

Using public procurement to achieve social outcomes

Christopher McCrudden

Abstract

The use of public procurement to achieve social outcomes is widespread, but detailed information about how it operates is often sketchy and difficult to find. This article is essentially a mapping exercise, describing the history and current use of government contracting as a tool of social regulation, what the author calls the issue of 'linkage'. The article considers the popularity of linkage in the 19th century in Europe and North America, particularly in dealing with issues of labour standards and unemployment. The use of linkage expanded during the 20th century, initially to include the provision of employment opportunities to disabled workers. During and after World War II, the use of linkage became particularly important in the United States in addressing racial equality, in the requirements for non-discrimination in contracts, and in affirmative action and set-asides for minority businesses. Subsequently, the role of procurement spread both in its geographical coverage and in the subject areas of social policy that it was used to promote. The article considers examples of the use of procurement to promote equality on the basis of ethnicity and gender drawn from Malaysia, South Africa, Canada, and the European Community. More recently, procurement has been used as an instrument to promote human rights transnationally, also by international organizations such as the International Labour Organisation. The article includes some reflections on the relationship between 'green' procurement, 'social' procurement, and sustainable development, and recent attempts to develop the concept of 'sustainable procurement.'

Keywords: Public procurement; Targeted procurement; Green procurement; Sustainable development; Disabled workers; Affirmative action; Equal rights; Aboriginal rights; Human rights; Labour standards; Unemployment; Gender equality.

1. Introduction

This article considers how governments currently attempt to use contracts to produce desired social policy outcomes through public procurement. We often think of government as regulating market participants, sometimes encouraging markets through competition law, or restraining them through minimum wage laws. But governments also increasingly play a role as active participants in the market itself, purchasing public works, supplies, and services. The particular issue that is the focus of this article is how government attempts to combine these two functions: participating in the market as purchaser and at the same time regulating it through the use of its purchasing power to advance conceptions of social justice. The term 'linkage' is used throughout this article to describe this use of procurement. 'Linkage' is used in preference to 'conditionality'. Although the terms share certain similarities, the diversity of ways in which procurement and social policy have been brought together goes beyond simply awarding contracts on certain conditions, and extends to include, for example, the definition

of the contract, the qualifications of contractors, and the criteria for the award of the contract.

There has been an important parallel development: using public procurement to achieve environmental goals. During the 1990s, the development of 'green procurement' policies was nothing short of dramatic, at the national level, but more particularly at the European and international levels (OECD, 2003). Such initiatives were, however, more often than not, separated from efforts to integrate social policy goals into procurement. The development of 'green procurement' came to be seen as one part of a raft of initiatives to promote the general goal of sustainable development. Given that sustainable development has taken on an important social dimension, it is not surprising that there is now a growing interest in the social aspects of procurement. More recently, therefore, there has been growing debate about how aspects of social procurement can be combined with green procurement to produce 'sustainable procurement', thus addressing both social and environmental issues. The linkage of both social and environmental purchasing under the umbrella of 'sustainable procurement' appears to be generating a renewed interest in exploring the applicability of social linkages with procurement. There is, however, not much easily accessible information on the current extent of

Christopher McCrudden is Professor of Human Rights Law at Oxford University, Oxford, UK.

social procurement worldwide. The purpose of this article is to contribute to that debate by providing a preliminary map of the history and current use of procurement for social purposes.

2. Linking procurement to labour standards and employment

The closer we look at the instrument choices adopted to further many of the most important social policies of the 19th and 20th centuries, the more public procurement seems to crop up. The use of government contracts to put social policies into effect has a long history. The attempts to link social justice issues with procurement mostly originate in the 19th century in England and the United States, but also in France. In 1840, US President Martin Van Buren issued an executive order establishing the 10-hour working day for those working under certain government contracts (Richardson, 1897–1916).¹ In 1891, a resolution on fair wages was passed by the House of Commons in the UK. This committed government departments to include a stipulation in all contracts with private sector employers that workers must be paid generally accepted rates for the job.² A range of socio-economic goals were subsequently linked to procurement: promoting fair labour conditions and fair wages, and the use of public works to tackle unemployment. In the past, public procurement was seen much more frequently, at least in those jurisdictions with which this study is principally concerned, as an instrument intimately involved in securing national economic and social policies, as defined by national governments. It is not too much of an exaggeration to say that modern procurement systems evolved alongside the development of the welfare State, and it is hardly surprising that the former was used in part to underpin the goals of the latter.

The 19th century thus saw the beginning of the linkages between procurement and the slowly developing social policy manifested in concerns for the unemployed and the working man. In many countries, this also resulted in the use of public works, sometimes financed through government contracting, to address sudden rises in unemployment. In addition, in the United Kingdom, the United States and France, government contracts were used to secure minimum wages. The Davis-Bacon Act of 1931 in the US required contractors to pay local prevailing wage rates on construction projects in excess of US\$ 2,000 when the United States or the District of Columbia was a party to the contract (Tracey, 2001). The supporters of Davis-Bacon argued that this legislation would protect local contractors and workers

from migrant construction workers, who might come into the area where there was a federal construction project and take the government jobs for lower wages than those expected by the local workforce. Without such protections, the effect of awarding government contracts to the lowest bidder would be to depress local wages, and that contractors would lower wages in order to win federal contracts. The Act therefore required that the local ‘prevailing wage’ should be paid by all contractors on federal construction projects.³ In practice, the primary beneficiaries of such policies were those the policy-makers conceived as the paradigm case in need of protection: the indigenous, able-bodied, male breadwinner. Indeed, linkage between procurement and social policy not infrequently was to the detriment of those conceived as marginal: women, children, racial minorities, and the disabled.

2.1 Disabled workers

The first major move away from this approach began after World War I, when government contracting came to be seen as an important mechanism for addressing the needs of the disabled, thus using procurement to address the needs of more marginal workers. In particular, the British Government introduced a significant programme for work by disabled ex-servicemen, using the mechanism of government contracting (House of Commons, 1926; House of Lords, 1926). After World War II, this approach spread beyond ex-servicemen in Britain, and was generalized to the rest of the disabled working population. A popular approach was the establishment of ‘sheltered workshops’ for disabled workers, where limited types of goods were manufactured; these products were given preference in government purchasing.

