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The Legal and Social Construction of Value in Government Procurement Markets

RICHARD CRAVEN*

Abstract

The Public Services (Social Value) Act 2012 introduces a social value duty. It requires public authorities in England and Wales, carrying out procurement activities, to ‘consider’ how such activities might ‘improve ... economic, social and environmental well-being’. This article analyses qualitative, empirical data on how the social value duty has been interpreted and applied across local government in England. Although only a weak legal duty, this law has made a notable impact on practice. The article explains the changes brought about in practice under the social value duty, and seeks to understand why these changes have occurred. It does so by recognising local government procurement markets, as well as local government organisations themselves, as strategic action fields. In these fields, there are competing visions for social value. It is through conversations between actors that a common meaning comes to be attached to the law.

INTRODUCTION

The financial crisis was a crisis about value(s):¹ the value of collateralized debt obligations, but also the values of capitalism. In 2009, in the wake of the crisis, the British Prime Minister declared, ‘[m]arkets need what they cannot generate themselves; ... markets need morals’.² Against this backdrop, in 2010, the Conservative-Liberal government was formed. This government, alongside a programme of austerity, would attempt to cultivate David Cameron’s ‘big society’.³ Here, we examine one aspect of the legislation underpinning the big society: the social value duty, found in the Public Services (Social Value) Act 2012.⁴ The duty attracts significant interest from policymakers and practitioners, due, in the main, to connections made between lowest price, competitive tendering and recent procurement scandals – notably, the collapse of the government contractor, Carillion, in 2018.⁵ For the present government, returning to state provision is not an

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¹ Unsurprisingly, the theme generates much literature – B. Skeggs, ‘Values beyond value? Is anything beyond the logic of capital?’ (2013) 65(1) *The Brit. J. of Sociology*. 1; M. Mazzucato, *The value of everything: making and taking in the global economy* (2018).

² G. Brown (2009), Labour Party Congress, quoted in B. Amable, ‘Morals and politics in the ideology of neo-liberalism’ (2011) 9(1) *Socio-Economic Rev.* 3, p.12.

³ Conservative Party, *Invitation to join the government of Britain* (2010), p.35.

⁴ S.1; L. Floyd, ‘The elephant in the room: The Public Services (Social Value) Act 2012’ (2013) 129(Apr) *Law Q. Rev.* 180.

⁵ A cursory internet search reveals a multitude of commentary

option; the policy response is a reinforced commitment behind social value: public services must be delivered ‘with values at their heart, where ... wider social benefits matter and are recognised’.⁶ Forming part of its civil society strategy,⁷ in 2019, the government consulted on strengthening and extending social value.⁸

The article’s focus is the regulation of local government procurement in England. By studying procurement, we see government active as a buyer in the marketplace, and, in essence, a clash between two fundamental institutions – government and the market - each of which possesses a distinct system of values. From a market perspective, government is not economically rational, as say a private corporation – guided by the profit motive – might be. For local government, because of its democratic, political set-up, non-commercial (economically irrational) values are inevitably embedded in decision-making.⁹ Legal regulation, used to bring some of these markets into existence, provides the framework for market behaviour.

The social value duty applies to the buying activities of public authorities. Authorities must ‘consider’ how they might ‘improve ... economic, social and environmental well-being’ (s.1(3)). This article therefore addresses a common theme in the literature on public procurement: using procurement to achieve objectives that are collateral to the central purchasing objective and value for money (*dominium* power).¹⁰ Contrasting with much of this literature - which is predominantly doctrinal,¹¹ interpreting legal grey-areas, especially those deriving under European Union law - the analysis here is based upon qualitative interview data. The article thus contributes to socio-legal literature on law’s role in markets: a so-called ‘econo-socio-legal’ perspective.¹²

⁶ D. Lidington (25 June 2018), Reform.

⁷ Cabinet Office, Civil society strategy: building a future that works for everyone (2018).

⁸ Cabinet Office, Social value in government procurement: a consultation on how government should take account of social value in the award of central government contracts (2019).

⁹ In this context, see *Wheeler v Leicester City Council* [1985] 2 All ER 1106; *R v Lewisham London Borough Council, ex parte Shell UK Ltd* [1988] 1 All ER 938; *Jewish Rights Watch Ltd v Leicester City Council* [2018] EWCA Civ 1551.

¹⁰ The literature on this is vast – see, notably, S. Arrowsmith, ‘Public procurement as an instrument of policy and the impact of market liberalisation’ (1995) 111(Apr) Law Q. Rev. 235; C. McCrudden, *Buying social justice: equality, government procurement, and legal change* (2007).

¹¹ Exceptions include A. Aspey, ‘Labour considerations in EU procurement: a study of UK utilities’ (2012) 37(3) *European Law Rev.* 294; A. Ludlow, *Privatising public prisons: labour law and the public procurement process* (2015).

¹² A. Perry-Kessaris, ‘Anemos-ity, Apatheia, Enthousiasmos: An Economic Sociology of Law and Wind Farm Development in Cyprus’ (2013) 40(1) *J. of Law and Society.* 68.

In studying law in markets for government contracts, we are concerned with how regulation constructs the rationality of the government buyer,¹³ but also how the meaning of the regulation is itself socially constructed. The article utilises insights from organisational theory, particularly Fligstein and McAdam's 'strategic action fields'.¹⁴ In this view, 'social life is dominated by a complex web' of these spheres of social action. The market, as well as organisations in the market, are places where various actors jockey for position. In studying the market in this way, we see the importance of actors' interactions to evolving practice under the social value duty. We argue that the regulatory approach depends heavily on facilitating, what Black terms, 'regulatory conversations'.¹⁵ These strategic interactions are not direct conversations between regulator and regulated actors, but are conversations amongst a variety of field actors.

The social value duty appears to contrast starkly with the policies and strategies that marked the regulatory approach to government procurement in the recent past, in the era of the New Public Management (NPM).¹⁶ That is, superficially, at least, the new duty, rubs against price value – driven out through competitive tendering – often privileged in NPM. Arguably, therefore, it signals that NPM is coming to an end. The study here into the way in which social value is operationalised, provides empirical insight into public management post-NPM¹⁷ – in particular, in relation to NPM's potential successor, Public Value/s Management (PVM),¹⁸ and new regulatory styles and techniques accompanying PVM.

The article is divided into three main parts. Part one locates the discussion in the econo-socio-legal. It opens with a section detailing the origins and content of the social value duty. It then moves on to look at approaches to regulating value/s in local government. This is followed with information on the qualitative empirical study, which underpins the discussion in parts two and three. Part two focuses on interpretations and the application of the law. It looks at the operation of the social value duty, specifically detailing changes to practice occurring under the duty. Part

¹³ A. Lang, 'The legal construction of economic rationalities' (2013) 40(1) *J. of Law and Society*. 155.

¹⁴ N. Fligstein and D. McAdam, *A Theory of Fields* (2015).

¹⁵ J. Black, 'Talking about regulation' (1998) *Public Law*. 77; and 'Regulatory conversations' (2002) 29(1) *J. of Law and Society*. 163.

¹⁶ C. Hood, 'A public management for all seasons?' (1999) 69(1) *Public Administration*. 3.

¹⁷ P. Dunleavy et al., 'New Public Management is dead—long live digital-era governance' (2005) 16 *J. of Public Administration Research and Theory*. 467; J. O'Flynn, 'From new public management to public value: paradigmatic change and managerial implications' (2007) 66(3) *Aus. J. of Public Administration*. 353.

¹⁸ J. Benington and M. Moore (eds.) (2011) *Public value theory and practice* (2011); B. Bozeman, 'Public value failure: when efficient markets may not do' (2002) 62(2) *Public Administration Rev.* 134; M. Moore, *Creating public value: strategic management in government* (1995).

three considers reasons behind these responses to the law – looking at interactions in local government and in the market.

SITUATING THE INVESTIGATION IN THE ECONO-SOCIO-LEGAL

1. Government's Social Value Duty

The article studies social objectives in local government procurement in England, looking specifically at social value. This is a prominent theme in the United Kingdom and across the European Union, receiving particular attention since the financial crisis. In the early 2010s, with dramatic funding cuts constraining local government, local politicians would take growing interest in how procurement might contribute to their local objectives.¹⁹ The Public Services (Social Value) Act 2012, which introduces the social value duty, ostensibly, seeks to facilitate this, in a particular way. This opening section explains the legal duty.

Efforts have been made to make better use of procurement as a policy tool for some time.²⁰ Representing legislative backing for this thinking (despite government's deregulatory agenda),²¹ in January 2013, the Public Services (Social Value) Act 2012 entered into force.²² The Act is a remnant of the big society: a short-lived policy banner, promoted by Cameron's Conservative Party as the answer to Britain's broken society.²³ Drawing upon 'red Toryism'²⁴ and 'liberal paternalism',²⁵ in the big society, politicians aspired to empower local communities, and ignite a culture of volunteerism. A greater role in delivering public services was envisaged for SMEs and the third sector - mutuals, co-operatives, charities and social enterprises. Resulting from an emphasis on lowest-price tendering competitions, it was said that procurement was oriented in favour of big business, to the detriment of these alternative, socially desirable providers (the 'supermarketisation' of public services).²⁶

The Act, which started out as the Public Services (Social Enterprises and Social Value) Bill, did not originate from government. It was tabled by back-bench Conservative, Chris White. Aided by lobbying from the Social Enterprise Coalition (now Social Enterprise UK), it is one of few

¹⁹ Just Fair, Tackling socio-economic inequalities locally: good practices in the implementation of the socio-economic duty by local authorities in England (2018), p.4.

