaker of the Chamber of Deputies, the Prime Minister or the President of Supreme Court [should] immediately transmit the case file to the Prosecutor General of the Republic. The latter [will] conduct himself or herself investigation and prosecution before the Supreme Court. (...)”⁷¹³

This article reduced the number of privileged leaders - in the past, the list was extensive, including many figures at the central (ministers, parliamentarians and central judges) and local levels (governors, local judges, and district mayors).⁷¹⁴

This kind of inequality strengthened government powers in comparison with their citizens. The behaviour of leaders also is likely to correspond to the powers which they possess; if the leader is legally immune, his decisions are final. Such great or extreme powers would make citizens venerate the leader, instead of disputing his behaviour if they believe it to be wrong. As a result, when a citizen wrongs the government, the government is able to utilise its extensive powers to swiftly obtain damages. However, when a citizen is wronged by a government leader, it is difficult for the individual to seek damages if that leader possesses immunity.

From a good governance perspective, it is significant that the privileges awarded to government leaders may result in an accountability deficit, in

⁷¹³ Art. 206 of Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure, *O.G* Special n° of 30/07/2004.

⁷¹⁴ Law of 23/02/1963 relating to criminal procedure, in *O.G.* 1963, p. 98; See also Decree-Law n° 41/78 of 29/12/1978 governing organization and jurisdiction of courts, *O.G.*, 1979, p. 35.

that leaders may not be properly held to account in respect of their actions (the principle of accountability is examined below).

Reference to common law countries following a convergent approach

On a structural level, there are many reasons why Rwanda should follow the lead of some other countries and try to achieve a greater convergence between public and private law. For instance, the English legal system was the foundation of other 'common law' legal systems. In England lawyers and judges follow a unitary approach, avoiding a strict separation of private and public laws.⁷¹⁵ England colonized countries which neighbour Rwanda, such as Uganda, Kenya and Tanzania. It is clear that these countries inherited the common law tradition from their colonists, and their legal systems exemplify the unitary approach to the public/private question.

Although historically the Rwandan legal tradition was Romano-Germanic, after 1994 many Rwandan refugees returned from exile from countries with varying legal traditions. Some returned from countries which have a civil law tradition (such as Burundi, the Congo and Rwanda), whilst others had taken refuge in countries with a common law background (such as Uganda, Tanzania and Kenya). Accordingly, modern Rwandan lawyers and legal practitioners may find a mixed approach more easily acceptable.

Furthermore, Rwanda and Burundi recently became part of the East African Community.⁷¹⁶ Entry into the community involves an undertaking on the part of the joining state that they will harmonise their domestic law with community law.

This encourages the comparative study of legal rules with a view to harmonisation. There is an impetus for the adoption of a balanced approach to public and private law, so as to accommodate other legal systems in the community which have a common law tradition (Uganda, Tanzania and Kenya).

⁷¹⁵ Vogenauer, *Loc. cit.*, p. v.

⁷¹⁶ Treaty of accession of the Republic of Rwanda to the East African Community, signed in Kampala, in Uganda, on 18/06/2007, *O.G.* n° special of 28/06/2007.

Movement to a convergent approach with reference to civil law countries

In order to understand the convergence between public and private law in the field of public contracts, it is useful to study countries where there was originally a divergence between public and private law, but which have now almost reached a state of convergence, and other countries which have achieved a balance between public and private law.

Movement towards a convergent approach in France

In France a divergence exists between public and private law, supported by French administrative law, which grants extensive privileges to the administration. This was Dicey's viewpoint of the "contrast between a French system of *droit administratif* privileging and protecting public officials and an English system essentially subjecting them to the general law in a uniform way".⁷¹⁷

Certainly for long, the French administrative law was more concerned with the administrative organs, i.e. the State, local government and public establishments and their duty to perform activities in the public interest. Then, in order to protect the public interest and stimulated by the Napoleonic philosophy of the powerful administration,⁷¹⁸ the public institutions were mainly subject to public law and were endowed with special powers and prerogatives. It is with this approach that one could differentiate between the public institutions and the private institutions, which (the latter) had to place their exclusive attention to the execution of activities of private interest and did not concern themselves with the public interest. This explains the existence of two categories of legal persons in France - legal persons subject to public law and legal persons subject to private law.

The French system clearly maintains the distinction between public and private law. Such a distinction developed because of three main factors: the

⁷¹⁷ Dicey, *Op. cit.*, pp. 337-350, cited by M. Freedland, "The evolving approach to the public/private distinction in English law", in M. Freedland & J.B. Auby (eds.), *Op.cit.*, p. 96.

⁷¹⁸ G. Dupuis et al., *Op. cit.*, p. 4.

first prevalent distinction lies in the juridical order which draws two important fields of law, public law and private law; the second unambiguous distinction emerges from the two courts structures, the 'judicial courts structure' and the 'administrative courts structure'; and thirdly there is a predetermined scientific division between public law and private law.⁷¹⁹

An analysis of the French legal system proves that the most important feature of public contracts is that they are governed by public law, and maintenance of the separation between public and private law is persistent. Furthermore, the rules of public law applicable to public contracts have been rooted in legislation and case law, to the point that they cannot be easily changed. However, "French lawyers realised (...) long ago that the modern state, its emanations and the actions of officials cannot always be characterised in terms of superiority and subordination."⁷²⁰ Thus, even in France, one can observe situations where some public institutions act as though they were private entities: "This resulted in the coming together of two categories of legal persons [legal persons subject to public law and legal persons subject to private law] with the consequent possibility of generating intermediate situations. Still in practice, difficulties can arise when one has to decide which category a legal person belongs to".⁷²¹

This is what Freedland expresses when stating that the viewpoint of Dicey on the French administrative law was misconceived, because there was a "degree of convergence which had taken place between the French system as it moved away from its revolutionary and Napoleonic phases, and the English system (...)".⁷²²

By contrast to the French system, in English law there is convergence between public and private law, which is based on the principle that the administration is subject to the law in the same way as all ordinary citizens. The distinction between public law and private law is therefore weak, and we

⁷¹⁹ O. Beaud, "La distinction entre droit public et droit privé: Un dualisme qui résiste aux critiques", in M. Freedland & J.B. Auby (eds.), *Op.cit.*, pp. 21-24.

⁷²⁰ S. Vogenauer, "Series editor's foreword", in M. Freedland & J.B. Auby, *Op. cit.*, p. vi.

⁷²¹ J. Rivero & J. Waline, *Op. cit.*, 2006, p. 49 (translation from French).

⁷²² M. Freedland, *Loc. cit.*, p. 96.

can see that public contracts are not exclusively subject to private law, but also to some rules delegating powers of intervention and responsibilities to the administration.⁷²³ Freedland adopts this position, and argues that the distinction between public and private law is not rigid:

“The distinction between public and private law cannot and should not be regarded as being rigid or water-tight in any of the [three] dimensions [the jurisdictional dimension, the procedural dimension, and the doctrinal or substantive dimension].⁷²⁴ On the contrary, we should fully expect that public law and private law will overlap or intersect in all three dimensions”.⁷²⁵

Reference to countries where public and private law are applied in balance

Some countries, such as the Netherlands and (to some extent) Belgium, are in the process of going beyond the limits of a divide between public and private law. In the Netherlands, a discussion is ongoing as to whether any separation should exist between public law and private law. Scholars and practitioners are increasingly convinced that, in modern society, the distinction between public and private law is not clear cut (especially in the fields of tort and contract law). Hartkamp and Tillema in particular have stressed that “the boundaries between public law and private law [have] become more and more vague”.⁷²⁶

Take the example of a car accident, involving a driver (employed by a municipality) who is at fault. The nature of the case does not change if we

⁷²³ P. Vincent-Jones, *Op. cit.*, p. xxix.

⁷²⁴ “In the jurisdictional dimension, we identify or seek to identify the persons, institutions, activities or functions to which public and private law respectively apply. In the procedural dimension, we distinguish the processes of regulation and above all of adjudication through which public and private law are respectively implemented. In the doctrinal or substantive dimension, we identify the rules and principles which are specific respectively to public and private law” (M. Freedland, “The evolving approach to the public / private distinction in English Law”, in M. Freedland & J.B. Auby, *Op. cit.*, p. 108).

⁷²⁵ M. Freedland, “The evolving approach to the public / private distinction in English Law”, in M. Freedland & J.B. Auby, *Op. cit.*, p. 108.

⁷²⁶ A.S. Hartkamp & M.M.M. Tillema, *Op. cit.*, p. 30.

substitute a private individual in the place of the municipality driver. Accordingly, the applicable rules of law do not change either. Furthermore, the nature of a breach of contract by a public entity is frequently not different to the nature of a breach by a private entity. Once more, the same rules of law ought to apply.

We can also see convergence between public and private law if we look at the court which has jurisdiction over tort and contract law litigation which involves the administration. If we assume that any action performed by the administration may be enforced before the courts, the question becomes “before which courts?” Is administrative action solely enforceable before the administrative courts, or are the civil courts competent to deal with litigation involving the administration?

In the Netherlands and Belgium for example, even though private and public law are independent fields, they are gradually converging, at least when applied to public contracts. In the Netherlands, litigation arising from public contracts falls within the exclusive jurisdiction of the civil courts.⁷²⁷ Likewise, in Belgium, public contract litigation which engages civil law rights falls within the exclusive jurisdiction of the civil courts.⁷²⁸ Scheltema and Scheltema describe the development as follows: “Administrative law and private law are distinct fields of law, but the rules of one field can as well apply to the other field of law. At the present time, there is an increasing move towards a convergence between administrative law and private law”.⁷²⁹

Movement towards a mixed legal approach to public contracts in Rwanda

When it comes to public contracts, in Rwanda there has often been a tendency to disregard ordinary contract law, and viewing administrative law as the exclusively applicable law in this field. However, two significant developments show the importance of ordinary contract law for the regulation of public contracts. Firstly, there has been a tendency towards the

⁷²⁷ Art. 8.3 of the General Administrative Law Act, mentioned above.

⁷²⁸ Art. 144 & 145 of the Belgian Constitution, mentioned above.

⁷²⁹ M.W. Scheltema & M. Scheltema, *Gemeenschappelijk recht: Wisselwerking tussen publiek- en privaatrecht*, Alphen aan den Rijn, Kluwer, 2008, p. 4.

application of a combination of private and public law to public contracts. Secondly, public and private entities now have comparable levels of power.

Definitely administrative law applies (at least in theory) as a matter of right to most public contracts. However, certain public attorneys at the Ministry of Justice argue that in practice the terms of public contracts are governed by ordinary contract law.

Attorney of State Rubango notes that proceedings concerning public contracts initially tend to be focused on procedural issues, which usually engage rules of administrative law (such as the procurement law rules on tenders, and the prerogatives and privileges of the state, which empower the government to unilaterally enforce, modify or terminate any contract, if to do so would be in the public interest).⁷³⁰ Nevertheless, Attorney of State Butare argues that when the substance of a case is examined before the court, the principles of ordinary contract law complement the rules of administrative law: “When you commence proceedings, procedural law (made up of administrative law rules) prevail over other rules. But when you enter the substantial part of the case, private law returns, and is applied to the contract in question”.⁷³¹

The courts also resort to the rules of ordinary contract law in order to settle conflicts which arise between the national rules of public procurement law and provisions of international treaties to which Rwanda is a party. Attorney of State Malaala⁷³² notes that the provisions of article 3 of the Rwandan Public Procurement Law might direct to the application of ordinary contract law: “To the extent that this Law⁷³³ conflicts with procurement rules of bilateral or multilateral treaties, or other international agreements, to which

⁷³⁰ Interview with E. Rubango, Principal Attorney of State at the Ministry of Justice, conducted on 27/07/2010.

⁷³¹ Interview with E. Butare, Principal Attorney of State at the Ministry of Justice, conducted on 27/07/2010.

⁷³² Interview with A. Malaala, Principal Attorney of State at the Ministry of Justice, conducted on 27/07/2010.

⁷³³ Law n° 12/2007 of 29/03/2007 on Public Procurement, in *O.G.* n° 8 of 15/04/2007.

the Government of Rwanda is a party, the requirements of those agreements shall prevail; (...)”.⁷³⁴

Finally, foreign corporations which contract with the Rwandan government tend to require the government to waive its sovereign immunity in the case of a breach of contract by the government, a point noted by Attorney of State Butare. This is illustrated by the contract entered into between the Republic of Rwanda and Olyana Holdings LLC for the sale of shares in the Gisovu Tea Company. Article 8.6.1 of that contract states that “[t]he government hereby waives its sovereign immunity protection prohibiting the institution of a suit or arbitration proceedings against the government on matters arising out of the government’s breach of this agreement”.⁷³⁵

These situations highlight a tendency to apply public law in combination with private law, and suggest these two types of law may be converging in this field.

In addition, in Rwanda and many other African countries, people view the administration and its organs as possessing greater power than private bodies, both economic and in terms of man-power. Many Rwandans also suspect that the administration and organs of state provide better employee welfare benefits, and that many individuals have been made wealthy by virtue of a high position in the civil service. Accordingly, many individuals aspire to work for the administration, or in a government institution.

However, the government is combating this perception through the implementation of policies aimed at empowering individuals and corporations to undertake activities which are business oriented.⁷³⁶ This is in line with a wider aim of the current Rwandan administration, namely the empowerment of private corporations to the extent that they can carry out work that is in the public interest and which was previously undertaken by the administration.

⁷³⁴ Art. 3, par. 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁷³⁵ The Gisovu Tea Company share sale agreement between the Republic of Rwanda and Olyana Holdings LLC, made on 24/09/2009, Agreement n° RDB PRZ 08/21/09.

⁷³⁶ Report on the reform of the Business regulatory framework in Rwanda, Ministry of Justice, December 2005.

There are many examples of this. For instance, in the education sector, many private schools have been established on various levels, including university level. In industry, there has been widespread privatisation of tea factories, cement factories and mining companies which were previously run by the state.

In the face of widespread privatisation, it becomes clear that the administration is not alone acting in the public interest.⁷³⁷ In due time, it is likely that individuals will have a greater capacity to provide jobs and services than the administration. Accordingly, the justification for a special administrative law which protects the administration at the expense of private institutions falls away. Furthermore, the maintenance of a distinction between public corporations and private corporations may serve to hinder private entities from acting to further the public interest.

7.3 Conclusions of this chapter

In conclusion, it is important to outline how principles of good governance can be recognised and accepted in Rwanda and why they ought to also be recognised and used to the public contracting. Certainly in Rwanda, good governance is at the top of the political speech, and more so, the constitution and some legal instruments refer to them as core values to consider during the administrative action, but the principles of good governance have not yet been fully recognised as binding legal principles to apply to the public contracting.

It is thus important to note that these principles ought to be set as norms having legal effect to the public contracting. In that case, the administration would be by law required to comply with the principles of good governance, hence developing procedures for the administrative decision-making and streamlining the exercise of the powers of the public authorities in the execution of administrative activities.

⁷³⁷ "Since privatisation programme started around 61 companies were fully privatized, 7 companies were liquidated, 17 are still under privatization with different phases of privatization or awaiting decision to be privatized, and 10 withdrawn from the list" (Rwanda Development Board, *Privatisation Program in Rwanda – Current situation*, January 2012, p. 4.

If the legal platform is so clearly discerned, the relevant principles of good governance will undergo an interpretative process by the public authorities during application, and also by the judges the time of judicial review on the grounds of non-compliance with these principles. Good governance would therefore call for a new legal approach to the public contracting in Rwanda, and our suggestion, looking into the different factors influencing the current legal context in the country, is that a convergence of public and private law is needed.

It is important to draw attention to the fact that the law of public contracts which is highly dominated by the influence of public law, supported by principles which vest the administration with various prerogatives and privileges, ought to be substituted by the law of public contracts dominated by a blend of public and private law rules, with the help of principles of good governance to shape up their implementation.

Obviously the main reason why public law dominates the law of public contracts is Rwanda's civil law background. It was against this background that the principles granting prerogatives and privileges to the administration to support its action also developed. These principles were widely accepted in national law, particularly because of the influence of French and Belgian legal literature which emphasized the benefits of such privileges. The approach in the literature was a result of the common perception in France and Belgium that the administration was in the best position to protect and safeguard the public interest.

However, the increased application of public law to public contracts is unsustainable given the modern level of interaction between public and private actors. If public law, with the help of public actors, was largely concerned with public law norms and principles to achieve public interest in the public contracting, there are good arguments to justify that the same role can be achieved by private law, with the help of public as well as private actors.

It is important to realize that nowadays private actors, under private law rules, are capable of furthering and safeguarding the public interest.

Likewise, in a move towards self-sustainability, public establishments and national corporations are increasingly involved in performing lucrative private activities, and their actions in those fields should be governed by private law. It becomes difficult for judges to know whether to apply public or private law to a particular case simply by looking at the identity of the parties, as the organic criterion is no longer decisive.

Moreover, comparatively it is notable that the distinction between public and private law is not sharp as it used to be. The study emphasized that very fact in countries which principally apply public law to public contracts, such as France, a move towards the application of private law to some public contracts has taken place. Likewise in countries that claim to primarily apply the private law to public contracts, such as England some approach to public law regulating some aspects of the public contracting appears to take effect. And some other countries are already using public and private law in interaction, such as the Netherlands.

Furthermore, Rwanda is an active member state of the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA). Certain member states of the EAC and COMESA favour a regulatory framework based on English law, in which there is a convergence between the application of public and private law. Therefore, to comply with the spirit of the community, the rules and principles governing public contracts must be harmonized in the different community member states.

For all these reasons, it is crucial that greater interaction is achieved between public and private law, so that similar cases are treated in the same way. However, this can only be achieved if principles of good governance are used to shape the law of public contracts, countering the adverse effects of certain public or private law rules.

In conclusion, it is desirable that public contracts in Rwanda be regulated by a combination of public and private law, with the support of the principles of good governance, applied by administrative decision-makers and interpreted by courts as legal rules which aim to achieve good governance.

8 Consequences of the new legality of public contracts from a good governance perspective

The two categories of public contracts which currently exist in Rwanda have already been set out in chapter two. Firstly, there are ‘administrative contracts’, which make up the majority of public contracts. Their implementation is governed by public law. Secondly, there are ‘private contracts’, which are less numerous than ‘administrative contracts’ because private law has not yet been developed to the point where it can usefully operate to further the public interest.

When the functional categorisation was formulated, due account was taken of the grounds for convergence between public and private law in Rwanda, which explain the move from a categorisation basing on the public/private law divide to a categorisation based on the function of the contract.

8.1 A functional categorisation of public contracts

In this chapter, the categories of public contracts are developed from the idea that the administration, when contracting, is pursuing diverse purposes, which are ranging from performance of a public utility or public service; procurement of goods, services or works; employment contracts; to contracts in relation to businesses of the administration. However, such a functional categorisation follows a certain hierarchy, derived from the public interest underlying the function. The public interest which is at stake in public contracts is not always uniform. Rather, a ‘scale’ of the public interest exists, varying from contracts where there is a significant public interest at stake to contracts where there is only a minor public interest at stake.

Firstly, in certain public contracts the public interest at stake is unquestionably significant. These include contracts which directly reflect the common good or national interest, such as electricity supply contracts, telecommunications contracts and water supply contracts. The state entity and the private entity are in a ‘vertical’ relationship, and accordingly it is appropriate to apply more public law rules to such contracts.

Secondly, some public contracts do not engage any particular public interest, but because they involve a high degree of business market or labour market

competitiveness, the process for the award of a contract or employment calls for caution. Thus, the accuracy of the competitive procedure is ensured, not only to reduce abuse of power in the administrative decision-making, but also to ensure that public expenditure is deployed in the most efficient manner. In such cases, it may be appropriate for public law to govern the tendering process, the procedural aspect of the contract, and for private law to govern the contractual undertakings, the substantial aspect of the contract. Such contracts would include, for instance, those for the construction of public roads.

Thirdly, there are many public contracts in which there is no public interest at stake, and which are simply concerned with the ordinary management of the administration. Such contracts include those for the mere lucrative profit by the administration. The relationship between the state entity and private entity is horizontal in nature, and so the application of private law, to the exclusion of public law rules, to such contracts is appropriate.

In short, it is submitted that public contracts should be re-categorised into the following three groups:

1. Public contracts having a high level of public interest (governed by more public law rules);
2. Public contracts having a medium level of public interest (governed by less public law rules);
3. Public contracts having low level of public interest / no public interest (governed by private law).

In this re-categorisation, examples of contracts are not intended to be exhaustive, they are rather given as reference for any other kind of contract that might fit in the suggested category.

8.1.1 Contracts for a function of high level public interest

This category includes many public contracts which undoubtedly involve a significant public interest and create a vertical relationship between the administration and the other contracting party. Examples of such contracts are contracts for the performance of a public utility or service, which are entered into with public bodies, or private bodies through a privatization

contract or any other form of public-private partnership. Such contracts should entail more rules of public law.

Public institutions performing public utility under contract

In contracts aiming at performance of a public utility or service, public bodies may contract with the administration to perform the public utility, such as the distribution of gas or electricity, the supply of water, the provision of public transport or the maintenance of a system of telecommunications. However, the public nature of the entities does not matter; as explained above, reliable private bodies may also be granted the power to undertake such a task, in the agenda of privatisation or concessions or other form of Public-Private Partnerships.

Private institutions performing public utility under privatisation contract

The government of Rwanda is currently in the process of using privatisation to make more profitable or free itself from its loss-making establishments, assets and services. The administration wishes to dispose of certain assets because they are a source of loss as well as certain establishments and services which the administration has been unable to manage in a cost-effective manner. The law concerning privatisation⁷³⁸ empowers the administration to proceed with the sale or lease of public establishments, assets and services to private operators if those operators commit to ensuring a certain level of profitability or service provision over a given time period.

The Secretariat for Privatisation was responsible for the systematic privatisation of public establishments, assets and services, as is described in the table below.

Table 1: Implementation of privatisation contracts from the year 2005 to 2008

Government companies planned for privatization	Already privatised	Under process of privatisation	Withdrawn from the list of companies to be privatized
95 companies	68 companies	17 companies	10 companies

Source: Secretariat for privatization, 03/04/2012

⁷³⁸ See Art. 3 of Law n° 2 of 11/03/1996 relating to privatisation and public investment, cited above.

However, it is questionable whether, once sale or lease has occurred, the administration can legitimately exercise control over the private operator, if that operator fails to comply with the terms of the privatisation agreement. This proved problematic, as it was not clear whether the privatised establishment, asset or service was owned outright by the private firm which received it, or whether it was subject to a resolutive condition which could potentially re-vest that establishment, asset or service in the state.

In *Munyampirwa v. Rwandan State* the Supreme Court, agreeing with the arguments advanced by the administration, held that a privatisation contract concerning an hotel was governed under public law, since the state could force performance of the contract, or impose penalties on the other contracting party, when that party failed to adhere to certain terms of the contract (regarding the satisfaction of the needs of the guests, the renovation and management of the hotel and the provision of high quality service). The applicant had argued that the contract should have been governed by private law, because the privatisation contract had no 'public interest' goal, and accordingly the contract should give rise to an unimpeachable right of ownership in property law.⁷³⁹

Everything depends on the initial intent of the administration. If the purpose of the privatisation of the establishment, asset or service was to improve it, and make it profitable, then the contract should state clearly that failure to do so will lead to cancellation of the contract.

For example, management of ELECTROGAZ (a public establishment supplying water and electricity) was conceded to a private entity, but that entity failed to profitably run the establishment.⁷⁴⁰ Accordingly, the contract was cancelled by the administration. Such a transfer operated under a resolutive condition.