The approach also spread beyond Britain. In 1938, the United States passed the Wagner-O’Day Act, ‘to create a Committee on Purchases of Blind-made Products, and for other purposes’.⁴ The Committee established by this Act was to be composed ‘of a private citizen conversant with the problems incident to the employment of the blind’ and representatives from the main cabinet departments, to be appointed by the president. The Committee was ‘to determine the fair market price of all brooms and mops and other suitable commodities manufactured by the blind and offered for sale to the federal Government by any non-profit-making agency for the blind organized under the laws of the United States or of any State.’ The Act required that ‘all suitable commodities . . . procured . . . by or for any federal department or agency shall be procured from such non-profit making agencies for the blind.’ The major limits set on this obligation were availability and price. The articles were to be procured where ‘available within the period

¹ *A Compilation of the Messages and Papers of the Presidents*, Vol. IV, p. 1819.

² The most comprehensive treatment of the Fair Wages Resolution has been done by Bercusson (1976).

³ US Public Law No 403, 74th Congress.

⁴ Public Law No 739.

specified at the price determined by the committee to be the fair market price for the article or articles so procured.’ The legislation remained in this restrictive form until the Act was revised in 1971, extending it to include ‘other severely handicapped’ among the beneficiaries of the legislation, and ‘services’ as well as ‘commodities’ that should be given priority in procurement by the federal Government from non-profit agencies.⁵

2.2 Current examples: Disabled workers and unemployment

Such uses of public procurement are not merely of historical interest. Many of these programmes continue into the present day in somewhat different forms in both developed and developing countries.⁶ The Special Contract Arrangements (SCA) is a British scheme aimed at assisting employers of severely disabled people in the European economic area to compete for contracts from UK government departments and agencies.⁷ The SCA requires contracting authorities to give special consideration to buying products and services from suppliers registered with the scheme. The scheme involves a system known as ‘offer back’ under which a registered supplier whose tender is unacceptable on price alone should be given an opportunity to submit a revised tender for part or all of a contract. If on such ‘offer back’ the registered supplier is able to match the best offer, its revised tender should be accepted.

Procurement also continues to be used as a tool for addressing unemployment. In the Netherlands, several of the larger municipal governments not only used public procurement for social purposes, but also to increase the labour participation of the long-term unemployed. Indeed, the use of public procurement was being thought about, and being used, more often since 1994 than before (Hessel *et al.*, 2000a and 2000b). The use of public procurement for social purposes was still mainly being used in the building sector. In Belgium, the Brussels administrative region adopted regulations in 1999 providing for social clauses⁸ in its own public contracts as well as encouraging the incorporation of social clauses in those of the 19 local governments (*communes*) it supervises. A government decree⁹ was adopted that provides that a request for subsidies concerning work, then worth more than 30 million Belgian francs¹⁰ and lasting more than 60 working days,

could only be granted if the public contract incorporated a social clause under which the contractor has to recruit an unemployed person registered with the ORBEM (the Brussels unemployment service). In addition, the national approaches taken to the socio-economic uses of public procurement, in particular the uses made of procurement in safeguarding labour standards, partly explain the extent to which it is likely to be used for social purposes in other contexts.

2.3 Status discrimination, equality and procurement

The areas of social policy linked to procurement did not stand still at the domestic level. Linkages between procurement and tackling unemployment and enforcing various aspects of labour rights persisted and developed other forms. In addition, however, new social policies developed that became closely associated in some countries with procurement linkage. In several jurisdictions, the development of efforts to tackle status discrimination and provide greater status equality since World War II were significantly linked to procurement. Three relatively distinct types of linkage may be particularly emphasized at this stage of the discussion: the use of procurement as a method of enforcing anti-discrimination law in the employment context, often described as ‘contract compliance’; the use of procurement to advance a wider conception of distributive justice, particularly affirmative action in employment; and the use of procurement as a method to help stimulate increased entrepreneurial activity by disadvantaged groups, in particular so called ‘set-asides’ for minority businesses.

In this context, procurement has been used to address important quasi-constitutional problems: attempts to address racial inequality in the United States, or attempts to resolve the issue of the indigenous people (*bumiputera*) in Malaysia, for example. More recent and more explicit linkages between procurement and the settlement of major constitutional disputes are apparent in Canada, relating to the treatment of aboriginal peoples; in Northern Ireland, relating to the respective position of the two religiously defined communities; and in South Africa relating to the end of *apartheid* and the development of democratic government. In each of these situations, although in somewhat different ways, linkage to procurement has become part of these constitutional settlements.

2.4 Civil rights movement in the United States

The growth of the movement to end discrimination against black Americans (the ‘civil rights movement’ as it was called) galvanized the development of the anti-discrimination principle both in the United States and in several other countries. At the federal level, anti-discrimination legislation was long delayed, due to the stranglehold exerted by a minority of legislators from the southern states in the federal legislature. Until legislation was passed at the federal level, one

⁵ Public Law 92–28, commonly called the Javits-Wagner-O’Day Act.

⁶ In India, for example, procurement rules stipulating that certain products must be purchased exclusively from the small-scale sector, even if the prices charged are up to 15% higher than those offered by the closest competition, are intended to promote artisans and small-scale firms (Srivastava, 2003).

⁷ See www.ams.mod.uk/ams/content/docs/toolkit/ams/policy/mcm/mcm04-01.htm.

⁸ The material for this discussion is derived from Noel (2000).

⁹ Government Decree, 22/04/1999.

