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Managing dissonance: bureaucratic justice and public procurement

ABSTRACT

This article puts forward an analytical framework for understanding administrative justice. It does so by reading a leading approach, Jerry Mashaw's administrative justice models, in conjunction with the pragmatic sociology of Luc Boltanski and Laurent Thévenot, and their orders of worth framework. This provides an enhanced framework, which, whilst remaining consistent with Mashaw, offers additional insights and is particularly suitable for analyzing decision-making environments in the modern contracting state. The article illustrates the workings of the new framework by looking at a controversy under UK and EU law concerning the inclusion of labor objectives in public procurement. The discussion reveals a decision-making environment characterized by system dissonance. Actors must navigate different sets of tensions and trade-offs between competing normative and ethical visions for procurement decision-making.

Key words: administrative justice; orders of worth; procurement; discretion; public values

1. INTRODUCTION

In the administrative justice literature, Mashaw's socio-legal theorizing in *Bureaucratic Justice* (1983) provides one of the leading understandings of the organization of administrative decision-making. In his influential study of the administration of US disability welfare, rather than recognizing administrative justice in terms of the legal resolution of disputes, and focusing on courts and tribunals, Mashaw's concern is the internal law of the administration: actors'

day-to-day, conventional understandings of what amounts to just decision-making and good administration (1983, 16). Mashaw describes a plurality of decision-making models, "ideal types" (1983, 16), each capable of providing a legitimate basis for decision-making: "bureaucratic rationality", "professional treatment" and "moral judgment" (1983, 23-34).

Mashaw's models are a powerful analytical tool. However, since *Bureaucratic Justice*'s publication in 1983, the administrative state, in both the US and the UK, has undergone dramatic changes – notably, with the "new public management" (Hood 1991) and the "regulatory state" (Majone 1994). Due to contracting out, outsourcing and privatization, in the modern economy, private firms are now often at the heart of decision-making concerning the delivery of public services. Though there have been attempts to adapt Mashaw's approach to appreciate the variety of administrative decision-making, and the changing nature of public administration (Adler 2003; 2006; 2010; 2021; Halliday & Scott 2010; Kagan 2017; see generally Mashaw 2021), there is a lack of academic work into the administrative justice dimension of the contracting state (Benish 2014; Thomas 2021).

Public procurement, the backdrop in this article, is central to the contracting state: rather than providing, the public sector procures from the market, typically contracting with profit-seeking firms. This paper uses procurement decision-making – decision-making by administrative and commercial actors, not usually found in the literature on administrative justice – to build upon Mashaw's path-breaking theoretical work and strengthen our understanding of decision-making environments in the modern state. In the contracting state, including in procurement departments, in many situations, administrative decision-making entails a mix of civic and commercial considerations, which are not always in harmony (see Mashaw 1991, 518). The examination here therefore sheds light on how actors operate in this environment of "dissonance" (Mashaw 1983, 74). Dissonance, in this article, refers to situations when "diverse,

even antagonistic, performance principles overlap" (Stark 2011, 27) or, alternatively, "the battle of the norms" (Black 1997, 53).

The article builds upon *Bureaucratic Justice* by interpreting it in conjunction with the pragmatic sociology of Boltanski & Thévenot (1999; 2006). Boltanski & Thévenot's work is directly influenced by the value pluralism in the communitarian political theory of Michael Walzer (Walzer 1983). It appears Mashaw was influenced by similar intellectual trends (Adler 2003, 330). In terms of approach, both offering comparable notions of situated justice, there are striking parallels between *Bureaucratic Justice* and Boltanski & Thévenot's "orders of worth". Boltanski & Thévenot, for example, similar to Mashaw, outline a limited plurality of modes of justification, "orders of worth": civic, inspired, domestic, fame, market, and industrial.

Boltanski & Thévenot's work is a pragmatic sociology with routes in the French convention school, which originated from a group of heterodox economists working in Paris in the 1980s (Salais & Diaz-Bone 2008; Thévenot 2006). As this work has been translated, the popularity of the theoretical perspective has spread beyond France, and across the social sciences and humanities. However, despite Thévenot describing it as "law-friendly" in comparison to economics and sociology (2012), so far, its impact on legal studies has been only limited. Nevertheless, there is a great deal of interest in how this perspective might engage with law (Champeil-Desplats *et al*. 2019; Diaz-Bone 2015; Diaz-Bone *et al*. 2015). In this regard, in using it together with socio-legal theory, this article helps pave the way for an original research agenda.