²⁰ Office of the Deputy Prime Minister, National Procurement Strategy for Local Government in England (2003), p.47.

²¹ Deregulation Act 2015

²² Public Services (Social Value) Act 2012 (Commencement) Order 2012, S.I. no.3173.

²³ Conservative Party, op. cit., n.3, p.35.

²⁴ P. Blond, Red Tory: how left and right have broken Britain and how we can fix it (2010).

²⁵ R. Thaler and C. Sunstein, Nudge: improving decisions about health, wealth and happiness (2008).

²⁶ C. White, H.C. Debs. c1170 (19 November 2010).

successful Private Members Bills (ballot). The Bill originally proposed strong measures to promote social enterprises; however, despite garnering cross-party support, it would shed these over the course of the legislative process, leaving only a social value duty.²⁷ As a result, the Act, is relatively brief, comprising only four sections. The duty is only a duty to ‘consider’: public authorities must consider how what they propose to procure, and the way in which they carry out the procurement, ‘might improve the economic, social and environmental well-being of the relevant area’ (s.1(3)). Authorities are also required to ‘consider’ whether to consult on the above matters (s.1(7)). The relevant area, for the purposes of these two requirements, is the area consisting of the area/s of the relevant authority/ies on whose behalf a public service contract is intended to be made.

Little time was invested by government in thinking about what social value is, or strategies for achieving social value.²⁸ The phrase, social value, is only used for the purposes of the Act’s title, and is not defined in the legislation. Best value guidance from 2011 describes it as ‘a concept ... about seeking to maximise the additional benefit that can be created by procuring ... goods and services, above and beyond the benefit of merely the goods and services themselves’;²⁹ however, this explanation does not appear in updated guidance.³⁰ With various ideas about social value competing for attention in the field, government was seemingly content with the concept’s vagueness, and for its meaning to develop organically.

Local government is not empowered to do anything new that it did not already have power to do under the duty. Local authorities already had well-being powers,³¹ updated in 2011 to a general power of competence.³² Rather, this legal duty – consistent with the hallmarks of the big society - effectively nudges authorities, in their contracting activities, towards a broader conception of value.

The duty sits in tension with other legal and regulatory norms (for instance, relating to efficiency savings). It applies alongside local government’s best value duty (see below) and European Union procurement law: it applies to the ‘contracting authorities’ and services contracts governed by regulations transposing European Union procurement directives³³ (s.1(15)) – the duty does not extend to works and supply contracts (s.1(16)). The Act explicitly seeks to avoid conflict with

²⁷ Cabinet Office, The Public Services (Social Value) Act 2012: information note 10 (2012).

²⁸ C. White, Westminster Business Forum Keynote Seminar (2019) [on file].

²⁹ Department for Communities and Local Government, Best Value Statutory Guidance (2011).

³⁰ Department for Communities and Local Government, Revised Best Value Statutory Guidance (2015).

³¹ Local Government Act 2000, s.2.

³² Localism Act 2011, s.1.

³³ Public Contracts Regulations 2015, S.I. no.102, which transposes Directive 2014/24/EU of the European Parliament and of the Council on public procurement and repealing Directive 2004/18/EC [2014] OJ L94/65.

European Union law: channelling the language of these rules: an authority may only consider matters that are ‘relevant’, and ‘must consider the extent to which it is proportionate’ to take account of those matters (s.1(5)). In, what has come to be, a complex regulatory environment, tensions such as these, between regulatory aims and objectives, is arguably unavoidable. Regulators may even see this as something to exploit: using it to steer the behaviour of regulated actors towards a reasonable, middle course.³⁴

The big society would, ultimately, be drowned-out by government’s deficit reduction priorities, which have placed severe strain on local government finances. Funding from central government fell by around 49.1% from 2010-11 to 2017-18,³⁵ and local government austerity provides crucial context for this research, as recognised by interviewees: ‘... if somebody says “budget cut” once more, I shall be hiding under the desk with a bottle of gin’ (P24). Surprisingly, however, in spite of austerity, research participants, as well as government politicians, appear enthusiastic about social value. Despite only entering into force in 2013, already, there has been a ‘one year on’ report,³⁶ a review carried out by Lord Young,³⁷ as well as, as part of the response to the review, a Social Value Implementation and Measurement Project, which generated eight case studies.³⁸ Social value also finds itself centre stage in the government’s response to Carillion’s collapse. After the collapse, government announced that it would strengthen the Act to ‘ensure that contracts were awarded on the basis of more than just value for money – but a company’s values too, so that their actions in society are rightly recognised and rewarded’.³⁹ This was followed, in 2019, with a government consultation on social value in central government contracts,⁴⁰ which draws upon ‘best practice’ experience from local government. Here, the government outlines proposals to mandate that social value be considered in deciding between tenders in awarding contracts (with a minimum 10% weighting on social value),⁴¹ it seeks views on a new model for evaluating tenders,⁴² and, amongst other details, states that 4,000 procurement professionals will receive training in social value.⁴³

³⁴ C. Scott, ‘Accountability in the regulatory state’ (2000) 27(1) *J. of Law and Society*. 38, p.57.

³⁵ National Audit Office, *Financial sustainability of local authorities 2018* (2018).

³⁶ Cabinet Office, *The Public Services (Social Value) Act 2012: one year on* (2014).

³⁷ Cabinet Office, *Social Value Act review* (2015).

³⁸ <<https://www.gov.uk/government/publications/social-value-implementation-and-measurement-project-case-studies>>.

³⁹ Lidington, *op. cit.*, n.6.

⁴⁰ Consultation, *op. cit.*, n.8.

⁴¹ *id.*, p.6.

⁴² *id.*

⁴³ *id.*, p.9.

2. *Regulating Value(s) in Government Procurement*

In various ways, government expresses values in its buying activities. Throughout the twentieth century, in the United Kingdom, the appearance of social values in government contracting has been pronounced;⁴⁴ though participating in markets, ultimately, government was a political beast and used its buying power to contribute towards its political ends. However, this would change from the mid-1970s with the shift from classic public administration to NPM, even for local government.⁴⁵ In this section, to better understand the social value duty today - and what, if anything, the adjective 'social' adds to the noun 'value' in the procurement context - we review social procurement, focusing on local government, over the past 40 years.

NPM is a broad concept, which refers to 'a strongly developed and coherent theory of managerial change based on importing into the public sector central concepts from relatively modern business practices' and public choice economics.⁴⁶ Ideas from economics, would be employed to portray the traditional bureaucracy as 'bumbler or villain', with interference in markets leading to 'distortion, inefficiency, deadweight loss and worse'.⁴⁷ In addition, contrary to the idealized, Weberian public administration – where bureaucracies implement, without influencing, government policy - according to public choice, we are to be wary about trusting bureaucrats. These actors are 'selfish rather than selfless', just like other economic agents, and will 'maximise budgets, staff or leisure' over performance.⁴⁸

In this view, the public sector, shielded from competition, is inefficient and ineffective because it lacks the organisational and individual performance incentives found in private corporations - the threat of bankruptcy, for poor performing organisations, or redundancy, for individuals.⁴⁹ The policy answer was to be based around the discipline of competition:⁵⁰ competition was the means by which public authorities would be steered towards the public interest, as opposed to the private interests of bureaucrats.⁵¹

⁴⁴ B. Bercusson, Fair wages resolutions (1977); and 'Proposal to rescind fair wages resolution: the future of fair wages policy' (1982) 11(1) *Industrial Law J.* 271; P.E. Morris, 'Legal regulation of contract compliance: an Anglo-American comparison' (1990) 19 *Anglo-American Law Rev.* 87.

⁴⁵ C. Cockburn, *The local state: management of cities and people* (1977).

⁴⁶ Dunleavy, *op. cit.*, n.17, p.471.

⁴⁷ J. Sekera, 'The public economy: understanding government as a producer. A reformation of public economics' (2018) 84 *Real-World Economics Rev.* 36, p.36.

⁴⁸ G. A. Boyne, 'Competition and local government: a public choice perspective' (1996) 33(4-5) *Urban Studies.* 703, 704; P. Self, *Government by the market: the politics of public choice* (1993).

⁴⁹ *id.*

⁵⁰ H.M. Treasury, *Competing for quality* (1991; C.M. 1730); N. Ridley, *The local right: enabling not providing* (1988) Centre for Policy Studies.

⁵¹ Boyne, *id.*, p.704.

During the 1980s, hostile central-local relations – brought about by ideological differences between Thatcher’s government, committed to ‘rolling back the frontiers of the state’, and predominantly Labour-held local authorities - led to reliance on blunt (and ultimately ineffective) command and control regulation in implementing the above ideas in local government.⁵² A prominent example is the rollout across local government, between 1980 and 1997, of compulsory competitive tendering,⁵³ which would require competition between incumbent inhouse providers and private corporations over who was to deliver services.

