

The Legislative Defects of Public-Private Partnership in China and Lessons Drawn

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Abstract. Over the recent decades of economic growth, the Public-Private Partnership (PPP) has been an emerging business model for the Chinese government to establish an efficient relationship with the private sector for public policy. However, there exist obstacles to truly implementing a PPP in place. Apart from inexperienced PPP implementation, the lack of appropriate legal guidance is another major barrier to carrying out a PPP project. A shortage in a well-structured legal system, encompassing relevant legislative deficiency, leaves the scholars the duty to navigate the way for enhancing legislative structure for PPP. Even loads of research have been done on defining the role of the government and the private capital, in hopes that the risk-bearing process involved in a PPP project would be properly designed. But little discussion thereof has been carried out, combining the analysis with the legal nature of public-private partnership itself. Therefore, this paper presents a theoretical framework for examining the legal nature of PPP and analyses the legislative defects regarding PPP with a case. In this paper, the fragmented nature of PPP legislation in China is figured out, pointing to the absence of laws with higher hierarchies regulating PPP, which reveals the vague legal nature of PPP contracts and little legal constraints on the government. What is also surfaced from the fragmented and chaotic PPP legislative state is the ill categorized legal nature of the government, with overlapping roles from different governmental departments, exacerbating the unevenly distributed risks imposed on different parties involved in PPP. This paper then ends with conclusions extracted from experience drawn from both inside and outside China, particularly making an analogy with France, and stresses the need to build a more detailed and logically clarified legislative system for PPP.

Keywords: Public-private partnership; legislative defects; risk-bearing allocation; government.

1. Introduction

Public-private partnership, considered a useful financing instrument sharing the fiscal burden from the perspective of government borrowing, as well as a mighty means catering to public demands, has undergone decades of development in China since 1984 [1]. In the context of promoting urbanization in China, the national strategy emphasizes new-type urbanization. Such transformation emphasizes that land urbanization should be paralleled by an all-round transformation of the rural population flooding into urban areas; the infrastructure construction ought to be intensified and varied culturally to guide the switch of identity from peasant to citizen. In this way, it necessitates introducing the presumed efficient PPP model in place, for either the arising financing needs by the government or the public welfare of multicultural citizens [2].

Promising as a business model, the PPP still seems deficient in its legal construction. The government, expected to be properly risk-bearing in a public-private partnership contract, could also exert great power on cooperating enterprises for its superior state as a public authority, presenting an indefinite role of the government and then the vague law application when disputes arise. Apart from that, a public-private partnership requires risk-bearing collaboration between the government and the private capital, of which the risks should be properly allocated according to their roles, while this might be far from factual consequences without adequate legal guidance. Loads of research have been done on defining the role of the government and the private capital, but little discussion thereof has been carried out, combining the analysis with the legal nature of public-private partnership itself.

As such, this paper will further discuss the deficiency in legislation for the public-private partnership with an analysis of a particular PPP case in China, namely the case of the 2008 Beijing

Olympics Stadium. In this paper, a discussion of external legal practice would be supplemented, in an attempt to conclude the role of the government, as well as the dispute resolution approach regarding the PPP. This paper aims to further the legislative suggestions for PPP legal practice in China, and hopefully would clarify the role of the government with a proposal of rights and obligations of the subjects involved in the PPP and feasible legal constraints on the government.

2. Theoretical Structure for Analysis

2.1 The Definition of PPP and Its Theoretical Basis

The definition of PPP is partly decided by the varying perspectives of theoretical approaches, reflecting different facets emphasized regarding the nature of the PPP. Despite all the theoretical differences, which altogether establish the theoretical basis for the PPP from the perspective of relational contract, transaction cost economics, property rights economics and social game, PPP is a collaborative long-term relationship between the government and the private sector [1]. It has a strong characteristic of being a legal contract requiring endeavours, profits and risks to be equally born by these two parties involved while catering to the government's need to provide public goods, ultimately contributing to infrastructure or public service for public welfare.

With the help of a combination of both the established theoretical basis and legal theory analysis framework for discussing the PPP, it would be more viable to spot the corresponding problem in the legislative deficiency regarding the PPP, requiring this paper to present the legal theory analysis framework as below. Yet pitifully, it still waits to be interpreted the real nature and definition of PPP from the perspective of legal theory, making the ensuing legal analytical framework an even more necessary object for reference, for it is a mix of various established legal perspectives to dig into the nature of PPP in China.