In addition to its theoretical contribution, in addressing UK/EU procurement law, this article can aid regulatory efforts in this area. In December 2020, the UK government published its long-awaited green paper on reforming procurement regulation. The green paper - "transforming public procurement" - launched a consultation on proposals aiming to, post-

Brexit, “shape the future of public procurement in this country for many years to come” (Cabinet Office 2020, 7). In view of the green paper’s ambition, it is timely to reflect on how we conceptualize this regulatory context.

The paper begins in section two by responding to a prevalent way of thinking about decision-making in commercial settings, like procurement departments. It is standard to assume actors to be strategic, calculated decision-makers. Though a useful benchmark, this perspective offers only limited insights for understanding the administrative context in which procurement decision-making takes place. The paper therefore moves on, in the following sections, to construct a theoretical approach that utilizes insights from two separate strands of literature: it interprets Mashaw’s *Bureaucratic Justice* in conjunction with Boltanski & Thévenot’s orders of worth. Having discussed Boltanski & Thévenot’s approach (section three), and Mashaw’s *Bureaucratic Justice* in light of this (section four), section five sets out this analytical framework. This enhanced framework, it is argued, is consistent with Mashaw’s theorizing, whilst also accounting for certain perceived limitations of Mashaw’s models. As a way of illustrating the workings of the new framework, the final sections of the paper examine controversy surrounding the inclusion of labor objectives in procurement.

2. ECONOMIC RATIONALITY

The limits of economic rationality

Rationality is a core assumption in the cynical economic models of decision-making that commonly inform academic and policy thinking regarding procurement decision-makers. This section explains why economic rationality fails to provide an adequate basis for understanding procurement decision-making.

Discretion, according to Davis's straightforward definition, refers to "the power … to make a choice among possible courses of action or inaction'' (1969, 4). *Bureaucratic Justice*, as well as the administrative justice literature deriving from it, concentrates on the exercise of discretion by street-level bureaucrats, seeking to identify the values that drive decision-making and to understand what relevant actors perceive "just" decision-making to be.

Procurement decision-makers (such as managers within procurement departments), enjoy varying degrees of discretion under the law - concerning what to buy, how to buy (the specifics of the process) and who to contract with. However, though this discretion is important – with a considerable amount of public money spent via procurement – the reference narrative for academics and policymakers is, in general, based around the idea of the rational, optimizing agent.

An explanation for this is that, in contrast to the citizen-facing, disability welfare decision-makers one encounters in *Bureaucratic Justice*, procurement is a back-office, commercial function, not driven by a need to secure individualized justice. In framing the decision-making environment differently, one is inclined to regard actors, not as administrative justice decision-makers, but as "strategic" - a viewpoint associated with economics (such as the principal-agent problem and cost-benefit analysis) and game theory (e.g. McAfee & McMillan 1988; Laffont & Tirole 1993). Decision-makers, in this view, optimize under imperfect information and uncertainty.

The idea of rational, strategic calculation makes most sense in situations involving "risk", which Knight understood as "measurable uncertainty" (1921, 20): situations where, though the future is unknown, one can assign numerical probabilities to the set of possible events that might occur (the roll of a dice, for example). It is less helpful, and potentially misleading, in situations involving "unmeasurable" uncertainty, when it is not possible to assign numerical

probabilities to a set of possible future events or where the uncertainty is such that one cannot even describe the possible set of events. Nevertheless, relying on subjective probability theory (LeRoy & Singell 1987), economists commonly model behavior asserting that choices are made as if individuals held probabilistic beliefs, neglecting Knight's distinction (Kay & King 2020, 72-74).

A form of a strategic calculation may play an essential part in decision-making, especially for significant decisions and in commercial environments, when experts, such as economic consultants and lawyers are on hand to assist. However, a considerable body of research in both the social and behavioral sciences cautions against the temptation of equating economists' models with real life behavior. This includes warnings that regulatory systems (rules and incentives) premised on an *a priori* assumption that individuals are self-interested can often find that expectation is fulfilled (Kay 2003, 317 and 347).