In addition, in contrast to today’s social value duty, legislation would be employed to depoliticise local government procurement, aligning purchasing behaviour with economically rational decision-making criteria: the Local Government Act 1988, s.17(1) proscribes ‘non-commercial considerations’ in awarding supply and works contracts.⁵⁴ Section 18 of the Act carved out some scope for procurement to be used to promote racial equality (powers bolstered under the Equality Act 2010);⁵⁵ however, legally, scope for political/executive value judgements was tightly constrained. Section 17 remains on the statute book to this day; though, in recent years, it has necessarily been dulled to enable non-commercial considerations ‘to the extent that the authority considers it necessary or expedient to do so to enable or facilitate compliance with [the social value duty]’.⁵⁶

From 1997, the ‘new’ Labour Government would adopt a different regulatory style for based around best value: a general duty, for local authorities in England and Wales, to ‘... secure continuous improvement in the exercise of all functions undertaken by the authority, having regard to a combination of economy, efficiency and effectiveness’⁵⁷ would replace compulsory competitive tendering. Vincent-Jones explains this as representing the ‘broader trend ... towards regulation by outcome rather than input’: ‘[t]he shift is away from counting what goes in to assessing what is being delivered’.⁵⁸ The approach places more emphasis on self-assessment (ss.5

⁵² M. Loughlin, *Legality and locality: the role of law in central-local government relations* (1996).

⁵³ Local Government, Planning and Land Act 1980; Local Government Act 1988; and Local Government Act 1992.

⁵⁴ M. Radford, ‘Competition rules: The Local Government Act 1988’ (1988) 51(6) *Modern Law Rev.* 747.

⁵⁵ Equality Act 2010, sch.26(1).

⁵⁶ Public Services (Social Value) Act, s.2.

⁵⁷ Local Government Act 1999, s.3. P. Vincent-Jones, ‘Central-local relations under the Local Government Act 1999: a new consensus?’ (2000) 63(1) *Modern Law Rev.* 84; P. Vincent-Jones, ‘Values and purpose in government: central-local relations in regulatory perspective’ (2002) 29(1) *J. of Law and Society.* 27.

⁵⁸ Vincent-Jones (2000), *id.*, p.99.

and 6), central control by way of performance indicators and standards (s.4), and external audit and inspections (s.7-s.14).

In addition, from 2004, European Union procurement regulation came into the foreground for local government, as it became more procedurally detailed and prescriptive.⁵⁹ In view of the threat that non-commercial considerations might mask anti-competitive decision-making (for example, bias favouring domestic suppliers), the European Commission would move to interpret the scope for such considerations narrowly, sometimes contrary to the traditional approach taken by the Court of Justice.⁶⁰

A decoding of the language of ‘social value’, which represents an amalgamation of social values and economic/price value, suggests a revival of ‘the social’;⁶¹ it has not gone unnoticed that this discourse – traditionally associated with the post-war consensus and the welfare state – is in circulation today as part of various managerial, methodological and governmental strategies.⁶² Illustrating such a point, Davies lists ‘social marketing’, ‘social enterprise’ and ‘social entrepreneurship’, found in business management; ‘social valuation’ and ‘social return on investment’,⁶³ linked to accounting; and, even, ‘social media’ and ‘social analytics’.⁶⁴ The new duty arrives at a time (post-financial crisis) when there have been important shifts in mainstream thinking in economics and public management. For instance, the behavioural sciences are influencing economics, and behavioural insights have traction with policymakers. In behavioural economics, amongst other things, we see economics accepting the sociality of human beings,⁶⁵ which contrasts with ‘homo economicus’ – the introverted and selfish agent conventionally relied upon to formulate economic models.

⁵⁹ S. Arrowsmith, ‘The past and future evolution of EC procurement law: from framework to common code?’ (2006) 35(3) *Public Contract Law J.* 337.

⁶⁰ J. Arnould, ‘Secondary policies in public procurement: the innovations of the new Directives’ (2004) *Public Procurement Law Rev.* 187, 188; and P. Kunzlik, ‘Neoliberalism and the European public procurement regime’ in *Cambridge Yearbook of European Legal Studies*, Vol.15, eds. C. Barnard, et al. (2012–2013), 283.

⁶¹ N. Rose, ‘The death of the social? Re-figuring the territory of government’ (1996) 25(3) *Economy and Society.* 327.

⁶² W. Davies, ‘The return of social government: from “socialist calculation” to “social analytics”’ (2015) 18(4) *European Journal of Social Theory.* 431, p.432.

⁶³ See E. Dowling and D. Harvie, ‘Harnessing the social: state, crisis and (Big) Society’ (2014) 48(5) *Sociology.* 869 - on social value and big society Capital.

⁶⁴ Davies, *op. cit.*, n.62

⁶⁵ S. Frerichs, ‘Bounded sociality: behavioural economists’ truncated understanding of the social and its implications for politics’ (2019) 26(3) *J. of Economic Methodology.* 243.

Alongside the rise of behavioural economics, the intellectual impetus behind NPM has waned,⁶⁶ and values have become a central to discourses in public management literature. Much of this stems from Moore's, *Creating Public Value*.⁶⁷ For Moore, it is not appropriate to judge the value of public sector activities by the yardstick found in the private sector (financial value reported to shareholders): '[t]he social values inherent in public services may not be adequately addressed by the economic efficiency calculus of markets'.⁶⁸ Moore emphasises the role of public managers: similar to managers in private corporations, they are key to producing and communicating value for their organisation – 'helping to discover and define what would be valuable to do'.⁶⁹ In PVM, public managers construct and refine value through interaction with politicians and citizens - articulating 'collective citizens' preferences and thereby redressing the 'democratic deficit' between public services and citizens.⁷⁰ However, like NPM, PVM still seeks to ensure public organisations are responsive, innovative, and effective. As it has been interpreted and implemented,⁷¹ PVM has developed in various different ways,⁷² and a lack of clarity exists over what it means in practice. However, broadly, it includes strategic planning, dialogue with citizens, and - because conventional democratic processes represent 'a very blunt mechanism for signalling complex preferences across a broad range of policy issues' -⁷³ measurement.

Arguably, the influence of behavioural economics and PVM, which challenge the NPM and its underpinning economics, are apparent in social value.⁷⁴ Endorsing an active role for managers in procurement departments to discover and realise a broader conception of value for the authority, the duty potentially signals a change of tack with respect to perceptions of these administrative actors, and how we might best regulate them. The duty is therefore regulation that places trust in procurement managers. It merely nudges them away from a lowest-price conception of value. Authorities must 'consider' social value, but, having done so, they are at liberty to decide not to do anything. In studying responses to the duty in practice, the article provides us with insight into an

⁶⁶ Dunleavy, op. cit., n.17, p.471.

⁶⁷ Moore, op. cit., n.18.

⁶⁸ A. Hefetz and M. Warner, 'Privatisation and its reverse: explaining the dynamics of the government contracting process' (2004) 14(2) *J. of Public Administration Research and Theory*. 171, 174 (quoted in O'Flynn (2007), op. cit., n.17, 358).

⁶⁹ Moore, op. cit., n.18, 21.

⁷⁰ L. Horner et al., *Deliberative democracy and the role of public managers* (2006) Work Foundation, p.7.

⁷¹ D. Coyle et al., *Public value in practice: restoring the ethos of public service* (2010) British Broadcasting Corporation; K. Clark (ed.) *Capturing the public value of heritage* (2006) English Heritage.

⁷² C. Talbot, 'Public value—the next "big thing" in public management?' (2009) 32(3) *International J. of Public Administration*. 167, p.168.

⁷³ G. Kelly et al., *Creating public value: an analytical framework for public service reform* (2002) Cabinet Office, p.31.

⁷⁴ A. Turrell, *Applying public value management theory to procurement* (2017).

emerging system of regulation, and, rules and regulation in the post-NPM. The next section details the empirical work underpinning the analysis in parts two and three.

3. *Method*

The article is informed by qualitative empirical research conducted between December 2015 and March 2017. The research initially set out to find out about responses to legal uncertainty around the use of procurement to achieve social objectives under European Union law; but, as data collection progressed, in accordance with an inductive approach - with incoming data informing and guiding ongoing data collection and analysis - the research evolved. This occurred mainly in reaction to the weight interviewees attached to obligations deriving under the Public Services (Social Value) Act 2012. In contrast to perceptions in the academic literature (the 'law in books'), participants downplayed the relevance of restrictions and uncertainty in European Union law. The study entailed 52 semi-structured interviews with actors with practical experience of local government procurement. This section of the article provides details on the basic theoretical framework used to understand the data, and data collection.

In keeping with an econo-socio-legal perspective, the analysis of the interview data is informed by the sociological literature on organisations.⁷⁵ The analysis utilises Fligstein and McAdam's field theoretic approach to understand government procurement markets. A field, according to Fligstein, is a 'local social order'.⁷⁶ It refers to 'the socially constructed normative worlds in which organisations exist'.⁷⁷ Fields – such as markets – therefore, are sites within which actors – with shared understandings about the field – are aware of, and interact strategically with, one another. 'Strategic action' refers to attempts by 'social actors to create and maintain stable social worlds by securing the cooperation of others'.⁷⁸ Social skills are important, as socially skilled actors are best able to secure the cooperation of others.