2.2 Economic Law

2.2.1 Transaction Cost Theory for Public Goods

Transaction cost theory for public goods was innovatively proposed from the perspective of examining the economic theory establishing the necessity of fiscal law. It explains the role of the government as cutting the costs for dealing with externality, namely providing public goods at lower costs and aiming at lowering the transaction costs for society. Moreover, the transaction cost theory stands in contrast to the public goods theory as the traditional basic theory that merely defines the government as a provider of public goods irrespective of the corresponding costs [3]. The above-mentioned theory, which describes the function of the government in a more accurate tongue, would make a mighty analysis tool for the PPP legislation, as the PPP is a partnership involving cooperation between the government and the private capital, aimed at providing public goods in high efficiency.

2.2.2 Trichotomy of the Power of the Government

The very nature of the PPP decides that the government is burdened with more than one role in promoting the project involved in the PPP, namely at least two, respectively as the superior public authority forwarding public welfare and the equal partner bearing risks, obligations, and profits with social capital. Furthermore, considering the unique economic system in China, where the state-owned economy dominates the national economy, which indicates that the government-controlled state-owned enterprise is a heavy participant in the fields closely connected with the lifeblood of the people, even more functions are actually born by the government. The trichotomy thesis that the government should decentralize state power and separate the state's regulatory power from executive power while separating enterprises from the administration [4] has offered an analysis framework to explain the feature of different functions of the government, which hopefully would be applicable to identifying the role of the government in the PPP as well.

3. A Brief Analysis of a PPP Case in China: The Failure of the 2008 Beijing Olympics Stadium

Covering an area of 204,000 square meters plus a floor area of 258,000 square meters, the 2008 Beijing Olympics Stadium, located in the southern central areas of the Beijing Olympic Park, can accommodate 91,000 spectators. As the initial international large venue built and operated in the field of the PPP in China, it used to serve as the main stadium for the 2008 Beijing Olympics, now cited as the National Stadium, which is a vivid example of the uneven road on which the development of the PPP in China proceeds inch by inch.

The Build-Operate-Transfer (BOT) is the model implemented for the National Stadium project. A Joint Venture Contract was signed between Beijing State-owned Assets Management Corporate Limited representing the government, and the foreign-direct-investment-included CITIC Group Consortium on behalf of the private sector. Such a contract means the government would have the fiscal burden shared by co-funding with the private sector whilst still securing the ownership of the infrastructure after handing over the construction and operation process to another party. The franchise period being 30 years from the 2008 Olympic Games, the Concession Agreement was signed between the Joint Venture and the Beijing Municipal Government, clarifying their respective rights and obligations, as well as liability for breach of contract and dispute settlement for both parties, latter of the parties burdened with the rights to supervise the franchise enterprise. The Joint Venture also signed the National Stadium Agreement with the Beijing Organizing Committee for the Games of the XXIX Olympiad (BOCOG) and the Beijing Municipal Government, specifying the service to provide for the 2008 Olympics by the Joint Venture [5].

Ambitious and promising as the project seems, this paper would not consider it as a complete success in the history of the PPP development in China. As right in the year 2009, the franchise rights of the CITIC Group Consortium were terminated according to the Agreement on Further Strengthening the Operation and Maintenance Management of the National Stadium signed by the CITIC Group Consortium and the Beijing Municipal Government [6], which means the government took control of the operation in advance instead of building a long-term yet stable relation with the private sector in the public service domain.

What lies behind the failure of the one of the preliminary attempts at running a PPP project in China mainly boils down to the unbalanced risks allocated to the parties concerned. This uneven distribution of risks further brought to light the legal deficiency incurring chaos in defining the boundaries between the role of the government and the private sector, which resulted in a failed shot at slashing the transaction costs for public goods. Actually, the private sector assumed most of the uncontrollable risks, such as market risks, construction cost overruns and operating cost overruns. With those excessive risks transferred to the private sector, the project's finances were in a much more critical state than expected [6]. As such, more specified clauses under varying legal hierarchies should be further legislated in allocating the risks to different parties in China's PPP projects.

Meanwhile, a shortage of experience for the CITIC Group Consortium born with the building and operating risks of the project to build and operate the sports facilities featuring public welfare is seemingly the direct cause of the unexpectedly higher costs burdened.