Behavioral economics, an economics that utilizes insights from the behavioral sciences, has therefore emerged as a supplement to economic rationality. This points to how decision-making routinely departs from an ideal of rational utility maximization. Experiments demonstrate that people make systematic mistakes or "biases" (Kahneman 2012), and these may just as easily be prevalent in areas of administrative and legal decision-making, as in other areas (see Chen *et al*. 2016; Harley 2007).

However, in addition to concerns over the replicability of experiments (Retraction Watch 2017), a criticism of modern behavioral economics is that, now, it too often resembles a critique of human decision-making. In its origins, behavioral economics was arguably more a critique of the notion of economic rationality and optimizing behavior (King & Kay 2020). Simon's phrase, "bounded rationality" – in the old behavioral economics - captures "the inability of the human mind to bring to bear upon a single decision all aspects of value, knowledge and

behavior that would be relevant" (1997, 117). Rather than rationally choosing, according to Simon, actors "satisfice", looking for courses of action that are "good enough", "because they have not the wits to do otherwise" (1997, 118). In this view (in keeping with the value pluralism discussed in the sections below), rather than "biases", one might regard deviations from rationality, in a more positive light, as "evolutionary adaptations" (like conventions and rules of thumb) to complexity and uncertainty (King & Kay 2020, 152).

In this vein, Gigerenzer notes that many real-life decisions ultimately come down to intuition, and that, in situations of uncertainty, involving experienced decision-makers, outcomes can be preferable to an economist's cost-benefit calculation (2007). In situations of complexity and uncertainty, there is often not one optimum decision to be made. As Kay argues, individuals reach decisions through a process of "negotiation, adaptation and compromise. … [D]ecisions will be resolved in different ways by different people at different times" (2010, 79).

Economic rationality and public procurement law

In the procurement law context, a detailed and prescriptive rules-based regulatory system (a version of command and control) is in place to constrain procurement discretion (Arrowsmith 2006a). As such, there is a tendency to think about procurement decision-making as a matter of rule compliance versus non-compliance. The concept of justice (and just decision-making) is most likely to be used as a way of referring to the adequacy of legal dispute resolution and remedies (Arrowsmith & Craven 2016): a just decision is a legally compliant decision.

In economic models, compliance is the product of a cost-benefit calculation. The assumption is that individuals are "amoral calculators" (Kagan & Scholz 1984) and will comply with rules only when, and to the extent that, it is in their rational self-interest to do so – when the expected

costs of non-compliance (the risk and severity of sanctions) outweigh the expected benefits of non-compliance (Becker 1968).

There are various reasons why decision-makers do not comply with public procurement law, distinct from non-compliance as a deliberate move (Arrowsmith *et al*. 1998; Aspey & Craven 2018; Gelderman *et al*. 2006; Gelderman *et al*. 2010). The law is often criticized for its complexity and accessibility (e.g. requiring familiarity with technical EU case law). Individuals may not comply, even when predisposed towards rule compliance, because they are not aware of the law or do not understand the legal requirements. Constraints on resources (e.g. insufficient money and time) and/or capabilities clearly play a role in this (Baldwin 1990).

In addition, in rational choice it is typical to regard legal rules as unambiguously defining compliant/non-compliant behavior. The EU procurement rules, however, being the product of intergovernmental negotiation and compromise, are riddled with legal grey areas (Arrowsmith 2006b). There is often uncertainty surrounding what precisely compliant behavior is, as well as to what extent non-compliant behavior will identified and will face sanction. Despite a rules-based system, as Black explains, "discretion and rules are not in a zero-sum relationship such that the more rules there are, the less discretion there is and vice versa" (2001, 2). According to the idea of "embedded discretion", legal grey areas amount to pockets of discretion within legal texts (Harlow & Rawlings 1984, 298). This discretion can arise simply due to the constraints of language, and can be significant: for example, when decision-makers must give meaning to concepts like proportionality.

Rational choice models also typically assume that enforcement is the primary motivator behind compliance, and that, in deciding whether to comply, actors are able to calculate the probability of enforcement. From a UK perspective, the embedded discretion, described above, can be

especially powerful, as legal ambiguity generally combines with weak enforcement (Arrowsmith & Craven 2016; Pachnou 2005a; 2005b).