⁷³⁹ *Munyampirwa v. Rwandan State*, par. 71, cited above. In the same logic, Hotel Kiyovu (a public asset) was privatised on 08/12/1998. That contract was cancelled on 12/10/2001 (letter n° 2179/01/10/Privat).

⁷⁴⁰ Contract of 15/08/2003 between Rwandan State (Ministry of Infrastructures) and Lahmeyer International (a German management consultants firm).

However, if the purpose of the privatisation of the establishment, asset or service was simply to completely free the administration from an unprofitable establishment, asset or service, the maintenance of which is no longer in the public interest, then the contract is not be subject to any resolutive condition. Failure to achieve profitability does not lead to cancellation of contract - full ownership of the establishment, asset or service has been transferred to the private operator. For example, a state-owned shoes factory in the City of Kigali, SODEPARAL,⁷⁴¹ currently named Rwanda Leather Industries Ltd,⁷⁴² was in 1997 privatised, but this contract was not subject to a resolutive condition. The public interest was not engaged, and the administration wanted to free itself from this unprofitable company.

From a good governance perspective, it is our suggestion that the question of applicable law should be settled when the parties enter into the contract, not after an alleged breach. This would enhance legal certainty, which is an important consideration in the public contracting process. The *Munyampirwa* case illustrated how uncertain the right conferred on the private operator was. When the administration entered into the contract, it should have clearly stated that it had the power to reclaim the hotel in case of management failure, on the basis of the preservation of the public interest. If the administration fails to set out its public law powers as regards particular contracts *ex ante*, then the situation is problematic from the outset.

In this regard, it is worth distinguishing between those privatisation contracts which are designed to free the government from an unprofitable establishment, asset or service, and those which offer an establishment, asset or service to a private operator to facilitate its cost-effective management. It is suggested that privatisation contracts in the first category ought to lead to unimpeachable ownership, whilst those in the second category ought to lead to ownership subject to a resolutive condition.

However, an alternative solution is also possible, by which the administration sells those establishments, assets and services in which there is no public

⁷⁴¹ Contract of 1997 between Rwandan State (Ministry of Infrastructures) and SABAN, Société d'Abattoir de Nyagatare.

⁷⁴² On 22/03/2006, the company transformed into "Rwanda Leather Industries Ltd", a commercial company governed under ordinary company law.

interest, and leases or concedes⁷⁴³ those in which there is a public interest to be safeguarded. In the case of sale without any reservation of ownership, private law would apply as a matter of fact, whilst in the case of lease, public law remedies would be by law applicable.

Contracts of lease of state's assets or services

A “lease of state land hosting public infrastructure is a contract between the government and an individual on condition of rent payment, to personally hold or to exploit the public land with public infrastructure”.⁷⁴⁴ The state's public land or assets are leased under the precondition of conversion from public domain to state's private domain.⁷⁴⁵ The uses of such land under lease contract can be residential, industrial, economic, commercial, agricultural, animal husbandry, forestry, tourism, social and cultural, science and scientific research, uses in protected land, fishing.⁷⁴⁶

The contract is for temporary use, normally for a period of time varying between three (3) and ninety nine (99) years.⁷⁴⁷ Usually when the contract is determined for a short term, the word “lease” is used, but if the right to occupy the land or asset is given for a much longer period, the contract becomes leasehold, commonly set to 99 years.⁷⁴⁸

⁷⁴³ The words ‘lease’ and ‘concede’ are in this study used to mean the same.

⁷⁴⁴ “Lease of state land hosting public infrastructure is a contract between the government and an individual on condition of rent payment, to personally hold or to exploit the public land with public infrastructure” (Art. 2 of Organic Law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, *O.G.* n° 18 of 15/09/2005).

⁷⁴⁵ Art. 4(6⁰) of Presidential Order n° 30/01 of 29/06/2007 determining the exact number of years of land lease, *O.G.* n° 13 of 01/07/2007.

⁷⁴⁶ Art. 5 of Presidential Order n° 30/01 of 29/06/2007 determining the exact number of years of land lease, cited above.

⁷⁴⁷ Art. 4(1⁰) of Presidential Order n° 30/01 of 29/06/2007 determining the exact number of years of land lease, cited above.

⁷⁴⁸ Art. 62 (relating to emphytheutic lease not exceeding 99 years) and Art. 76 (relating to leasehold not exceeding 50 years) of Decree of 20/7/1920 governing ownership and modifications to ownership, in *O.G.*, 1920, p. 870.

Lease or concession of public assets and public services are closely related. The concession of a public asset describes an arrangement whereby the government, whilst remaining the owner of an asset - such as a hospital, school, section of public infrastructure, or mine - contracts with a private operator, and the latter undertakes to operate and maintain the asset, and invest in that asset to ensure its development.⁷⁴⁹

Concession of a public service describes an arrangement whereby the government contracts with a private operator for the supply of a public service (such as health care services).⁷⁵⁰

Certain categories of concession contracts may combine elements of both assets and services. In practice, the assets and services may be interrelated, as the operation of an asset may involve the provision of a service. For example, if a hospital is conceded (an asset), operation of that hospital includes the provision of health care to individuals (a service).

Private operators must enter into concessions contracts, governed by private law and public law, the latter helping the administration to ensure that the private operators deliver public services which are up to the requisite standard. The grant of some public law powers to the administration is wholly appropriate in such cases, as it is clearly in the public interest that the quality of public service delivery is maintained.

When a concession contract involves the concession of a public establishment, a public enterprise or a service normally performed by the State, the State must go through a privatisation procedure, described above. Article 3 of Law n^o 2 of 11 March 1996 (concerning privatisation and public investment),⁷⁵¹ provides that "(...) the State can (...) partially or totally cede a

⁷⁴⁹ "Concessions", in <http://rru.worldbank.org/Toolkits/InfrastructureConcessions/>, accessed on 04/05/2010; see also Ch. Guettier, *Op. cit.*, pp. 227-230; L. Richer, *Op. cit.*, pp. 554-559.

⁷⁵⁰ International Accounting Standards Board, "Service Concessions – Project Summary", London, September 2006, accessed in <http://www.iasb.org/NR/rdonlyres/A23BFAEA-A8E8-4F84-BBDD-A98E481F7AEB/0/Serviceconcessionsprojectsummary.pdf>, on 2/5/2010; see also Ch. Guettier, *Op. cit.*, Paris, PUF, 2004, p. 227ss ; pp. 227-230; L. Richer, *Op. cit.*, pp. 554-559.

⁷⁵¹ Law n^o 2 of 11/03/1996 relating to privatisation and public investment, cited above.

public establishment and/or other public enterprise, or service normally performed by the state, by way of presidential order or according to the provisions of the law used for its creation: or if management of the enterprise has been failing, or the State wishes to disengage from a commercial or industrial enterprise; (...).”

Grant of subsidy to perform a public service under contract

Subsidy contracts are concluded between the administration (Contracting Authority) and the operator of a public or private project (Lead Partner). Usually, a monetary subsidy is provided in return for the implementation of a project agreed upon by the parties and approved by decision of the Contracting Authority. The subsidy is funding continuation of the ordinary activities of the public or private partner, which the administration believes are in the public interest (such as the running of an education or health facility), in order to improve and enhance a service already being provided. Subsidy contracts range from simple subsidy contracts to Public-Private Partnership Agreements (the latter of which determine, *inter alia*, the rights and responsibilities of the Lead Partner and the Contracting Authority, the scope of the activities to be carried out, the terms of funding, any reporting requirements and financial controls, and guarantees which must be undertaken to cover the amount received by the Lead Partner).⁷⁵²

Subsidy contracts would fit better in contracts governed by public and private law in interaction, the former vesting the administration with special privileges for control over the use of funds and the attainment of the goals set under the contract and the latter giving the private operator some freedom to perform its activities under the rules of private law. In this context, we can see extensive indications that public law rules will be used to support the administration in safeguarding the public service, regardless of whether the other party is a public or private entity.

In conclusion, public and private law are the fields of law which in combination would govern these contracts enclosing a high degree of public interest, in order for the administration, using public law powers, to closely

⁷⁵² “Subsidy contract”, in <http://www.interreg3c.net/sixcms/detail.php?id=1591>, accessed on 2/5/2010.

watch over the assets or services contracted out by way of privatization or lease, and the private operator, using the ordinary private law, to easily manage its operations.

8.1.2 Contracts for a function of medium level public interest

This category of public contracts for a function of medium level public interest include those which entail a large public expenditure, or involve a certain degree of competitiveness, but which do not involve the performance of a task which is in the public interest. Public procurement contracts, including contracts for the supply of goods and services, and contracts for public works, and also employment contracts concluded with the administration fall within this category.

We consider that public law rules should be applied to the procedure which must be followed before such contract can be entered into. However, the substance of these contracts is purely private in nature. It is in this way that a combination of public and private law can be applied to them.

Public procurement contracts

There are three categories of public procurement contracts: contracts for the procurement of goods, of services, and of works. When examining the nature of these contracts, it is worth noting that it is essential for the administration to utilise public procurement contracts in order to implement its policies. However, it is not easy to dissociate administrative action from the means used to achieve it. Whilst the administration procures certain products, services or works (such as the construction of a hospital, the installation of electricity or the purchase of a generator), it does so with the general aim of improving service delivery to the public.

Nevertheless, even if the administration implicitly wishes to improve service delivery to the public by entering into a contract, it is difficult to argue that such a contract involves *direct* pursuit of the public interest. In many cases, the procurement of goods, services or works is an activity habitually performed by ordinary managers of the public institution. These managing officers are focused on the procurement of high quality goods, services of

works, not on the effect that this procurement will have on the public interest.

Currently, public law is applied to public procurement contracts, and legal protection under public law is offered to the administration and those who submit tenders to public bodies. According to Rwandan administrative law, any public contract involving the procurement of goods, services or works by the administration is governed by the law on public procurement,⁷⁵³ regardless of the public expenditure at stake. The only legal basis for distinguishing between the various public procurement contracts is by looking at *what* is procured (goods, services or works). At least on the basis of the current administrative law, the use of any other criterion, such as state expenditure on the contract, or the magnitude of the works or services obtained, is inappropriate.

An analysis of the public-law preference in this context shows us that the rules of public law place hurdles in the way of the acquisition of products, services and works. The relevant institution must comply with many procedural rules and go through various procedural stages before obtaining the relevant product, such as the producing of a tender document and its advertisement, the acceptance and evaluation of bids, the award of contract, the drafting of the contract and its signing, the acquisition of a security bond pre-requisite to payment of an advance payment, and so on. It is arguable that a 'public law in combination with private law' approach to such procurement contracts could help to mitigate the delay and complexity which accompanies the current, public law, approach.

Firstly, the application of a combination of public and private law would improve efficiency. Certain types of procurement contracts necessitate prompt consideration, especially in situations where public institutions urgently need to acquire particular equipment or services. These could include, for example, the replacement of an important computer, printer or projector, the repair of a broken glass door or window, the provision of travel arrangements for employee civil servant who must go without delay on a mission abroad, or the simple refitting of an electrical power or computer

⁷⁵³ Law n° 12/2007 of 27/03/2007 on public procurement, cited above.

program supply. If the public institution does not act with celerity, this would hinder high-quality service delivery.

Secondly, the application of a combination of public and private law would avoid the inappropriate application of public law to certain cases of public procurement. For example, where products, works or services are procured simply to ensure the basic functioning of public institutions, private law would be suitable to these cases in order to reduce public law lengthy procedures. Thirdly, adoption of the public-private law approach would help reduce the risk of embezzlement of public funds. Whilst some argue that the use of lengthy procurement procedures reduces the risk of embezzlement, this assumption is not necessarily true. In fact, a lengthy procedure can afford a malicious officer greater opportunity to defraud the administration in sophisticated ways.

Consequently, a combination of public and private law rules should be adopted to govern the procurement of goods, services and works, to reduce the time taken by such long procedures, and to counter the risk of embezzlement. In this regard, more public law rules should be introduced in the pre-contractual phase and award phase, and more private law rules in the contractual phase. For instance, if the tender engages issues which are in the social, economic or public interest, this might justify the application of more public law rules to the pre-contractual process. If the government wishes for example to procure restricted items, either for the army or other public bodies responsible for public security, national interest issues are engaged. Accordingly, the application of more public law rules to the pre-contractual and award phase is appropriate.

Certain other projects can be thought of which, to varying degrees, engage the national interest or the public interest more generally. For example, a sensitive consultancy project on political issues may engage the national interest, whilst an important research project aimed at tackling malaria in the country clearly raises issues which are in the public interest. In such cases, the pre-contractual and award phase ought to be governed by more public law rules, and this should be clearly provided for in the terms of the contract.

Employment contracts

In the employment contracts with the administration, a distinction is made between the employment contracts with civil servants and the labour contracts with other employees.

Employment contracts with civil servants

The employment rights of civil servants in Rwanda are governed by law n° 22/2002 of 09/07/2002 (concerning the Rwandan civil service).⁷⁵⁴ This gives them a status different to those whose employment rights are governed by private law.⁷⁵⁵ The general rule is that civil servants are recruited and appointed by administrative decision, which determines their duties and rights. They are not recruited or appointed under contract: “Appointment is the administrative act by which the competent authority appoints a Government employee to a working post”.⁷⁵⁶

This use of public law is primarily intended to defend the rights of employees, but also affords increased protection to the privileges of the administration. On the one hand, the law allows government employees to benefit from their statutory positions (they are provided with special leave allowances, training, health insurance, as well as state contribution to their accommodation and transport to work)⁷⁵⁷ and also guarantees that they can challenge any decision made regarding their position or performance by way of claim for administrative review.⁷⁵⁸ On the other hand, however, the law explicitly provides that the administration may impose sanctions on its employees for failure to perform their duties, or for disciplinary fault: “First degree sanctions are a warning, official reprimand, and deduction of a quarter of the individual’s salary for a maximum period of one month. Second degree

⁷⁵⁴ Law n° 22/2002 of 09/07/2002 on general statutes for Rwanda public service, cited above.

⁷⁵⁵ Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, in *O.G.* n° special of 27/05/2009.

⁷⁵⁶ Art. 35 of Law n° 22/2002 of 09/07/2002 on general statutes for Rwanda public service, cited above.

⁷⁵⁷ Art. 73-105, *Idem.*

⁷⁵⁸ Art. 96-98, *Idem.*

sanctions are suspension for a maximum period of three months, delay in promotion and expulsion".⁷⁵⁹

In the past both the administration and its employees viewed this state of affairs as legitimate, but nowadays it has been subject to change. Notwithstanding the advantages offered by the civil servants status, there are three ways in which employment with the administration may sometimes be considered less attractive than private employment, than may have been the case in previous years.

First, in current employment environment, the administration is no longer the chief employment-provider. This is because of the new trend towards greater private sector participation, within a competitive framework, in the country's social and economic development.⁷⁶⁰

Secondly, certain civil servants are being made subject to dual regulation. Not satisfied with the statutory regulation of employment rights, certain administrative authorities have made it compulsory for employees to sign an additional performance contract, also dealing with their employment rights and obligations. Furthermore, some employees may prefer not to be bound by statutory provisions, which can impose demanding obligations on civil servants, and are often not proportionate to the salary offered.⁷⁶¹ Meanwhile, there are increasing employment opportunities with private entities, which can be less demanding and offer similar pay.

For instance, turning back to the university example, which neatly illustrates the parallels and contrasts between the public and private sectors, we can see a clear salary resemblance. The NUR (National University of Rwanda - a

⁷⁵⁹ Art. 92, *Idem*.

⁷⁶⁰ Privatisation of public assets and establishments is one of the examples to that aim (see Law n° 2 of 11/03/1996 relating to privatisation and public investment cited above).

⁷⁶¹ For example, art. 86 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service (cited above) provides: "The following is incompatible with a Government employee's status: 1° Any political activity likely to be prejudicial to the good functioning and general interest of the Public Service as well as to maintaining his/her action's objectivity; 2° Any profession or commercial or industrial activity prejudicial to the fulfilment of his/her duties; (...)".

public higher learning institution), basing on the salary scheme for public servants, could raise the salary scale of its academic staff sufficiently enough to improve performance,⁷⁶² and likewise the ULK (Independent University of Kigali - a private higher learning institution) was also able to afford increase of salary to that end.

Table 2: Salary scale for academic staff at NUR and ULK, year 2009 (in Rwandan Francs)

	Assistant lecturer		Lecturer		Senior Lecturer		Associate Professor		Professor	
	Gross	Net pay	Gross	Net pay	Gross	Net pay	Gross	Net pay	Gross	Net pay
NUR	659,019	382,846	817,921	475,061	945,873	544,137	1,354,957	776,520	1,793,914	1,016,435
ULK	700,000	448,675	800,000	556,200	1,000,000	591,250	1,200,000	758,775	1,500,000	937,725

Source: NUR Human resource department, 21/02/2013; ULK Human resource department, 28/02/2013

However, to achieve high quality service performance, the administration has recently exhibited a tendency not only to recruit proficient employees and pay them well, but also to take all measures necessary to replace those employees whose weak skills could lead to inefficiency. This growing tendency towards competitiveness and the provision of quality service should go hand in hand with development of the legal framework within which employment arrangements are concluded and executed.

It is becoming evident that the general statutes which govern the Rwandan civil service, which set out the employment rights of civil servants, should be rethought so as to embody a mixed approach to employment law, combining elements of public law (to cater for the requirements of government) and elements of private law (to alleviate the severity of public law rules). Public law can usefully govern the process of recruitment and appointment, and private law can then step in to regulate the performance and enforcement of the employment contract.

⁷⁶² Prime Minister's Order n° 53/03 of 14/07/2012 establishing salaries and fringe benefits for public servants of the Central government, O.G. n° special of 14/07/2012, as modified and complemented by Prime Minister's Order n° 92/03 01/03/2013, O.G. of n° special of 01/03/2013.

Labour contracts with the administration

There are a number of cases in which the administration enters into labour contracts without exercising any of its prerogatives, and which accordingly do not serve any particular public interest. This category encompasses various categories of labour contracts, including those of fixed or variable duration, as well as contracts made with casual workers which have a very short duration.

Logically, these contracts should be governed by more rule of private law, and correspondingly the labour chambers of the ordinary courts should have jurisdiction over disputes arising from them. However, in making use of private law in novel areas, the administration must take into account the specific legal responses of labour law on various important points, including contract creation, payment, and social security (where applicable).⁷⁶³

All in all, it is notable that, in the context of employment contracts, the principles of good governance should assist the administration in attaining a high standard of contracting practice, as explained further below. The principles of good governance principles should operate in the background as a safety net, to ensure that public interest goals are attained and that public funds are managed in an efficient manner.

8.1.3 Contracts for a function of low level /no public interest

When speaking about these categories of public contracts for a function of low level or no public interest, it is important to note, as their defining characteristic, the low level (or indeed absence of) public interest in their creation and performance. When it is clear that a contract is private in nature, it follows that the applicable rules governing that contract are those of private law, including commercial law when national companies engage in commercial dealings.

Contracts which enclose a low level of public interest or no public interest at all include contracts of sale of the State's private assets and contracts for

⁷⁶³ See Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, cited above.

supply of services by the administration, and a wide range of commercial dealings by the administration.

Contracts of sale of the State's private assets

The State's private assets make up an important part of the state's holdings. These are the movable and immovable assets in the care of State organs, and not meant for public use, because they may have depreciated in value, or been spoilt to the extent that they no longer serves any useful purpose, or they have a value which is no longer of any use to the State institutions. They also include property whose ownership is unknown.⁷⁶⁴

On the one hand, we can view the decision to transform these public assets, in the care of a public body, into private assets as governed by administrative law: "Each year, public institutions with private assets to be disposed of shall prepare a list indicating their condition and value. Such a list of assets to be sold, donated, exchanged or destroyed shall be prepared within the same period as the annual budget (...)"⁷⁶⁵ If so, such a decision is governed by public law, not private law.⁷⁶⁶

On the other hand, we can view this process as governed by private law. Rwandan administrative law provides for a special procedure to be followed for the disposal of the state's private assets (by sale, donation, exchange or destruction) for which there is no further public use. Such assets include office equipment and furniture which has been spoilt, old state housing facilities for civil servants which have lost value and abandoned things whose owners cannot be determined. It is clear that retaining such assets could lead to certain costs, which would not be borne if the property was managed effectively.

⁷⁶⁴ Art. 1(6°) & 2 of Law n° 50/2008 of 09/09/2008 determining the procedure for disposal of state private assets, *O.G* n°24 of 15/12/2008.

⁷⁶⁵ Art. 6 of Law n° 50/2008 of 09/09/2008 determining the procedure for disposal of state private assets, cited above.

⁷⁶⁶ The law provides rules for determination and valuation of assets to dispose of (see Law n° 50/2008 of 09/09/2008 determining the procedure for disposal of state private assets, cited above).

It is submitted that private law should apply to the sale, donation, exchange or destruction of such assets (public assets transformed into the private assets of the state). For example, when disposing of such assets, the administration should comply with the private law rule that the transfer of ownership takes place at the time of sale in case of movable property⁷⁶⁷ or the time of registration in case of immovable registered property.⁷⁶⁸

Contracts involving commercial dealings of the administration

Most of businesses undertaken by the administration are performed by the national companies. It is important to note that Rwandan administrative law regards national companies and government corporations as ‘business entities of the administration’, which perform commercial or industrial activities in the pursuit of profit. It has been accepted that the ordinary dealings of these companies (such as their procurement of goods, services and works) are governed by private law, and the ordinary court has jurisdiction over disputes arising from those dealings.⁷⁶⁹

However, there exist a wide range of other dealings having a commercial nature, such as treasury bond contracts entered into with the National Bank of Rwanda and insurance contracts for the state’s assets. The release of treasury bonds offered by the National Bank of Rwanda is performed under contract for a long term period of reimbursement, by which the bank agrees to refund the debt with interest. This activity does not differ from any other loan dealings carried out by the ordinary commercial banks in their usual activities, which lead us to confirm their private law character.

⁷⁶⁷ Art. 264 of Law governing contracts (CCBIII) provides that “A sale is complete between the parties and ownership passes as a matter of right to the purchaser from the seller as soon as the thing and the price have been agreed upon, although the thing is not yet delivered or the price paid”.

⁷⁶⁸ “Transfer of ownership in immovable property takes place the time of registration of transfer by the registrar of title deeds” (Art. 37 of Law governing property, CCBII).

⁷⁶⁹ Art. 5, par. 3 of Law n° 2 of 11 Mars 1996 relating to privatization and public investment (cited above) provides: “A national company refers to a public enterprise with commercial or industrial goal, made up of actions subscribed by the state together with or without other public entities, whose capital is determined by presidential regulation”.

As regards the insurance contracts which provide insurance cover for government vehicles and public infrastructure, private law also applies. It is clear that commercial law governs all insurance contracts to which the government is a party: “ (...) commercial matters include [among others] (...) disputes arising from cases related to insurance litigation (but do not include compensation claims arising out of road accidents by litigants who have no contract with the relevant insurance firms)”.⁷⁷⁰ As a result, insurance contracts to which the government is a party, for instance those relating to government vehicles and infrastructure, are governed by commercial law, as stipulated by article 3(5°) of Organic Law n° 59/2007 of 16/12/2007 (mentioned above).

All disputes arising from dealings of a commercial or industrial nature have recently been held to be governed by commercial law, and commercial courts⁷⁷¹ granted the jurisdiction to hear them.⁷⁷² It is suggested that private (commercial) law ought to apply to regulate the commercial dealings of public institutions, particularly those of national companies.