As a field, local government procurement markets comprise local authorities (buyers) and potential suppliers/bidders (sellers). The boundaries of the field – the actors it encompasses – are shaped on a situational basis, according to the issues at stake. Thus, with regard to the social value issue, the field includes a host of additional interested organisations, including external advisors –

⁷⁵ M. Fourcade, 'Theories of markets and theories of society' (2007) 50(8) *American Behavioural Scientist*. 1015.

⁷⁶ N. Fligstein, 'Social skill and the theory of fields' (2001) 19(2) *Sociological Theory*. 105, p.107.

⁷⁷ M. Orru, et al., 'Organizational isomorphism in East Asia', in *The new institutionalism in organizational Analysis*, eds. W. Powell and Paul DiMaggio (1991) 361.

⁷⁸ Fligstein and McAdam, *op. cit.*, n.14, p.17.

solicitors and consultancy firms ('regulatory intermediaries')⁷⁹ – policymakers, including central government, as well as representative organisations, like the Local Government Association and trade unions. In the field, Fligstein and McAdam tells us that actors - including incumbents and challengers are constantly jostling for position: '[a]ctors make moves and other actors have to interpret them, consider their options, and act in response'.⁸⁰

The literature around organisational fields has tended to focus on the homogeneity of institutional actors, emphasising stability and inertia within fields. This article, however, prefers Fligstein and McAdam's conception of fields as dynamic spaces. They emphasise the broader field environment in explaining why fields emerge and change. Fields are embedded in complex webs of other fields, and, because of interdependence between fields, changes in one field can lead to instability in other fields - potentially provoking contention and resulting in new ways of doing things. In the present study, we see how the introduction of the social value duty was part of a disruption to the institutional settlement in the field. The fields perspective allows us to appreciate contests over the meaning of social value, and the way in which, through social interaction between field actors – regulatory conversations, a common understanding emerged.

In accordance with the above discussion, local government organisations in the market are themselves fields. In studying the inner workings of these organisations, the article benefits from Edelman's insights on law's social construction.⁸¹ The social value duty is (on paper) a light provision. Nevertheless, the procurement managers interviewed described, enthusiastically (in the main), important changes in practice that had occurred under the duty. This article details how the duty acquired meaning – describing the way in which this indeterminate law is socially constructed: it is given meaning in the real world as people (public sector managers and professional advisors) respond to it in different situations, through a 'process of extraction, interpretation and dissemination'.⁸² Edelman's work points to the role of lawyers and media sources in the dissemination of law, along with the opportunities for professional actors within organisations to construct the law for their employers, and hence influence the employer's response to it.⁸³

⁷⁹ K. W. Abbott, et al., 'Introducing regulatory intermediaries' (2017) 670(1) *The Annals of the American Academy of Political and Social Science*. 6.

⁸⁰ Fligstein and McAdam, *op. cit.*, n.14, p.12.

⁸¹ L.B. Edelman et al., 'Legal ambiguity and the politics of compliance: affirmative action officers' dilemma' (1991) 13(1) *Law & Policy*. 73.

⁸² L.B. Edelman et al., 'Professional construction of law: the inflated threat of wrongful discharge' (1992) 26(1) *Law & Society Rev.* 47, p.48.

⁸³ *id.*

Adopting a purposive sampling strategy, we identified legal advisors with experience of advising on the conduct of local government procurement processes. We carried out sixteen interviews, between December 2015 and August 2016, with solicitors with the necessary experience. Previous research suggests that external legal advisors are well placed in the regulatory field to provide broad-ranging information on the interpretation and application of the law by clients;⁸⁴ here, however, incoming data quickly reached a point of saturation: although legal advisors could talk confidently about general trends and concerns for local government procurers, such as pressures from austerity, they were often not privy to the formulation of policy, and decision-making, on social procurement, which would tend to be carried out within specific procurement departments, sometimes assisted by inhouse lawyers. If lawyers were brought in, this would tend to be at a later stage, when the authority was encountering problems, after decisions on this issue had been taken.

In the United Kingdom, local government is made up of different types of local authority, which function to provide services in accordance with powers and duties granted to them under statute.⁸⁵ In this study, we targeted local councils, due to the financial significance of their procurement, their prominence in local communities, and their democratic and political nature. There are 353 local councils in England, including 36 metropolitan boroughs, 32 London boroughs, 55 unitary authorities, 27 county councils and 201 district councils, and also the City of London Corporation and Isles of Scilly.⁸⁶ In addition, London has the Greater London Authority. There are also 22 authorities in Wales, 32 in Scotland, eleven in Northern Ireland, and devolved administrations in these territories. Under the devolution legislation, procurement policy is not a reserved power. Despite a great number of similarities in law and policy, there are important differences across the different jurisdictions, and therefore the article confines itself to the situation in England.

Procurement managers within local authority procurement departments were in a strong position to provide insights into the law in practice. 31 interviews were carried out, between April 2016 and January 2017, with senior figures in local government procurement departments. In identifying participants, we targeted councils in urban areas (based on population figures), where social concerns would be strongest. The authorities taking part therefore tended to be the larger, unitary authorities (including London Borough Councils) (29/31 interviewees), and the Labour Party had control of most of the councils.

⁸⁴ E. Aspey and R. Craven, 'Regulating complex contracting' (2018) 81(2) *Modern Law Rev.* 191, p.199.

⁸⁵ Local Government Act 1972, as amended.

⁸⁶ <<https://www.lgiu.org.uk/local-government-facts-and-figures/#how-many-councils-are-there>>. Also see *The municipal yearbook* (2018).

The procurement managers interviewed were not the typical actors found in socio-legal studies in administrative law – ‘street-level bureaucrats’. The procurement function has become increasingly professionalised. In participating authorities, the vast majority of procurement (that had not been outsourced) is carried out by a centralised procurement department on behalf of internal clients (the service area needing to procure), and is overseen by qualified individuals. This professionalisation enabled procurement managers to claim expertise over procurement matters, including legal matters, tending to give them enhanced status within the organisation. In this regard, Procurement Manager 9 responded with hostility to the suggestion that procurement was ‘back office’: ‘... the knowledge and skill, the intellectual requirements, the tensions ... it’s a really difficult job ... to do well, and, I would say this wouldn’t I, but the value of procurement staff in the public sector is grossly underestimated, grossly’. Procurement managers would play a critical role in the construction of the law for their organisations.

The procurement department’s culture and values was overwhelmingly commercial. The pressure on local government to find cost/efficiency savings under the NPM had been unrelenting,⁸⁷ especially so for procurement – an easy target for politicians seeking back-office savings. Interviewees recognised this aspect of their role to be fundamental: ‘... getting a good enough service for the lowest possible price is my job’ (P11). As might be expected, the language of the department was therefore very much ‘corporate managementspeak’ as opposed to ‘public bureaucratese’.⁸⁸ For example, when talking about the local authority’s social objectives, procurement managers would frequently refer to this as ‘CSR’ (Corporate and Social Responsibility), generally associated with private corporations. In addition, many of the procurement managers had experience of working in the private sector:

[I]n the [private sector], I sourced [inputs] for [product], setting-up a brand-new company on the doorstep. Before the factory was even built ... I’d sourced [updated product’s input] in Slovakia because it was cheaper. ... [T]hat decision was going to kill the factory, and I knew that. Did I care? Not one iota. I’ve got cheap [input]. Did I have any consideration for the social, economic, environmental wellbeing of the locality? No... [T]he reality was the hard, commercial numbers made the decisions. ... [My counterparts in Barcelona] were saying, ‘do you realise what that’s going to do to the local economy?’. Do I care? ... No, I don’t. (P9)

⁸⁷ P. Gershon, *Releasing resources to the front line: independent review of public sector efficiency* (2004).

⁸⁸ C. Hood and M. Jackson, *Administrative argument* (1991), p.189.

These actors saw themselves as part of a professional procurement community, as much as part of a public-sector community. As will be seen, the above features, distinguishing procurement managers from the frontline decision-makers typically encountered in socio-legal studies, were critical to the framing of an organisational response to social value; procurement managers were minded to do so in a commercial manner.

In addition to lawyers and procurement managers, based on incoming interview data, further interviews were carried out with individuals representing specialist social value organisations (four interviews), which offered consultancy services to local government, and, in two cases, also represented and lobbied on behalf of third sector suppliers. Also, one further interview was carried out with representatives from a policymaking organisation.

THE EMERGENCE OF SOCIAL VALUE RATIONALITY

1. *Take-up*

Lord Young's review, in 2015, reports back positively on the operation of the social value duty, though there are concerns over a lack of awareness and take-up.⁸⁹ The concerns relate mostly to smaller authorities (such as, district councils) and central government,⁹⁰ which lacks a local constituency and is, arguably, not as accessible for the regulatory conversations explained in part three, below. Only three of the procurement managers participating described their organisation's response in this way:

... [T]hey wrote a policy, which is a ... kneejerk reaction in local authorities to most things. It's a very good policy ... [F]or the most part, it ... sat on the shelf. ... As with most policies, you ... launch them singing and dancing, don't you? ... [F]our years later you might not have done very much (P25)

The vast majority of the procurement managers recognised social value to have become a prominent part of the culture of their procurement department, if not throughout the whole organisation.