¹⁰ Equivalent to about US\$873,000 in December 1998.

of the ways in which the United States federal Government attempted to secure non-discrimination in employment was by attaching conditions to government contractors. As a substitute for congressional legislation, successive presidents issued 'executive orders' requiring non-discrimination by federal government contractors by virtue of the president's inherent powers to control the operation of government contracts, and this continued to be an important source of government regulation in the area (Reed, 1991; Kesselman, 1948; Ruchames, 1953). It was not until 1964 that the first federal employment discrimination legislation was passed. Between 1941 and 1964, the primary sources of federal regulation of employment discrimination were presidential executive orders regulating employment on government contracts. Even after federal legislation was eventually passed (Civil Rights Act, 1964), the importance of the executive order remained, although in a somewhat different role.

2.5 *Affirmative action in the United States*

The importance of the issue of race in the United States, its intractability, and the intensity of the legal effort brought to bear in the 1950s and 1960s gave rise to a development of considerable importance to our study, namely that of 'affirmative action'. Beginning from the middle to late 1960s, the term came to be used to describe approaches to dealing with discrimination that went beyond simply enforcing a prohibition of discrimination, and came to encompass a wide variety of proactive measures seeking to achieve greater equality for the disadvantaged group. Such affirmative action tended to result from:

- A finding by a court that unlawful discrimination had been committed and 'affirmative action' should be adopted by the discriminator as a remedy to tackle such discrimination; or
- Settlements adopted to end litigation alleging such discrimination; or
- Administrative findings of 'under-representation' and requirements to adopt 'affirmative action' in order to tackle such 'under-representation'.

One of the central regulatory pillars of this strategy was attaching conditions requiring affirmative action in employment in government contracts. One of the earliest examples of this was in the Philadelphia Plan, adopted in June 1969 (Schuwerk, 1972).

2.6 *Set-asides in the United States*

Subsequently, additional provisions were introduced to ensure that proportions of government contracts would be secured by black-owned businesses, in an attempt to stimulate further the development of an entrepreneurial black middle class. An early example was the Public Works

Employment Act of 1977, which provided that at least 10% of each grant for local work projects under that Act, be expended for minority business enterprises. A minority business enterprise was defined to mean a business half or more of which was owned by minority group members, defined to include black Americans. A waiver of the set-aside requirement could be obtained if the set-aside could not be filled by minority businesses located within a reasonable trade area. Equivalent programmes were created by federal agencies and state and local government authorities that administered public works construction projects.

3. Expansion of anti-discrimination legislation

From the 1960s onwards, anti-discrimination law developed significantly in other countries, often influenced by developments in American law. The influence of the United States civil rights movement in other countries is well known, and that influence was not confined to campaigning around the anti-discrimination principle itself. It extended also to the import of some of the legal strategies that the United States developed to tackle the problem of discrimination against black Americans. This was true in particular throughout the common law world, where anti-discrimination legislation, based on variations of the American state or federal approaches, was widely adopted from the 1960s onwards.

This spread of American influence appears to have its first tangible legislative results in the United Kingdom, where legislation to tackle the growing problem of discrimination on the grounds of race against black and Asian immigrants from Commonwealth countries was finally enacted in 1965. Once enacted, however, further anti-discrimination law to tackle such discrimination was not long in coming, and additional legislation prohibiting racial discrimination in employment and housing was passed in 1968 and 1976. In turn, other Commonwealth countries adopted anti-discrimination legislation drawing on the British and American legislation, with the Canadian provinces enacting human rights statutes (in practice anti-discrimination legislation) from the early 1960s. The adoption of anti-discrimination legislation was also often accompanied by the adoption of modified forms of linkage of non-discrimination or affirmative action to government contracting, as in Canada.

The Canadian Government instituted a Federal Contractors Programme, which came into effect on 1 September 1986.¹¹ The programme was 'an initiative which complements the Federal Employment Equity Act, and which extends the basic ideals expressed in that law into areas that would otherwise fall within provincial jurisdiction'

¹¹ Directive 3055 of 30 September 1986, replacing Directive 3055 dated 29 August 1986, Supply Policy Manual, Supply and Services Canada.

(Tarnopolsky and Pentney, 1985: 37). Organizations that employed 100 persons or more and wished to bid on contracts of C\$200,000 (approximately US\$145,000 in September 1986) or more to supply goods and services to the federal Government were required to commit themselves to implementing employment equity and to demonstrate this commitment by signing a certificate of commitment to employment equity. The criteria for implementation of employment equity that those signing the certificate commit themselves to were set out in detail.

3.1 *Bumiputeras in Malaysia*

The development of an approach to equality that emphasized the need to address discrimination based on particular statuses also became closely linked with the movement for decolonization, that is the movement for independence in countries that were then British, French and Belgian colonies in Asia and Africa. Given the status discrimination that so often accompanied colonial rule, independence movements often stressed the need for non-discrimination, and, on independence, supported international moves to outlaw such discrimination. The approach that was taken in the Indian Constitution, including both an anti-discrimination principle and the possibility of extensive reservations for particular groups was influential in other countries, notably in British colonial Malaya, where somewhat different political issues arose in the discussions leading to independence. In the British colony of Malaya, comprising the present Malaysia and Singapore, there were several ethnic groups in competition for both political and economic power, and resources: the indigenous Malays, ethnic Chinese, and Indians who had been brought from the Indian subcontinent. The Indians and the Chinese became middle-men and increasingly dominated the economic life of the country. The indigenous Malays, who formed the majority, mostly dominated the independence movement. On independence, then, Malaysia was faced with attempting to deal with the situation of an economically disadvantaged political majority, and two minorities that were economically strong, but in a minority politically. This led to the incorporation into the independence Constitution of provisions modelled on the Indian Constitution guaranteeing non-discrimination but also providing for the possibility of reservations in favour of the indigenous Malays (called *bumiputeras*, literally ‘sons of the soil’).