However, a problem might arise when managing the simplified procedure offered by private law. Some argue that procurement officers in public institutions may find it easier to embezzle public funds when private law is applied to their actions, as opposed to public law.⁷⁷³ As shall be explained further below, the principles of good governance can go some way towards meeting this objection, by guaranteeing the good administration of such contracts and preventing the misuse of the simplified procedures.

⁷⁷⁰ Art. 3(5°) of Organic Law n° 59/2007 of 16/12/2007 establishing the commercial courts and determining their organisation, functioning and jurisdiction, cited above.

⁷⁷¹ “Commercial Courts shall hear commercial, financial and tax matters. Commercial Courts are the Commercial High Court and Commercial Courts.” (art. 36 of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

⁷⁷² Art. 3(1°) of Organic Law n° 59/2007 of 16/12/2007 establishing the commercial courts and determining their organisation, functioning and jurisdiction, *O.G.* n° 5 of 01/03/2008.

⁷⁷³ Interview with I. Kalihangabo, Assistant deputy attorney of State in charge of State’s contracts, Ministry of Justice, conducted on 16/08/2010.

8.2 A combined application of public and private law to public contracts

In principle, for all public contracts the public and private law rules and principles should be applied in combination. However, more public law rules and principles ought to be applied to the public contracts enclosing a high level of public interest, whereas more private law rules ought to apply to contracts which enclose a low or no public interest, as explained above.

8.2.1 Public and private law rules/principles applied in combination

The variation of a combined application of public and private law to public contracts is examined, with reference to the level of public interest at stake.

More public law rules/principles to contracts of high level public interest

Contracts involving a high degree of public interest should be governed by more public law rules, so that the administration can exercise the control and oversight necessary to safeguard the public interest, by using the coercive powers afforded to it by public law. In this regard, it appears essential to guarantee that the contracts are performed in line with the underlying public interest to preserve, by means of public law norms and administration's prerogatives.

However, in the case of contracts between the administration and a private body, if we acknowledge that the private entity which entered into the contract is accustomed to having their actions governed by private law, then to what extent must the behaviour of the administration empowered with excessive powers, in this context, be compatible with the principles of private law? It seems clear that the principles of private law may conflict with the public law prerogatives vested in the administration. One way to resolve this conflict is to introduce the principles of good governance in the process, to avoid any frustration on the part of the private body.

These principles of good governance would be regarded as 'procedural and substantive principles', which the administration must respect during the public contracting process, but which should not limit the prerogatives held by the administration, if the administration has good reason to exercise them in the public interest.

If the application of the principles of private law, of public law and of good governance is to be done in combination, then only those contracts which undoubtedly engage a significant public interest ought to fall within this category of public contracts, such as contracts for the performance of a public utility or service or concession of public assets contracts.

Less public law rules/principles to contracts of medium/low public interest

There is no difficulty with applying public law rules and principles in combination with private law rules and principles to public contracts with medium or low level of public interest.

As mentioned above, the application of public law, and the consequent grant of privileges to the administration in case of contracts enclosing a high level of public interest, would be appropriate to ensure that the public interest is safeguarded. Practically, in the case of such contracts, the ordinary judge should be able to assess the application of public law to the dispute, attention paid to the interest to be safeguarded. If there is an indisputable public interest at stake, public law rules and principles granting privileges to the administration should be applied. However, if there is a low or no public interest at stake, less or no public law rules and principles would be applicable.

In these categories of public contracts, public law rules and principles shall be applied to a lesser degree, because of the medium or minimal level of public interest to defend. Nevertheless, where for rules and principles of private law would be inappropriate in certain circumstances, they will be compensated by the use of principles of good governance. Thus, the use of principles of good governance gives a room to the possibility of introducing a more private law oriented to the pre-contractual and contractual phases of procurement of items, services and works, or employment contracts, or sale of state's private assets, or businesses undertaken by the administration, which helps to avoid delays and time-consuming public law procedures.

In conclusion, if the application of public and private law in combination is the basis chosen for public contracts, principles of good governance shall always be placed in their background, not only for accuracy, but also for a

public recognition. Courts may of course be able to check on the application of the principles of good governance during disputes concerning public contracts, whether the contract is governed by public or private law. To help them do so, the administration and legislature must transform the principles of good governance into legal norms capable of application and interpretation. It is therefore necessary to set out the parameters of their application in the law, in addition to public and private law rules and principles, as explained below.

8.2.2 Principles of good governance applied to all public contracts

In outline, there exist six categories of principles of good governance in administrative law:

1. Principles of properness; encompassing
 - a. the prohibition of the misuse of power,
 - b. the prohibition of arbitrariness,
 - c. the principle of legal certainty,
 - d. the principle of legitimate expectations,
 - e. the principle of equality,
 - f. the principle of proportionality,
 - g. the principle of due care, and
 - h. the principle of justification
2. Principles of participation;
3. Principles of transparency;
4. Principles of effectiveness;
5. Principles of accountability; and
6. Principles of human rights.⁷⁷⁴

This study will analyse to what extent the law governing public contracts in Rwanda is compatible with the principles of good governance. In doing so, it will examine how certain key principles of good governance can be utilised to improve the existing law, from the pre-contractual stage onwards, both in the public and private law contexts.

⁷⁷⁴ G.H. Addink, "Principles of good governance: Lessons from Administrative Law", *Loc. cit.*, pp. 22-23; see also Ph.M. Langbroek, *Loc. cit.*, p. 83-107.

These principles have to be applied to all the categories of public contracts. However, a selection of important principles has been done, in consideration of the following three elements:

- A principle becomes relevant depending on the stage of public contracting;
- Some principles connect to each other, which helps to choose the most relevant principle depending on the phase of public contracting, to avoid duplications;
- Simplifying the principles in terms of number might ease interpretation and implementation by administrative decision-makers and judges.

In this regard;

- the principles of equality of addressees of any public contract, transparency of information in relation to public contracting and prohibition of misuse of the administrative authority's power were selected to apply to the pre-contractual and award phases;
- the principles of justification of decisions made by the contracting authority, prohibition of arbitrariness in decision-making, effectiveness in the management of the public contract and legitimate expectation of the contracting party were opted for the contractual phase; and
- for litigation arising out of public contracts execution, the principle of fairness of the administrative redress and the principles of administrative and legal accountability were chosen.

Principles to apply to the pre-contractual and award phases

There are three important phases to public contracts: the pre-contractual phase, the award phase, and the contractual phase.

The first two phases are prerequisites for the formation of a public contract. During these stages agreement should be reached on which legal rules and principles will govern the pre-contractual procedure, as well as the way that the principles of good governance will be applied to the process. Three principles of good governance are particularly significant during these first two phases, namely the principles of equality, transparency, and the prohibition of the misuse of power.

Equality of parties to public contracts

The principle of equality is set out as a general principle in the Rwandan Constitution, Article 9 of which states that “the State of Rwanda commits itself (...) to building a state governed by the rule of law, with a pluralistic democratic government, where there is equality between all Rwandans, and particularly between women and men (...)”.⁷⁷⁵ This principle compels the administration to treat equal parties in the same way. A good illustration of the principle can be found in the EU context where the European Code of Good Administrative Behaviour states under the provisions of Article 5 that:

“1. In dealing with requests from the public and in making decisions, the official shall ensure that the principle of equal treatment is respected. Members of the public who are in the same situation shall be treated in a similar manner.

2. If any difference in treatment is made, the official shall ensure that it is justified by the objective relevant features of the particular case. (...)”⁷⁷⁶

The equality principle encompasses another principle particularly relevant in the current context, namely the principle of non-discrimination, which requires the removal of legal obstacles hindering the participation of foreign individuals or foreign firms in the public contracting process. In the EU context, Arrowsmith describes the principle as follows: “[I]t [free movement of services] applies when a government restricts access to the market in general – for example, by banning foreign firms from providing services in the state, or making access subject to payment of a fee that does not apply to domestic firms”.⁷⁷⁷

In Rwanda, no open strategy has yet been devised to provide for a regulatory mechanism, operating at the level of governance of public contracts, to take into account foreign employees or firms, be it at the level of employment, public procurement or concession contracts.

⁷⁷⁵ Art. 9, Rwandan Constitution of 2003 as amended, cited above.

⁷⁷⁶ The European Ombudsman, The European Code of Good Administrative Behaviour, in <http://www.ombudsman.europa.eu/code/en/default.htm#hl9>, visited on 14/05/2010.

⁷⁷⁷ S. Arrowsmith, *Op. cit.*, p. 211.

Apart from the services or works which Rwandans are unable to perform, most existing rules prefer Rwandan persons or firms rather than foreign ones, solely on the basis of nationality. For example, Article 28 of Law n° 22/2002 of 09/07/2002 (concerning the Rwandan public service) provides, *inter alia*, that successful candidates must “be ... Rwandan nationals”: “Successful candidates must fulfill the following conditions: 1° Be a Rwandan national; (...)”.⁷⁷⁸ However, recent regulatory innovation has helped improve compliance with this principle in the context of public procurement and privatisation contracts. For example, Article 23, paragraph 2 of the Law on Public Procurement remarkably states that: “Bidders from foreign countries shall be allowed to participate in open competitive bidding if they are willing to do so”.⁷⁷⁹

Nevertheless, the commitment to non-discrimination is not complete. ‘Reservation’ rules exist, often with a certain ‘local preference’. For example, Article 41 of the Law on Public Procurement states that:

“Local preference not exceeding 10% may be granted to companies registered in Rwanda or to Rwandan nationals and bidders in regional economic integration bodies member states. Such local preference shall be included in the bidding document and defined in the procurement regulations”⁷⁸⁰.

Another good example of the move towards equality and non-discrimination is the new Labour Code, which provides in Article 12 that:

“It shall be forbidden to discriminate, directly or indirectly, against workers so as to deny them certain opportunities or pay, especially when the discrimination is based upon the following:

1. Race, colour, or origin;
2. Sex, marital status or family responsibilities;
3. Religion, beliefs or political opinions;

⁷⁷⁸ Art. 28 of Law n° 22/2002 of 09/07/2002 on general statutes for Rwanda public service, cited above.

⁷⁷⁹ Art. 23, par. 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁷⁸⁰ Art. 41, *Idem*.

4. Social or economic conditions;
5. Country of origin;
6. Disability;
7. Previous, current or future pregnancy;
8. Any other type of discrimination".⁷⁸¹

Good governance should be encouraged in Rwanda. For this reason, the principle of equality in general and the principle of non-discrimination in particular should be used as an instrument to regulate public contracts, particularly in the framework of the East African Community that Rwanda joined as recently as in 2007.⁷⁸²

Transparency of information and decisions concerning tender and award

In Rwanda there are many existing provisions in place which facilitate the provision of information to those entitled to it, especially in the context of public contracts. The principles of transparent administration consist of the principle of transparency of information and the principle of transparency of decisions and orders.

Transparency is achieved by allowing the free communication of information. In the context of public contracts, this includes informing those involved in the tendering process and those interested in the tender, or decisions made (and how those decisions were reached). As Ngaire Woods notes, for the transparent administration to be, transparent procedures must be in place which ensure transparency and the free flow of information.⁷⁸³ This is to be adequately explained in as far as the principles regarding the procedures of tendering and recruitment are concerned and most especially concerning the role of the transparency principle during the process.

⁷⁸¹ Art. 12 of Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, cited above.

⁷⁸² Treaty of accession of the Republic of Rwanda to the East African Community, signed in Kampala, in Uganda, on 18/06/2007, O.G. n° special of 28/06/2007.

⁷⁸³ Ngaire Woods, "Good governance in international organizations", *Global Governance*, Jan-Mar99, Vol. 5 Issue 1, p. 6, 23p, <http://www.globaleconomicgovernance.org/docs/Good%20Governance%20in%20International%20Organizations.pdf>, accessed May 6th, 2008.

The first way in which transparency is achieved in the context of public contracts is through the laws and regulations which govern those contracts. For example, Article 5 of the Public Procurement Law states that “[t]he law, orders, standard bidding documents and contracts shall be made available to the public”. Even aside from these laws and regulations, other documents set out transparency requirements which the government must adhere to during the procurement process. One such document states that, “a copy of the decision of the Independent Review Panel shall be promptly made available for inspection by the general public (...)”,⁷⁸⁴ and another that the procuring entity shall inform all the bidders in writing the reason for rejecting any bid.⁷⁸⁵

Other laws mention the principle of transparency, directly or indirectly. For instance, Article 26 of the law governing public civil servants, through an ‘advertising’ requirement, helps assist the free flow of information: “The recruitment of Government employees (...) is (...) organized by the Commission, which is in charge of advertising vacant posts, as well as advertising the results from the related competition”.⁷⁸⁶

Transparency is also achieved by disclosure of the relevant award criteria. Arrowsmith, speaking in the EU context, argues that:

“Disclosing the award criteria and methodology helps to ensure that there is no abuse of discretion to favour particular providers, contrary to the directives’ objectives, and also that participants can respond in an appropriate way, by submitting tenders that best reflect the purchaser’s priorities”.⁷⁸⁷

Proper disclosure entails setting out the basis for a particular decision (whether to award a tender or employment position to a particular individual or company, and why other competitors were unsuccessful obtaining the award), as well as the reasons for any connected decision.

⁷⁸⁴ Art. 72 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁷⁸⁵ Art. 40, par. 3, *Idem*.

⁷⁸⁶ Art. 26 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above.

⁷⁸⁷ S. Arrowsmith, *Op. cit.*, p. 519.

Transparency must be maintained because of the principle of competitiveness, which underpins the pre-contractual and award phases of public contracting. One of the fundamental principles underlying public contracting law in Rwanda is competitiveness. The law on public procurement requires government authorities to give out tenders on a competitive basis. Article 26 states that: “The bidding documents shall contain enough information to allow fair competition among those who may wish to submit tenders.”⁷⁸⁸

The law goes on to assert that during the tendering process, there must be practical competition. This is explained in Article 17, which states that:

“During and after the procurement process, no procuring entity and no employee or agent of the procuring entity, or member of the Board of Directors or Tender Committee of the procuring entity, shall disclose the following:

1. (...);
2. Information relating to a procurement whose disclosure would prejudice a bidder’s legitimate commercial interest or inhibit fair competition”.⁷⁸⁹

Furthermore, a copy of the decision awarding the contract must be available to the public, where that disclosure does not distort the principles of fair competition:

“A copy of the decision reached by the Independent Review Panel shall be promptly made available for inspection by the general public; however, no information shall be disclosed if its disclosure would be contrary to the law, would impede law enforcement, would not be in the public interest, would jeopardize the commercial interests of the parties or would inhibit fair competition”.⁷⁹⁰

Again, Article 3 of law n° 2 of 11 March 1996 (concerning privatization and public investment) states that, “[t]he selling, letting, or giving out partially or

⁷⁸⁸ Art. 26, par. 2 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁷⁸⁹ Art. 17, *Idem*.

⁷⁹⁰ Art. 72 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

completely of Government establishments and their shares is done through a tendering process.”⁷⁹¹ Article 26 of the law governing civil servants (mentioned above) also states clearly that offers of employment must be made in a competitive manner: “The recruitment of Government employees (...) is done through competition (...)”.⁷⁹² Likewise, for civil servants employment, a Public Service Commission was created to ascertain an appropriate system of recruitment of public servants candidates which is objective, impartial, transparent and equitable for all.⁷⁹³

From the above, it is clear that competitiveness, and the principle of transparency which it supports, plays an important role in public contracting process, and help guard against the making of arbitrary conclusions in this context.

The prohibition of the misuse of power during the contract creation phase

There are two scenarios in which an administrative authority can misuse its power during the public contracting process.

Firstly, the contracting authority may arbitrary direct the way decisions concerning public contracts are made. As Langbroek in the EU context states, the prohibition of the misuse of power (*défense de détournement de pouvoir*) means that a public body should not use its power for a purpose other than that for which it was conferred.⁷⁹⁴ To do so is an abuse of the authority entrusted in that body, and such abuse often goes hand in hand with nepotism, a trait common in certain non-democratic countries.

⁷⁹¹ Law n° 2 of 11/03/1996 relating to privatisation and public investment, cited above.

⁷⁹² Art. 26 of art. 27 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above. Also art. 27 provides: “There are two kinds of competition: internal competition and external competition. Internal competition is done at the level of each public administration, and within the Public Service. External competition is open to all persons likely to meet requirements for the advertised post” (art. 27 of Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, cited above).

⁷⁹³ Art. 4 of Law n° 06/2007 of 01/02/2007 determining the organization and functioning of the Public Service Commission, O.G. n° 6 of 15/03/2007.

⁷⁹⁴ Ph.M. Langbroek, *Loc. cit.*, p. 93, interpreting art. 3.3 of the Dutch GALA, which provides: “An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred” (General Administrative Law Act (GALA, cited above).

Secondly, under Rwandan procurement law, the prohibition of the misuse of power is additionally referred to as the prohibition of influence peddling, under the provisions of Article 178 of the Public Procurement Law which provides that: “Any act by any person aimed at influencing any decision regarding the award of a procurement contract shall be prohibited, and is punishable by imprisonment for six to twelve months, or a maximum fine of five hundred thousand Rwanda Francs (500,000 RwF), or both”.⁷⁹⁵ If contracting authorities allow themselves to be influenced by external irrelevant considerations during the contracting process, this can ruin the transparency principle which should characterise the entire public contracting process.

Principles to apply to the execution of public contracts

Four principles of good governance are most pertinent to this step of public contracting, i.e. the principle of justifying any variation and termination of a public contract, the prohibition of arbitrariness in deciding about modification or cancellation of a public contract, its effective and efficient management, and the taking into account of the legitimate expectations of the other contracting party. In the context of good governance, these principles have been selected for their significant help in the execution of public contracts.

Justification and prohibition of arbitrariness when varying or terminating public contracts

Historically, the Rwandan administration did not have to justify its decisions by reference to any particular laws or regulations. The judiciary were obliged to justify their conclusions, but the administration could simply hand down unreasoned decisions. The principle of justification requires reference to relevant proper reasons, usually legal provisions, which empower the decision maker and affect his decision. This entails a certain acquaintance with the law, a situation which is not commonly found in the Rwandan administration. Furthermore, the justification of decisions would not fit well with the administrative approach to decision-making in Rwanda, traditionally

⁷⁹⁵ Art. 178 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

designed to create a top-down relationship between the decision maker and the citizen.

The situation has been examined by the Institute of Research and Dialogue for Peace (IRDP, an independent institute for research on political and administrative issues). In a report on the matter, it interpreted the administration's typical failure to justify its decisions on the basis of legal provisions as founded on both a lack of awareness of the law, as well as tendency to resist recourse to legal provisions (as they are frequently viewed as a potential hindrance by the administration). The Institute states that:

“Administrative authorities would not care about using the law or regulations when making decisions. It is exceptional that they would dare mention the relevant legal provisions in the decision-making context. Certainly, the source of this situation lies in the idea that public authorities are sometimes unaware of the law, or, they might deliberately ignore it because they consider its application as an element of obstruction to the decision they want to make”.⁷⁹⁶

If administrative decisions need not necessarily be justified by reference to legal provisions, then it is difficult to imagine how those decisions could reflect the principle of legal certainty, given that they could be varied at the whim of the administration, unrestrained by law. This is particularly problematic in the case of public contracts, the performance of which can be varied or terminated unilaterally by the administration. Though in theory the administration may only vary the contracts to preserve the public interest, in practice variations may be motivated by irrelevant, even personal concerns, known only to the administrative authority, which cannot be legally justified.

This was ruled specifically by the High Court in *Habimana et al v. ISAE Busogo*,⁷⁹⁷ a case which concerned a group of individuals employed by a higher learning public institution. Their contracts were governed by private law, and they were dismissed from their positions without legal justification. The court interpreted that dismissal as a breach of contract by the

⁷⁹⁶ Institute of Research and Dialogue for Peace, *Op. cit.*, p. 78 (translation from French).

⁷⁹⁷ *Habimana et alii v. ISAE Busogo*, cited above.

administration, and it was liable to be pay damages to the individuals. The same principle was confirmed in *Munyampirwa v. Rwandan State*,⁷⁹⁸ in which the court ruled that if the state failed to perform its contractual obligations, damages would be payable to the other contracting party in respect of any performance rendered.

With reference to the principle of justification mentioned above, we can see that if the administration is not obliged to justify its decisions by reference to law, this can lead to arbitrariness during the public contracting process. The administrative authority has the opportunity to exploit its dominant position, under cover of the nebulous concept of public interest protection. To ensure that decision-making during the contractual phase is legitimate, public authorities ought to avoid *arbitrariness* in the exercise of their powers, by complying with the justification principle.

The principle of justification is the basis for the prohibition of arbitrary decisions during the process of public contracting. The prohibition prevents the arbitrary variation or termination of public contracts, and allows aggrieved parties to claim redress before the relevant administrative or judicial authority.

Effective and efficient management of public contracts

The term ‘efficiency’ and ‘economy’, appear in Article 4 of the Public Procurement Law,⁷⁹⁹ which presents them as principles which are key to the public procurement process. However, that law does not define them. In order to understand them, and the principle of ‘efficiency’ and ‘economy’, one must understand the purpose of that law, and the context in which it uses those terms.

First, it is worth noting that ‘efficiency’ is a noun, related to the adjective efficient. In the public procurement process, if contractors for example are ‘efficient’ in fulfilling their contractual obligations, then they are capable of

⁷⁹⁸ *Munyampirwa v. Rwandan State*, cited above.

⁷⁹⁹ “Public procurement shall be governed by the following fundamental principles: 1. transparency; 2. competition; 3. economy; 4. efficiency; 5. fairness; 6. accountability.” (Art. 4 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above).

managing their time well, and exploiting the resources provided in a way which maximises their utility and minimises waste.⁸⁰⁰ The principle of economy is closely related to the principle of efficiency, as defined above, and prohibits lavish government expenditure on public contracts.

The principle of efficiency is in line with that of effectiveness. 'Effectiveness' is indirectly referred to in Article 168 of the Law on Public Procurement (also applicable to the privatization process, by virtue of Article 2) in the definition of 'accountability': "The successful bidder shall be accountable for the mistakes that he or she makes during the execution of the contract. Whenever it is required by the procuring entity, the successful bidder shall, at his or her own cost, correct any mistake that was identified in his or her work." Thus, contractors who are given a government tender, or government resources to administer, are also accountable to the government for any mistakes they make for the duration of the contract.

Apart from mistakes which lead to patent defects, evident at the time of performance, Article 142 of the Public Procurement Law also requires the contractor to guarantee against latent defects in its performance, by way of a ten year warranty:

"From the final acceptance of the works, the successful bidder (and, if appropriate, any other engineer or company which designed the works or assisted in their construction) shall be held accountable for any mistakes made during the design and construction of the works, for a period of ten years".⁸⁰¹

However, according to Article 168 of the Law on Public Procurement, if the public institution did not comply with any advice given by the contractor, then they cannot be held liable. Furthermore, the contractor is also absolved from liability if the government attempted to impose additional obligations on the contractor to which it did not agree or if the public institution wrongly implemented the contractor's recommendations.⁸⁰²

⁸⁰⁰ See definition of the word 'efficient' by the Oxford Advanced Learner's Dictionary.

⁸⁰¹ Art. 142 of Law n° 12/2007 of 29/03/2007 on Public Procurement, cited above.