Apart from the unbalanced risks in accordance with the unbalanced roles of the government and the private sector, the unfulfilled promise from the government is another factor contributing to the failure of the project. This cause represents the government's difficulty in keeping an appointment when playing a vague role swinging and straying between the administrative subject seeking to realize public interest without directly competing in the market and a regulator of the market making investments in certain fields as a unique market participant. The Miscellaneous Provisions in the Investment Agreement stipulated that the Beijing Development Reform Committee (BDRC) should coordinate with various departments to help the consortium make profits, but it turned out to be difficult to be put in place [6]. The methods of coordinating with various departments instead of otherwise shaping the market to maximize the profits guaranteed by the government were proven to

be inefficient in this case, calling for better defining the role of the government with more legal guidance in legislation.

4. Deficiency in legislation regarding PPP in China

4.1 An Overview of the PPP Legislation in an Initial Phase

The above-mentioned case analysis, which reveals China's PPP legal system deficiency in defining the role of the government and the risk distribution for different parties involved in a PPP project, necessitates the need to dig into the legislative aspect of the legal system. That being said, merely talking about the deficiency in legislation would be far from enough, as the law concerning the PPP exists not only in the books, but in the actual operation of the law, giving space for further research in such aspects. This paper would focus its attention on the legislative aspect regarding PPP, and in an attempt to connect the problem on the surface in legislation with the factual operations.

It could be concluded that the legislative stage for the PPP in China is still an initial one. This paper considers the feature of the legislative documents regarding the PPP as fragmented and chaotic in a broad sense, which explains its being in an initial phase in need of much improvement. Policy papers and administrative papers are leading the guidance on carrying out PPP projects in China at this stage, scattered by various government departments, whose legal effect is uncertain and inferior in China's legal system. Such uncertainty and fragmentation are in connection with the uncertain role of the government and the improper risk-bearing problem, embodying the vague legal definition of the nature of PPP.

4.2 Analysis of the Legislative State regarding China's PPP from Two Perspectives

4.2.1 A Vertical Perspective Examining the Hierarchies of Legislative Documents in the Context of PPP

From the perspective of the legal hierarchies of various legal resources of mainland China, where the Constitution ranking top, the laws enacted by the National People's Congress or the Standing Committee rank second while the administrative regulations rank third, with the inferior legal effect shared by the local regulations and the government departmental regulations. While the legislation for the PPP is a cluster of fragmentation where conflicts of law are expected.

Without a particular specific law enacted for the sake of the PPP, referring to the laws concerned means looking up the clauses in a legion of fragmented documents, which leaves much space for the judicial subject to coordinate with the trivial law conflicts. Despite the fact that it is merely impractical to mean this paper for strengthening uniform legislation and eliminating law conflicts, as is the pragmatic stand describing the limited effect of legal research as simply a legitimate demonstration of the legal system while the operation of the latter deriving from society [7]. It is still conducive to further analyse the details of the legislative documents reflecting law conflicts, in the hope that the operational mess the legal system was and still is in would be revelatory.

Under such fragmented legislative documents' guidance for PPP, law interpretation, though usually considered not to belong to the formal sources of law in China, could also be legally authoritative if applied to a judicial process [8]. Therefore, it would impose greater uncertainty and chaos on the application of the law without centralized legislation on some basic legal nature definition regarding PPP, especially in the dispute resolution process. Actually, the dispute of whether arbitration could be agreed and applied in a PPP contract is further complicated by the law interpretation of Provisions of the Supreme People's Court on Several Issues Concerning the Trial of Administrative Agreement Cases, implemented on January 1, 2020, which stipulates that where an administrative agreement contains an arbitration clause, the people's court shall confirm the nullity of the clause. Nonetheless, the legal nature of a PPP contract is a much controversial subject in China [9]. Such stipulations inherently define a PPP contract with the administrative agreement feature as non-arbitral, putting in debate the binary opposition of a PPP contract either as an administrative

agreement or as a civil contract, as well as questioning the rationality of rejecting the idea of a PPP administrative agreement being arbitral. Moreover, with the theoretically disputed legal definition of an administrative contract, which means a public-welfare-oriented PPP contract is extremely possible to be taken as administrative under the given analysis theoretical framework stressing the unequal state between the government and the private sector and accenting the public service purpose of an administrative contract, the multiple vague openings for conceptual interpretation in the above-mentioned clauses are inclined to expand the interpretation of a PPP administrative agreement [10].

The aforementioned law interpretation, enacted by the Supreme Court, with a much higher effect than the local regulations and the government departmental regulations for its practical functions applied broadly in legal practice, plays a mighty yet negative part in regulating PPP. It tremendously limits the disputed resolution approaches with the attempt to exclude the arbitration from the contract. Furthermore, the administrative priority to benefit by the government in the context of an administrative agreement is susceptible to abuse in nature for a vague definition of public welfare. This might intensify the unequal state between the government and the private sector, leaving little constraint on the role of the government, which might arbitrarily modify the PPP agreement with public welfare open to explain. In that case, an unfitting distribution of risks would be in store.