The importance of tackling these deep-seated inequalities was brought home when, in the late 1960s, serious rioting broke out between the native Malays and the Chinese Malaysians. The likelihood of serious instability in Malaysia led the Government to introduce a set of economic policies designed to further economic growth at the same time as ensuring redistribution designed to lift the native Malays. One of the important elements in that strategy was the use of procurement contracts structured in such a way as to

generate over time an entrepreneurial Malay middle class. In 1997, the WTO Trade Policy Review’s report on Malaysia considered the system of preferences. At that time, for supplies contracts, Malaysian *bumiputera* companies received a margin of preference of 2.5 to 10% over a reference price. The margin of preference was inversely proportional to a value of not more than RM 15 million.¹² Malaysian *bumiputera* manufacturing companies also enjoyed preferential treatment of 3 to 10%, with the margin of preference being inversely related to the contract value up to RM 100 million. All supplies contracts with a value between RM 10,000 and RM 100,000, and works contracts up to RM 100,000 were reserved for *bumiputera* suppliers. As a matter of planning for procurement of works contracts, at least 30% of the annual value of works contracts were set aside for *bumiputera* contractors. Contracts above these limits were open to competitive bidding (WTO, 1997).

3.2 *Anti-discrimination based on gender*

One of the most important developments from the 1960s was what has been referred to by Fiss (1974) as the ‘proliferation of the protectorate’, that is, the extension of the coverage of anti-discrimination law beyond the original prohibition of discrimination on the basis of race or colour. The extent to which grounds other than race should come within the purview of anti-discrimination law has been the subject of considerable debate. The most common, and now most firmly accepted, extension of the protectorate, relates to gender. In the United States, as the coverage of the legislation expanded, so too did the use of procurement linkages. By the late 1960s, affirmative action requirements were extended to benefit women in employment under federal government contracts, and to ensure that businesses owned by women would also secure a proportion of government contracts.

3.3 *South Africa post-apartheid*

After the collapse of *apartheid*, it was not surprising that procurement should be seen as one of the regulatory techniques that should be used to redress the effects of institutional discrimination and inequality. The new Constitution for South Africa specifically provided that procurement should serve the aims of efficiency and equity. However, an extensive system of ‘targeted procurement’, somewhat similar to that established in Malaysia with regard to the *bumiputera*, was established. The South African Constitution provides, in section 217, that when an organ in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a

¹² Currency conversion: US\$1.00 = 3.8 Malaysian ringgits (pegged with US\$ since September 1998).

system which is fair, equitable, transparent, competitive and cost-effective. However, this requirement does not prevent these organs of State or institutions from implementing a procurement policy providing for categories of preference in the allocation of contracts, and the protection or advancement of persons, or categories of persons, disadvantaged by unfair discrimination. This needed legislation for it to be made effective and this was enacted in 2000.¹³

The South African legislation provides that a preference points system must be followed. The legislation sets out a non-exhaustive list of several social policy goals. The inclusion of these in the contract will attract preference points. These policy goals include: contracting with persons, or categories of persons, historically disadvantaged by unfair discrimination on the basis of race, gender or disability, and implementing the programmes of the Reconstruction and Development Programme. For contracts with a rand value above a prescribed amount, a maximum of 10 points may be allocated for the specific social policy, provided that the lowest acceptable tender scores 90 points for price. For contracts with a rand value equal to or below a prescribed amount, a maximum of 20 points may be allocated for the specific social policy goals, provided that the lowest acceptable tender scores 80 points for price. Any other acceptable tenders which are higher in price must score fewer points, on a pro rata basis, calculated on their tender prices in relation to the lowest acceptable tender, in accordance with a prescribed formula. Any specific social policy goal for which a point may be awarded, must be clearly specified in the invitation to submit a tender. Such goals must be measurable, quantifiable and monitored for compliance. The contract must be awarded to the tenderer who scores the highest points, unless objective criteria justify the award to another tenderer.

3.4 Northern Ireland and religious discrimination

In most jurisdictions, the influence of the United States was usually confined to the adoption of anti-discrimination legislation. Much less frequently, affirmative action was adopted by States on the American model. South Africa is one example where affirmative action was adopted. Another example is Northern Ireland, where what was thought of as the American approach was emulated much more closely than in the rest of the United Kingdom, in the specific context of an attempt to tackle the discrimination and inequality that persisted between Catholics and Protestants.

After many twists and turns, legislation was introduced by the British Government in 1976 prohibiting discrimination on grounds of religious belief and political opinion, using the legislation of New York State as a model. This

legislation was substantially unsuccessful and was reformed in 1989, following extensive discussion of the advantages and disadvantages of adopting elements of the American approach, and following pressure on American businesses with subsidiaries in Northern Ireland to adopt the MacBride Principles, to be discussed below. The 1989 legislation went beyond anything that had hitherto operated in Northern Ireland or the rest of the United Kingdom, and introduced a variant of affirmative action (McCrudden, 1992). Employers were required to take steps to ensure ‘fair participation’ by both religious communities in Northern Ireland, and the legislation set out various steps to achieve this, including introducing compulsory monitoring and self-assessment. The Northern Ireland legislation adopted in 1989 also adopted linkage as one of the techniques of enforcement, providing that consistent failure to follow the legislative requirements could lead to deprivation of the opportunity to contract with government. This legislation was replaced by the Fair Employment and Treatment Order 1998 which makes it unlawful to discriminate against someone on the grounds of religious or political belief, and requires employers to ensure ‘fair participation’ of both communities in their workforces through the adoption of affirmative action. Employers who are in default of the legislation through failure to register with the Equality Commission, or for not submitting monitoring returns, face penalties as well as economic sanctions such as the loss of government grants and exclusion from public procurement contracts. Therefore, companies in default of this legislation can be excluded from the procurement process.

3.5 Canadian preferences for aboriginal businesses

In Canada, in March 1996, procurement measures were announced by the Minister of Indian Affairs and Northern Development that were designed to increase the participation of aboriginal businesses in bidding for federal government contracts. A contracting policy notice was issued on aboriginal business procurement policy and incentives, which formally notified federal departments and agencies that the Government had approved a strategy to promote aboriginal business development through the federal government procurement process. The initiative consisted of several different elements: a greater emphasis on aboriginal economic development when planning procurement; mandatory set-asides in procurements above a certain threshold which were destined for aboriginal populations; selective set-asides for specific procurements; and provision for subcontracting with aboriginal firms. These mandatory and selective supplier development activities would be developed with the aim of achieving increased representation of aboriginal businesses in contract awards by individual departments and agencies.¹⁴

¹³ The Preferential Procurement Policy Framework Act, 2000 (Act 5, 2000) provides for the framework for implementation of national procurement policy in this respect.