⁸⁰² Art. 168, *Idem*

Thus, under the current law on public procurement, ‘effectiveness’ can be viewed in three ways:

- Firstly, the administration is responsible for the procedural propriety of the contracting process, and any decisions made by the administration as a part of that process;
- Secondly, the administration is answerable for performance of the contract – it is duty bound to ensure that performance is effective;
- Thirdly, the other contracting party is accountable to the administration as regards their performance of the contract.

The legitimate expectations of the other contracting party

The law governing contracts, Article 64 provides that: “Contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.”⁸⁰³ From this we can see that, in private law context, the contracting parties are the only ones who determine the scope of their contract. Once created, the contract binds its parties and therefore creates an expectation in each contracting party that the other will perform their obligations under the contract.

Furthermore, neither party is capable of unilaterally modifying or terminating the contract, unless agreed upon, as provided by the Law governing contracts, Article 108, which states that,

“If a party, knowing of a modification that extinguishes his/her obligations, manifests assent to the modification, his/her manifestation shall be equivalent to an acceptance of an offer to substitute the modified clauses.

If a party, knowing of a modification that extinguishes his/her obligations, asserts his/her rights under the original contract or otherwise manifests a willingness to remain subject to the original contract, the original contract shall be revived.”⁸⁰⁴

⁸⁰³ Art. 64, Law governing contracts, cited above.

⁸⁰⁴ Article 40, Law governing contracts, cited above.

However, public law does not mirror private law in this respect. It is clear that the administration cannot enter into contracts on a whim, and freely determine their specifications. Nor can it always guarantee that the legitimate expectations of the other contracting party will be fulfilled, because the public interest may require variation of the contract. This is noted in the EU context by J.B.J.M. ten Berge & R. Widdershoven, who note that:

“In relations under civil law, individuals are in principle free to give promises and make contracts. An administrative authority does not automatically have this freedom. The authority must, after all, exercise its powers in the public interest and in accordance with the applicable public law rules. This may mean that it is not always entitled to give promises about the exercise of a power and, moreover, that the legitimate expectations created by a promise are overruled by other interests.”⁸⁰⁵

Respect for legitimate expectations is one of the principles of good governance. However, in Rwandan public law it is frequently disregarded where it comes into conflict with the public interest. For instance, if the public interest requires the modification or termination of a public contract then this is permissible, even if such modification or variation is contrary to the other contracting party’s legitimate expectations. This was confirmed in *Munyampirwa v. Rwandan State*.⁸⁰⁶

In that case, an individual brought a claim for damages against the administration because a hotel, which he had obtained pursuant to a privatisation contract with the administration, was subsequently recovered by the Rwandan State.⁸⁰⁷ The claimant argued that he had legitimately expected to receive an unimpeachable private law ownership right to the hotel. However, the administration argued that the contract was governed by administrative law, and as a result it had the power to recover the property if it was used in a way which was contrary to the terms of the privatisation contract. The Supreme Court ruled that the contract was administrative,

⁸⁰⁵ J.B.J.M. ten Berge & R. Widdershoven, *Loc. cit.*, p. 425.

⁸⁰⁶ *Munyampirwa v Rwandan State*, cited above.

⁸⁰⁷ See *supra*, 4.4.1.

because it involved a public institution, and the administration could at the same time demonstrate its coercive powers through some of the provisions of the contract.

From this case we can see that if a contract is governed by public law, this grants certain prerogatives to the administration which allow it to safeguard the public interest, regardless of the expectations of the other contracting party. However, this is contrary to what is required by the principles of good governance, and practically may not lead to satisfactory results. Davies in the EU context argues that the administration “should not be allowed to disrupt the ordinary expectations of contractors. Uncertainty may make contractors reluctant to bid for government business”.⁸⁰⁸

This problem harks back to the conflict, examined earlier, between the public interest on the one hand and the legitimate expectations of the other contracting party on the other. The solution here is the same – once a clear public interest in variation or modification of a public contract can be irrefutably demonstrated, the administration should be allowed to do so. However, if such an interest cannot be shown, the legitimate expectation of the other the contracting party that the contract be performed according to its terms ought to be respected.

Principles to apply to litigation arising from public contracts

Fairness of administrative redress procedure

In setting out the dispute resolution procedures for cases involving public contracts, the Rwandan legal system prefers recourse to administrative rather than judicial avenues of redress:

“The action for annulment shall be accepted only if it relates to an explicit or implicit decision of an administrative authority. Before filing a claim, the aggrieved party who is against the administrative decision shall be required to first lodge an informal appeal with the

⁸⁰⁸ A.C.L. Davies, *Op. cit.*, p. 101.

immediate superior authority vis-à-vis the one who took the concerned decision”.⁸⁰⁹

This shows a preference for dispute resolution which is less contentious than would be obtained before the courts. A similar approach has been adopted in several other countries. For instance, Davies informs us that in the United Kingdom there is a preference for alternative dispute resolution in this area:

“(…) government contracts do not give rise to a rich vein of decisions in judicial review for scholars to analyse. This is, in part, because the government seeks to avoid litigation wherever it is possible, and therefore makes extensive use of negotiation and alternative dispute resolution when problems arise”.⁸¹⁰

The problem with administrative dispute resolution is ensuring fairness, and accordingly fairness should be made the cornerstone of the process. Admittedly, complaints directed at the administration may not be fairly dealt with if consideration is only given to the ‘public interest’ in taking the action which resulted in the complaint. However, good governance requires that public officials must act impartially, fairly and reasonably, regardless of whether the relevant contract is governed by public or private law, which should ensure that a balanced approach towards complaints is adopted by the administration.⁸¹¹ In this way, the principle of fairness operates to prevent administrative decisions which are unlawful from taking effect.

Administrative and legal accountability

Under administrative law, and particularly as regards the principles of good governance, accountability refers to the idea that some public body, external to the administration, has the authority to oversee administrative action. “Accountability ensures actions and decisions taken by public officials are subject to oversight so as to guarantee that government initiatives meet their

⁸⁰⁹ Art. 336, par. 1 & 2 of Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, cited above.

⁸¹⁰ A.C.L. Davies, *Op. cit.*, p. xv; also A.C.L. Davies, in an Interview conducted on 22/04/2010.

⁸¹¹ Art. 11 of The European Code of good administration behaviour, in <http://www.ombudsman.europa.eu/resources/code.faces#hl4>, accessed on 26/05/2010.

stated objectives and respond to the needs of the community they are meant to be benefiting, thereby contributing to better governance and poverty reduction”.⁸¹² Therefore, one of the key features of accountability is that “it is external, in that the account is given to an outside authority”.⁸¹³ That external authority may be, for instance, Parliament, the auditor general’s office, civil society in general, or beneficiaries invited to participate in the public contracting process.

There are numerous types of accountability, but horizontal accountability is the most appropriate in this context. It is an external, as well as highly practical, method of oversight, and can be achieved by cooperation between the auditor general, Parliament and the courts:

“The prevailing view is that institutions of accountability, such as the parliament and the judiciary, provide what is commonly termed horizontal accountability, or the capacity of a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper conduct in discharging the responsibilities of a given official. In other words, horizontal accountability is the capacity of state institutions to check abuses by other public agencies and branches of government, or the requirement for agencies to report sideways.”⁸¹⁴

The auditor general is responsible for ensuring that the conduct of the administration is proper and appropriate. Parliament checks that the correct legal procedures are followed, and, based on the auditor general’s reports, can instruct the general prosecutor to investigate a particular set of facts,

⁸¹² “Accountability in Governance”, in <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>, accessed on 17/05/2010.

⁸¹³ A. Ebrahim & E. Weisband (eds.), *Global Accountabilities: Participation, Pluralism, and Public Ethics*, New York, Cambridge University Press, 2007, excerpt accessed in http://assets.cambridge.org/97805218/76476/excerpt/9780521876476_excerpt.pdf, on 17/05/2010.

⁸¹⁴ “Accountability in Governance”, in <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>, accessed on 17/05/2010.

and, if necessary, bring charges before the courts. The courts will thus be empowered to check on the implementation of the law through the public contracting, with the help of the prosecution office.

8.3 A dual jurisdiction of courts over public contracts litigation

When determining the admissibility of a public contracts dispute, a distinction was made between the decision to enter into the contract and the contract itself. This means that the suggestion for a dispute arising from public contracts to fall or not fall into the jurisdiction of the administrative chamber of court, has significant support in the differentiation made between the decision to enter into a public contract and the contract entered into.

In principle, litigation arising out of the decision to enter into a public contract, like any other administrative decision, should fall within the jurisdiction of the administrative chamber of courts, whereas those stemming from the execution of the public contract shall fall with the jurisdiction of the ordinary courts. The administrative chamber of court should automatically be empowered with the power to assess the application of public law rules and principles as need be. However, and likewise, the ordinary court must be capable of determining the accuracy of application of public rules and principles to a case, regarding the level of public interest to be safeguarded by the public contract. The same courts should also be able to examine the application of relevant good governance principles to that contract.

8.3.1 Administrative chamber competent over pre-contractual phase litigation

Decisions to enter into public contracts, like any other decisions of the administration, are public in nature; they ought to be of the administrative chamber of court's jurisdiction.

Principle

Our recommendation concerns the competent court and legal rules and principles which govern the decision to enter into public contracts. As these decisions call for high levels of scrutiny, it is arguable that the administrative

chamber of the court should retain jurisdiction over most disputes involving such decisions, and the chamber should have the power to assess and interpret the application of public law rules and principles to such cases, in conjunction with relevant principles of good governance. These include decisions over most of all public contracts, be they having a high or medium or low level of public interest to safeguard, such as contracts between public bodies, privatisation contracts, lease or sale of public assets contracts, procurement contracts, employment contracts.

Exception to the rule

In order to maximise efficiency, it is advisable that disputes over decisions to enter into contracts entered into by the national corporations continue to be heard before the ordinary courts, and be subject to *general* private law. For example, contracts involving national companies participating in dealings of commercial nature shall be subject specifically to *commercial* law and disputes arising from the decision to enter into a contract will automatically fall within the jurisdiction of the commercial courts and commercial law shall ipso facto apply. Those of social nature shall be heard before the social chamber of court and labour law shall apply to such cases.

8.3.2 Jurisdiction of ordinary courts over the contractual phase litigation

As the law stands, the administrative court has jurisdiction over disputes concerning public contracts. Article 83 (paragraphs 2 and 4) of Organic Law n° 51/2008 of 09/09/2008 (concerning the organisation, functioning and jurisdiction of courts) states that actions concerning public contracts, governed by public or private law (up to the district level), and labour disputes between individuals and the State or its corporations, fall within the jurisdiction of the administrative chamber of the Intermediate court.⁸¹⁵ Any other similar disputes which do not fall within the jurisdiction of the intermediate courts come under the jurisdiction of the High Court, which “shall hear disputes related to administrative contracts which come within its

⁸¹⁵ Art. 83 (2° & 4°) of Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, cited above.

competence, particularly concerning their validity, interpretation, nullification, enforcement or breach”⁸¹⁶.

This means that, as the law stands, disputes concerning public contracts are channelled automatically to the administrative chamber of court, regardless of whether the contract is governed by public or private law. However, if the trigger for the jurisdiction of the administrative chamber of court was, alternatively, there are good reasons to redirect jurisdiction of public contracts to the ordinary court. In fact, there are several arguments in favour of reform, and the adoption of a ‘private law application’ trigger:

- To do so would facilitate harmonisation between the legal systems of member states of the East African Community;
- It would also help harmonise the principles of law applied by the civil judges with those applied by the administrative judges, and would promote equality between public and private establishments engaged in similar activities;
- The current tendency to “doing-business’ adopted as a policy under corporate governance in Rwanda would be most welcome in commercial dealings undertaken by the administration, thus entailing application of commercial law and jurisdiction of commercial courts to these businesses;
- Finally, and most importantly, reform would enhance the compliance of Rwandan law with the principles of good governance.

Our recommendation thus concerns the jurisdiction of courts over disputes arising from breaches of public contracts. The proposition goes in line with the judicial enforcement of public contracts, which is that the ordinary court - ordinary civil court, commercial court or social chamber of court depending on the case - will have jurisdiction. Disputes relating to public contracts having a high or medium or low level of public interest to defend or purely private contracts ought to fall within the jurisdiction of the ordinary chamber of the court, but such contracts should be governed by a blend of Public and private law, depending on the level of public interest to protect. Disputes which are exclusively concerned with the execution of such contracts shall automatically fall within the jurisdiction of the ordinary court, be they entered into between public bodies or between a public body and a private

⁸¹⁶ Art. 95, *Idem*.

body, be they for performance of a public utility or service, or just for procurement of goods, services and works or lease or sale of public assets.

However, depending on the category of public contract and in order to cater for the public interest reflected by the operation, the judge should be granted the power to examine the use of public law rules and principles in conjunction with private law rules and principles, as well as principles of good governance.

In summary, it is our suggestion that;

- disputes over contracts entered into for performance of a public utility or service should come within the jurisdiction of the *ordinary* courts, and a combination of application of public and private law rules and principles shall be accepted, together with relevant principles of good governance, with prevalence of public law rules and principles ;
- those involving lease or sale of public assets and public procurement contracts should also come before the *ordinary* courts, and a balanced application of public and private law rules, together with relevant principles of good governance, shall be appropriate to such contracts;
- those involving employment contracts with civil servants and labour contracts ought to be heard before courts which administer private law, i.e. the jurisdiction of *social* chamber of courts, and a combination of application of public and private law rules and principles, together with relevant principles of good governance, shall be appropriate to contracts; and
- those entered into by national or public companies in their commercial dealings should come within the jurisdiction of the *ordinary* courts, and application of private law, together with relevant principles of good governance, shall be suitable.

8.4 Conclusions of this chapter

In the previous chapter, the good governance approach to public contracts and its impact on the legality of these contracts was examined, and it was observed that the mixed law regime, combining the application of public and private law rules and principles as well as principles of good governance, is more suitable to public contracts in Rwanda. Then, based on a three-level scale of varying degrees of public interest, a gradation of application of public

law rules and principles to the public contracts, grouped under a functional categorisation, was suggested.

At the first level, there are contracts in which there is an undeniable public interest. These consist, for example, of contracts for the performance of a public utility, concessions of public assets or services and subsidy contracts for performance of a public service. The application of more public law rules and principles to such contracts is logical and desirable. The principles of law which grant the administration various prerogatives and privileges during the public contracting process, and which operate to the benefit of the administration and the public in general, were also suggested to be maintained for this category of public contract.

At the second level, there are contracts which do not involve direct protection of the public interest, but nevertheless involve some element of public interest which ought to be safeguarded. These include, for example, public procurement contracts and employment contracts. Public law and private law can apply in combination to such contracts. However, the principles granting the administration excessive powers should be excluded from the implementation of these categories of public contracts.

At the third level, there are contracts in which there is little or no engagement of the public interest. These include contracts for the sale of the state's private assets and the administration's commercial dealings. The application of more private law rules and principles to such contracts is logical and desirable.

It was also suggested that the principles of good governance ought to be adopted to ensure that good governance is achieved throughout the public contracting process.

In the application of these principles of good governance to the pre-contractual and award phases, the principle of equality between recipients of a public contract, the principle of transparency of rules, documents and procedures for conclusion of contract and the principle of the prohibition of misuse of power in the award of contract shall be deployed. During the contractual phase, the contract should be managed effectively and efficiently, and any variation or termination of public contracts must not be

taken arbitrarily and should be justified, so as to accord with the legitimate expectations of both contracting parties. During the period of performance, any litigation arising from the contract must be conducted fairly, and the administration shall be held accountable for its conduct throughout the public contracting process. If so implemented, the principles of good governance will operate to ensure that standards of good governance are achieved in this field, whether they are applied to contracts governed by public law or private law.

In the terms proposed in this chapter, jurisdiction of courts over cases involving decisions in relation to the preparation and conclusion of public contracts, like any other decisions of the administration, shall be of the administrative chamber of courts jurisdiction, except where the contracts would involve pure commercial dealings undertaken by the national corporations. The ordinary courts shall be devolved the power to adjudicate all litigation arising out of public contracts execution.

This study supports the proposition that, with this good governance approach, the borderline between public law and private law rules will be minimized, so as to make it possible for the ordinary courts to also examine the accuracy of application of public law rules and principles, not only in the public interest, but also against their side effects on the contracting party's expectation.

9. General conclusions and recommendations

This study has been a comparative examination of the principle of legality when applied to public contracts in Rwanda, entailing a close assessment of the powers which the public authorities have in contracting, the legal rules and principles which govern conclusion and execution of public contracts, and the jurisdiction of courts over public contracts litigation.

From the beginning, it was shown that the process of public contracting in Rwanda is mainly governed by public law. This application justifies the remarkable distinction made between the ‘administrative contracts’ which represent the majority of public contracts in Rwanda, and ‘the private contracts’. Thus, private law rules rarely form the basis for public contracts, and when they do, any litigation arising from the contract still falls within the jurisdiction of the administrative chamber of the court. It was explained that the upholding of such a differentiation, in a country of growing business interactions with the administration, does not guarantee a proper execution of public contracts.

Yet again, what is particularly notable about the Rwandan system of public contracting is the imbalanced relationship between the administration and the other contracting party, because the administration has the capacity to act as a ‘super-party’, as a result public law rules and principles which grant certain special powers to the administration, giving it various advantages throughout the public contracting process. It was explained that these privileges do not ensure proper execution of public contracts and an alternative was needed, specifically their minimal application in combination with the principles of good governance.

Once more, the accession of Rwanda to the East African Community entails review and reform of the current legal framework for the public contracting, to facilitate contractual interactions with other community member states, which mainly follow a public contracting which is more private law oriented. It was clarified that, shifting from a public law to a private law regulation of public contracts was not practically the best choice, but a balanced application between public and private law could be appropriate.

The central question which was raised in this study is how legality of public contracts in Rwanda is and how legality of public contracts in relation to principles of good governance should be. We asked ourselves,

- whether the law of public contracts in Rwanda should continue to be dominated by public law, which grants certain special powers to the administration (including the power to unilaterally modify or terminate the contract, and the privileges of prior compliance and unhindered forced execution without judicial authorisation); or
- whether the rules of public and private law can be applied together, with the support of modern principles of law (namely, the principles of good governance).

In this regard, we could show that there exist three levels in which we are asking the question:

- The conceptual level of legality considering how legality, part of the rule of law, is applied to the different categories of public contracts. In this respect, two categories of public contracts exist in Rwanda, the 'administrative contracts' which are big in number, governed by public law and the 'private contracts' which are rarely resorted to by the administration, governed by private law.
- The level of the legal base, describing the rules and the classical principles of law applied to public contracts and how to make a bridge between legality of public contracts and principles of good governance. This study could show that, from a good governance perspective, a balance of application between public and private law could have better results, if applied with the help of principles of good governance to shape up their effectiveness.
- The level of judicial review of decisions on public contracts and jurisdiction of courts over public contracts litigation. In principle, as the law stands, the administrative chamber of court has jurisdiction for judicial review of decisions in relation to the public contracts, and also over any other public contracts litigation in Rwanda, except for those involving government corporations subjected to the jurisdiction of ordinary courts. With the new legality approach from a good governance perspective, decisions over public contracts are suggested to be subject to the jurisdiction of the administrative chamber, and the contractual phase of public contracts should be subject to the jurisdiction of the ordinary courts.

Thus, the central question being how legality of public contracts is and how it ought to be from a good governance approach, the central focus of this study has been an analysis of the law of public contracts in Rwanda with a view to placing it within the normative framework of legality supplied by the principles of good governance. Hence the title: *“Public contracts and good governance. A comparative perspective on the balance between public and private law in Rwanda”*.

With this aim in mind, the law of public contracts in several different countries (France, Belgium, England, and the Netherlands) was examined (with particular focus on the varying uses of public and private law in this context) and compared with the legal situation in Rwanda.

In Rwanda, the State in general and public institutions which are endowed with legal personality have, through their respective administrative authorities, the power to enter into contractual arrangements. This legal personality, from central to local administration, is derived from the law. The characteristic of Rwandan law of public contracts is that the legal rules applied to public contracts are mainly derived from public law, which additionally grants some special powers to the administration in order to control and supervise the public contracting. Hence, litigation arising out of public contracts, without any consideration of the administrative or private character, falls under the jurisdiction of the administrative chambers of the Court, with the exception of contracts made by the national corporations.

Likewise in France, the recognition of a public institution as having legal personality empowers the representing administrative authorities to create obligations stemming from contracts. However this power is either by law delimited or exercised discretionary. In this country, most of public contracts (the administrative contracts) are governed by public law rules and principles. In this regard, the administration is granted special powers to implement these contracts and disputes over them are specifically directed to the jurisdiction of administrative courts. However, there exist a category of public contracts which are regulated under private law (the private contracts) and which, differently from Rwanda, fall under the jurisdiction of ordinary courts.

In Belgium, the power of administrative authorities to make contracts is granted by law. A general or particular law specifies the authority the administration has in making contracts. Like in France and Rwanda, there exist a category of administrative contracts in big number and a category of private contracts. There is also a close link made between public law and public contracts, and the existence of privileges in favour of the administration. However in this country, private law has begun to play an important role in the law on public contracts, because jurisdiction over litigation arising out of public contracts which give rise to civil and political rights, without distinguishing between administrative or private contracts, is placed before the ordinary courts, which are also granted the authority to use private law to such cases. Only disputes which do not give rise to such rights fall under the jurisdiction of the Council of State.

The characteristic of England is that the Crown or central government is naturally empowered with the authority to engage in contracts. But other public authorities need statutory powers to do so. Another special feature of English law of public contracts is the application of same private law rules and principles either to public or private contracts. Hence, there only exist one category of public contracts, the private contracts, and there is no differentiation of courts to deal with litigation stemming from public contracts or private contracts, both falling within the jurisdiction of ordinary courts. However, and most importantly, public law rules and principles have started to have influence on public contracts, not only in the context of 'executive necessity', but also for compliance with the EU law and GPA (Government Procurement Agreement).

In the Netherlands, in principle public authorities do not need a written statutory provision to enter into contracts. The principle is that any public entity, endowed with legal personality is at liberty to engage in contracts. The characteristic of Dutch law of public contracts - even if they are classified in public power contracts, private power contracts and mixed contracts - is that private law rules and principles form umbrella norms for regulation of public contracts, covered by the principles of proper administration. However in their application, a great deal of consideration is given to public law, since private law application should not in any way hamper the norms of public law. This explains how Dutch law of public contracts applies private and public law in interaction. At last, like in England and Belgium and differently

from Rwanda and France, public contracts litigation is in principle directed to the jurisdiction of ordinary courts, apart from some specific categories which may be appealed before specialised administrative courts, such as disputes over contracts of employment for civil servants.

This study shows how the French and Belgian classical conception of legality has influenced the law on public contracts in Rwanda (a conception which favours the application of public law, the grant of special powers to the administration, and jurisdiction of the administrative chamber of court, so that it can safeguard the public interest). It also demonstrated the possibility of introducing a new conception of legality, which can help transform the law of public contracts, bringing in more elements of private law to apply in interaction with public law, account taken of the English and Dutch law of public contracts. But most importantly, this study proved that legality of public contracts, if applied within a frame of principles of good governance, can be better organised in Rwanda. That is to say that the good governance approach recommends that the public contracting process should be governed by rules of public and private law which facilitate transparent procedures, the proper and efficient administration of public contracts, and greater administrative accountability and fairness as regards those contracts. It is for that reason that this study explores the possibilities offered by the latter approach, and shifts the focus from the prerogatives of the administration to good governance by the administration.