In a nutshell, the absence of laws with higher legal hierarchies is a signal of tentativeness and uncertainty of the transferring progress in PPP legislation, demonstrating the chaotic legislative construction regarding PPP. And that is exhibited by the role of the law interpretation, which is not a formal source of law but an alternative to the laws with higher effect in legislative documents regulating PPP.

4.2.2 A Horizontal Perspective Briefing PPP Legislative Documents Enacted by Paralleled Governmental Departments

The framework of vertical legislative documents regarding the PPP unveils the legislative shortage in clear systematic construction and accounts for the technical problems as obstacles to dispute resolution. While the fragmented nature of legislation could also be observed in a horizontal sense, further explaining the legislative deficiency giving rise to the difficulty of carrying out the proper allocation of risk-bearing for the government and the private sector.

The fragmentation reflected in the PPP legislative documents in a horizontal sense boil down to the subtle relationship between the two governmental departments leading the PPP legislation, respectively the National Development and Reform Commission (NDRC) and the Ministry of Finance. In the absence of effective law regulating PPP in higher legal hierarchies, the former takes PPP as an innovative reform to provide public goods while the latter emphasizes more on the financing sides of PPP's function, causing the gap regarding the understanding of PPP and the role of the government between the legislative documents enacted severally by the two [11].

For example, the PPP Law (Draft) issued by the Ministry of Finance and the Administrative Measures on Infrastructure and Public Utilities issued by the NDRC even conflicts with each other on the connotation of PPP and the extent of PPP's application. Even with the issuing of Regulations on PPP in Infrastructure and Public Utilities (Draft) in 2017, which has a higher legal effect, the above-mentioned divide between the two governmental departments still sees no perfect solution to bridging the gap. Despite the relevant provisions made on the scope of powers and responsibilities of each department, Regulations on PPP in Infrastructure and Public Utilities (Draft) still avoids stipulating the dominant rank amongst the two departments, falling into the possibility that the same areas regarding PPP projects would continue to be governed by the overlapping regulations from different departments [12]. Such a divide showing great uncertainty even in the basic legal concept about PPP, might cause immense confusion when the private sector is participating in a PPP project.

Moreover, these two departments being unable to be well-coordinated with each other, the vague and abstract role of the government involved in PPP is actually embodied by the departmental conflicts, but in a negative sense, as the ideal trichotomy of the governmental roles is confronted with the overlapping functions between the two departments. As is reflected from the Guide on PPP Mode

(Trial) issued by the Ministry of Finance and the Guidance on Implementing PPP issued by the NDRC, both the Ministry of Finance and the NDRC are defined as regulatory subjects on PPP, making the risk-bearing process complicated, for a much huger policy risk is expected with the double-head supervision [11].

5. Experience from France

5.1 An Analogy Drawn between the Legal System in France and China

A realistic attempt to optimize the legislative states regarding PPP in China is extracting the experience from another country, in the hope that an analogy could be drawn between the two, making the relatively untested experience practicable in another country. This paper counts France as a reliable reference object in view of the shared features of the legal system between France and China.

The PPP legislative fragmentation scattered throughout numerous legislative documents once in France is similar to the situation now in China [13]. The fragmented feature in France is a gesture of the transposition of the European directives intended to optimize the French legal framework to some extent [14], which resembles the efforts being made in China to clarify the legal framework by diverse governmental departments. What is distinct about France is that the scattered legal rules are in a large part mature regulating tools for PPP. In 2018, a Public Procurement and Concession Agreements Code (PPP Code) was enacted, aimed at gathering in one single legislative document all rules regarding public procurement and concession agreements so that all companies would be provided with better access to it, but with no major modifications on the substance of the legal provisions [14]. This paper takes that the maturity of the scattered PPP legislative documents is what China could be really drawing lessons from, as an analysis of the stark contrast between the seemingly chaotic fragmentation and the actually clarified legal framework hopefully would be instructive in defining the role of the government in connection with the legal nature of PPP and the contract thereof, providing revelatory insights into China's attempt at enacting clarified and unified legislative documents.

In a bigger picture of the French legal system, where the administrative system and the proportion of the state-owned economy are by far the most analogous to China in western countries, it is much easier to draw more analogies between the two [13]. Especially in terms of the PPP risk-bearing mode, as well as the legal nature and disputed resolution choices of a PPP contract, as the power and the role implemented by the government are much more comparable with China in a legal sense.