Considering the inevitability of discretion in this context, from a regulatory perspective, it is logical to look to the socio-legal literature on discretion. Studying compliance with procurement law (in the form of approaches to legal risk), Aspey & Craven show how various degrees of legal uncertainty in UK/EU procurement law provide an environment in which legal norms converge and/or compete with other normative and ethical influences (2018). They do not go on to consider, however, how actors work through the various tensions, particularly those arising between civic and commercial norms. In Mashaw's words, therefore, how do decision-makers "flesh out" the "substantive and procedural skeleton" set out in the legislation (Mashaw 1983, 24)?

This article now goes on to provide a framework to shed light on the way actors navigate a decision-making environment characterized by this regulatory dissonance (defined in section 1 above). It does so by relying on perceptions of "just" decision-making from economic sociology and socio-legal studies.

3. ORDERS OF WORTH

The procurement function can be viewed as a mix of both administrative and market behavior. To study this decision-making environment, therefore, rather than relying on an analytical framework from a single discipline, the article melds together approaches from both relevant disciplines (economics and public administration), both of which are centered on conceptualizing the idea of justice. This section sets out Boltanski & Thévenot's orders of worth to establish an economic perspective. This approach usefully complements Mashaw's, offering fresh insights on how to comprehend Mashaw's decision-making models, as well as

how Mashaw's models may act as a means of analyzing decision-making contexts in the era of the contracting state.

Boltanski & Thévenot's work is part of French pragmatic sociology or convention theory, which began to emerge at around the same time Mashaw was working on *Bureaucratic Justice*, in the early 1980s. Dissatisfied with risk and uncertainty, as understood in microeconomics (see above), the starting point for the French conventionalists is a recognition of the uncertainty (even radical uncertainty) that is pervasive in everyday social life (Salais & Diaz-Bone 2008, 17). Despite uncertainty – for example, over how we are expected to act and behave, and how we expect others to act and behave – actors coordinate and form agreements. They are able to do so, according to this perspective, due to conventions, which underpin the constitutive and regulative, formal and informal rules that make up institutions (Lewis 1969).

Like in legal studies, a "convention" refers to a routinized way of doing things (akin to "customs"), which might be/become law, via the common law and/or through legislative codification. The conventionalists, however, stress that even established conventions can be unstable and liable to change. Though there may exist established norms and customs, one should not assume compliance or even that these will be interpreted in a typical manner from one situation to the next. Conventions are not routines or rules to which actors uncritically submit. Rather, they hinge on how actors interpret the specific situations they find themselves in, and how they evaluate what actions and behaviors are appropriate (Storper & Salais 1997, 17). In "pragmatic situations", where actors must coordinate in order to realize a mutually beneficial outcome (e.g. exchange), actors - who are continually appraising and reappraising their expectations – must arrive at a shared means of interpreting and evaluating the situation (Salais & Diaz-Bone 2008, 18).

A cornerstone for convention theorists is the aim "to comprehend from the point of view of people themselves how they try to solve the problems of coordination which they face on a daily basis" (Salais & Diaz-Bone 2008, 17). Boltanski & Thévenot draw attention to the critical operations of actors involved in disputes, or "critical moments", when the conventional way of doing something comes under challenge (1999). These critical moments ultimately boil down to disagreements about "worth" and how actors evaluate what matters in a given situation:

> "[A]ctors in organizational settings … sift through a barrage of information – seemingly growing at an exponential rate – to select what counts, what matters, what is of true relevance. More fundamentally, organizations are engaged in a search for what is valuable. What new products can be brought to the market? What new technologies or production processes should be pursued? … And how should the units, of teams, and of the individual employees within them be evaluated?" (Stark 2011, 6).

Critical moments, Boltanski & Thévenot explain, give rise to a "constraint of justification" (1999, 364): assuming actors are reasonable (contrasting with "rationality" in microeconomics as well as the Weberian bureaucracy), a criticism or defense should be supported with a justification (relatedly see Mercier & Sperber 2017; Tilly 2006).

To be accepted as legitimate within the community, a justification must transcend the particularities of the immediate, individual dispute, and, at a more general level, establish an equivalence with a mode of interpretation and evaluation shared amongst actors and upon which all can find agreement (1999, 361).

Boltanski & Thévenot elucidate a limited (though non-exhaustive) "plurality of mutually incompatible" principles of evaluation, which all actors may have recourse to (1999, 369). These distinct "orders of worth" are set out in *Table 1*.

Table 1.