The foregoing analysis identifies the principles of good governance as being the chief legal norm for administrative action and decision making, particularly in the context of the public contracting process. The reason for this is the evolving conception of legality in administrative law. We are moving from the classical legality, which favours the grant of special powers to the administration, to a modern legality privileging the principles of good governance.

The Rwandan legal system does not yet have a general law codifying the principles of good governance. Nevertheless, it was possible to show that the application of principles of good governance (recognised nationally) to the existing law concerning public contracts is possible, and that those principles offer a more appropriate normative framework for the law on public contracting in Rwanda than that which currently exists. It is worth noting that

if the administration utilises the principles of good governance (namely the principles of properness, transparency, effectiveness and accountability) during the public contracting process, it can still achieve any aims and objectives which it has in this area in a timely and efficient manner.

Furthermore, these principles, if clearly connected to the public contracting process, can serve not only to improve that process, but also to counter any adverse consequences which may be caused by the application of either public or private law. For instance, the application of public law could cause delays, or frustrate the legitimate expectations of the other contracting party, which the principles of good governance have the potential to mitigate. Moreover, the application of private law could cause disagreement amongst government policy makers, which the principles of good governance could help resolve.

This study could show that the principles of good governance shall positively influence legality of the public contracts, regardless of whether the applicable law is public or private. Our concrete suggestion in that regard has been that of applying to public contracts the rules of public and private law in combination, but against a background of relevant principles of good governance. This is more proved taking into account the situation of Rwanda trying to strengthen its position in the East African Community. Its recent accession to the East African Community, where most of the member states tend to apply private law to public contracts, is pulling Rwanda from a legal system of public contracts favouring public law application towards a new system conducive to the application of public and private law in balance.

This new approach to legality of the public contracts (balance between public and private law, with the support of principles of good governance) will help Rwanda to regulate the public contracts under harmonised and trustworthy rules in the community. In conclusion, reform of the existing legal system so as to allow the application of a combination of public and private law rules to the process of public contracting, supported by the principles of good governance, is recommended for Rwanda.

9.1 Study findings

Findings in relation to the categorization of public contracts

In the countries under comparison (Rwanda, France, Belgium, the Netherlands and England) public contracts are not categorized in the same way.

Three of the countries (Rwanda, France and Belgium) have a ‘two-category’ classification. In these countries there are two categories of public contracts, ‘administrative contracts’ (plentiful), and ‘private contracts’ (rare). The difference between these categories is the type of relationship created between the administration and the other contracting party, which in administrative contracts is vertical whereas in private contracts it is horizontal.

In the Netherlands one finds a ‘three-category’ classification. There are ‘public power contracts’, ‘private power contracts’, and ‘mixed power contracts’. Again, the difference between these categories is the type of contractual relationship created between the administration and the other contracting party, respectively vertical, horizontal and hybrid.

Finally, in England there is no distinction between different types of public contract – they all fall within one ‘category’, government contracts, and are governed by private law. The contractual relationship created in an English public contract, between the administration and the other contracting party, is in most respects identical to that created between two ordinary private parties when they enter into a normal contract.

Even though these categorisations vary in many ways, in one respect they are similar: in all five legal systems, if the administration acts as a private entity, then any contract which it enters into is *ipso facto* private in nature. It is only when the government acts as a public entity that we see variation between the different countries as regards the applicable law.

This comparison of the various typologies which exist in different countries assists us in evaluating the need for a new category of public contracts in

Rwanda, to which a combination of public and private law could apply, supported by the principles of good governance.

Findings in relation to the legal rules applicable to public contracts

Legal rules governing the power of the contracting authorities

In Rwanda, France and the Netherlands, public authorities that represent public institutions which hold the requisite legal capacity can enter into contracts on behalf of those institutions, whilst those authorities that represent public institutions which do not have the necessary legal capacity act on behalf of the state. In Belgium, public authorities must be empowered by general or specific statutory provision to enter into public contracts. In England, the Crown or central government has an inherent power to engage in contracts and other public authorities need a statutory provision to do so. In the countries under comparison, it is worth mentioning the fact that, even if each and every legal system might have its own specifications of the public authorities' power for the making of public contracts, the public law approach to making contracts has won the day, even in countries of the private law approach to public contracting such as England and the Netherlands.

Legal rules which governs public contracts

Different types of law govern public contracts in the five countries under comparison.

In Rwanda, administrative contracts are governed by public law, and private contracts can be governed by public or private law. In France, administrative contracts are governed by public law and private contracts by private law. In Belgium, private law applies to all (administrative or private) contracts which give rise to civil or political rights, while public law applies to administrative contracts which do not give rise to civil or political rights. In England, public contracts are governed by private law. In the Netherlands, public contracts are governed by a mixture of public and private law. The study then went on to consider whether a mixed application of public and private law rules to public contracts in Rwanda was appropriate.

Principles of law applicable to public contracts

When examining the principles of law applicable to public contracts in the different legal systems under analysis, we can see clear differences. In some of the countries, the public contracting process is supported by principles which grant broad powers to the administration (Rwanda, France and Belgium). However, in England and the Netherlands, the administration is treated in the same way as the other contracting party and both are subjected to the rules of private law applied along with principles of reasonableness and fairness.

This led to consideration of whether it was appropriate for the administration in Rwanda to be treated as an ordinary citizen when it entered into contracts. Ultimately, the aim of this study is to strike a balance between the grant of appropriate prerogatives to the administration, and the rights which should be afforded to the other contracting party. The principles of good governance can help achieve this balance.

Findings in relation to the jurisdiction of courts over public contracts

Within the countries under consideration, it is possible to distinguish between those where administrative courts have jurisdiction over disputes arising from public contracts, and those where ordinary courts have jurisdiction over such matters.

Rwanda and France belong to the former category. In Rwanda, the administrative chamber of the court has jurisdiction over most of all disputes arising from public contracts, including those governed by private law with the exception of those involving government corporations. In France, disputes arising from administrative contracts fall within the jurisdiction of the administrative courts, whilst those arising from private contracts are heard before the ordinary courts. Belgium, the Netherlands and England fall into the second category. In Belgium, disputes arising from public contracts which give rise to civil or political rights fall within the jurisdiction of the ordinary courts. Disputes concerning public contracts which give rise to other rights, such as those regarding decisions made during the pre-contractual phase (*actes détachables*), are excluded by law from the jurisdiction of the ordinary courts, and instead are heard before the Council of State. In England

and the Netherlands, public contract litigation is decided by the ordinary courts.

The study then examines whether it is appropriate for all litigation arising from public contracts to be heard before the ordinary courts, or at least whether litigation which arises from the contractual stage of public contracts could be heard before the ordinary courts.

9.2 Proposition

This study argues that the public contracting process in Rwanda would be more effective if administrative law was applied to it in combination with private law, and supported by the principles of good governance, and accordingly proposes that this be done. It examines how effective the various principles of good governance have the potential to be if applied to the public contracting process in Rwanda.

Justification I: A ‘good governance’ approach to public contracts

In the past the Rwandan administration was perceived as the only body capable of safeguarding the public interest, and accordingly public law was viewed as applicable to its actions so that it could do so. However, this perception has changed. Certain private institutions are now capable of working to safeguard the public interest, and their activities are governed by private law. Accordingly, the justification for the application of public law to much administrative activity has fallen away.

This conclusion comes from the mere fact that the element of public interest can nowadays be disconnected with the institution. Public interest as such can no longer be seen as an exclusive endeavour of the administration; it can also be an end-result of the private institutions’ actions.

Justification II: A new conception of legality from a good governance approach

A modern state functions in accordance with three cornerstones, explicitly the rule of law (which started its application in the 19th century and was built on four key pillars, i.e. legality of the administrative action, separation of the

three state's powers, an independent judiciary and protection of human rights), democracy (which began its development in the 20th century and means the influence of the people on policies and activities of the government) and good governance (characterising the 21st century and referring to government or governance by way of principles such as properness, transparency, participation, effectiveness, accountability and human rights).

One of these pillars of the rule of law, i.e. legality analysed in the context of public contracts in Rwanda, constitutes the central focus of this study. Currently, administrative decisions made in relation to public contracts are usually governed by public law (although private law rules are on occasion applied), and are supported by the privileges and prerogatives afforded to the administration (referred to as the classical view of legality). However, with the introduction of the new concept of good governance, there ensues an undeniable impact on legality of public contracts (referred to as the modern view of legality). The principles of good governance are introduced as a new norm to the administration, in a more restrictive way, because it helps to lessen the use of privileges, but in a positive way. This is to explain that this competing view of legality, associated with the principles of good governance, can be used to counter any of the adverse consequences which may be brought on by the application of public or private law to public contracts.

However, in Rwanda the principles of good governance, even if they are already referred to in the constitution and other legal instruments, and have much political support - they have yet to be enacted in any single general Act of Parliament. To reach their full potential, they ought to be legitimised by approval of the Parliament.

Justification III: Grounds for a mixed application of public and private law

In support of the above proposition, the reasons why such a shift in the conception of legality (from public law to mixed) in the public contracting context is justified must be set out. There are *internal* and *external* grounds for this shift.

The internal grounds are substantive, procedural and structural. Substantively, if one looks at the caselaw, it can be seen that already the courts have applied public and private law in combination. Procedurally, it is easier for judges if they can apply the same principles to similar situations, even if the some of those situations involve government action. Finally, on a structural level, Rwanda's recent accession to the East African Community, the other members of which have adopted a combined approach in their law on public contracts, means that such a shift is in the interests of harmonisation.

External justifications for the shift can be found by examining the law which prevails in other countries. In countries such as France and Belgium, public and private law are converging in the field of public contracts, and in these countries the principles of good governance are already being applied. In the Netherlands and England, the combined approach has already been established.

9.3 Recommendations

It is recommended that public contracts in Rwanda ought to be categorised in a new way, which is necessary to implement the new 'legality' set out above.

General recommendations

A functional categorization of public contracts

Hierarchy of public contracts basing on the three-level scale of public interest

To achieve compatibility with the principles of good governance, public contracts ought to be re-organised into a functional categorisation, grouped into three categories, which represent a sliding scale of public interest.

At the upper level we find a tightly controlled category of 'public contracts with a high level of public interest to defend', which include contracts such as those for performance of a public utility or concession of public assets or services, governed by more public law and supported both by prerogatives afforded to the administration by public law, and the principles of good governance.

Most public contracts will fall into the middle category include contracts such as public procurement contracts and employment contracts. Such contracts will be tinted with a 'medium level of public interest', as both public and private law will be applied to them, with the support of the principles of good governance. This will prevent the administration from abusing public law privileges and prerogatives during the public contracting process.

At the bottom level of scale is the category of 'public contracts with less or no public interest to safeguard', made up of contracts in relation to sale of state's private assets or businesses of the administration undertaken through national corporations. These are governed by more private law rules and principles, and supported by the principles of good governance. The application of private law to such contracts will enhance the efficiency of public contracting, and supports the view that the administration can achieve its goals even when its actions are governed by private law.

Compatibility of new categories with the principles of good governance

When applying the principles of good governance to public contracts, the following principles are relevant to particular stages of public contracting. During the pre-contractual and award phase, the principles of equality (as amongst addressees), transparency of information and the prohibition of the misuse of power (by the contracting authority) are most relevant. During the contractual phase public contracts may not be arbitrary modified or terminated, and if such modifications occur, they must be justified according to the principle of justification. The principles of effectiveness and efficiency must also be respected during performance. Furthermore, the legitimate expectations of the other contracting party must also be taken into account during this phase. The principle of accountability is also triggered, from the perspective of the contracting authority being held to account by the public. Moreover, the principle of fairness is applicable to the determination of disputes and provision of remedies, whether by administrative avenues or judicial. If any litigation arises from public contracts, then jurisdiction over the pre-contractual and award phases should be given the administrative chamber of court, and the ordinary court shall be competent for those stemming from public contracts execution.

A draft code of good governance of the public contracts recommended

To understand the draft code as presented here below, three clarifications must be given:

1. The focus of this activity is not that of describing the different categories of public contracts. This draft code is not giving details on the public contracts law regime, which includes all legal rules (of public or private law) and principles (classical principles and good governance principles) applicable to them; the focus is rather that of setting a legal framework to the principles of good governance, hence explaining their applicability to all aspects of the public contracting, starting from the making to the execution (and eventually litigation) stages;
2. This draft code is intended to serve as an indication of principles of good governance, chosen on the basis of their legal applicability to the public contracts. It can therefore be varied or completed depending on the goals pursued by the legislator;
3. This draft code is intended to apply to the public contracting; it does not extend to all public decisions in general.
4. This draft code shows how interrelated are public or private law rules and the principles of good governance. Be they of high or medium or low level of public interest, be they governed under public or private law, all public contracts need principles of good governance to shape up their usefulness

Draft Law n° governing good governance of the public contracts

Motivation:

In the context of this law, public contracts are categorised in the following three groups:

1. Public contracts having a high level of public interest, governed by more public law rules, such as contracts for the performance of a public utility or service, which are entered into with public bodies, or private bodies through a privatization contract or any other form of public-private partnership;
2. Public contracts having a medium level of public interest, governed by less public law rules, such as contracts which entail a large public expenditure,

or involve a certain degree of competitiveness, but which do not involve the performance of a task or service which is in the public interest;

3. Public contracts having low level of public interest or no public interest, governed by private law, such as contracts for sale of the State's private assets and contracts for supply of services by the administration, and a wide range of commercial dealings by the administration.

Whereas the principles of good governance are intended to apply to all categories of public contracts, be they of high, medium or minimal level of public interest, be they of public or private nature, the administration's special powers shall only be invoked if the public interest at stake is of a high level degree.

Section 1. Preliminary

Article 1: Scope of application

- (1) This law governs the principles of good governance applicable to public contracts in Rwanda.
- (2) Principles of good governance are applicable to all categories of public contracts, be they of high, medium or low level of public interest.
- (3) Unless otherwise provided, principles vesting the administration with special prerogatives or privileges remain only applicable to public contracts demonstrating a high level of public interest.

Article 2: Definitions of terms

For the purpose of this Law,

1. "Public contracts" describe the various contracts made by public institutions for services, supply of goods or work, or indeed any other purpose, such as privatisation contracts, employment contracts, concessions contracts, or insurance contracts.
2. "Principles of good governance", in the context of public contracts, are principles which underscore the manner in which the administration can in a proper, transparent, accountable, effective, participatory and human rights oriented, utilize its means and resources during the public contracting to reach the aim of good governance.
3. "Prerogatives and privileges" or "special powers", in the context of public contracts, denotes any powers vested in the administration to make binding decisions in relation to public contracts, without the need to

obtain consent from the other contracting party, or any prior intervention by a judge.

Section 2. Principles of good governance applicable to the making of public contracts

Article 3: The principle of equality of addressees of any public contract

For preparation and award of a public contract, all addressees shall be treated equally in equal circumstances.

Article 4: Transparency of information in relation to public contracting

The Contracting authority shall provide enough information required by all addressees and on equal terms, whenever the provision of such information is in the interests of effective governance of the contract.

Article 5: Prohibition of misuse of the administrative authority's power

A contracting authority shall not use its administrative power to take an unjust decision of award of a public contract.

Section 3. Principles of good governance applicable to the execution of public contracts

Article 6: Principle of justification of decisions made by the contracting authority

A decision to modify or terminate a public contract shall be based on proper reasons.

Article 7: Principle of prohibition of arbitrariness

An administrative authority shall consider the interests directly affected by a decision to modify or terminate a public contract.

Article 8: Effectiveness in the management of the public contract

A public contract shall be managed to the full degree of effectiveness of the law governing the contract and in particular of the obligations undertaken by the parties to that contract.

Article 9: Legitimate expectation of the contracting party

The contracting authority may not withdraw its decision of award of contract, nor modify or terminate a contract to the detriment of the contracting party, unless:

1. The contracting party has provided incorrect or incomplete information and the provision of correct or complete information would have resulted in a different decision on the award of the contract;
2. The contracting party has failed to comply with the requirements attached to the contract;
3. The activities or part of the activities for which the contract has been concluded will not take place.

Section 4. Principles of good governance applicable to litigation on public contracts and remedies

Article 10: Principle of legal and administrative accountability

The contracting authorities are held accountable of their management of the public contracts, basing on the specific responsibilities legally and contractually conferred upon them.

Article 11: Principle of fairness of the administrative and judicial redress

Decisions of the administrative authorities and competent courts shall be characteristic of fairness towards both the contracting authority and the contracting party.

Section 5. Final provisions

Article 12: Drafting, consideration and adoption of this Law

This Law was drafted in English, considered and adopted in Kinyarwanda.

Article 13: Repealing provision

All prior legal provisions contrary to this Law are hereby repealed.

Article 14: Commencement

This Law shall come into force on the date of its publication in the Official Gazette of the Republic of Rwanda.

Summary in Dutch

Goed bestuur en overheidscontracten. Een vergelijkend perspectief op het evenwicht tussen publiek- en privaatrecht in Rwanda.

Dit proefschrift betreft een rechtsvergelijkend onderzoek naar de toepassing van het legaliteitsbeginsel⁸¹⁷ op overheidscontracten in Rwanda. Het onderzoek omvat een nauwkeurige evaluatie van de bevoegdheden van het openbaar bestuur bij het contracteren, van de wettelijke regels en beginselen betreffende het sluiten en uitvoeren van overheidscontracten, en van de rechterlijke bevoegdheid bij procedures over overheidscontracten.

Om te beginnen is het van belang om erop te wijzen dat in Rwanda op het terrein van de overheidscontracten hoofdzakelijk het publiekrecht van toepassing is. Deze toepasselijkheid rechtvaardigt het opmerkelijke verschil tussen enerzijds 'bestuursrechtelijke contracten', die het merendeel van de overheidscontracten in Rwanda vormen, en anderzijds de veel minder frequent voorkomende 'privaatrechtelijke contracten'. Louter privaatrechtelijke regels vormen aldus zelden de grondslag voor overheidscontracten en indien dit toch het geval is, vallen mogelijke procedures op grond van de overeenkomst alsnog veelal onder de

⁸¹⁷ In deze studie wordt de term 'legaliteit' als volgt gedefinieerd: het bestuur is onderworpen aan het recht, d.w.z. aan een geschreven juridische basis (legaliteit in enge zin). Conform deze betekenis "vereist het legaliteitsbeginsel dat iedere bestuurshandeling die de rechten en vrijheden van een individu betreft een wettelijke basis heeft" (J. Chorus, P. Gerver & E. Hondius (eds.), *Introduction to Dutch Law*, Fourth revised edition, Kluwer Law International, 2006, p. 343). Om te beginnen vormt het 'legaliteitsbeginsel' een der vier pijlers van de '*rule of law*' (rechtsstaat). Naast het legaliteitsbeginsel zijn dit de scheiding (of het evenwicht) der machten, een onafhankelijke rechterlijke macht en de bescherming van mensenrechten. Deze vier elementen zijn met elkaar verbonden. De '*rule of law*' in formele zin betekent dat het bestuursorgaan dient te beschikken over een wettelijke bevoegdheid om te handelen (legaliteit in enge zin), maar '*rule of law*' in materiële zin omvat zowel de rechtsregels als de rechtsbeginselen (legaliteit in ruime zin) en garanderen aldus gerechtigheid en billijkheid van bestuursbeslissingen en bestuurshandelingen. Het vereiste van *rule of law* in materiële zin rechtvaardigt derhalve de toepassing van de beginselen van goed bestuur -die ook een essentieel onderdeel vormen van de legaliteit in ruime zin- op het terrein van overheidscontracten. Laatstgenoemde beginselen zullen, in tegenstelling tot de klassieke beginselen van het bestuurs- en het privaatrecht, ongetwijfeld leiden tot een verhoging van de fundamentele effectiviteit van overheidscontracten en aldus het gebruik van de klassieke rechtsbeginselen verminderen of vervangen.

bevoegdheid van de administratieve kamer van de rechtbank. De instandhouding van dit onderscheid in een land waarin het aantal zakelijke transacties met de overheid toeneemt, garandeert geen juiste uitvoering van overheidscontracten. Hetgeen echter vooral opvalt bij het Rwandese systeem van overheidscontracten is de ongelijke juridische verhouding tussen het bestuur en de contracterende wederpartij. Het bestuur, dat op basis van publiekrechtelijke regels speciale bevoegdheden heeft verkregen, treedt nogal eens op als een 'superpartij' en geniet op het gehele terrein van overheidscontracten diverse voorrechten. Aangezien deze privileges geen garantie geven voor een correcte uitvoering van overheidscontracten is een alternatief vereist, namelijk het gebruik van overheidscontracten in combinatie met de beginselen van goed bestuur. Bovendien leidt Rwanda's toetreding tot de *East African Community* (EAC) tot een herziening en hervorming van het huidige juridische kader voor overheidscontracten, ter vereenvoudiging van de contractuele transacties met andere lidstaten van de EAC, die op het gebied van overheidscontracten – vanwege het in die landen geldende *common law* regime - een meer privaatrechtelijk georiënteerde koers volgen. Een verschuiving van publiekrechtelijke naar privaatrechtelijke regelgeving op het terrein van overheidscontracten is in de praktijk inderdaad niet de beste keuze, maar een evenwichtige toepassing van zowel publiek- als privaatrecht zou geschikt kunnen zijn.

De centrale onderzoeksvraag die in dit proefschrift aan de orde komt is hoe het in Rwanda is gesteld met de legaliteit van overheidscontracten, en hoe de verhouding tussen het legaliteitsbeginsel en de beginselen van goed bestuur in relatie tot overheidscontracten zou moeten zijn. Met andere woorden, dient het recht met betrekking tot overheidscontracten in Rwanda in hoofdzaak onder het publiekrecht te blijven, dat bepaalde speciale voorrechten toewijst aan het bestuur of dienen zowel publiek- als privaatrechtelijke regels gezamenlijk te worden aangewend met de ondersteuning van moderne rechtsbeginselen: de beginselen van goed bestuur. De legaliteit van overheidscontracten wordt in dit verband op drie niveaus geanalyseerd. Op het eerste niveau, het conceptuele niveau, wordt onderzocht hoe het legaliteitsbeginsel, als onderdeel van de *rule of law*, wordt toegepast binnen de verschillende categorieën overheidscontracten. In Rwanda bestaan er twee soorten overheidscontracten, de 'bestuursrechtelijke contracten', die veelvuldig voorkomen en waarop publiekrecht van toepassing is, en de 'privaatrechtelijke contracten', waarvan

het bestuur zelden gebruik maakt en waarop het privaatrecht van toepassing is. Op het tweede niveau, het niveau van de rechtsgrondslag, worden de op overheidscontracten toegepaste regels en klassieke rechtsbeginselen beschreven en wordt de vraag behandeld hoe men een brug dient te slaan tussen de legaliteit van overheidscontracten en de beginselen van goed bestuur, om de effectiviteit hiervan te bevorderen. Het derde niveau betreft de rechterlijke toetsing van beslissingen ten aanzien van overheidscontracten en de rechterlijke bevoegdheid in geval van procedures over overheidscontracten. Naar de huidige stand van het recht is de administratieve kamer van de rechtbank in beginsel bevoegd tot het toetsen van beslissingen en bezit zij tevens bevoegdheid in geval van enige andere procedure aangaande overheidscontracten in Rwanda, met uitzondering van zaken in relatie tot publiekrechtelijke vennootschappen die vallen onder de jurisdictie van de burgerlijke rechter. In de nieuwe benadering van het legaliteitsbeginsel vanuit het perspectief van de beginselen van goed bestuur, zouden beslissingen over overheidscontracten moeten vallen onder de bevoegdheid van de administratieve kamer, en zou de fase van de uitvoering van overheidscontracten dienen te vallen onder de bevoegdheid van de burgerlijke rechter. Aangezien de centrale vraag dus is hoe het is gesteld met het legaliteitsbeginsel bij overheidscontracten en hoe het zou moeten zijn vanuit het gezichtspunt van de beginselen van goed bestuur, wordt in dit onderzoek het accent gelegd op een analyse van het in Rwanda op overheidscontracten toepasselijke recht met de bedoeling om dit te plaatsen binnen het normatieve legaliteitskader gebaseerd op de beginselen van goed bestuur. De titel is derhalve: *“Overheidscontracten en goed bestuur. Een vergelijkend perspectief op het evenwicht tussen publiek- en privaatrecht in Rwanda”*.