¹⁴ Contracting Policy Notice on Aboriginal Business Procurement Policy and Incentives 1996–2, para 4.

The first phase, which became effective on 1 April 1996, required all contracting authorities, where a procurement is valued in excess of C\$5,000, and for which aboriginal populations are the primary recipients, to restrict this procurement to qualified aboriginal suppliers where operational requirements, best value, prudence and probity, and sound contracting management can be assured.¹⁵ Contracts valued at less than C\$5,000 may also be set aside for qualified aboriginal suppliers if it is practical to do so. All departments and agencies were authorized and encouraged to voluntarily set aside other procurements under the set-aside programme for aboriginal businesses where practical and cost effective. There was no upper limit for these types of procurement, but procurements over C\$2 million in value will continue to be subject to the procurement review process. In addition, in other procurements, participation of aboriginal business as subcontractors to the prime contractors should be encouraged. However, where a procurement is subject to one of the international trade agreements, any consideration of, or requirement to use aboriginal subcontractors was regarded as inconsistent with those agreements. Under phase two of the initiative, beginning in 1997, each department and agency with an annual contracting budget in excess of C\$1 million was required to develop multiyear performance objectives for contracting with aboriginal businesses.

4. Social globalization and linkage

At this point we need to add a new layer of complexity. So far, we have portrayed the development of linkage as essentially a domestic debate, in which international actors are marginal, although we have seen that in several contexts there was significant learning from other jurisdictions and borrowing of regulatory techniques based on linkage. We have seen that the truism that ‘ideas travel’ is fully borne out in the development of these policies. International and regional debates within equality law have, in particular, been an important source of the spread of such policies. A consistent subtheme of much of the international and comparative anti-discrimination enforcement literature has been the utility of ‘contract compliance’ approaches (McCrudden, 1999a and 2001). The United States experience has been particularly important in Canada, Germany and the United Kingdom. South Africa borrowed from Canada and Malaysia. It is to the other various dimensions of transnational influence that we now turn. In several respects, the issue of linkage between procurement and social policy has taken on a transnational character, due in particular to several regional and international developments, which have gone under the name of ‘globalization’ and it is these that we consider next.

Different aspects of globalization have, however, very different effects on linkage. The relationship between the domestic and the international is complex. We can identify two faces of globalization. One is what we might call ‘economic globalization,’ meaning those developments that have been spurred on by a type of economic liberalism. We can identify another face of globalization, however. This second manifestation of globalization we might call ‘social’ globalization. In this form, ideas are spread by a combination of international and regional actors, and non-governmental organizations. Such policies include the development of social policies. These two aspects of globalization (economic and social) are of central importance for the study of linkage. Whilst economic globalization has challenged and restricted linkage, ‘social’ globalization has, on occasion, helped encourage linkage.

5. Selective purchasing in the United States: South Africa, Northern Ireland and Myanmar

The American civil rights movement was one galvanizing movement in the spread of linkage. Another, as important in its own way, was the development of *apartheid* in South Africa, and the worldwide campaign to ensure its removal. This campaign operated continuously from the 1960s through to the release of Nelson Mandela, and the subsequent development of a democratic South Africa. The anti-*apartheid* movement developed techniques for bringing pressure to bear on South Africa that owed something to the techniques that had been used to tackle racial discrimination in the United States. Most notably, this involved the application of economic pressure to ensure political progress, including the use of consumer and investor pressure on businesses based in Europe and North America to get them to leave South Africa. The development of these techniques resulted from the inability or unwillingness of the international community to enforce norms against discrimination against uncooperative States. In retrospect, we can see the development of the Sullivan Principles (a set of non-legally binding NGO generated non-discrimination and affirmative action principles addressed in particular to American multi-national corporations operating in South Africa) as the beginning of attempts to develop ‘non-governmental’ methods of human rights norm creation and enforcement (McCrudden, 1999b). So too, one of the techniques used to put pressure on the United Kingdom Government to adopt significantly more effective anti-discrimination legislation in Northern Ireland during the 1980s was the pressure put on American companies with operations in Northern Ireland by state and local governments in the United States to adopt the MacBride Principles. As with the Sullivan Principles relating to South Africa, one of the techniques adopted to put pressure on these companies was the threat that they could be deprived of government contracts if they refused, and several US state governments made compliance with

¹⁵ Based on Contracting Policy Notice on Aboriginal Business Procurement Policy and Incentives 1996–2.

the Sullivan and MacBride principles a requirement for those contracting with the State, often under political pressure from such NGOs.

Another controversial example of this approach was the Burma legislation enacted by the state of Massachusetts. In 1996, the Commonwealth of Massachusetts enacted legislation limiting state agencies from signing new contracts or renewals of contracts with companies doing business with or in Myanmar (formerly called Burma).¹⁶ The legislation was based directly on previous legislation regulating state contracts with companies that had South African links. The legislation provided for the establishment of a restricted purchase list, which included persons doing business with Myanmar. Most state agencies could only procure goods or services from persons on the restricted purchase list if the procurement was essential and if elimination of the person would result in inadequate competition among bidders. Even then, it would seem that where any procurement included bidders who were on the restricted purchase list, the state authority could award the contract to a person on the list only if there was no ‘comparable low bid or offer’ by a person not on the list. A bid by a person not on the list could be up to 10% greater than a bid submitted by a person on the restricted list and still remain comparably low. Exceptions were provided for news organizations operating in Myanmar, and for the procurement of medical supplies.¹⁷

We can see in these examples the development of an important new role that linkage has been given, in the global as opposed to the national economy. The links between procurement and such initiatives as those relating to South Africa, Northern Ireland and Burma involve the use of procurement to secure human rights transnationally. This use of procurement helps produce an increasing convergence between private business and government in some contexts. Private contractors, particularly larger multinationals, increasingly stress the need to consider their reputational interests, and corporate social responsibility, requiring sub-contractors to behave responsibly or lose their opportunity to contract with the company.