5.2 French legislative choice on PPP

French PPP legislative documents have clarified the legal nature concerning PPP and PPP contracts. A PPP contract is considered as an administrative one with saved narrow exceptions. There are two types of PPPs mainly used in France, of which are concession agreements serving to implement major infrastructure projects and partnership contract analogous to private finance initiative contracts.

In the context of defining PPP contracts as administrative ones, French legislative documents still leave much space for diversifying dispute resolution approaches.

Concession agreements and partnership contracts as administrative contracts under French law are subject to the jurisdiction of French administrative courts, which means that public authorities are in principle forbidden from entering into arbitration agreements under Article 2060 of the Civil Code, except for international matters. However, several other narrow exceptions are also provided under Article L 311-6 of the Administrative Justice Code.

Moreover, the PPP Code has brought some clarifications about the possibility of resorting to arbitration for disputes arising from the implementation of such agreements and contracts. In both cases, if such dispute only involves private parties, the said parties can submit their dispute to arbitration. Regarding partnership contracts, public and private parties are expressly allowed to

submit their dispute to arbitration, provided that the governing law is French law. On the contrary, arbitration is forbidden for parties to a concession agreement [14].

PPP contracts being defined as administrative ones under French law, the unilateral rights by the public authority to terminate a public law contract on the grounds of general interest is guaranteed in this case, while exceptions are saved for it, putting a proper legal constraint on the immense power of public authority, and balancing the unequal state of different subjects involved in PPP. The unilateral rights of the public authority to terminate a public law contract cannot be enforced in some particularly serious circumstances, especially when activities involved have begun or must be continuously carried out so that it is impossible to terminate the contract immediately [14,15].

In sum, French PPP legislative documents are clearly structured in logic and properly clarified in legal distribution of the roles between the government and the private sector, thus building diverse dispute resolution approaches with legal constraints on the government in place.

The accurate logical framework for French PPP legislative documents is the fruit born from long-term legal practice and in-depth legal nature divided for different PPP participants. What China could learn from the legislative construction is the attempt to detail the legal nature of different PPP participants, categorizing the legal nature of PPP contracts and the roles of both the private sector and the government in accordance with the unique legal features in China.

6. Conclusions and Suggestions

Following a theoretical basis for establishing the legal of PPP in China and then a brief analysis of a specific PPP case in China, this paper argues that the Chinese legislative state regarding PPP is still in an initial phase, evidenced by the fragmented and uncertain nature of the Chinese legislative documents from both vertical and horizontal perspective. The PPP laws, with no higher legal effects plus insufficiently clarified legal nature for PPP contracts and parties involved, make the risk-bearing process and dispute resolution choice a tough task, especially for the private sector.

An analogy is then drawn between the French and Chinese legal systems, explaining the similarity in the efforts to build a unified legislative document for regulating PPP and the disposition to entitle the government to great power in a PPP project. Whereas hereof exhibited is the contrast that the legislative construction of China is far from logically mature and complete, and vague legal nature is reflected in the government and the PPP contracts.

As such, suggestions for intensifying the legislative state regarding PPP in China are proposed, from experience extracted domestically and overseas. The deficiency in legislation is a reflection of insufficiently categorized legal nature regarding the contracts and parties involved in PPP projects. It is imperative to combine the PPP operation with theoretical construction together, establishing a more well-structured and logically clarified legislation framework. First is to apply the theory of the trichotomy of the Chinese government to define the legal nature and concrete roles for the government, which means the overlapping roles of dominant governmental departments are to be clarified, categorizing the nature of PPP contracts as well as the roles of the government. Second, a more logically reliable legislative path for diversifying dispute resolution approaches could be transposed from the French legal system, which saves limited exceptions to defining PPP contracts as non-arbitral administrative agreements.

With the analysis of the legislative defects of PPP in China, this paper has established the efforts to combine the roles of the government in PPP and the legal nature thereof to further the discussion about PPP, in the hope that the possibility of building a much more logically complete legislative framework regulating PPP could be seen.

That being said, this paper is still lacking in formulating a sound connection between the legal nature of the PPP and PPP contracts and does not further analyse the relationship between the legal nature of the government and the risk-bearing process, leaving the task of establishing an all-round theoretical framework for PPP legislation unfulfilled. What's more, the main focus of this paper is on

the legislative state of PPP, which means the subject of the operation of PPP and corresponding justice practice is overlooked hereof, making another area for scholars to dig into PPP in China.

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