The orders of worth each differently represent "a shared basis on which to distinguish between people and between things and make evaluations of their relative worth" (Davies 2015, 14). The market, for example, is organized under a principle of competition, with price representing a measure of worth (Boltanski & Thévenot 2006, 193-203).

There are similarities here to what Galligan terms "social spheres" (2007; see also Walzer 1983). Galligan's social spheres are areas "of activity in which the participants share understandings and conventions about the activity, and which influence and guide the way they engage in it" (2007, 103). The different orders of worth, however, are not mutually exclusive. Instead of mapping to distinct societal domains (e.g. the economic or the social), they coexist in various social settings, often in a state of tension – e.g. in a compromise with one order dominant whilst others are marginalized or suppressed.

Boltanski & Thévenot, for example, argue that, though commonly looked upon as part of an economic sphere, in the modern corporation, similar to other organizations and institutions, all orders of worth are present (1999, 369). Actors flit in and out of the different orders ("during the space of one day or even one hour") according to the situation (Boltanski & Thévenot 1999, 369). The recent "public values management" literature, similarly, attests to the value pluralism that public sector actors encounter (Bozeman, 2007; Oldenhof *et al*. 2014; West & Davis 2011).

The orders of worth are attractive because, as with Mashaw's models (*Table 2* below), they appreciate the straightforward point that arrangements some find appealing are not necessarily appealing to others (Adler 2003, 330). The explanation for this is that, in any given situation, there are a plurality of "notions of the common good in play, and multiple techniques by which to assess it" (Davies 2015, 20).

The criticisms and justifications that actors deploy in social situations offer a window into the normative and ethical principles that underpin arrangements. This can enable one to discern the types of trade-offs and compromises between different orders, and to reflect on how things might be organized differently (Adler 2003, 330).

The article now moves on to discuss Mashaw's *Bureaucratic Justice* in light of the overarching theoretical perspective provided by Boltanski & Thévenot.

4. MASHAW'S IDEAL TYPES

The French conventionalists (discussed above) seek to explain conventions, such as the "tacit understandings" between actors about what a regulatory system (or an individual rule) is for (Lewis 1969, 46). In a similar way, as opposed to external legal standards, *Bureaucratic Justice*'s focus is the internal law of the administration:

> "… [T]he administrator confronts conflicting modes of conceptualizing the normative 'goodness' of the administrative system that is to be constructed. What are the images of "good administration" that guide bureaucratic behavior, that permit evaluation and hierarchical control?" (Mashaw 1983, 16).

Mashaw defines administrative justice as "those qualities of a decision process that provide arguments for the acceptability of its decisions" (1983, 24). Similarly, Adler, developing Mashaw's argument, refers to "the [normative] principles that can be used to evaluate the justice inherent in administrative decision-making" (2003, 323). Both see administrative justice as reflecting the legitimate modes of justification that sit behind decision-making.

Mashaw identifies three separate models of administrative justice (*Table 2*).

Table 2.

Mashaw constructs his three modes of justification by analyzing the different strands of criticism levelled at a US program of disability welfare in the 1980s.

The "bureaucratic rationality" model relates to criticism concerning unpredictability and inconsistency in decision-making. In these criticisms, there is a desire for complete and objective criteria in the exercise of discretion, and "the system is viewed in bureaucratic terms and criticized for inadequate management controls" (Mashaw 1983, 22). According to Mashaw, in this model, the justice argument is "that decisions should be accurate and efficient concrete realizations of the legislative will" (Mashaw 1983, 25).

The "professional treatment" model corresponds with criticisms concerning the adequacy of the service for the "client" (Mashaw 1983, 25-26). In the context of the medical profession, Mashaw explains "an administrative system for disability decision-making would … be client-orientated", involving judgements based on experience and expertise that are tailored to the client's individual needs (Mashaw 1983, 26-28).

The final model – "moral judgment" – derives from a more "'legalistic' perspective", and concerns "the capacity of claimants to assert and defend their rights" (Mashaw 1983, 21).

Like the orders of worth, each of Mashaw's models, on its own, can serve as a legitimate, normative basis for administrative decision-making. Similarly, in line with Boltanski & Thévenot (section 3 above), these models are not mutually exclusive. They are, however, in competition with each other, with each of Mashaw's models providing a basis from which to criticize decision-making (and the idea of justice) grounded in an alternative model (Boltanski & Thévenot 2006, 237-269 Mashaw 1983, 23). For example, as Halliday explains,

individualized, discretionary judgements, though prized in the professional treatment model, are antithetical to the goals of accuracy and consistency of bureaucratic rationality (2004, 117).