6. Gender equality and procurement in the European Community

Another major source of transnational debate concerning the appropriate linkage between procurement and equality issues has been the European Community. For many years, the European Community restricted its prohibitions on grounds of discrimination to nationality and gender. In the

case of nationality, the prohibitions on discrimination were closely related to economic integration. In the case of gender, the inclusion of equal pay in the Treaty of Rome was originally included in order to prevent what would now be termed social dumping. The Community did not begin to act on this requirement, nor extend the prohibition of sex discrimination more broadly until the mid-1970s, when further legislation was enacted. Since then, the Community has developed a significant body of legislation on this issue.

One of the features of the approach to compliance with these legal norms at the national level was the extent to which governmental authorities in some countries adopted linkages with procurement as a regulatory tool of enforcement (McCrudden, 1998). This was particularly the case at the levels of government below the national level. So we see, during the 1980s, the adoption of linkage between procurement and non-discrimination requirements by several *Länder* (states) in Germany, several local authorities in the United Kingdom, and many local authorities in the Netherlands. Although particularly popular at the local level of governance, such a use of procurement was not absent at the national level. Thus did, for example, Italian legislation prohibiting discrimination on grounds of gender link enforcement with the procurement tool.

7. Economic globalization encourages linkage

During the 1980s and 1990s, extensive changes occurred in the delivery of public services, in part under pressure from global economic constraints. This involved a combination of privatization, contracting out, and deregulation. The contractual method came to be seen by some as itself a problematic instrument of government from the social perspective, and attempts were made to try to limit the damage that was perceived as being done to the social fabric by such use of the contractual method of policy delivery. Decisions by government to use procurement to deliver a particular government function were increasingly seen as raising important social issues. It was argued by some, particularly trade unions, that procuring services from the private sector rather than delivering them directly through the public service system had distributional consequences for employees and consumers that needed to be taken into account in the initial decision as to whether or not to contract out delivery of services to the private sector. It was argued, for example, that there could be a significantly adverse effect on status equality in contracting out where wage rates in the public sector were significantly higher than in the private sector, and those employed in contracted-out services were more likely to be women and ethnic minorities. The classic instance of this were contracts that contracted-out the delivery of services that had previously been delivered by government itself through its own directly employed workforce to private sector service deliverers employing workers not in public employment.

¹⁶ An Act Regulating Contracts with Companies Doing Business with or in Burma (Myanmar), ch 130, 1996 Session Laws, Mass. Gen Laws Ann., ch 7, 223.

¹⁷ The legislation was subsequently held to be unconstitutional by the United States Supreme Court.

Where procurement was thought likely to be itself the cause of inequality or discrimination, then linkage between procurement and social policy was sometimes introduced to limit or control the perceived damage.¹⁸

8. Linkage and the International Labour Organisation

So far, we have concentrated on national, transnational and European influences. We turn now to consider more truly international influences. One starting point for this development can be seen in the approach adopted to linkage by the International Labour Organisation (ILO). We have seen that until World War II, the predominant social use of linkage was in the area of traditional labour law enforcement, particularly in ensuring that government contractors would not undermine collectively agreed pay rates adopted by other employers not engaged in government contracting. The first engagement by the ILO with linkage built on this approach¹⁹ and, in 1949, a Convention was adopted by the International Labour Conference that required parties to ensure that such linkages were put in place, and established a monitoring system to promote compliance (ILO, 1948). This provided that workers employed under contracts issued by a central public authority were to be protected. States party to the Convention were required to include clauses in their public contracts ensuring that wages (including allowances), hours of work, and other conditions of labour were not less favourable than those established for work of the same character in the trade or industry in the district where the work is carried out.²⁰

Subsequently, the ILO adopted several conventions dealing specifically with status discrimination, including two that the ILO came to regard as central to its mission.²¹ In the context of making recommendations as to the effective enforcement of these provisions, ILO bodies drew on procurement linkage. Recommendation R111 provides that each member should promote the observance of the principles of non-discrimination ‘where practicable and necessary’ by such methods as making eligibility for contracts involving the expenditure of public funds dependent on observance of the principles, and making eligibility for grants to training establishments and for a licence to operate a private

employment agency or a private vocational guidance office dependent on observance of the principles.²² More broadly, the ILO Committee of Experts subsequently stressed the desirability of the use of government contracts for both securing equal pay and equal opportunities by stating that guaranteeing equal remuneration in contracts awarded by the public authorities can be an extremely effective tool in ensuring respect for the principles contained in the Convention (ILO, 1986). The Committee considered that the possibility of resort to this method of application of the principle of equality of opportunity and treatment should be given careful examination (ILO, 1988).

The ILO’s role, however, is not restricted to standard-setting. The ILO also has an important role in providing technical assistance to countries that request it. During the 1970s and 1980s, the ILO developed an important role in assisting in the establishment of labour-intensive methods of road-building and other infrastructure development in developing countries, often as part of World Bank or other international donor-funded projects. The interest of the ILO in developing such labour (as opposed to equipment) intensive methods was so that developing countries would put their large labour forces to productive use, reducing the substantial pool of long-term unemployed, and reducing the extent to which the developing country needed to spend scarce foreign reserves to import expensive foreign equipment. The role of the ILO in these programmes has developed significantly in recent years, and with it a more clearly defined policy that infrastructure development in developing countries should benefit local people, not just in the provision of a road or building, but in the course of its construction as well. The ILO’s Employment-Intensive Investment Branch currently runs a programme called the Advisory Support Information Services and Training for Employment-Intensive Infrastructure (ASIST).