Met dit doel voor ogen is het recht betreffende overheidscontracten in diverse landen, die een zekere invloed hadden of hebben op het Rwandese rechtssysteem (Frankrijk, België, Engeland en Nederland) bestudeerd en vergeleken met de juridische situatie in Rwanda. Het accent lag daarbij op het uiteenlopende gebruik van publiek- en privaatrecht in deze context.

Categorisering van overheidscontracten: in de landen die zijn vergeleken (Rwanda, Frankrijk, België, Nederland en Engeland) worden overheidscontracten niet op dezelfde wijze gecategoriseerd. Drie landen (Rwanda, Frankrijk en België) kennen een onderscheid tussen twee

categorieën overheidscontracten: 'bestuursrechtelijke contracten' (veelvuldig voorkomend) en 'privaatrechtelijke contracten' (zelden voorkomend). Het verschil tussen deze categorieën is gelegen in het soort contractuele verhouding dat wordt gecreëerd tussen het bestuur en de contracterende wederpartij: deze is bij bestuursrechtelijke contracten verticaal en bij privaatrechtelijke contracten horizontaal. Nederland kent een onderscheid tussen drie categorieën overheidscontracten. Er zijn 'publiekrechtelijke contracten', 'privaatrechtelijke contracten' en 'gemengde contracten'. Ook hier ligt het verschil tussen deze categorieën in het type contractuele verhouding dat wordt gecreëerd tussen het bestuur en de contracterende wederpartij, die respectievelijk verticaal, horizontaal en gemengd is. Engeland, ten slotte, kent geen onderscheid tussen verschillende types overheidscontracten; deze vallen allemaal in dezelfde 'categorie' van de overheidscontracten waarop het privaatrecht van toepassing is. De contractuele verhouding die bij een Engels overheidscontract wordt geschapen tussen het bestuur en de contracterende wederpartij is in vrijwel altijd horizontaal. Deze is identiek aan de verhouding tussen twee private partijen, wanneer deze een gewone overeenkomst aangaan. Hoewel deze categorisering van contracten in vele opzichten verschillen, komen ze in één opzicht overeen: in alle vijf rechtsstelsels is het zo dat indien het bestuur handelt in de hoedanigheid van een private partij, iedere overeenkomst die zij aangaat *ipso facto* privaatrechtelijk van aard is. Enkel indien het bestuur optreedt in de hoedanigheid van een publiekrechtelijk orgaan zien we verschillen tussen de diverse landen wat betreft het toepasselijke recht. Deze vergelijking van de diverse typologieën in de verschillende landen helpt ons bij de beoordeling van de noodzaak van een nieuwe categorie van overheidscontracten in Rwanda, waarop een combinatie van publiek- en privaatrecht van toepassing zou kunnen zijn, ondersteund door de beginselen van goed bestuur.

Wettelijke regels aangaande de bevoegdheid van overheidsorganen tot het sluiten van overheidscontracten: in Rwanda, Frankrijk en Nederland kunnen overheidsorganen die overheidsinstellingen vertegenwoordigen en over de vereiste bevoegdheid tot het verrichten van rechtshandelingen beschikken namens deze instellingen overeenkomsten afsluiten, terwijl overheidsorganen die overheidsinstellingen vertegenwoordigen die niet over de noodzakelijke bevoegdheid tot het verrichten van rechtshandelingen beschikken, namens de staat handelen. In België dienen overheidsorganen op

grond van een algemene of een specifieke wettelijke bepaling de bevoegdheid te hebben verkregen tot het sluiten van overheidscontracten. In Engeland beschikt de Kroon of de centrale overheid over een inherente bevoegdheid tot het sluiten van overeenkomsten en dient de bevoegdheid van andere overheidsorganen hiertoe te zijn gebaseerd op een wettelijke bepaling. Ook al heeft ieder afzonderlijk rechtssysteem haar eigen specificaties ten aanzien van de bevoegdheid van overheidsorganen tot het sluiten van overheidscontracten, de publiekrechtelijke benadering van het sluiten van overeenkomsten heeft de overhand, zelfs in landen zoals Engeland en Nederland, die een privaatrechtelijke benadering bij overheidscontracten hanteren.

Wettelijke regels en beginselen aangaande de uitvoering van overheidscontracten: in de vijf landen die zijn vergeleken vallen overheidscontracten onder verschillende soorten recht. In Rwanda zijn bestuursrechtelijke overeenkomsten onderworpen aan het publiekrecht en kunnen privaatrechtelijke overeenkomsten onderworpen zijn aan het publiek- of privaatrecht. In Frankrijk zijn bestuursrechtelijke overeenkomsten onderworpen aan het publiekrecht en privaatrechtelijke overeenkomsten aan het privaatrecht. In Engeland zijn overheidscontracten onderworpen aan het privaatrecht. In België en Nederland zijn overheidscontracten onderworpen aan een mengeling van publiek- en privaatrecht. Vervolgens is onderzocht of de toepassing van een mengeling van publiek- en privaatrechtelijke regels op overheidscontracten in Rwanda zinvol zou zijn. In enkele landen berust het sluiten van overheidscontracten op beginselen die het bestuur ruime bevoegdheden toekennen (Rwanda, Frankrijk en België). In Engeland en Nederland wordt het bestuur daarentegen op dezelfde wijze behandeld als de contracterende wederpartij en zijn beide partijen onderworpen aan dezelfde regels van het privaatrecht, die tezamen met de beginselen van redelijkheid en billijkheid worden toegepast. Dit heeft geleid tot de vraag of het zinvol zou zijn om het bestuur in Rwanda bij het sluiten van overeenkomsten op dezelfde wijze te behandelen als een gewone burger. Het is het uiteindelijke doel dit onderzoek om een balans te vinden tussen enerzijds de toewijzing van passende voorrechten aan het bestuur en anderzijds de rechten die aan de contracterende wederpartij dienen te worden verleend. De beginselen van goed bestuur kunnen ertoe bijdragen om deze balans te bewerkstelligen.

Rechterlijke bevoegdheid bij overheidscontracten: bij de onderzochte landen is het mogelijk een onderscheid te maken tussen die landen waar in geval van geschillen die voortvloeien uit overheidscontracten de bestuursrechter bevoegd is, en die landen waar in dergelijke gevallen de burgerlijke rechter bevoegd is. Rwanda en Frankrijk behoren tot de eerste categorie. In Rwanda is de administratieve kamer van de rechtbank bevoegd in het merendeel van de geschillen voortvloeiend uit overheidscontracten, met inbegrip van zulke die onder het privaatrecht vallen, maar met uitzondering van overheidscontracten die publiekrechtelijke vennootschappen betreffen. In Frankrijk vallen geschillen die voortvloeien uit bestuursrechtelijke overeenkomsten onder de bevoegdheid van de bestuursrechter, terwijl geschillen die voortvloeien uit privaatrechtelijke overeenkomsten door de burgerlijke rechter worden behandeld. België, Nederland en Engeland behoren tot de tweede categorie. In België vallen geschillen die voortvloeien uit overheidscontracten en die burgerlijke of politieke rechten betreffen onder de bevoegdheid van de burgerlijke rechter. Geschillen voortvloeiend uit overheidscontracten die betrekking hebben op andere rechten, zoals geschillen over beslissingen die in de precontractuele fase (*actes détachables*) werden genomen, worden behandeld door de Raad van State. In Engeland en Nederland worden geschillen betreffende overheidscontracten beslecht door de burgerlijke rechter. In dit onderzoek is vervolgens onderzocht of het zinvol is om alle uit overheidscontracten voortvloeiende geschillen door de burgerlijke rechter te laten behandelen, of om in elk geval geschillen die voortvloeien uit de uitvoeringsfase van overheidscontracten door de burgerlijke rechter te kunnen laten behandelen.

Conclusie: dit onderzoek laat zien hoe de Franse en Belgische klassieke opvatting van legaliteit en het legaliteitsbeginsel (een opvatting die toepassing van publiekrecht, toekenning van speciale bevoegdheden aan het bestuur en de bevoegdheid van de administratieve kamer van de rechtbank voorstaat) het recht betreffende overheidscontracten in Rwanda heeft beïnvloed. Deze toont tevens de mogelijkheid tot de introductie van een nieuwe opvatting van legaliteit en het legaliteitsbeginsel, die kan bijdragen tot een transformatie van het recht betreffende overheidscontracten door de invoering van meer privaatrechtelijke elementen die worden toegepast in wisselwerking met het publiekrecht, in navolging van het Engelse en Nederlandse recht betreffende overheidscontracten. Maar bovenal toont dit onderzoek aan, dat de legaliteit en het legaliteitsbeginsel bij

overheidscontracten in Rwanda beter kan worden georganiseerd, indien deze wordt geplaatst binnen een kader van beginselen van goed bestuur. Vanuit de invalshoek van goed bestuur zou het terrein van de overheidscontracten dienen te vallen onder zowel publiek- als privaatrechtelijke regels, die transparante procedures, een correct en efficiënt bestuur en een grotere bestuurlijke verantwoording en billijkheid met betrekking tot overheidscontracten bevorderen. Dit onderzoek verkent de mogelijkheden die door de laatstgenoemde invalshoek worden geboden en verlegt het accent van de voorrechten van het bestuur naar eisen van een goed bestuur door het bestuur.

In de analyse wordt vastgesteld dat de beginselen van goed bestuur de belangrijkste juridische norm vormen voor handelingen van en besluitvorming door het bestuur, in het bijzonder in de context van overheidscontracten. De reden hiervoor is gelegen in de ontwikkeling van het begrip legaliteit en het legaliteitsbeginsel in het bestuursrecht. We bewegen van het klassieke legaliteitsbegrip, dat speciale bevoegdheden aan het bestuur toekent, in de richting van een modern legaliteitsbegrip, waarin de beginselen van goed bestuur centraal staan. Het rechtssysteem in Rwanda kent nog geen algemene wet waarin de beginselen van goed bestuur zijn gecodificeerd. Desalniettemin is het mogelijk om de beginselen van goed bestuur (zoals die nationaal zijn erkend) toe te passen op het bestaande recht inzake overheidscontracten. Deze beginselen bieden een passender normatief kader voor het recht inzake overheidscontracten in Rwanda dan het huidige kader. Indien het bestuur de beginselen van goed bestuur toepast, kan het nog steeds alle doelstellingen op dit terrein, tijdig en op een efficiënte wijze behalen. Bovendien kunnen deze beginselen, indien deze duidelijk worden toegepast op het proces van contracteren door de overheid, dit proces niet enkel verbeteren, maar ook mogelijke nadelige gevolgen veroorzaakt door de toepassing van hetzij publiekrecht, hetzij privaatrecht opheffen. Zo is het bijvoorbeeld mogelijk om met behulp van de beginselen van goed bestuur de eventuele nadelen van de toepassing van het publiekrecht, zoals vertragingen of de beschaming van het gerechtvaardigd vertrouwen van de contracterende wederpartij, te verzachten. De toepassing van het privaatrecht kan daarentegen leiden tot onenigheid tussen bestuurlijke beleidsmakers, die met behulp van de beginselen van goed bestuur zou kunnen worden opgelost.

Stelling: de stelling in dit onderzoek luidt dat de effectiviteit op het terrein van de overheidscontracten in Rwanda zou kunnen worden vergroot door de toepassing van het privaatrecht naast het publiekrecht en door inachtneming van de beginselen van goed bestuur, en bevat derhalve het voorstel om hieraan uitvoering te geven. Bestudeerd wordt hoe effectief de beginselen van goed bestuur kunnen zijn indien deze op het contracteren door de overheid worden toegepast.

Redenering I: Een 'goed bestuur'-visie op overheidscontracten: in het verleden werd het bestuur in Rwanda gezien als het enige orgaan dat in staat was tot de behartiging van het algemeen belang, en bijgevolg werd het publiekrecht van toepassing geacht op handelingen van het bestuur zodat dit hiervoor kon zorgen. Deze visie is echter veranderd. Bepaalde private instellingen zijn nu in staat om het algemeen belang te behartigen en hun activiteiten zijn onderworpen aan het privaatrecht. Bijgevolg is de rechtvaardiging voor de toepassing van het publiekrecht op veel bestuurlijke activiteiten weggefallen. Deze conclusie is gebaseerd op het simpele feit dat het element van algemeen belang tegenwoordig kan worden losgekoppeld van de instelling. Het algemeen belang als zodanig kan niet langer worden beschouwd als een exclusieve taak van het bestuur, maar het kan ook het eindresultaat zijn van handelingen van private instellingen.

Redenering II: Een nieuwe opvatting van legaliteit en het legaliteitsbeginsel vanuit het perspectief van een goed bestuur en de daaruit voortvloeiende beginselen: het functioneren van een moderne staat is gebaseerd op drie hoekstenen, te weten de rule of law (gebaseerd op vier hoofdpijlers, i.e. de legaliteit van het bestuurlijk handelen, de scheiding van of evenwicht tussen de drie staatsmachten, een onafhankelijke rechterlijke macht en de bescherming van de mensenrechten), democratie (hetgeen de invloed van het volk op het beleid en de activiteiten van de overheid inhoudt) en goed bestuur (dat verwijst naar een overheid of bestuur middels beginselen als behoorlijkheid, transparantie, participatie, doelmatigheid, verantwoordelijkheid en mensenrechten). Een van deze pijlers van de *rule of law*, te weten de legaliteit geanalyseerd in de context van overheidscontracten in Rwanda, vormt het centrale onderwerp van dit onderzoek. Op dit moment vallen bestuursrechtelijke beslissingen met betrekking tot overheidscontracten onder het publiekrecht (ofschoon privaatrechtelijke regels zo nu en dan worden toegepast) en gebaseerd op de

aan het bestuur toegekende privileges (klassieke opvatting van legaliteit). De introductie van het nieuwe begrip van goed bestuur heeft ontegenzeggelijk invloed op de legaliteit van overheidscontracten (de moderne visie op legaliteit). De beginselen van goed bestuur worden geïntroduceerd als een nieuwe, restrictievere norm voor het bestuur, omdat deze bijdraagt tot een vermindering van het gebruik van privileges, maar op een positieve wijze. Dit verklaart dat deze concurrerende opvatting van legaliteit, die wordt geassocieerd met de beginselen van goed bestuur, kan worden gehanteerd om enige nadelen die worden veroorzaakt door de toepassing van publiek- of privaatrecht op overheidscontracten tegen te gaan.

Redenering III: Redenen voor de toepassing van een mengeling van publiek- en privaatrecht: ter staving van de bovengenoemde stelling dienen de rechtvaardigingsgronden voor zo een verschuiving in de opvatting van legaliteit en het legaliteitsbeginsel (van publiekrechtelijk naar gemengd) binnen de context van de overheidscontracten te worden uiteengezet. Voor deze verschuiving zijn er zowel *interne* als *externe* gronden. De interne gronden zijn inhoudelijk, procedureel en structureel van aard. Wat de inhoud betreft kan men, gelet op de jurisprudentie, zien dat de rechter reeds een mengeling van publiek- en privaatrecht heeft toegepast. Wat de procedure betreft, is het voor de rechter eenvoudiger om dezelfde beginselen op vergelijkbare situaties toe te kunnen passen, ook al hebben enkele van deze situaties betrekking op overheidshandelen. Tot slot de structurele reden: aangezien Rwanda recentelijk is toegetreden tot de *East African Community* en de andere lidstaten een gemengde benadering voor hun recht betreffende overheidscontracten hanteren, betekent dit dat zo een verschuiving in het belang is van harmonisatie. Externe gronden voor de verschuiving kunnen worden gevonden in de bestudering van het in andere landen geldende recht. In landen als Frankrijk en België komen publiek- en privaatrecht samen op het terrein van de overheidscontracten, en in deze landen worden de beginselen van goed bestuur reeds toegepast. In Nederland en Engeland bestaat de gemengde benadering al.

Aanbevelingen: het verdient aanbeveling om overheidscontracten in Rwanda op een nieuwe wijze te categoriseren, hetgeen noodzakelijk is om de eerdergenoemde nieuwe 'legaliteit' te effectueren.

Een hiërarchie van overheidscontracten op basis van een schaal met drie niveaus van algemeen belang: om overheidscontracten verenigbaar te laten zijn met de beginselen van goed bestuur, zouden deze moeten worden heringedeeld volgens een functionele categorisering met drie categorieën die een glijdende schaal van algemeen belang vertegenwoordigen. Op het hoogste niveau vinden we een streng afgebakende categorie van 'overheidscontracten waarbij sprake is van een hoge mate van algemeen belang'. Hieronder vallen bijvoorbeeld overeenkomsten ter exploitatie van een openbaar nutsbedrijf of concessies voor openbare werken en diensten. Deze categorie valt meer onder het publiekrecht en wordt gekenmerkt door op basis van het publiekrecht aan het bestuur verleende voorrechten en door de beginselen van goed bestuur. Het merendeel van de overheidscontracten zal echter in de middelste categorie vallen: deze bevat bijvoorbeeld overheidsaanbestedings- en arbeidsovereenkomsten. Deze overeenkomsten worden gekenmerkt door een 'gemiddelde mate van algemeen belang', aangezien hierop zowel publiek- als privaatrecht zal worden toegepast, aangevuld met de beginselen van goed bestuur. Dit zal het bestuur weerhouden van misbruik van publiekrechtelijke privileges bij het sluiten van overheidscontracten. Op het laagste niveau van de schaal vinden we de categorie 'overheidscontracten waarbij minder of geen algemeen belang dient te worden gewaarborgd': hieronder vallen overeenkomsten aangaande de verkoop van particuliere bezittingen van de staat of via publiekrechtelijke vennootschappen geëxploiteerde bedrijven van het bestuur. Op deze overeenkomsten zullen meer privaatrechtelijke regels en beginselen worden toegepast, aangevuld met de beginselen van goed bestuur.

Verenigbaarheid van de nieuwe categorieën met de beginselen van goed bestuur: in het kader van de toepassing van de beginselen van goed bestuur op overheidscontracten zijn de volgende beginselen relevant voor bepaalde stadia van het contracteren door de overheid. In het stadium van het sluiten van een overheidscontract zijn de beginselen van gelijkheid (tussen de geadresseerden), transparantie van informatie, en het verbod op het misbruik van bevoegdheden (door het contracterende overheidsorgaan) het meest relevant. Overheidscontracten mogen gedurende de uitvoering ervan niet willekeurig worden gewijzigd of beëindigd, en indien zulke wijzigingen al voorkomen, dienen deze conform het motiveringsbeginsel te worden gemotiveerd. Ook dienen de doeltreffendheids- en efficiëntiebeginselen te worden gerespecteerd en dient rekening te worden gehouden met het

gerechtvaardigd vertrouwen van de contracterende wederpartij. Het verantwoordingsbeginsel en het beginsel van *fair play* zijn van toepassing op de beslissing van geschillen en de toewijzing van rechtsvorderingen, langs bestuurlijke of gerechtelijke weg. Indien overheidscontracten aanleiding vormen voor procedures, dient de administratieve kamer van de rechtbank bevoegdheid te hebben wat de precontractuele fase en de toekenningfase betreft, en dient de burgerlijke rechter bevoegd te zijn ter zake van geschillen over de uitvoering van overheidscontracten.

Table of laws and regulations

Rwanda

1. Constitution of the Republic of Rwanda as amended, 04/06/2003, *O.G.* n° special of 2nd December 2003.
2. Treaty of accession of the Republic of Rwanda to the East African Community, signed in Kampala, in Uganda, on 18/06/2007, *O. G.* n° special of 28/06/2007. Authorization of ratification by Law n° 29/2007 of 27/06/2007. Ratification by the Presidential Order n° 24/01 of 28/06/2007, *O.G.* n° special of 28/06/2007.
3. Organic law n° 01/2010/OL of 09/06/2010 establishing the National Law Reform Commission, *O.G.* n° 28 of 12/07/2010.
4. Organic Law n° 06/2009/OL of 21/12/2009 establishing general provisions governing public institutions, in *O.G.* n° special of 30/12/2009.
5. Organic Law n° 51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of courts, *O.G.* Special n° of 10/09/2008.
6. Organic Law n° 59/2007 of 16/12/2007 establishing the commercial courts and determining their organisation, functioning and jurisdiction, *O.G.* n° 5 of 01/03/2008.
7. Organic Law n° 29/2005 of 23/12/2005 determining the administrative entities of the Republic of Rwanda, *O.G.* n° Special of 23/12/2005.
8. Organic law n° 08/2005 of 14/07/2005 determining the use and management of land in Rwanda, *O.G.* n° 18 of 15/09/2005.
9. Organic Law n° 16/2004 of 19/6/2004 establishing the organisation, competence and functioning of Gacaca Courts charged with prosecuting and trying the perpetrators of the crime of genocide and other crimes against humanity, committed between october 1st, 1990 and december 31st, 1994, *O.G.* n° special of 19/06/2004, as amended and complemented to date.
10. Organic Law n° 07/2004 of 25/04/2004 determining the organisation, functioning and jurisdiction of courts, *O.G.* n° 14 of 15/07/2004 as amended by Organic Law n° 14/2006 of 22/03/2006.
11. Law n° 36/2012 of 21/09/2012 relating to competition and consumer protection, *O.G.* n° 46 of 12/11/2012.
12. Law n° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, *O.G.* n° 29 of 16/07/2012.
13. Law n° 45/2011 of 25/11/2011 relating to contracts, *O.G.* n° 4 bis of 23/01/2012.

14. Law n° 41/2011 of 30/09/2011 establishing the Rwanda Governance Board and determining its mission, organisation and functioning, *O.G.* n° 46 of 14/11/2011.
15. Law n° 13/2009 of 27/05/2009 regulating labour in Rwanda, in *O.G.* n° special of 27/05/2009.
16. Law n° 50/2008 of 09/09/2008 determining the procedure for disposal of state private assets, *O.G.* n° 24 of 15/12/2008.
17. Law n° 12/2007 of 29/03/2007 on Public Procurement, in *O.G.* n° 8 of 15/04/2007.
18. Law n° 08/2007 of 03/02/2007 determining the responsibilities, organization and functioning of Rwanda Public Transport Authority (ONATRACOM), *O.G.*, n° 6 of 15/03/2007.
19. Law n° 08/2006 of 24/02/2006 determining the organisation and functioning of the district, *O.G.* n° Special of 24/02/2006.
20. Law n° 01/2006 of 24/01/2006 establishing the organisation and functioning of province, *O.G.* n° special of 28/01/2006.
21. Law n° 13/2004 of 17/5/2004 relating to the code of criminal procedure, *O.G.* Special n° of 30/07/2004.
22. Law n° 25/2003 of 15/08/2003 establishing the organisation and functioning of the Office of the Ombudsman, *O.G.* Special n° of 03/09/2003.
23. Law n° 18/2002 of 11/05/2002 governing the press, *O.G.* n° 13/2002 of 01/07/2002.
24. Law n° 22/2002 of 09/07/2002 on General Statutes for Rwanda Public Service, in *O.G.* n° 17 of 01/09/2002.
25. Law n° 02/2002 of 17/01/2002 modifying Decree-Law n° 32/75 of 07/08/1975 relating to the compulsory civil liability insurance with regard to automotive vehicles, *O.G.* n° 6 of 15/03/2002, p. 30.
26. Law n° 51/2001 of 30/12/2001 establishing the labour code, *O.G.* n° 05 of 01/03/2002.
27. Law n° 05/98 of 04/6/1998 establishing the Office of the Auditor General of the state finances, *O.G.* n° 17 of 01/09/1998.
28. Law n° 2 of 11/03/1996 relating to privatisation and public investment, in *O.G.* n° 6 of 15/03/1996.
29. Law n° 11/82 of March 1982 relating to protection, preservation and utilisation of the soil, *O.G.*, 1982, p. 334.
30. Decree-Law n° 41/78 of 29/12/1978 governing organization and jurisdiction of courts, *O.G.*, 1979, p. 35.