Each of Mashaw's models - with their "distinctive goals, specific approaches to framing … questions …, basic techniques for resolving … questions, and subsidiary decision processes and routines that functionally describe the model" (1983, 31) – depicts the decision-making environment differently. Boltanski & Thévenot, similarly, emphasize how actors represent the objective decision-making environment in the process of justification - how they identify objects, persons and actions as relevant and the way they portray their worth. In this regard, scholars draw attention to the values-laden grammar of administrative justice (Tomlinson 2017): a prominent example is how individuals claiming welfare entitlements, though citizens in the civic worth, are "customers" or "service-users" in the market worth (O'Brien 2012).

Boltanski & Thévenot also explain how actors rely on "reality tests", referring to recognized mechanisms for resolving value uncertainty and bringing disputes to an end (e.g. price competition) (1999, 367). Though Mashaw does not use this language, in building a taxonomy of different forms of state, market and social accountability, he has subsequently moved the discussion in this direction (2006). Adler similarly identifies the remedial systems characteristically associated with each of Mashaw's models (*Table 3* below). This includes "administrative review" for bureaucratic rationality, "second opinion or complaint to a professional body" for professional treatment, and "appeal to a court or tribunal (public law)" for the moral judgment model (2003). In addition, Adler, grappling with how Mashaw's models operate in an era of new public management, goes further, arguing that "publicity" is a characteristic remedy in a new and distinct "managerial" model, "'voice' and/or compensation through a consumer charter" a characteristic remedy in a "consumerist" model, and, in Adler's new "market" model, it is "'exit' and/or court action (private law)" (*Table 3*) (2003).

The next section, taking a lead from Adler, presents a framework for analyzing the organization of procurement decision-making. Mashaw's models are regarded as residing within Boltanski & Thévenot's civic order. The framework in section five, below, recognizes, separate to Mashaw's models, a plurality of orders of worth.

5. AN ANALYTICAL FRAMEWORK FOR PROCUREMENT

The framework

This section melds together the above two theoretical lenses to provide a means of examining how decision-making is organized in procurement departments. In developing a new analytical framework relevant to the contracting state, it is necessary to look beyond the civic order, the backdrop to Mashaw's models. Adler does this by introducing additional "normative models": managerial, consumerist and market (*Table 3*) (Adler 2003).

Table 3.

Halliday argues that, in contrast to Mashaw's original models, Adler's models are insufficiently "distinct" and "robust" (2004, 121). As the new models are aspects of the new public management, Halliday argues that, due to overlaps - such as the market with the managerial and between the managerial and the bureaucratic - Adler's consumerist model is the only worthwhile addition (2004, 123). Similarly, for Cane, on closer inspection, Adler's managerialism collapses into Mashaw's bureaucratic rationality, aspects of the consumerist fall within moral judgment, and only the market offers a complete model of justice: "a procedure

– competition for available resources, and a decision-making criterion – the allocation of resources to their highest-value use" (2009, 216). To illustrate this point, Cane refers to government procurement, "to a significant extent ... conducted on market principles" (2009, 216).

In view of these arguable overlaps (above), the enhanced framework below (*Table 4*) is based on a two-dimensional grid, better capturing the trade-offs between bureaucratic rationality and professional treatment within and between the civic and the market in the procurement context.

Table 4.

This new framework, *Table 4*, embeds Mashaw's models within the orders of worth. In this way, whilst, for example, in a civic order, the bureaucratic mode corresponds with Mashaw's bureaucratic rationality (top left of *Table 4*), and the professional mode corresponds with aspects of Mashaw's professional treatment (bottom left of *Table 4*), in the market order, for instance, the bureaucratic mode shares more in common with Adler's managerial model (top right of *Table 4*).

To keep the explanation of the model straightforward – for ease of understanding and presentational purposes - a simplifying assumption is made, limiting the framework to the sets of tensions most pertinent to the discussion below on labor objectives in procurement: the civic and the market, and, within these, bureaucratic and professional. This involves dropping Mashaw's moral judgment mode and several orders of worth. The grid could be made more elaborate with the inclusion of additional models/orders of worth, however, which would add extra dimensions. Additional orders of worth could serve to highlight illegitimate justifications. For instance, situations involving allegations of procurement corruption/cronyism, may give

rise to justifications perceived as belonging in a domestic order (relationships and trust), which – though aspects of relational contracting - are illegitimate in a civic order (Wagner 1994, 283).