More recently, the ILO has shifted its approach to norm creation and compliance, again with consequences for procurement linkage. Since the mid-1990s, in order to provide a better focus for its work, the ILO has adopted a policy of emphasizing a limited set of the more than 180 conventions as ‘core’ to its mission, and has designated them as ‘fundamental rights at work’. Amongst these fundamental rights are the right to non-discrimination, the right to freedom from forced labour, the right to freedom of collective bargaining, and the abolition of the worst forms of child labour. This development had been extremely successful in focusing attention on these rights. The ILO machinery provides a limited method of ensuring compliance with these rights, however. Outside the organization, however, others have taken up the challenge of making these rights more effective in practice, through the adoption of codes of practice incorporating these rights and particularly their application to transnational corporations, coinciding with a renewed emphasis on corporate social responsibility. Here too,

¹⁸ See, for example, in Scotland, STUC/Scottish Executive, PPP Employment Protocol, to be found at www.unison-scotland.org.uk/briefings/protocolapp1.html

¹⁹ For the discussions leading to the adoption of this Convention, see ILO (1948).

²⁰ Article 2(1) and (2). See Nielsen (1995).

²¹ The first was the Equal Remuneration Convention, 1951 (Convention 100), which introduced the principle of equal pay for men and women for work of equal value. The second was the Discrimination (Employment and Occupation) Convention, 1958 (Convention 111), and its associated Recommendation (R111), which prohibits discrimination in employment on grounds of race, colour, sex, religion, political opinion, national extraction or social origin.

²² Paragraph 3.

there have been attempts to encourage compliance with these requirements through linkage with access to government contracts.

A recently completed study on the social aspects of construction (Jennings *et al.*, 2003) surveyed the application of nine ILO labour standards over a four-year period, with the objective of improving the conditions for construction workers. The standards were applied in three different contexts: to a bridge construction programme using conventional contracting in Ghana; to community contracting under the decentralization programme of the state government of Kerala (India); and to a self-help scheme using unpaid labour in the peri-urban settlements of Lusaka (Zambia). The authors argue that the study has demonstrated that the contracting framework can be a means to improve the working conditions of semi- and unskilled casual workers. 'Building in social clauses to the construction contract offers a mechanism for protecting the labour rights of workers and enables the contract to function as an instrument for extending labour and social policy to difficult-to-reach temporary and casual workers. However, it needs to be supported by a process of awareness raising among clients, contractors and workers, voluntary buy-in, and rigorous mechanisms for monitoring compliance' (Jennings *et al.*, 2003: 2).²³

9. Linkage and international human rights norms

Another major transnational development that has encouraged social linkage is the growth of human rights thinking since World War II. Human rights were to include not only civil and political rights but also socio-economic rights. From this changing sense of what was necessary grew the approach developed in the Universal Declaration of Human Rights and regional human rights treaties (particularly the European Convention on Human Rights). There is now an increasingly complex web of international, regional and national law relating to human rights, both treaty-based legal requirements, 'soft-law' standards, and customary international law.²⁴ During the late 1990s, the difficulties in enforcing such norms gave rise to efforts to devise supplementary methods of making them more effective in practice; in some contexts, this has seen the rise of attempts to link them to procurement regimes at the national, regional and international levels.

The procurement policies of the United Nations Children's Fund (UNICEF), for example, include restrictions

on purchasing from companies that employ child labour, or manufacture land mines or their components. As regards child labour, UNICEF subscribes to the Convention on the Rights of the Child and draws the attention of potential suppliers to Article 32 of the Convention that requires that a child shall be protected from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development. UNICEF reserves the right to terminate any contract unconditionally and without liability in the event that the supplier is discovered to be in non-compliance with the national labour laws and regulations with respect to child employment. As regards land mines, UNICEF requires each supplier to guarantee that neither the supplier's company, nor any of its affiliates, nor any subsidiaries controlled by the supplier's company, is engaged in the sale or manufacture of anti-personnel mines or components utilized in the manufacture of anti-personnel mines. The supplier is required to accept that a breach of this provision will entitle UNICEF to terminate its contract with the supplier.

10. Conclusion

This preliminary study of the variety of social procurement initiatives raises several questions, two of which are of particular importance in the context of discussions on sustainable procurement.

First, there remain tantalising issues concerning how similar 'green' procurement is to social procurement, including the extent to which these two sets of initiatives complement or cut across each other. This will clearly affect the extent to which acceptance of international or regional standards in the area of social procurement will be possible in the context of sustainable procurement. Does the umbrella term 'sustainable procurement' help us to understand the commonalities of social and green public purchasing, or serve only to camouflage their essential differences? This article has not attempted a comparative analysis of the two types of procurement, concentrating instead on social procurement.

Second, there are uncertainties about the extent to which social procurement raises different legal and policy issues regarding their compatibility with international and regional legal frameworks. To the extent that there are legal differences in the treatment of each, then discussions of sustainable procurement will be made more complex. This article has not considered the important questions of the desirability, or the legality of these linkages under domestic law, international or regional trade regimes.²⁵ The article had a more limited aim: to provide an introductory survey of social procurement practices, as a basis on which future legal and policy analyses can build.

²³ See also Ladbury *et al.* (2003).

²⁴ Such norms include the International Convention on the Elimination of all Forms of Racial Discrimination, 1966; the International Covenant on Civil and Political Rights, 1966; the International Covenant on Economic, Social and Cultural Rights, 1966; the Refugee Convention, 1951; the Convention on the Rights of the Child (1989); International Convention on the Protection of the Rights of Migrant Workers and Members of their Families (1990); and many more.

²⁵ For these questions, see McCrudden (1998 and 1999c).

Acknowledgement

This article draws on a study commissioned by the United Nations: Christopher McCrudden, 2004, *Integration of social policy into sustainable public procurement: A study for the United Nations Department of Economic and Social Affairs*.