Much literature on regulatory compliance presents legal rules as obstacles that organisations must surmount, which they will seek to do in the most efficient manner. This study is different because,

⁸⁹ Cabinet Office, op. cit., n.37, pp.16-24.

⁹⁰ Social Enterprise UK, Procuring for Good (2016), p.12.

to comply, regulated actors need do very little – they must consider the potential for social value. Even if they fail to do so, legal consequences are remote.⁹¹ Despite this, the interview data reveals that, since the introduction of the social value duty, procurement practice altered markedly; noticeably, the entire language around social procurement has become modernised – now embracing ‘SMART’, ‘sustainability’, the ‘circular economy’, and the like. This section of the article discusses a new approach to procurement emerging in local government. This new approach contrasts with a traditional approach to pursuing social measures, typified, in the recent past, by policies promoting national and local living wage campaigns via contractual clauses.⁹² Though such practices are becoming eclipsed by emphasis around social value, against this backdrop changes to practice can be most clearly discerned.

2. *What is social value?*

In formulating policy on the duty, procurement departments were required to think about what social value actually was, and what the duty requires them to do. In this section, we see the economic and political climate shaping the meaning of the duty – and the types of measures pursued in its name; in essence, crises in neighbouring fields, would reshape understandings within local government and the market. In view of local government austerity, in particular, which was focusing political attention on the local economy (the ‘local pound’), social value came to be recognised as local, cost-neutral and commercially proportionate, and measurable.

As government has looked to its contracting powers to promote social objectives, typically, the legal debate has focussed on the scope for doing so under European Union law.⁹³ European Union procurement law is in place to counter trade barriers, such as national bias in awarding public contracts. It comprises general rules and principles, deriving from the treaties, and detailed procedural rules, based on principles of non-discrimination, transparency and equal treatment, which are implemented in domestic law through statutory regulations.⁹⁴ The European Union regime applies to local government contracts, provided the contract meets specified financial thresholds, and is not excluded.⁹⁵

⁹¹ S. Arrowsmith and R. Craven, ‘Public procurement and access to justice: a legal and empirical study of the UK system’ (2016) 6 *Public Procurement Law Rev.* 227; D. Pachnou, ‘Bidders’ Use of Mechanisms to enforce EC Procurement Law’ (2005) 14 *Public Procurement Law Rev.* 256.

⁹² C. Barnard, ‘Using procurement law to enforce labour standards’, ch.16 in G. Davidov and B. Langille (eds.), *The idea of labour law* (2011), 256; A. Koukiadaki, ‘The far-reaching implications of the Laval quartet: the case of the UK living wage’ (2014) 43(2) *Industrial Law J.* 91.

⁹³ S. Arrowsmith and P. Kunzlik (eds.), *Social and Environmental Policies in EC Procurement Law: new directives and new directions* (2009).

⁹⁴ 2015 Regulations, *op. cit.*, n.33.

⁹⁵ Reg.3.

The research interviews took place at a time when new regulations, implementing recent European Union-level reforms,⁹⁶ were entering into force. These reforms sought to clarify significant grey areas in relation to the possibilities around sustainable procurement.⁹⁷ The ‘sustainability’ tenor of the reforms had filtered through to procurement managers: the message they extracted about the law, and legal risk surrounding social procurement, was positive; in general, European Union law was not perceived as restraining a commercially sensible approach to social value.

European Union law offers a toolbox of procedures for awarding contracts, and sustainability considerations may feature at different points in procedures.⁹⁸ For simplicity, the explanation here focuses on the most commonly used ‘restricted’ procedure.⁹⁹ The procedure formally begins when the authority advertises the contract European Union-wide in the official journal.¹⁰⁰ The authority may then invite, from qualifying firms expressing an interest in bidding, a minimum of five bidders¹⁰¹ to tender for the contract.¹⁰² In the tendering stage, bidders submit tenders, against a technical specification drawn up by the authority in advance,¹⁰³ and the contract must be awarded to the ‘economically most advantageous tender’.¹⁰⁴ As the process progresses, there are a number of points at which different social considerations may feature. These include in the period prior to formally starting the process – in relation to what to go out to the market to buy and what to stipulate in the specifications – as well as during the process, in qualifying requirements or in the criteria used to select between bidders in shortlisting or award.

Traditionally, labour matters have been pursued using contract performance conditions – for example, winning firms contractually undertaking to pay the workforce a living wage.¹⁰⁵ This is how local authorities, such as the Greater London Authority, initially attempted to promote the non-statutory living wage.¹⁰⁶ The approach is attractive because it makes a statement about an authority’s commitment to raising standards; but, arguably, it is a blunt method that depends upon

⁹⁶ 2015 Regulations, *op. cit.*, n.33.

⁹⁷ R. Caranta, ‘The changes to the public contract directives and the story they tell about how EU law works’ (2015) 52(2) *Common Market Law Rev.* 391.

⁹⁸ S. Arrowsmith, *The law of public and utilities procurement: volume two* (2018); C. Barnard, ‘To boldly go: social clauses in public procurement’ (2016) 46(2) *Industrial Law J.* 208.

⁹⁹ 2015 Regulations, *op. cit.*, n.33, reg.28.

¹⁰⁰ Reg.26(2), and (8)-(10).

¹⁰¹ Regs.28(4) and 65.

¹⁰² Reg.28(3).

¹⁰³ Reg.42.

¹⁰⁴ Reg.67.

¹⁰⁵ Reg.70.

¹⁰⁶ Barnard, *op. cit.* n.92; Koukiadaki, *op. cit.* n.92.

effective enforcement.¹⁰⁷ In European Union law, there has generally been perceived to be most leeway at this point: even prior to the 2014 reforms, the text of the Directive explicitly admitted the permissibility of social clauses. The Court of Justice has also been willing to accept such clauses, subject to limitations that they are linked to the subject matter of the contract, ruling out clauses that relate to bidders' general corporate policies; that bidders are notified of the clause upfront, in the contract advert or other bidding documents; and, also, that the clause is generally compatible with European Union law (for instance, it should not discriminate).¹⁰⁸

In the decade preceding the social value duty's introduction, legal uncertainty surrounding living wage clauses was heightened due to Case C-346/06, *Rüffert*.¹⁰⁹ As such, by the time of the interviews, a blanket approach to mandatory living wage clauses had come to be recognised, by all, as legally and commercially controversial,¹¹⁰ and heat had lifted from the issue due to the Chancellor announcing a much criticised national 'living wage' in the 2015 budget.¹¹¹

Participating authorities, nevertheless, sought to project a forthright commitment to the living wage; however, in general, living wage clauses were thought of as distinct from social value. Bidders might be persuaded to voluntarily accept living wage clauses; however, living wage clauses tended to be acceptable only in high-paying sectors, such as construction, where a living wage (or a wage close to it) was already an industry norm. In sectors where this was not the case, such as social care, the living wage, which would ultimately be shouldered by the authority in the contract price, was often deemed unaffordable:

...[T]he living wage foundation's living wage, not the national living wage, for clarity [laughs]. So yeah, we've signed up to that and ... are embedding it into contracts ... [W]e've made an exclusion for social care because the cost impact ... would be too great. It would cost us about £12 million a year, which, in the current climate, we can't do (P1)

In contrast, policies on social value, devised by procurement departments, would be based around the specific authority's wider strategic objectives – found in its corporate plan. The policies would

¹⁰⁷ Arrowmith, op. cit. n.10, 242.

¹⁰⁸ The line of Court of Justice case law on the subject stems from Case 31/87 *Beentjes v State of the Netherlands* [1988] ECR 4635.

¹⁰⁹ Case C-346/06 *Rüffert* [2008] ECR I-1989; and subsequent cases: Case C-549/13 *Bundesdruckerei*; Case C-115/14, *RegioPost*. Sánchez Graells (ed.), *Smart Public Procurement and Labour Standards* (2018).

¹¹⁰ Using procurement processes to encourage living wage principles: final report prepared by Centre for Economic Strategies: presented to Manchester City Council (2014).

¹¹¹ National Minimum Wage (Amendment) Regulations 2019, S.I. no.603.

need to be signed-off by members (politicians), but this would invariably be forthcoming because the priorities sitting behind the duty – as operationalised by these local government actors – were local; as such, they would mirror the authority’s political priorities - relating to, for example, unemployment; skills and training; supporting local businesses; and tackling deprivation:

... we’ve just tried ... to ensure we are getting that local benefit. ... [I]n the old days, you had some big corporations and they say things like for every ton of toilet roll we sell, we’ll plant a tree in Venezuela ... We’ve kind of come back to real grass roots local delivery (P26)

Attention was shifting to the local economy, and this meant that a living wage requirement, which could run counter to local objectives – for example, if unaffordable for smaller local businesses – was not accepted as social value. It was also recognised that benefits from a living wage were not certain to flow to the local community (for example, workers might live elsewhere): ‘[y]ou buy ten beds and three other authorities buy the others and they don’t pay the living wage. You actually can’t pay the living wage for yours without subsidising theirs, which we can’t do under law, never mind ethically’ (P21).