31. Decree-Law n° 32/75 of 07/08/1975 relating to the compulsory civil liability insurance with regard to automotive vehicles, *O.G.*, 1975, p. 544.
32. Law of 20/06/1975 relating to insurances, in *O.G.*, 1975, p. 449.
33. Decree-Law of 25/02/1959 relating to public procurement of works, goods and transport, *Official Bulletin*, 1959.
34. Decree of 20/7/1920 governing ownership and modifications to ownership, in *O.G.*, 1920, p. 870.
35. Law of February 23rd, 1963 relating to criminal procedure, in *O.G.* 1963, p. 98.
36. Prime Minister's Order n° 53/03 of 14/07/2012 establishing salaries and fringe benefits for public servants of the Central government, *O.G.* n° special of 14/07/2012, as modified and complemented by Prime Minister's Order n° 92/03 01/03/2013, *O.G.* of n° special of 01/03/2013.
37. Ministerial Order n° 001/08/10/MIN of 15/01/2008 establishing regulations on public procurement and standard bidding documents, *O.G.* n° 2 of 15/01/2008.
38. Ministerial Order n° 002/06/10 min of 07/08/2006 fixing the threshold for public procurement entities, *O.G.* n° 17 of 01/09/2006.

France

39. Constitution of the Republic of France, 04/10/1958, in <http://www.assemblee-nationale.fr/english/8ab.asp>, accessed on 19/11/2010.
40. Code of State's Property (art. L54), consolidated version of 21/06/2010.
41. French Civil code, in http://195.83.177.9/upl/pdf/code_22.pdf, accessed on 2/5/2010.
42. Ordinance n° 2009-864 of 15/07/2009 relating to concession of public works contracts.
43. Law n° 2008-735 of 28/07/2008 governing contracts of partnership.
44. Decree n° 2006-975 of 01/08/2006 on public procurement (as amended), *JORF* n°179 of 04/08/2006 p. 11627.
45. Law n° 2005-809 of 20/07/2005 relating to concession of works and equipments installation and maintenance operations.
46. Law n°2002-6 of 04/01/2002 relating to the creation of public establishments for cultural cooperation.
47. Law n° 93-122 of 29/01/1993 relating to prevention of corruption and transparency in the economic life and public procedures (*Loi Sapin*).

48. Decree n° 93-471 of 24/03/1993 relating to the application of art. 38 of law n° 93-122 of 29/01/1993 governing advertisement of delegation of public service contracts, in application of art. 38 of Law n° 93-122 of 29/01/1993 relating to prevention of corruption and transparency of the economy and public procedures.
49. Law n° 90-568 of 02/07/1990 governing the functioning of the public service of posts and France Telecom.
50. Decree n°53-933 of 30/09/1953 relating to the status, organisation and functioning of institutions for economic intervention of private nature, Consolidated version of 01/09/2007.

Belgium

51. Constitution of the Kingdom of Belgium of 17/02/1994 (as revised), in <http://www.ejustice.just.fgov.be/loi/loi.htm>, last visited on 12/10/2012.
52. Coordinated Laws on the Council of State of 12 January 1973, in *Moniteur Belge*, March 21st, 1973, p. 3461.
53. Law of 04/12/2006 relating to use of railways infrastructure, *Moniteur Belge*, 23/01/2007.
54. Law of 15/06/2006 relating to public procurement of works, goods and services, in *Moniteur Belge*, 15.02.2007, p. 7355.
55. Law of 29/04/1999 relating to gas market, *Moniteur Belge*, 11.05.1999 - Ed. 2, p. 16278.
56. Law of 29/04/1999 relating to electricity market. *Moniteur Belge*, 11/05/1999 - Ed. 2, p. 16264.
57. Law of 24/12/1993 relating to public procurement of works, goods and services (repealed).
58. Law of 25/06/1992 governing terrestrial insurance contract, *Moniteur Belge*, 20/08/1992, p. 18283; see also Law of July 9th, 1975 relating to control of insurance companies, *Moniteur Belge*, 29/07/1975.
59. Law of 14/07/1976 relating to public procurement of works, goods and services (repealed).
60. Law of 04/03/1963 relating to public procurement of works, goods and services.
61. Law of 30/04/1958 relating to concession of beach spaces to municipalities neighbouring the ocean (*concessions de plages aux communes du littoral*), *Moniteur Belge*, 30/05/1958.

62. Law of 01/03/1922 relating to the association of municipalities for a public interest goal (*association des communes dans un but d'utilité publique*), *Moniteur Belge*, 16/03/1922, p. 2282.
63. Law of December 1862 granting government the power to procure printing and binding facilities for ministerial departments for a five-year term, *Moniteur Belge*, 23/12/1862, p. 5833.
64. Royal Decree of 12/12/2005 modifying Royal Decree of April 2003 governing second contract for management by ASTRID, in *Moniteur Belge*, Ed. 2, 23/01/2006, p. 3673.
65. Decree of governing the Flemish Company for Water Distribution (*Société Flamande de Distribution d'eau SFDE*), *Moniteur Belge*, 01-12-1983, p. 14836.
66. Government (French Community) Decree of 31/03/2004 relating to approbation of the management contract with ETNIC, *Moniteur Belge*, Ed. 2, 25/05/2005, p. 40512.
67. Decree of 07/03/2001 relating to the Wallonie Company for Water Distribution (*Société Wallonne des Distributions d'Eau SWDE*), in *Moniteur Belge*, 17.03.2001 - Ed. 2, p. 8512.
68. Ordinance establishing the framework for water policy, *Moniteur Belge*, 03/11/2006 – Ed. 2, p. 58772.
69. Ministerial Order of 10/12/2002 relating to supply of uniforms and accessories to the employees called for dressing uniforms - Division of exploitation in the General Division of Wallon Ministry of Transport, *Moniteur Belge*, 17/01/2003, p. 1579.
70. Ministerial Order of September 3rd, 1971 relating to attributes, signs of uniforms of military courts judges and clerks and members of the General military prosecution Secretariat, *Moniteur Belge*, 08/07/1998, p. 22295.
71. Circular 307quinquies of July 13th, 2009 relating to purchase of government vehicles and vehicles of governmental institutions acting for public interest, *Moniteur Belge*, 03/08/2009, p. 51882.
72. Circular of the Wallon Government of June 3rd, 2009 relating to purchase of papers for copying or printing, in *Moniteur Belge*, 22/06/2009, p. 43296.
73. Circular of July 11th, 2006 relating to contractual relationships between procurement entities (*relations contractuelles entre pouvoirs adjudicateurs*), *Moniteur Belge*, 13/10/2006, p. 54834.
74. Circular of July 20th, 2005 governing sale or acquisition of immovable properties by the communes, provinces or the CPAS and also

emphytheosis right or superficy right, in *Moniteur Belge*, 03/08/2005, p. 34152.

75. Circular of July 20th, 2005 governing sale or acquisition of immovable properties by the communes, provinces or the CPAS and also emphytheosis right or superficy right, in *Moniteur Belge*, 03/08/2005, p. 34152.

England

76. Crown Proceedings Act 1947, in <http://www.statutelaw.gov.uk/content.aspx?activeTextDocId=1140084>, accessed on October 13th, 2010.
77. Human Rights Act 1998 (Meaning of Public Function) Bill, House of Commons, in <http://www.publications.parliament.uk/pa/cm200708/cmbills/045/08045.i-i.html>, accessed on 18/05/2010.
78. Local Government Act 1988, in <http://www.legislation.gov.uk/ukpga/1988/9/contents>, last visited on November 12th, 2010; Local Government Act 1999, in <http://www.legislation.gov.uk/ukpga/1999/27/contents>, last visited on November 12th, 2010.
79. Memorandum from Granville Ram, First Parliamentary Counsel of 2nd November 1945, in <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldlwa/30122wa1.pdf>, last visited on 30th September, 2010.
80. Newport City Council standing orders, in http://www.newport.gov.uk/stellent/groups/public/documents/policies_and_procedures/n_010930.pdf, accessed on October 20th, 2010.
81. Plymouth City Council standing orders, in http://www.plymouth.gov.uk/procurementfaqs#what_are_standing_orders, accessed on October 20th, 2010;
82. Post and electronic telecommunications Act, consolidated version of July 25th, 2010.
83. Public Contracts Regulations 2006, England and Wales, in http://www.opsi.gov.uk/si/si2006/uksi_20060005_en.pdf, last visited on April 6th, 2010.
84. Public Order Act 1994, s. 127.
85. Sheffield City Council standing orders, in <http://www.sheffield.gov.uk/your-city-council/council->

meetings/cabinet/agendas-2007/agenda-14th-march/contracts-standing-orders, accessed on October 20th, 2010.

86. Statutory Instruments 2009 [Supreme Court], n^o 1604), in <http://www.legislation.gov.uk/uksi/2009/1604>, accessed on 30/9/2010.
87. Trade Union and Labour Relations (Consolidation) Act 1992, s. 280(1).

The Netherlands

88. Constitution of the Kingdom of the Netherlands, accessed in <http://www.legislationline.org/documents/section/constitutions/country/12>, visited on November 25th, 2010.
89. Dutch Civil Code in H. Warendorf, R. Thomas & I. Curry-Summer, *The Civil Code of the Netherlands*, Alphen aan den Rijn, Kluwer Law International, 2009.
90. General Administrative Law Act (GALA), accessed in <http://www.rijksoverheid.nl/documenten-en-publicaties/besluiten/2009/10/01/general-administrative-law-act-text-per-1-october-2009.html>, last visited on October 23rd, 2012.

European Union

91. Commission of the European Communities, “European Governance – A White Paper”, Brussels, 25/07/2001, COM(2001) 428 final, p. 10, in http://eur-lex.europa.eu/LexUriServ/site/en/com/2001/com2001_0428en01.pdf, last visited on October 19th, 2010.
92. Council of Europe, Recommendation CM/Rec(2007)7 of the Committee of Ministers to member States on good administration, adopted by the Committee of Ministers on 20 June 2007 at the 999bis meeting of the Ministers’ Deputies, in [http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_&_Documents/Conv_Rec_Res/Rec\(2007\)7_en.pdf](http://www.coe.int/t/e/legal_affairs/legal_cooperation/administrative_law_and_justice/Texts_&_Documents/Conv_Rec_Res/Rec(2007)7_en.pdf) accessed on 15/10/2009.
93. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, accessed in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0018:EN:NOT>, last visited on February 24th, 2013.
94. Directive 2004/17/EC of the European Parliament and of the Council of the European Union of 31 March 2004 coordinating the procurement

- procedures of entities operating in the water, energy, transport and postal services sectors, accessed in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0017:en:NOT>, last visited on February 24th, 2013.
95. European Union, “Consolidated versions of the Treaty on European Union and the Treaty establishing the European Community”, *Official Journal of the European Union*, 29.12.2006, C 321 E/1, accessed in <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:321E:0001:0331:EN:PDF>, on October 19th, 2010.
96. Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, *Official Journal of the European Communities*, L 145/43, of 31.5.2001, in http://www.europarl.europa.eu/RegData/PDF/r1049_en.pdf, last visited on October 1st, 2010.
97. The European Ombudsman, *The European Code of Good Administrative Behaviour*, in <http://www.ombudsman.europa.eu/code/en/default.htm#hl9>, visited on 14/05/2010.

Table of court judgments**Rwanda**

1. *Agro-Consult sarl v. Rwandan State (Ministry of Agriculture)*, High Court of Commerce, RCOM A0126/08/HCC, 27/11/2008 (unpublished).
2. *Bank of Kigali v. M. Umupfasoni, A. Anastase & National Commission for Human Rights*, Commercial Court of Nyarugenge, R.Com 0069/09/TC/NYGE, 16/04/2010 (unpublished).
3. *City of Kigali v. ECAN Company*, High Court, 0106/HC/KIG, 14/01/2011.
4. *Gone Fishin' v. Rwandan State*, Supreme Court, R.Ad.A 0006/07/CS, 19/02/2008 (unpublished).
5. *Habimana D. et alii v. ISAE Busogo*, High Court of the Republic, RAD 0004/06/HC/MUS, 30/11/2007 (unpublished).
6. *Karangwa v. Electrogaz*, Supreme Court, R.AD.A 0005/08/CS, 23/01/2009 (unpublished).
7. *Kayiranga v. Rwandan State et alii*, Supreme Court, R.Ad.A 0007/07/CS, 29/02/2008 (unpublished), accessed in <http://www.supremecourt.gov.rw/IMG/pdf/02radkayiranga-2.pdf>, last visited on November 12th, 2010.
8. *Mbarirende v. SONARWA*, High Court, R.SOC.A 0262/06/HC/KIG, 07/11/2008 (unpublished).
9. *Munyampirwa v. Rwandan State* (Supreme Court, R.Ad.A 0010/07/CS, 06/06/2008 (unpublished), accessed in <http://www.supremecourt.gov.rw/06admunyampirwa2.pdf>, accessed October 16/10/2009.
10. *Mutuyeyezu v. Ministry of Defense*, High Court, RAD 0105/09/HC/KIG, 01/04/2011 (unpublished).
11. *Nyiranduhuke, Munyarukiko & Nsabimana v. SCAR represented by SONARWA s.a.*, Intermediate Court of Rubavu, RC0034/07/TGI/Rbv - RC0035/07/TGI/Rbv - RC0037/TGI/Rbv, 11/04/2010 (unpublished).
12. *Social Security Fund & Rwandan state v. Janvier Hino Karekezi*, Supreme Court, R.Ad.A 0008/08/CS, 26/06/2009 (unpublished), accessed in www.judiciary.gov.rw, on 31/01/2013.

France

13. *Blanco v. French State*, TC, 8 February 1873, in 1st *suppl*t - *Rec. Lebon*, p. 61, accessed in http://www.lexinter.net/JPTXT2/arret_blanco.htm, on 7/10/2010.

14. *Bureau d'aide sociale de Blenod-lès-Pont-à-Mousson v. Office public d'habitations à loyer modéré de Meurthe-et-Moselle*, CE, 11/05/1980.
15. *Compagnie générale d'éclairage de Bordeaux v. Municipality of Bordeaux*, CE, 30/03/1916, Rec. Lebon, n° 59928, accessed in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007629465&fastReqId=1456593563&fastPos=1>, on 29/01/2013.
16. *Commune d'Agde v. Société d'équipement du Biterrois et de son littoral*, TC 05/07/1975, in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007604728&fastReqId=463060367&fastPos=67>, last visited on October 5th, 2010.
17. *Crédit Suisse v. Allerdale BC* [1997] QB 306, in <http://www.oup.com/uk/orc/bin/9780199277285/01student/ch15/03cases/>, accessed on July 22nd, 2010.
18. *CROUS Academie de Nancy-Metz v. Office public d'habitations à loyer modéré du Département de Moselle*, CE 7 october 1991.
19. *Entreprise Peyrot v. Société de l'autoroute Estérel-Côte-d'Azur*, TC 8 july 1963, in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007604220&fastReqId=1646919724&fastPos=1>, last visited on October 5th, 2010.
20. *Fonds des routes v. Société Anonyme "Aswebo"*, CC, 07/05/1982, in *Pasicrisie Belge*, 1982, I, p. 1032.
21. *Société d'équipement de la région Montpelliéraine (SERM) v. Entreprise Roussel*, CE 30 may 1975, in http://archiv.jura.uni-saarland.de/france/saja/ja/1975_05_30_ce.htm, accessed on October 6th, 2010.
22. *Société des granits porphyroïdes des Vosges v. Municipality of Lille*, CE, 31 July 1912, in <http://www.legifrance.gouv.fr/affichJuriAdmin.do?oldAction=rechJuriAdmin&idTexte=CETATEXT000007634187&fastReqId=1849126865&fastPos=1>, last visited on October 5th, 2010.
23. *Société Générale d'Entreprise (SOGEE) & Succession Sebera v. Banque Nationale du Rwanda*, Supreme Court, RCAA 0017/06/CS, 02/08/2007.
24. *Telaustria Verlags GmbH and Telefonadress GmbH v Telekom Austria AG & Herold Business Data AG (joined party)*, Court of Justice of the European Union (Sixth Chamber), December 7th, 2010, in

lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:61998J0324:EN:HTML , accessed on November 18th, 2010.

25. *Thérond*, CE 4 march 1910, in http://www.lexinter.net/JPTXT2/arret_therond.htm, accessed on October 8th, 2010.
26. *Union des Assurances de Paris [UAP] et autres assureurs du centre national pour l'exploitation des océans [CNEXO] v. Ministre des P. et T.*, Tribunal des Conflits, March 21st, 1983, in *Recueil Dalloz Sirey*, 1984, Jurisprudence, I, p. 33.

Belgium

27. *Auto-Camion Bruxellois v Belgian State (Ministry of Interior)*, CE, 22 décembre 1955, *Pasicrisie Belge*, 1956, p. 20.
28. *Belgian State – Ministry of Interior v. I.*, C.C., 16/01/2006, in *Pasicrisie Belge*, 2006, I, p. 165.
29. *Belgian State (Minister of Finances) v. Trine*, CC, December 21st, 1956, *Pasicrisie Belge*, 1957, p. 431.
30. *Belgian State v Y.*, Court of Cassation, 18/12/2008, *Pasicrisie Belge*, 2008, p. 3002.
31. *COBESMA (Compagnie Belgo-Suédoise de machines) v Belgian State (Ministry of Communications)*, CE, 10 august 1951, *Pasicrisie Belge*, 1952, p. 100.
32. *Cuvelier v. Société Nationale du Logement*, C.C., December 16th, 1965, in *Pasicrisie Belge*, I, 1966, I, p. 513.
33. *Martens v. Centre public d'aide sociale (CPAS) de Bree et Crts*, C.C., November 17th, 1994, in *Pasicrisie Belge*, 1994, I, p. 956.
34. *Ville de Bruges v. Société La Flandria* (the so-called *La Flandria* case), C.C., november 5th, 1920, *Pasicrisie Belge*, 1920, I, p. 193.

England

35. *Associated Provincial Picture houses v. Wednesbury Corporation*, [1948] 1 KB 223.
36. *Crédit Suisse v. Allerdale BC* [1997] QB 30.
37. *Crown Lands Comrs v Page*, , [1960] 2 QB 274 at 293.

The Netherlands

38. *Bentham v. The Netherlands*, European Court of Human Rights, Strasbourg, 23 October 1985, Application 8848/80, accessed in

<http://www.juridischeuitspraken.nl/19851023EHRMBenthem.pdf>, last visited on October 11th, 2010.

39. *Dutch State v. Windmill*, HR 26 January, AB 1990, 408; NJ 1991, 383.

Table of Interviews

Rwanda

1. Interview with S. Rugege, President of the (Rwanda) Supreme Court. Interview was conducted the time when he was Deputy Chief Justice, on August 17th, 2010.
2. Interview with A. Cyanzayire, Chief Ombudsman and Former President of the (Rwanda) Supreme Court. Interview was conducted the time when she was Chief Justice, on 31/08/2010.
3. Interview with L. Mugenzi, Judge to the (Rwanda) Supreme Court and former President of *Conseil d'Etat*, conducted on June 12th, 2008.
4. Interview with J.B. Mutashya, Judge to the (Rwanda) Supreme Court, August 30th, 2010.
5. Interview with J. Busingye, President of the (Rwanda) High Court, conducted on August 18th, 2010.
6. Interview with O. Biraro, Deputy Auditor General (Rwanda), conducted on January 10th, 2008.
7. Interview with J.P. Kayitare, Assistant Deputy Attorney of State in charge of legislation, Ministry of Justice (Rwanda), conducted on January 17th, 2008.
8. Interview with A. Sebazungu, Assistant deputy attorney of State in charge of State's courts litigations, Ministry of Justice (Rwanda), conducted on 16/08/2010.
9. Interview with I. Kalihangabo, Assistant deputy attorney of State in charge of State's contracts, Ministry of Justice, conducted on 16/08/2010.
10. Interview with A. Malaala, Principal Attorney of State at the Ministry of Justice (Rwanda), conducted on 27/07/2010.
11. Interview with E. Butare, Principal Attorney of State at the Ministry of Justice (Rwanda), conducted on 27/07/2010.
12. Interview with E. Rubango, Principal Attorney of State at the Ministry of Justice (Rwanda), conducted on 27/07/2010.
13. Interview with A. Basomingerera, Lawyer and expert of administrative law, conducted on March 31th, 2008.
14. Interview with L. Munyandirikira, Legal advisor, *Société Nouvelle d'Assurances au Rwanda* (SONARWA), conducted on 26/02/2009.
15. Interview with A. Rugira, Head of legal department, *Société Nouvelle d'Assurances au Rwanda* (SONARWA), conducted on 10/032011.

16. Interview with A. Bahizi, Head of Legal Department, Bank of Kigali, conducted on 24/03/2011.

France

17. Interview with J.B. Auby, Professor of Administrative Law at the University of Paris II, conducted on 20/11/2008.
18. Interview with R. Noguellou, Professor of Administrative Law, University of Nantes, conducted on 20/11/2008 in Paris.

Belgium

19. Interview with S. Van Garsse, Director of the Flemish Centre for Public-Private Partnership and part-time lecturer at the University of Antwerp (Faculty of Law), conducted on 14/12/2007.

England

20. Interview with A.C.L. Davies, Professor of Administrative law, Oxford University, 24/03/2010 & 22/10/2010.
21. Interview with P. Craig, Professor of Administrative Law, Oxford University, 12/04/2010.
22. Interview with M. Trybus, Professor of European Law and Policy, University of Birmingham – Law School, conducted at Stockholm on May 27th, 2010, at a conference on public contracts in the European Union, organized by the University of Sodertorn.

The Netherlands

23. Interview with E. Hondius, Professor of Private law, Utrecht University, conducted on 06/12/2007 at Utrecht.
24. Interview with O. Jansen, Institute of Constitutional and Administrative law of Utrecht University, conducted on 12/11/2007.