References

- Bercusson, B., 1976. *Fair Wages Resolutions*. Mansell Publishers, London.
- Fiss, O., 1974. The fate of the idea whose time has come: Anti-discrimination law in the second decade after *Brown v. Board of Education*. *University of Chicago Law Review*, 41(4): 742–773.
- Hessel, B., Kaar, R.H. van het, Wilthagen, A.C.J.M., Lieshout, H. van (Eds.), 2000a. Application of contract compliance under social conditions by municipal and provincial government: Conditions, experience and results (in Dutch: Onder sociale voorwaarden, toepassing van contract compliance door de gemeentelijke en provinciale overheid: randvoorwaarden, ervaringen en resultaten). Report for the Ministry of Social Affairs and Employment. Hugo Sinzheimer Institut, University of Amsterdam; and Europe Institut, University of Utrecht.
- Hessel, B., Luijendijk, H., Kaar, R.H. van het, 2000b. Contract compliance: Potentials and limits of a strategy to enhance labour market participation. In: Hessel, B., Schippers, J.J., Siegers, J.J. (Eds.), *The Interaction between Labour Markets and Commodity Markets. Economic and Legal Analyses*, Amsterdam/Cheltenham, UK, 17–53.
- House of Commons, 1926. *Official Report*, House of Commons, Vol. 191, col. 1830, 16 February.
- House of Lords, 1926. *Official Report*, House of Lords, Vol. 63, col. 129, 16 February.
- International Labour Organisation (ILO), 1948. Fair wages clauses in public contracts. Reports VI(b)(1) and (2) and Supplement of the International Labour Conference, 21st Session. International Labour Organisation (ILO), Geneva.
- International Labour Organisation (ILO), 1986. Equal remuneration: General survey by the Committee of Experts on the Application of Conventions and Recommendations. Report of the International Labour Conference, 72nd Session, No 123, Para. 158. International Labour Organisation (ILO), Geneva.
- International Labour Organisation (ILO), 1988. Equality in employment and occupation: General survey by the Committee of Experts on the Application of Conventions and Recommendations. Report of the International Labour Conference, 75th Session, para. 177. International Labour Organisation (ILO), Geneva.
- Jennings, M., Cotton, A., Ladbury, S., 2003. Inclusion of social benefits in infrastructure: Ensuring social benefits for road workers through implementing labour standards (available at: http://www.transport-links.org/transport_links/filearea/documentstore/322_Mary%20Jennings%20Paper%202.pdf)
- Kesselman, L., 1948. *Social Politics of FEPC*. University of North Carolina Press, Chapel Hill, N.C.
- Ladbury, S., Cotton, A.P., Jennings, M., 2003. *Implementing Labour Standards in Construction: A Sourcebook*. Water Engineering Development Centre (WEDC), Loughborough University, UK.
- McCrudden, C., 1992. Affirmative action and fair participation: Interpreting the Fair Employment Act 1989. *Industrial Law Journal*, 21(3): 170–198.
- McCrudden, C., 1998. Social policy issues in public procurement: A legal overview. In: Arrowsmith, S., Davies, A., (Eds.), *Public Procurement: Global Revolution*. Kluwer Law International, Dordrecht, The Netherlands, 219–239.
- McCrudden, C., 1999a. Advice to a legislator on problems regarding the enforcement of anti-discrimination law and strategies to overcome them. In: Loenen, T., Rodrigues, P., (Eds.), *Non-discrimination Law: Comparative Perspectives*. Kluwer Law International, Netherlands, 295–312.
- McCrudden, C., 1999b. Human rights codes for transnational corporations: What can the Sullivan and MacBride Principles tell us? *Oxford Journal of Legal Studies*, 19: 167–201.
- McCrudden, C., 1999c. International economic law and the pursuit of human rights: A framework for discussion of the legality of ‘Selective Purchasing’ Laws under the WTO Government Procurement Agreement. *Journal of International Economic Law*, 2(1): 3–48.
- McCrudden, C., 2001. National remedies for racial discrimination in European and International Law. In: Fredman, S., (Ed.), *Discrimination and Human Rights*. Oxford University Press, Oxford, UK.
- Nielsen, H.K., 1995. Public Procurement and International Labour Standards. *Public Procurement Law Review*, 4(94).
- Noel, J., 2000. Étude relative à la possibilité d’introduire, par la voie légale, réglementaire ou administrative, une clause sociale dans les marchés publics des différents pouvoirs adjudicateurs en Belgique. *Administration Publique*, 2000(1): 229.
- Organisation for Economic Cooperation and Development (OECD), 2003. The environmental performance of public procurement: Issues of policy coherence. Organisation for Economic Cooperation and Development (OECD), Paris.
- Reed, M.E., 1991. *Seedtime for the Modern Civil Rights Movement: The President’s Committee on Fair Employment Practice, 1941–1946*. Louisiana State University Press, Baton Rouge.
- Richardson, J.D. (Compiler), 1897–1916. *A compilation of the messages and papers of the presidents*, Vol. IV, p. 1819. Bureau of National Literature, New York, N.Y.
- Ruchames, L., 1953. *Race, Jobs and Politics*. Columbia University Press, New York.
- Schuerker, R.P., 1972. Comment. The Philadelphia Plan: A study of the dynamics of executive power. *University of Chicago Law Review*, 39(4): 723–760.
- Srivastava, V., 2003. India’s accession to the GPA: Identifying costs and benefits. Paper presented to the World Bank, National Council of Applied Economic Research and World Trade Organization South Asia Workshop, New Delhi, 20–21 December. In: United Nations Development Programme (UNDP). *Making Global Trade Work for the People*. Earthscan, London. Chapter 15.
- Tarnopolsky, W.S., Pentney, W., 1985. *Discrimination and the Law: Including Equality Rights under the Charter* (2nd Ed.). Don Mills, Ontario, Canada.
- Tracey, C., 2001. Comment: An argument for the repeal of the Davis-Bacon Act. *Journal of Small and Emerging Business Law*, 5(2): 285–309.
- World Trade Organization (WTO), 1997. Trade Policy Review: Malaysia — Report by the Government. World Trade Organization, Geneva.