This section next goes on to provide background detail to the different parts to *Table 4*. In particular, it outlines how different arguments are to be located in different parts of *Table 4*, and it further explains how *Table 4* operates, including what is meant by the middle row and column, labelled "trade".

Justifications for rulemaking

This section introduces certain core tensions observable in the justifications and criticisms concerning whether and how to regulate procurement (Arrowsmith 2021, 71-74; Arrowsmith *et al*. 2000; Dekel 2008; Schooner 2002; Trepte 2006). Arrowsmith identifies eight regulatory justifications. These are (1) value for money outcomes; (2) integrity (avoiding corruption and conflicts of interest); (3) implementation of industrial, social and environmental policies; (4) opening up markets to international trade; (5) equal opportunities and equal treatment for bidding firms; (6) fair treatment of bidding firms; (7) accountability; and (8) efficiency in the procurement process (2021, 71). Broadly, these fall into two sets of interrelated categories. In the discussion below, a distinction is made between justifications deriving from a market worth and civic justifications. In addition, a desire for constraining discretion is associated with a bureaucratic rationality, and arguments for discretion are associated with the professional treatment model (Kelman 1990).

Market-based criticisms and justifications are particularly pronounced in current political and policy debates around lowest price tendering and the role of outsourcing firms in public service delivery (the likes of Serco, G4S and Capita), the so-called "supermarketization" of public services (Parliament Hansard 2010). In the market worth (the right-hand column in *Table 4*),

justifications center upon economic efficiency (Sánchez-Graells 2015; Yukins 2010), which represents the basis upon which to assess the validity and relative importance of competing arguments (such as the regulatory arguments put forward by Arrowsmith, above). Thus, for example, to be accepted as legitimate in the market worth, arguments for fair treatment rules, which naturally one might associate with the civic worth, would need to be justified in economic terms – e.g. that these make procurement processes more attractive for bidding firms, enhancing competition in the longer-term.

A market logic is commonly associated with public sector reforms under the new public management (Hood 1991). For UK local government, for example, this would entail rules and incentives to promote commercial buying. For instance, under the compulsory competitive tendering regime (1979-1997), which preceded the best value duty, in-house providers had to compete against private firms to win the right to deliver defined activities. Legal rules would also attempt to streamline procurement: s.17 Local Government Act 1988 forbids non-commercial considerations in the award of supply and works contracts.

An alternative to the market worth is the civic worth (the left-hand column in *Table 4*), in which arguments are grounded in notions of social solidarity (see Prosser 2006, drawing upon Durkheim). Trepte uses the label "political" to distinguish non-economic arguments - which, here, are part of a civic worth - from economic arguments (2006). However, such a label carries negative connotations – for some, suggesting arbitrary, political meddling. Boltanski & Thévenot's civic worth, by contrast, elucidates a legitimate regulatory basis distinct from the market (Prosser 2006).

In the civic worth (the left-hand column in *Table 4*), rather than economic efficiency, there is a broader, "public good" objective. Civic justifications may relate to process – e.g. the need for integrity in public spending. They can also relate to outcomes. In this regard, concern for the

public good can be seen in broader, non-legal definitions of value for money: "suitability, effectiveness, prudence, quality, value and avoidance of error and other waste, judged for the Exchequer as a whole" (HM Treasury 2021, 193). It is also discernible in the "social value" duty, whereby authorities must take into consideration "economic, social and environmental well-being" (s.1, Public Services (Social Value) Act 2012), and the public sector equality duty (s.149, Equality Act 2010).

Before Brexit, in the UK, legal rules governing procurement discretion were mostly in place due to WTO and EU (internal market) law. The EU legal framework, which applies to most procurement deemed of cross-border interest, comprises general Treaty principles and rules, as well as detailed procedural rules (Directive 2014/24/EU). The procedural rules, based on principles of non-discrimination, equal treatment and transparency (art.18), seek to curtail national bias in the award of contracts.