In explaining their approach from a legal perspective, the procurement managers interviewed often fell back on European Union general principles, such as non-discrimination, proportionality and transparency.¹¹² The emphasis given, in interviews, to ‘the local’ in interpreting social value was striking. However, it was in tension with an essential message they had taken about non-discrimination: that specifying ‘local’ was discriminatory and, as such, unlawful. Thus, many noted how tender documents needed to avoid such language: ‘[y]ou’re ... constrained in as far as not being able to use the word “local”. I mean, that’s always a pain in the neck’ (P17). Despite this, though authorities might avoid ‘local’, they did not regard themselves as inhibited from achieving local objectives:

... [W]e recognise that we can’t go out and say, ‘we want ... an organisation that’s based within post codes whatever’, because that is ... clearly anti-competitive. ... [W]e can do it through the way we ask the questions and set out the evaluation criteria. Where we have a couple of bidders who are closely matched ..., if ... the difference between them is one organisation uses a local supply chain, for example, or one organisation employs lots of people locally ... then we ... take a view that that ... should be rewarded (P20)

¹¹² 2015 Regulations, op. cit., n.33, reg.18.

Local benefits – such as those to do with use of local labour (such as long-term unemployed), utilising local supply chains or establishing a place of business in the local area – are not inevitably precluded under European Union law. Legality, however, depends on the specific contract, and precisely how this is carried through in the procurement process.¹¹³ In particular, the discriminatory nature of such a measure (if any), potential justifications, and the degree to which the measure is linked to the subject-matter of the contract require careful consideration.¹¹⁴ Nevertheless, in general, the specifics of this European Union regulation did not inhibit procurement managers when thinking about social value. Often, this was because procurement managers did not appreciate these details (or, at least, would prefer to side-step the subject in the interviews), and, on the few occasions that they did, the risk of challenge was perceived as sufficiently low so as not to restrain such activity. In addition, despite the primacy of European Union law, there was a sense that the legal nature of the social value duty provided a justification for pushing the boundaries of the rules.

In addition to local, procurement managers saw social value as cost-neutral – that is, a feature distinguishing it from classic social measures was that the cost of social value was not passed on to the authority in the price. This is highly debatable, but is attractive for procurement managers and authorities operating in the austerity climate. As a result, social value crowded out measures with an obvious cost, historically associated with ‘the social’ – such as labour pay and conditions: ‘... [T]he number one question ... is: ‘can we pay them less?’. ... [T]hey’re faced with quite unbelievable pressures on their finances to get a lower-cost workforce’ (L2).

Similarly, proportionality was important in these descriptions of social value. However, though spoken about alongside the concept of proportionality found in European Union law, this was a businessperson’s understanding, in which social value was to be based on a ‘commonality of understanding’ of what was acceptable in the market: ‘[austerity] focuses ourselves ... on what is proportionate and relevant and trying not to ... over specify ... because, you know, we can’t push up cost too much’ (P1).

Recognising social value as cost-neutral and proportionate, tended to favour big suppliers, suppliers with established, resourced CSR policies. Procurement managers described how social

¹¹³ S. Arrowsmith and P. Kunzlik, ‘EC regulation of public procurement’ in Kunzlik and Arrowsmith, *op. cit.*, n.93, p.55.

¹¹⁴ C. Barnard, “‘British Jobs for British Workers’: the Lindsey Oil Refinery dispute and the future of local labour clauses in an integrated EU Market’ (2009) 38(3) *Industrial Law J.* 245; Barnard, *op. cit.*, n.98.

value was about finding out about, and piggybacking on, such CSR. The big suppliers were often in the strongest position to produce a convincing statement about their social value:

... [it] has been led by ... those companies doing those big projects and they're the larger companies; so, they're well bought into the concept of social value, apprenticeships, ... job creation and local supply chains ... And, ... the big companies are there, whilst ... SME[s] ... don't ... have the infrastructure, knowledge and the systems to do it (P1)

However, though convenient, this thinking was being challenged. Big business could provide a vehicle for local objectives, but, rather than 'transformative', it often meant that social value was bland – revolving around training and apprenticeships. Alternatively, for some, locally based suppliers, especially third sector suppliers, were in the strongest position to deliver social value, sometimes in simply existing and operating in the local community, and best practice under the duty required effort, on the part of authorities, to build understanding and skills amongst these bidders.

The modern version of social procurement also has a utilitarian flavour: in addition to the way in which 'good' social value was local and cost-neutral, there was ever-growing emphasis for social objectives that could be captured in numbers and measured,¹¹⁵ which is touched upon in Young's review¹¹⁶ and highlighted in the 2019 consultation.¹¹⁷ Quantification had many attractions: numerical data might enable the procurement department to better evaluate supplier performance, and also meant they were in a position to report back to stakeholders with statistics on social value achievements.

A small minority of procurement managers expressed caution about the robustness of this quantification: '[f]or us, it's more about the story of individuals - rather than saying, ... "for every pound [authority] spends we get £1.50 back in social value". Because it's all nonsense. It's all made up' (P9). Most, however, were excited by this numerical data, and there were signs that authorities were steering towards social aspects that are more readily quantified (such as training and apprenticeships), over qualitative social value.¹¹⁸

¹¹⁵ See T. M. Porter, *Trust in numbers: the pursuit of objectivity in science and public life* (1995).

¹¹⁶ Cabinet Office, *op. cit.*, n.37, pp.16-24.

¹¹⁷ Cabinet Office, *op. cit.*, n.8.

¹¹⁸ On measurement 'interven[ing] in the social worlds it depicts' see W. Nelsen-Espeland and M. Stevens, 'A sociology of quantification' (2008) 49(3) *European J. of Sociology*. 401, 412.

3. *Complying with the new legal duty*

The Young review notes a lack of consensus on best practice, and around what, legally, the authority can do.¹¹⁹ This is not readily apparent in relation to our procurement managers, as participating authorities were moving in a common direction, and thinking similarly about social value. Nevertheless, there distinctions were apparent, especially with some early-adopters, or authorities that had invested in social value (for example, benefiting from external expertise), advancing further along the path. Thus, categories found in other research – ‘embracers’ and ‘adopters’, and ‘compliers’ and ‘bystanders’ –¹²⁰ are understandable.

Despite austerity, which might be expected to focus spending on price, 28/31 participating authorities, presented social value enthusiastically, in a good light. For example, many had policies going beyond the requirements of the Act (over-compliance), extending the duty to procurement not covered by the Act:

... the starting ... position is that we ... incorporate social value into all ... our contracts, regardless of ... value ... or whether they're goods, services or works, and if a [procurement] lead ... makes a decision not to incorporate social value then they must [make a] report ... and we'll scrutinise that (P26)

The most obvious response to the duty can be seen in the raft of social value documentation published, internally and externally - available on websites and sent out with tender documents during procurement processes by local authorities. These include policies and strategies; charters, to which suppliers can sign-up, supposedly, to display the affinity of their organisational values to the authority's; and checklists for procurement officers to refer at different gateway points in a procurement. In addition, ten of the participating authorities had appointed an individual to act as its ‘champion’ on social value issues (see part three). These actions are not legally necessary, but do serve to symbolise compliance.¹²¹ The procurement department wanted to be seen to be doing something, especially in the eyes of local businesses. In addition, such responses were associated with transparency, and therefore perceived to be good practice, as well as consistent with European Union principles.

¹¹⁹ Cabinet Office, *op. cit.*, n.37, 24-26.

¹²⁰ Social Enterprise UK, *op. cit.*, n.90, 3.

¹²¹ Edelman, *op. cit.*, n.81.

It was generally recognised that the duty's focus was on decision-making in the commissioning phase - in the run up to commencing the procurement. In keeping with PVM, it was accepted that, in this phase, best practice entailed dialogue – which might mean the authority scoping, with local residents, local businesses or other potential bidders, possibilities around how local objectives might be accommodated. However, social value was an important part of commissioning only in a minority of authorities. This tended to be where there was a close working relationship between individuals tasked with commissioning and those tasked with procurement (where they worked alongside each other in the department). For most, organisational obstacles – constrained resources and deadlines - stood in the way of best practice. For example, if a procurement need arose urgently, or the procurement department was given insufficient warning, there might not be time for meaningful pre-procurement work around social value.

In practice, the procurement process was the main point for including social value. Though contract conditions have traditionally been the standard mechanism for achieving social objectives, all participating authorities now looked to the award stage – '[social value] is not about clauses in contracts. ... [W]e're now saying, "put it in place without any fancy clause"' (P5). That is, it formed part of the criteria used to identify a winning tender, alongside price and quality.

A numerical weighting was attached to social value, either as a heading in its own right or within the quality criterion, typically between five and 20% (some boasted of, on occasions, going up to as much as 30%). In bidding against the criteria, bidders would be prodded with information about the authority's local priorities, and, in order to receive a score under the social value heading, would be required to set out how the bid might contribute desirable social value. Ideally, this could then be incorporated into the contract as key performance indicators, in which bidders might be financially penalised for failing to deliver on commitments.

The shift in focus from contract clauses to award was not regarded as especially risky from a legal perspective – mainly due to clarifications made to the European Union directives in 2014, part of domestic law in England since 2015. In particular, the rules clarify that, in determining the 'most economically advantageous tender', authorities may refer to '... criteria, such as qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question'.¹²²

¹²² 2015 Regulations, op. cit., n.33, reg.67(2).