Bibliography

Rwanda

1. African Development Fund, Rwanda - Structural Adjustment Programme (Sap II), Completion Report, February 2007, in <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/ADF-BD-IF-2007-43-EN-RWANDA-PCR-STRUCTURAL-ADJUSTMENT-PROGRAMME-SAP-II.PDF>, accessed on November 17th, 2010
2. Article 22 of “The Covenant of the League of Nations”, in http://avalon.law.yale.edu/20th_century/leagcov.asp, accessed October 16th, 2009.
3. De Lacger L., *Rwanda*, Kabgayi, Imprimatur, 1959.
4. Contract n° I04934 of 20/01/2009 entered into between the Ministry of infrastructure and SONARWA, for cover of the Rwanda Revenue Authority building and equipments against any damage or loss.
5. Contract of 18/05/2004 entered into between Rwandan State (Ministry of finance and economic planification) and Maiserie Mukamira, a Maize Factory for maize operational activities.
6. Dessaint M., *Historique et chronologie du Rwanda*, Kigali, Office du Résident du Rwanda, 1947, p. 21.
7. Gaba L., *L’Etat de droit, la démocratie et le développement économique en Afrique Subsaharienne*, Paris, L’Harmattan, 2000.
8. Gakuba D., “Rwanda governance Advisory Council releases key governance indicators”, in Rwanda Bureau of Information and Broadcasting (ORINFOR), 02/09/2010, accessed in <http://www.orinfor.gov.rw/printmedia/topstory.php?id=1248>, on 16/02/2012
9. Institute of Research and Dialogue for Peace (IRDP), *L’Etat de droit au Rwanda*, Kigali, December 2005.
10. Institute of Research and Dialogue for Peace (IRDP), *Histoire et conflits au Rwanda*, Kigali, January 2006.
11. Kanimba C.M. & Van Pee L., *Rwanda. Its cultural heritage, past and present*, Huye, Institute of National Museums of Rwanda, 2008
12. Ndagijimana U., “Public procurement in Rwanda: Challenges for managers”, Presentation made during a lecture to LLM students in business law, 27/07/2007.

13. Paternostre de la Mairie B., *Le Rwanda. Son effort de développement, Antécédents historiques et conquêtes de la révolution rwandaise*, Kigali & Bruxelles, Editions Rwandaises & Editions A. De Boeck, 1983.
14. Prunier G., *The Rwanda crisis. History of a genocide*, Kampala, Fountain Publishers, 1994.
15. Reintjens F., *Pouvoir et droit au Rwanda – Droit Public et évolution politique, 1916-1973*, Musée Royal de l’Afrique Centrale – Tervuren, Belgique Annales – Série IN-8° - Sciences Humaines - N° 117, 1985.
16. “Rwanda Governance Advisory Council (RGAC)”, in <http://www.rwanda-gac.org/>, accessed on September 22nd, 2010.
17. Rwanda Governance Advisory Council, “Governance innovations in local government”, in <http://www.rwanda-gac.org/spip.php?rubrique5>, accessed on 1/10/2010.
18. Semarinyota A., “Good governance in Rwanda, Highlights”, Paper presented at a Conference on Good governance in Rwanda, held at Palace Hotel, 05/10/2004.
19. The Gisovu Tea Company share sale agreement between the Republic of Rwanda and Olyana Holdings LLC, made on September 24th, 2009, Agreement n° RDB PRZ 08/21/09.
20. Zigirinshuti F., *Specific private contracts*, Manual for students, Huye, Editions de l’Université Nationale du Rwanda, 2006.
21. Zigirinshuti, F., “Monographies nationales/National reports, Rwanda”, in R. Noguellou & U. Stelkens (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 859-886.

France

22. Alder J., *Constitutional and administrative law*, Fifth Edition, Hampshire, Palgrave Macmillan, 2005.
23. Ardant Ph. & Mathieu B., *Institutions politiques et droit constitutionnel*, 21st Edition, Paris, LGDJ, 2009.
24. Ardant Ph., *Institutions politiques et Droit constitutionnel*, 13th Edition, Paris, LGDJ, 2001.
25. Auby J.B., “Le rôle de la distinction du droit public et du droit privé dans le droit français”, in M. Freedland & J.-B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006.

26. Beaud O., "La distinction entre droit public et droit privé: Un dualisme qui résiste aux critiques", in M. Freedland & J.B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006.
27. Bell J. et alii, *Principles of French law*, Oxford, Oxford University Press, 1998.
28. Bermann G.A. & Picard E. (eds.), *Introduction to French law*, Alphen, Kluwer Law International, 2008.
29. Bousta Rh., *Essai sur la notion de bonne administration en droit public*, Paris, L'Harmattan, 2010
30. Braconnier S., *Précis du Droit des marchés publics*, 2nd Edition, Paris, Editions du Moniteur, 2007.
31. Braibant G. & Stirn B., *Le droit administratif français*, 7th edition, Paris, Presses des Sciences Po & Dalloz, 2005.
32. Brown L. N. & Bell J. S., *French administrative law*, Oxford, Clarendon Press, 1998.
33. Chapus R., *Droit administratif général*, Tome 1, 15th Edition, Paris, Montchrestien, 2001.
34. Chapus R., *Droit du contentieux administratif*, 12th edition, Paris, Montchrestien, 2006.
35. Degoffe M., *Droit administratif*, Paris, Ellipses, 2008.
36. Demichel A., *Le droit administratif, Essai de réflexion théorique*, Paris, LGDJ, 1978.
37. Dupuis G. et al., *Droit Administratif*, 10th ed., Paris, Sirey, 2007.
38. Foillard Ph., *Droit administratif*, Orléans, Paradigme, 2008.
39. Fougerouse J., *Le droit administratif en schémas*, Paris, Ellipses, 2008.
40. Gaudemet Y., *Droit administratif*, 18th ed., LGDJ, Paris, 2005.
41. Guettier Ch., *Droit des contrats administratifs*, Paris, PUF, 2004.
42. Hamon F. & Troper M., *Droit constitutionnel*, 31st Edition, Paris, LGDG, 2009.
43. Kirat Th. (ed.), *Economie et droit du contrat administratif*, Paris, La documentation française, 2005.
44. Laubadaire A., Venezia J.C. & Gaudemet Y., *Traité de droit administratif*, Tome 1, 14th Edition, Paris, LGDJ, 1996.
45. Morand-Deville J., *Cours de droit administratif: Cours, thèmes de réflexion, commentaires d'arrêts avec corrigés*, 8th edition, Paris, Montchrestien, 2003.

46. Noguellou R., "Monographies nationales/National reports, France", in Noguellou R. & Stelkens U. (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 675-699.
47. Richer L., *Droit des contrats administratifs*, 8th Edition, Paris, LGDJ, 2012.
48. Rivero J. & Waline J., *Droit administratif*, 20th edition, Paris, Dalloz, 2004.
49. Rivero J. & Waline J., *Droit administratif*, 21st edition, Paris, Dalloz, 2006.
50. Rivero J., *Droit administratif*, 1st edition, Paris, Dalloz, 1990.
51. Sayah J., *Droit administratif*, 2nd ed., Levallois-Perret, Studyrama, 2007.
52. Vogenauer S., "Series editor's foreword", in M. Freedland & J.B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006.

Belgium

53. Bocken H. & De Bondt W., *Introduction to Belgian law*, Bruxelles – The Hague, Bruylant – Kluwer, 2001.
54. Delpérée F., *Le droit constitutionnel de la Belgique*, Bruxelles, Bruylant, 2000.
55. Flamme M.A., *Traité théorique et pratique des marchés publics*, Tome I, Bruxelles, Etablissements Emile Bruylant, 1969.
56. Flamme Ph., "Monographies nationales/National reports, Belgique/Belgium", in Noguellou R. & Stelkens U. (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 399-430.
57. Goffaux P., *L'inexistence des privilèges de l'administration et le pouvoir d'exécution forcée*, Bruxelles, Bruylant, 2002.
58. Herbiet M. & Durviaux A.L., *Droit public économique*, Bruxelles, La Charte, 2008.
59. Lust S., "Administrative law in Belgium", in R. Seerdon & F. Stroink (eds.), *Administrative law of the European Union, its member states and the United States - A comparative analysis*, Antwerpen – Groningen, Intersentia, 2002, pp. 5-58.
60. Pâques M., *De l'acte unilatéral au contrat dans l'action administrative*, Bruxelles, E.Story-Scientia, 1991.
61. Nihoul M., *Les privilèges du préalable et de l'exécution d'office*, Bruges, La Charte, 2001.

62. Thiel P. & Dior V., *Le nouveau régime des marchés publics, Principales innovations introduites par les lois des 15 et 16 juin 2006*, Waterloo, Kluwer, 2007.
63. Vankerckhove J. & Coeckerlgerghs P., *Le louage de choses : Les baux en général*, Bruxelles, Larcier, 2000.

England

64. Arrowsmith S., *The law of public and utilities procurement*, London, Sweet & Maxwell, 2005.
65. Bailey S.H., *Cases, Materials & Commentary on Administrative Law*, Fourth Edition, London, Sweet & Maxwell, 2005.
66. Barnett H., *Constitutional & Administrative Law*, Sixth Edition, Oxon, Routledge-Cavendish, 2006.
67. Beatson J. & Matthews M. H., *Administrative Law: Cases & Materials*, Second Edition, 1989.
68. Cane P., "Theory and values in public law", in P. Craig & R. Rawlings, *Law and administration in Europe: Essays in honour of Carol Harlow*, Oxford, Oxford University Press, 2003.
69. Cane P., *Administrative law*, Fourth Edition, Oxford, Oxford University Press, 2004.
70. Clayton R. QC & Tomlinson H. QC, *The Law of Human Rights*, Second edition, Volume 1, Oxford, Oxford University Press, 2009.
71. Craig P. & Trybus M., "Monographies Nationales/National reports, Angleterre et Pays de Gales/England and Wales", in R. Noguellou & U. Stelkens (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 339-366.
72. P. Craig, "Formal and substantive conceptions of the rule of law: an analytical framework", *Public Law*, Vol. 21, 1997, pp. 467-487.
73. Davies A. C. L., *The public law of government contracts*, Oxford, Oxford University Press, 2008.
74. Davies A. C.L., "English law's treatment of government contracts: The problem of wider public interests", in M. Freedland & J.B. Auby, *The public law/Private law divide: Une entente cordiale?*, Oxford and Portland, HART Publishing, 2006.
75. Delany H., *Judicial review of administrative action*, Second edition, Thomson Reuters, Dublin, 2009.
76. Dicey A.V., *Introduction to the study of the law of the constitution*, 1885 (re-published by Macmillan & Co Ltd, 1961).

77. Ebrahim A. & Weisband E. (eds.), *Global Accountabilities: Participation, Pluralism, and Public Ethics*, New York, Cambridge University Press, 2007, excerpt accessed in http://assets.cambridge.org/97805218/76476/excerpt/9780521876476_excerpt.pdf, on 17/05/2010.
78. Elliott M., *Administrative Law: Text and Materials*, Oxford, University Press, 2005.
79. Feldman D., *English public law*, Second edition, Oxford, Oxford University Press, 2009.
80. Foster N. & Sule S., *German legal system and laws*, Fourth Edition, Oxford, Oxford University Press, 2010.
81. Foulkes D., *Administrative law*, 8th edition, London, Butterworths, 1995.
82. Fredman S., *Human rights transformed, positive rights and positive duties*, Oxford, Oxford University Press, 2008.
83. Freedland M., "Government by contract re-examined – Some functional issues", in P. Craig & R. Rawlings (eds.), *Law and administration in Europe: Essays in honour of Carol Harlow*, Oxford, Oxford University Press, 2003.
84. Freedland M., "The evolving approach to the public / private distinction in English Law", in M. Freedland & J.-B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006.
85. Harlow C., *Accountability in the European Union*, Oxford, Oxford University Press, 2002.
86. Harries J., *Cicero and the jurists: from citizens' law to the lawful state*, London, Duckworth, 2006.
87. Hofman H.C.H. & Türk A.H. (eds.), *Legal challenges in EU administrative law – Towards an integrated administration*, Cheltenham/Northampton, Edward Elgar, 2009, pp. 320-321.
88. Hogan G., *Constitutional and administrative law*, London, Sweet & Maxwell, 2008.
89. International Accounting Standards Board, "Service Concessions – Project Summary", London, September 2006, accessed in <http://www.iasb.org/NR/rdonlyres/A23BFAEA-A8E8-4F84-BBDD-A98E481F7AEB/0/Serviceconcessionsprojectsummary.pdf>, on 2/5/2010.
90. Lewis C., *Judicial Remedies in Public Law*, Third Edition, London, Sweet & Maxwell, 2004.

91. Lightman J., "The civil justice system and legal profession – The challenges ahead the 6th Edward Bramley memorial Lecture", University of Sheffield, 4 April 2003, p.5, page accessed on http://www.judiciary.gov.uk/publications_media/speeches/pre_2004
92. The Court Structure of Her Majesty's Courts Service (HMCS), in <http://www.hmcourts-service.gov.uk/aboutus/structure/index.htm>, last visited on 30/09/2010.
93. Turpin D., *Droit constitutionnel*, Paris, PUF, 1992.
94. Van Caenegem R.C., *An historical introduction to Western constitutional law*, Cambridge, Cambridge University Press, 1995.
95. Vincent-Jones P., *The new public contracting: Regulation, responsiveness, relationality*, Oxford, Oxford University Press, 2006.
96. Vinx, L., *Hans Kelsen's pure theory of law. Legality and legitimacy*, Oxford, Oxford University Press, 2007.
97. Wade H.W.R. & Forsyth C.F., *Administrative law*, Tenth Edition, Oxford, Oxford University Press, 2009.
98. Wade S. W., *Administrative law*, Ninth edition, Oxford, University Press, 2004.
99. Webley L. & Samuels H., *Public law, Text, Cases, and Materials*, Oxford, Oxford University Press, 2009.
100. Yeung K., "Competition law and the public/private divide", in M. Freedland & J.-B. Auby (eds.), *The Public Law/Private Law Divide, Une entente assez cordiale? La distinction du droit public et du droit privé : regards français et britanniques*, Portland, Hart Publishing, 2006.

The Netherlands

101. Addink G.H., "Principles of good governance, Lessons from administrative law", in R. Seerden & F. Stroink, *Administrative law of the European Union, its member states and the United States, A comparative analysis*, Antwerpen – Groningen, Intersentia, 2002.
102. Addink G.H., "Principles of good governance", in D.M. Curtin & R.A. Wessel, *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005.
103. Addink G.H., "The Ombudsman as the fourth power", in F. Stroink & E. van der Linden (eds.), *Lawmaking and administrative law*, Antwerp - Oxford, Intersentia, 2005, pp. 269-291.

104. Addink H., Anthony G., Buyse A., & Flinterman C., *Human rights & Good governance*, Sourcebook, Utrecht, SIM Special 34, 2010.
105. Adriaanse P.C., "Application of EU State Aid Law in the Netherlands", in P.F., Nemitz (Ed.), *The Effective Application of EU State Aid Procedures. The Role of National Law and Practice* (International Competition Law Series), 29, Alphen aan den Rijn: Kluwer Law International, 2007.
106. Barkhuysen T., W. Ouden & Y.E. Schuurmans, *The law on administrative procedures in the Netherlands*, NALL - Netherlands Administrative Law Library, 2009, p.1, in <http://www.nall.nl/tijdschrift/nall/2012/06/NALL-D-12-00004>.
107. Besselink L., *Constitutional Law of The Netherlands*, Nijmegen, Ars Aequi Libri, 2004.
108. Chorus J., Gerver P. & Hondius E. (eds.), *Introduction to Dutch Law*, Fourth revised edition, Alphen aan den Rijn, Kluwer Law International, 2006.
109. Costa P., "The rule of law: A historical introduction", in P. Costa & D. Zolo (eds.), *The rule of law: History, Theory and Criticism*, Dordrecht, Springer, 2007.
110. "Districts courts", in <http://www.rechtspraak.nl/Information+in+English/Judicial+system/District+Courts.htm>, last visited on November 12th, 2010.
111. Emaus J. & Zwart T., "Monographies nationales/National reports, Pays-Bas/Netherlands", in R. Noguellou & U. Stelkens (eds.), *Droit comparé des contrats publics/Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 741-757.
112. Hartkamp A.S. & Tillema M.M.M., *Contract Law in the Netherlands*, The Hague, Kluwer, 1995.
113. Jansen O., "Administration by negotiation in the Netherlands", p. 17, in http://igitur-archive.library.uu.nl/law/2005-0907-200651/article_print21.html, last visited on October 12th, 2010.
114. Jurgens G. and van Ommeren F., "The public-private divide in English and Dutch law: a multifunctional and context-dependant divide", *Cambridge Law Journal*, 71(1), March 2012, pp. 172–199.
115. Kleijne J., *Administrative justice in Europe*, Report for The Netherlands, Research Department of the Council of State of the Netherlands, May 2009, accessed in http://www.juradmin.eu/en/eurtour/i/countries/netherlands/netherlands_en.pdf, last visited on October 24th, 2012.

117. Kortmann C. A.J.M. & Bovend'Eert P. P.T., *Constitutional law of the Netherlands: An introduction*, Alphen aan den Rijn, Kluwer Law International, 2007.
118. Langbroek Ph.M., "General principles of proper administration in Dutch Administrative Law", in B. Hessel & P. Hofmanski (eds.), *Government Policy and Rule of Law. Theoretical and practical aspects in Poland and The Netherlands*, Bialystok - Utrecht, Published by Uniwersytet w Bialymstoku / Universiteit Utrecht, 1997.
119. Scheltema M.W. & Scheltema M., *Gemeenschappelijk recht: Wisselwerking tussen publiek- en privaatrecht*, Alphen aan den Rijn, Kluwer, 2008.
120. Ten Berge G. & Widdershoven R., "The principle of legitimate expectations in Dutch constitutional and Administrative law", in *The American Journal of Comparative Law*, 1991 – JSTOR?, 421- 452, p. 448, accessed in <http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b22.pdf>, visited on November 16th, 2006, p. 448.
121. "The court system in the Netherlands", in <http://www.lassche.nl/en/judicial.html>, last visited on November 23rd, 2010.
122. "The structure of the judicial system" [in the Netherlands], in <http://www.rechtspraak.nl/Information+in+English/English.htm>, last visited on October 11th, 2010; see also "The court system in the Netherlands", in <http://www.lassche.nl/en/judicial.html>, last visited on November 23rd, 2010.
123. Zekoll J. & Reimann M., *Introduction to German Law*, Second Edition, The Hague, Kluwer Law International, 2005.

European Union

124. Bovens M., "Analysing and assessing public accountability", in *European Law Journal*, Vol. 13, No. 4, pp. 447-468, accessed in <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0386.2007.00378.x/pdf>, on October 19th, 2010.
125. Curtin D. M. & Dekker I., "Good governance: The concept and its application by the European Union", in Curtin D.M. & Wessel R.A. (eds.), *Good governance and the European Union, Reflections on concepts*,

- institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005, pp. 3-20.
126. Curtin D.M. & Wessel R.A. (eds.), *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005.
127. Fennel K., "The European Ombudsman and the principles of good administration – Development and application of the European Code of good administrative behaviour", paper, in G. H. Addink & A.W.G.J. Buize, *Principles of good governance*, Studiewijzer, Part I, College year 2009/2010, period 1, pp. 2.53-2.72.
128. Kälin W., Müller L. & Wyttenbach J., *The face of human rights*, Baden - Switzerland, Lars Müller Publishers, 2004.
129. Niemivuo M., "Good administration and the Council of Europe", in *European Public Law*, 2008, pp. 545-563.
130. Nikiforos Diamandouros P. - the European Ombudsman, "Legality and good administration: is there a difference?", Speech at the Sixth Seminar of National Ombudsmen of EU Member States and Candidate Countries on 'Rethinking Good Administration in the European Union', Strasbourg, France, 15 October 2007, in <http://www.ombudsman.europa.eu/speeches/en/2007-10-15.htm>, accessed October 7th, 2009.
131. Popelier P., "Legal certainty and principles of proper law making", in *European Journal of Law Reform*, 2000, Vol. 2, no. 3, pp. 321-342.
132. Seerdon R. & Stroink F. (eds.), *Administrative law of the European Union, its member states and the United States - A comparative analysis*, Antwerpen – Groningen, Intersentia, 2002.
133. Scheltema M. & Scheltema M.W., "The relationship between public law and private law", *Nederlands Juristenblad*, 15 blz 767-822, jaargang 79, 9 april 2004, pp. 768-776.
134. The Swedish Agency for Public Management, "Principles of Good Administration in the Member States of the European Union", Survey on transforming principles of good administration into legal principles, 2004, accessed in <http://www.statskontoret.se/upload/Publikationer/2005/200504.pdf>, on December 1st, 2010.
135. Tomkins A., "Transparency and the emergence of a European Administrative Law", in P. Eeckhout & T. Tridimas, *Yearbook of European Law*, 1999/2000, pp. 217-256.

136. Wakefield J., *The right to good administration*, Alphen aan den Rijn, Kluwer Law International, 2007.
137. Wouters J. & Ryngaert C., "Good governance: Lessons from international organizations", in Curtin D.M. & Wessel R.A. (eds.), *Good governance and the European Union, Reflections on concepts, institutions and substance*, Antwerp - Oxford - New York, Intersentia, 2005.

Other publications

138. "Accountability in Governance", in <http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>, accessed on 17/05/2010.
139. "Administrative law", in *The American Journal of Comparative Law*, 1991 – JSTOR?, 421- 452, p. 448, accessed in <http://www.library.uu.nl/publarchief/jb/congres/01809180/15/b22.pdf>, visited on November 16th, 2006, p. 448.
140. Botchway F. N., "Good governance: The old, the new, the principle, and the elements", *Florida Journal of International Law*, Vol. 13, pp. 159-210.
141. Caroli Casavola, H., "Global rules for public procurement", in R. Noguellou & U. Stelkens (eds.), *Droit comparé des contrats publics / Comparative law on public contracts*, Bruxelles, Bruylant, 2010, pp. 27-61.
142. "Concessions", in <http://rru.worldbank.org/Toolkits/InfrastructureConcessions/>, accessed on 04/05/2010.
143. Esry D.C., "Good governance at the World Trade Organisation: Building a foundation of administrative law", in *Journal of International Economic Law* 10(3), 509-527.
144. Ngairé Woods, "Good governance in international organizations", *Global Governance*, Jan-Mar. 99, Vol. 5 Issue 1, p. 6, 23p, <http://www.globaleconomicgovernance.org/docs/Good%20Governance%20in%20International%20Organizations.pdf>, accessed May 6th, 2008.
145. Oji Umzurike U., *The African Charter on Human and Peoples' Rights*, The Hague, Martinus Nijhoff Publishers, 1997.
146. Sepúlveda M. et alii, *Human rights reference handbook*, Ciudad Colon - Costa Rica, University for Peace, 2004.
147. "Subsidy contract", in <http://www.interreg3c.net/sixcms/detail.php?id=1591>, accessed on 2/5/2010.

148. United Nations Economic and Social Commission for Asia & Pacific (UN-ESCAP), "What is good governance", in <http://www.gdrc.org/u-gov/escap-governance.htm>, accessed September 23rd, 2009.
149. West's Encyclopedia of American Law, edition 2, The Gale Group, Inc., Copyright 2008.

Dictionaries

150. Bix B.H., *A dictionary of legal theory*, Oxford, Oxford University Press, 2004.
151. Black H. C., *Black's law dictionary*, St Paul, Minn., West Publishing Co., 1990.
152. Martin E.A. & Law J., *Oxford Dictionary of Law*, Sixth Edition, Oxford, University Press, 2006.

Useful websites

Rwanda

www.amategeko.net for legislation

www.judiciary.gov.rw for court judgments

France

www.legifrance.gouv.fr for legislation and court judgments

Belgium

www.juridat.be for legislation and court judgments

England

www.bailii.org for court judgments

www.legislation.gov.uk for legislation

The Netherlands

www.overheid.nl for legislation

www.rechtspraak.nl for court judgments