The award stage, in contrast to contract conditions, potentially allows authorities to pursue values, but, to do so in a way that moderates between social outcomes and budgetary constraints – to achieve social objectives in an efficient manner. In adopting this approach, local authorities moved away from prescribing social measures to be met by external providers – as is often the case with contract conditions. Instead, whilst the authority would provide a general steer, the specifics around social value – and what was deemed achievable in a particular market – was left for bidders to determine. Bidders would be under competitive pressure to strike an attractive balance between social value and price – the most critical award criterion (invariably given the strongest weighting (over 50%)). For participating authorities, the method allowed them to catch innovative/alternative approaches in the market that they might not have been aware of. In addition, though questionable, social value practice was seen to answer a criticism commonly levelled at the inclusion of collateral objectives in procurement - that doing so is inefficient and the cost of non-commercial add-ons will be reflected in the price.

In contrast to traditional approaches, social value – framed by bidders (not the authority) at the award stage – represents a much more commercial take on social procurement. Also, in including social aspects at the award stage, these are brought into the competitive process.¹²³ The authority would be required to assess competing social value offerings alongside one another, as well as alongside price. Unsurprisingly, then, authorities were thinking about social offerings in a much more economic, quantifiable way (see above) - which touches upon a prominent theme in the academic literature: the extension of market rationality into non-market domains.¹²⁴

Numerical data had the potential to make multiple social value offerings, as well as social value and price, commensurable,¹²⁵ which, it was argued, would enable authorities to make better informed, objective award determinations. The hope was that, eventually, developments in data collection and analysis, would free authorities to give greater weighting to social value, with greater certainty around value for money and compliance with European Union law:

[W]e need to get better at metrics ... [I]f one company said to me 'we're going to give you five apprentices and ten work tasters', is that better or worse than three apprentices and ten work tasters? I don't know.

¹²³ N. Duxbury, 'Do markets degrade?' (1996) 59(3) *Modern Law Rev.* 331.

¹²⁴ M. Fourcade, 'Cents and sensibility: economic valuation and the nature of "nature"' (2011) 116(6) *Am. J. of Sociology.* 1721.

¹²⁵ W. Nelsen-Epseland and M. Sauder, 'Commensuration as a social process' (1998) 24 *Annual Rev. of Sociology.* 313

... [W]e've been working closely with [social value organisations] to try to get metrics ... so we can be ... very clear when we get bids back that that bid's worth 150k's worth of social value whereas that one's only worth 125k's worth; it's all open and transparent about the basis with which we've evaluated. Also, ... it's good for members and companies to be able to say, we've got X amount of social value ... The next phase ... is looking at how can we get social value not just to help us with apprentices and stuff like that, but to help us keep the social care home open or the library open (P19)

Ingraining quantification represents the next frontier in social value practice, according to the interview data, and several organisations in the market offer these services. In 2017, a national Social Value Taskforce (see below), together with the Social Value Portal (a social value specialist), launched a national Themes, Outcomes and Measures (TOMs) Framework, which seeks to set in place a common, minimum reporting standard for measuring social value across the United Kingdom.¹²⁶ This framework, which currently lists 17 outcomes and 35 measures, is endorsed by the government.¹²⁷ However, at the time of the interviews, few participating authorities were in a position to incur the cost of investing in advancing their 'social value measurement journey' (to employ the language of social value specialists).

In practice, corresponding with the Young review¹²⁸ as well as the seemingly unsophisticated proposals on metrics in the consultation,¹²⁹ quantification was, generally, underdeveloped. As described by the vast majority of interviewees, social value assessments at the award stage were invariably purely qualitative judgements, resembling an 'essay writing competition' between bidders, which would favour big suppliers, with CSR materials at hand, and it was clear that interviewees were uneasy about the objectivity of this.

Because of the persuasive power of price, the argument goes that converting social value into price represents an essential means of thinking more broadly about value in government. In this vein, when experimenting with methods of pursuing the living wage before funding pressures began to bite, a handful of authorities had invited bidders to submit variant bids – each bidder would submit two bids, a version of the bid with the living wage and a version without. The approach did not

¹²⁶ <<http://socialvalueportal.com/national-toms>>; <<https://www.local.gov.uk/our-support/efficiency-and-income-generation/procurement/achieving-community-benefits>>.

¹²⁷ Cabinet Office, op. cit., n.8, p.6.

¹²⁸ Cabinet Office, op. cit., n.37, pp.26-28.

¹²⁹ Cabinet Office, op. cit. n.8, pp.26-28. See further A. Sanchez-Graells, 'Response to UK Cabinet Office consultation on "social value in government contracts"' (2019) <<https://www.howtocrackanut.com/blog/tag/draft+policy>>.

catch on, but authorities described how, when adopting this approach, the living wage bid was always accepted by executive decision-makers, regardless of its higher cost – with cost potentially serving to concentrate minds around a particular social problem, such as funding social care.

In this section, studying social value practice, we see the field gravitating towards common ways of thinking about what social value is. This is despite the vagaries, and weak nature, of the legal duty. In particular, social value was a means of achieving the authority's local objectives, it was cost-neutral, and quantifiable. The meaning that is attached to the legal duty did not develop through individual procurement departments working in isolation. In the next section, we discuss how the duty was constructed, and spread, through 'conversations' between various field actors.

EXPLAINING SOCIAL VALUE RATIONALITY

1. Strategic action

In the above response to social value, actors are not simply doing the minimum necessary to comply – which we might expect under basic deterrence theories. Authorities are going far beyond the basic legal requirements. Having discussed what social value practice is, this section of the article explains how this light legal duty contributed to the response. It does so by attaching importance to 'conversations' between actors in fields – organisations and the wider market. The section begins by looking at conversations occurring within local authorities. It then looks at external reasons – the strategic actions of actors in local government contracts markets. We see social value altering the dynamics of the field: it brings particular actors – notably specialist social value organisations – into prominence, and gives legitimacy to social value conversations.

2. Strategic action in local government

From approximately 2010 (before the duty), elected members (politicians) were placing pressure on their procurement departments to demonstrate how they contribute to the authority's broad, community objectives. The duty was thus brought in at an opportune moment, and all, but three, procurement managers accepted it was now a prominent part of their authority's procurement.

In many participating authorities, the legal duty enhanced the status of the procurement department within the organisation. The department already claimed a position of expertise, within the organisation, over procurement matters. This is a commercial function, and cost savings have been the sole measure of judging performance. The motivation for including non-commercial policies in procurement has typically come from elsewhere in the organisation - politicians. For

instance, it had been politicians, such as local mayors, often committing authorities to living wage campaigns. The procurement department, sometimes in collaboration with lawyers, would then need to reconcile the delivery of such commitments with commercial considerations and legal compliance. The department therefore – tending to be commercially minded – saw their role (and expertise) as about moderating the political demands placed upon them, identifying commercial and legal risks and cautioning against an overly political use of procurement.

In the eyes of the procurement managers, social value endorsed a different view of the procurement function. The duty shifted the initiative over the instrumental use of procurement into their domain of expertise. In contrast to past approaches (wage clauses), responses to social value tended to originate from the procurement department, not politicians. Procurement managers described how the legal nature of the duty gave them ‘confidence’ to take it upon themselves to devise policies on social value. They could point to legislation, as the reason for their actions, and would begin to explain procurement’s role as about complementing the authority’s broader strategy for the local area. With social value promoted as win/win – achieving community objectives, whilst also efficient and cost-neutral – buy-in from politicians was inevitably forthcoming. Its selling points were significant, in view of austerity, when other social measures, like the living wage, might be proving difficult/costly:

[W]e have no money. Every week I go to a meeting where it’s, ‘Yes, you’ve got to make more savings ...’ ... [M]embers are keen on social value because it makes them look good ... [I]t’s all about the peripherals, the ‘nice to have’ extra ... [T]he cost of labour benefits is too high to bear (P24)

With authorities scaling back discretionary services (like library services), social value procurement was something positive that local government executives could publicise and celebrate – with procurement managers invited to present to different parts of the organisation on their achievements.

Familiar language used to describe a successful approach was that social value had become ‘embedded’ within the organisation’s culture. Early on, there may have been tensions between procurement departments and internal clients – with procurement wanting to talk about social value possibilities when the need to procure arose, and clients with other priorities, for example simply acquiring what it needed within a reasonable timeframe and/or protecting its budget. However, these were teething problems that would be ironed out as social value became routine.

The legal nature of social value (despite its vagaries and weaknesses) gave the procurement department leverage in discussions with reticent clients.

The social value champions found in several authorities tended to be younger department members who had shown particular interest in social value – one, for example, had a background in environmental campaigning. These actors were influential, claiming expertise over the meaning of social value and the requirements of the legislation. They received funding to gain expertise in social value – attending training and other events, and established networks of ‘champions’.

The apparent enthusiasm around social value is, arguably, compatible with rational choice. Though the actions appear public spirited, they can also be looked upon as self-serving. In emphasising the need to comply with the duty, which falls within the procurement department’s sphere of expertise - the department enhances its position in the organisation. The legal duty enabled the department, which often finds itself portrayed as back office, to play a more positive role in contributing to the authority’s values: ‘it gets us really excited ... [W]e’re not just seen as pen pushing boring people who say no all the time’ (P8). The procurement managers appeared to relish the opportunity presented by social value. There was keen interest in hearing about the latest innovations, about what others were doing, and how their department matched up to other authorities. This touches upon a dynamic of competition between authorities/procurement departments, which was cultivated by external organisations (below).

3. Strategic action in the market

The key question for procurement managers in developing a response to the new legal duty was – ‘what is social value?’. The matter is left open in the legal texts, including soft law. For an answer, most would look to the market and the various firms of competing social value specialists/consultants¹³⁰ that claimed ownership of the phrase.

In general, solicitors’ firms were slow to react to the commercial opportunity social value presented, and lawyers taking part in the study tended to provide, arguably, a dated view of practice. The market for legal advice in this area had been cornered, from an early point, by one particular senior solicitor at a medium-sized law firm outside London, who had been closely involved with the creation of the legislation. Numerous procurement managers spoke about how the authority

¹³⁰ Examples include the Centre for Local Economic Strategies; Social Enterprise UK and the Social Value Hub; Social Value UK; the Social Value Portal; and Seratio.

had received advice on social value from this solicitor: ‘... [H]e was ... the big legal forerunner with it all wasn’t he? I’ve had him involved’ (P31).

There were strong networks linking actors with interests in local government procurement. These networks were facilitated by social media, as well as associations of procurement professionals, such as lawyers¹³¹ and procurement managers, for example with regional networks for heads of procurement and social value champions: ‘[authority] is part of [region], so we do quite a lot of sharing best practices with other [region] heads of procurement’ (P20). These networks provided the means by which a common way of thinking about social value could spread. In these networks, events – bringing individual actors together – are significant. Though often attended for career advancement, such events would open the door for sharing narratives on social value (between procurement managers, and with legal professionals). In addition, actors claiming expertise in social value – and with a particular agenda for social value - would be given a platform at such regional events: ‘[t]here’s a [area] heads of procurement, which I’m on. We’ve talked about this occasionally as an item on the agenda ... We’ve had a few social value people come and talk to us’ (P11). Thus, procurement managers, in discussing practice, would frequently give examples of what other authorities were doing, based on what they had been told by contacts elsewhere: ‘... someone ... went to events that had something ... by [social value specialist] and we had the [social value specialist] who were here for a day doing some seminars, and ... I’ve got contacts in [area] through them’ (P30).

The legal duty had bolstered the position of various specialist social value organisations in the field. The duty was a hook that could engage procurement managers and/or local politicians. Procurement managers would describe the ‘explosion’ of events at around the time the duty was introduced: ‘[A]ll these seminars were cropping up everywhere. ... I’m not one for going to loads of seminars, but I attended a couple, and I just thought it’s really interesting’ (P5); and, they would also describe running into familiar faces and familiar themes and messages at various training workshops and conferences: ‘[T]hey go to every bloody conference going and if there’s ever a free one they’re always there giving the same presentation year after year ... You go first time and think, ‘this is fantastic’, ... but by the third time ... But, we’ve taken it and run with it’ (P13).

These social value organisations would thus come to the fore, steering procurement to a specific understanding of social value – such that, in interviews, the same language was used to talk about

¹³¹ <<https://www.procurementlawyers.org.uk/>>

social value, and it would be spoken about as if had a settled meaning. In addition to direct conversations, these organisations would interact with the field by distributing pamphlets, staging events – training workshops, and national and international conferences – holding various social value award ceremonies, as well as offering certification and providing consultancy services. In particular, a strategy for advancing conversations on social value, led by specialist social value organisations, was to develop various local social value ‘taskforces’ around the United Kingdom, which would comprise of social value specialists, local authorities, and often representatives for local businesses and the third sector.¹³² This concept would progress into a national Social Value Taskforce, involving 40 organisations, local authorities and other public bodies (such as Network Rail), along with social value specialists and business (Balfour Beatty), which would be supported by the Local Government Association and central government (Cabinet Office and the Crown Commercial Service);¹³³ traditional social actors, like trade unions, were not (formally, at least) part of these conversations. The main output of the taskforce has been to develop and endorse the Social Value Portal’s TOMS framework (above), which is promoted by the Social Value Portal as ‘strongly aligned’ with the ‘principles of social value’¹³⁴ (defined by Social Value UK – ‘a national network for anyone interested in social value’, and part of Social Value International).¹³⁵

The government maintained a light steer on the development of the law. Rather than regulating the field more directly, government facilitated the activities of select social value organisations. For instance, government associates itself, alongside the accountancy firm KPMG, with Social Value UK’s ‘social value awards’,¹³⁶ which take place each year at a Social Value Summit; this acts on a recommendation by the Young review.¹³⁷ In addition, under the Social Value Act: Implementation and Measurement Project, £30,000 was provided for eight local authority procurement departments to work with different social value organisations.¹³⁸ The government also endorses guidance produced by specific social value organisations.¹³⁹

¹³² Examples include the West Midlands Social Value Task Force (see <<https://governance.wmca.org.uk/documents/s624/Appendix%203.pdf>>) and the Durham Social Value Taskforce (<<https://democracy.durham.gov.uk/documents/s41424/Durham%20Social%20Value%20Taskforce.pdf>>).

¹³³ <<http://socialvalueportal.com/social-value-taskforce/>>.

¹³⁴ B. Carpenter and A. Mizia, Exploring the alignment of the social value principles and the national TOMS framework developed by the Social Value Portal (2018).

¹³⁵ <<http://www.socialvalueuk.org/about-social-value-uk/>>.

¹³⁶ <<https://www.gov.uk/government/publications/social-value-act-information-and-resources/social-value-act-information-and-resources#introduction>>.

¹³⁷ Cabinet Office, op. cit., n.37, p.10

¹³⁸ Cabinet Office, op. cit. n.38.

¹³⁹ Department for Culture, Media and Sport, The Public Services (Social Value) Act 2012: an introductory guide for commissioners and policymakers (2018), p.10.

An element of competition over social value can now be seen in social procurement. Certain authorities that had invested in working with social value organisations view themselves, and are viewed by others, as entrepreneurs in the field; they are celebrated in case studies and/or with awards, and also recognised in the press: ‘I do now work closely with the [Greater London Authority] because ... they are always ahead of us and I really aspire to be as advanced as they are’ (P17); ‘[w]e’re keen to learn as well. We’ve watched what’s happening in Birmingham ... quite a lot’ (P23). The awards, in particular, were effective in harnessing a competitive undercurrent to social value – in which there was a strong desire to be recognised amongst departments and individuals, especially champions.¹⁴⁰ In a broader perspective, these developments may be understandable given the austerity climate: procurement departments are under a constant threat of funding reductions, and most had already been downsized (some significantly) by the time the interviews took place.

CONCLUSION

This article has reported on and analysed findings from qualitative interviews undertaken in the context of local government procurement. The study focused on the way in which actors in practice interpreted and applied the law on social value— a legal duty, introduced in 2013, which merely requires government to ‘consider’ how its procurement activities might improve the economic, social and environmental well-being of the area.

The qualitative data suggests that, under the duty, dramatic changes occurred in the way procurement departments in local government approach the inclusion of social objectives in procurement. In particular, social value came to be understood as something different from traditional social measures, such as those to do with labour pay and conditions: social value was local, cost-neutral and proportionate, and measurable. In addition, in contrast to mandatory contract conditions, at one time a popular means of pursuing social measures, social value was to be pursued at a different point in the procurement process, the award stage, a practice that cast social value offerings into competition with each other and with price.

The legal duty, however, is only a weak legal nudge: how did it have such an impact? In answering this question, we look to theoretical work on strategic action fields. The social value duty was

¹⁴⁰ P.N. Grabosky, ‘Regulation by reward: on the use of incentives as regulatory instruments’ (1995) 17(3) *Law & Policy*. 257.

introduced at a point when there was significant impetus for change coming from the wider field environment, due to the impact of recession and austerity on localities. The new duty was often met with a strong desire to make use of it, particularly from specialist social value organisations and local government actors. The meaning of the social value duty in practice would arise from a contest between competing visions for social value in the market and in organisations. The law was therefore shaped by strategic interactions, or conversations, in fields between procurement departments, politicians and suppliers in different markets, and between different procurement departments, lawyers and social value consultants (for instance meeting at networking events). The legal nature of the social value duty was important in altering the dynamics within organisations and also the market. It gave particular actors – procurement departments and social value specialists – leverage, strengthening their field positions.

The regulatory approach recognises a role for managers in procurement departments. That is, these managers are key to determining, and realising, value. In local government, regardless of legal rules and prohibitions, procurement will be used in an instrumental way to pursue organisational values; indeed, even prior to the social value duty, living wage clauses in government contracts was on the agenda. The social value duty, however, is encouraging a different response, one that discourages local government from simply imposing its values on the market. Instead, social value in practice is about local government recognising, and attuning its approach, to conversations in the field (the market). The government is not mandating a specific approach to, or meaning of, social value under the duty; instead, it seeks to steer the conversation, which, for example, it does by endorsing particular conversations (especially now around measurement) and behaviours - through case studies and awards. At present, in the austerity climate where local government has little room for manoeuvre, this approach is, for the government, proving successful.