This trade objective (described above), which, under EU and WTO law, provides a legal justification for regulation, is not to be equated with an order of worth distinct from the market and the civic worth. It is rather an intermediate goal that is potentially compatible with either of these justificatory frameworks. For the purposes of the discussion below, the middle row and column of *Table 4* shows how, from a regulatory perspective, key mechanisms necessary for pursuing the trade objective, which is predicated on open and fair competition, can represent a compromise, potentially offering a means for reconciling the distinct normative positions outlined above. As *Table 4* highlights, malleable legal principles, like proportionality, have a role in enabling compromise.

Nevertheless, as a compromise, the EU's rule-based approach is open to criticism from either corner of *Table 4*. For instance, the EU rules, especially as interpreted by the European Commission, are criticized (from the bottom right of *Table 4*) for providing insufficient

freedom for civic and environmental objectives (Kunzlik 2013). In response, EU legislative reforms in 2014, transposed into UK law in 2015, attempt to clarify the scope of discretion relevant to "socially responsible procurement" (Commission 2021), and are motivated by arguments that recognize procurement as a demand-side policy lever that can contribute to these broader goals.

In addition, the detail and prescriptiveness of the EU rules is criticized from the bottom right of *Table 4* as procedurally burdensome and an obstacle to efficient processes - that avoid excessive costs and delay, which, bearing in mind budgets and deadlines, can derail projects. Indeed, Cabinet Office's post-Brexit plans for reform explain that "modern and innovative approaches to public procurement have been bogged down in bureaucratic, process-driven procedures" (2020, 24). Chiming with Mashaw's professional treatment, they also state a desire to enable expert decision-making: "[w]e need to abandon … complicated and stifling rules and unleash the potential of public procurement so that commercial teams can tailor their procedure to meet the needs of the market" (2020, 5).

The discussion above gives a sense of the tensions in the law, between the civic and the market and the bureaucratic and the professional. The next section uses the above theoretical insights to discuss a specific controversy arising under UK and EU procurement law.

6. APPLYING THE FRAMEWORK

Context

The framework outlined in the preceding sections is employed, in this section, to analyze a controversy in procurement law, policy and practice: the inclusion of labor objectives. From a

trade law perspective, it is helpful to distinguish between two categories of labor objectives (Arrowsmith 2009): those requiring compliance with general legal requirements, and requirements going beyond compliance with the general law. The discussion below addresses both types of objective: contracting with (1) firms that pay the statutory minimum wage, and (2) with firms that pay a non-statutory living wage, such as the London living wage. These objectives have featured heavily in political and policy debate, especially due to campaigns on the "cost of living crisis" and "modern slavery".

Different reasons explain why these objectives come to feature in procurement (Arrowsmith 2009). A public authority, in deciding whom to contract with, may want to associate itself with robust labor standards, which might align with its values and might also save it from any political fallout if it were not to do so (e.g. from negative media coverage). It is also the case that some see procurement as a legitimate regulatory tool – a means of enforcing domestic law or for promoting raised labor standards.

The discussion below is informed by 52 semi-structured interviews on the topic of social objectives in local government procurement under EU and UK law, which took place between December 2015 and March 2017. Interviewees were purposively selected, based on their role and seniority within their organization, and the extent of their experience of local government procurement. The sample consisted of 31 procurement managers - based in England and Wales, predominantly in larger unitary authorities in city regions - as well as 16 external lawyers, and five external consultants/policymakers. A thematic approach was employed in analyzing the data, adhering to the framework method (Ritchie *et al*.).

A significant period has passed since data collection, and the regulatory environment has changed (not least due to Brexit); the discussion, however, serves to illustrate the theoretical framework. It does not provide a current depiction of procurement practice.

In procuring under the UK legal framework, an authority must choose from a toolkit of procedures. The discussion below relates to the competitive procedures (reg.26, Public Contracts Regulations 2015), which formally commence when the authority has a contract advert (notice) published. The procedures can be broken up into stages, and, at different points, labor objectives may feature in different ways (see Arrowsmith 2018, chapter 20; Barnard 2016; Sánchez-Graells 2018a). The section below considers three key points – qualification, the contract, and award.

Qualification

The qualification stage provides an early opportunity to incorporate labor objectives. This stage, where the authority assesses the suitability of firms responding to the advert, comprises two parts: exclusion (reg.57) and selection (reg.58).

Regulation 57 sets out mandatory and discretionary exclusion grounds. These concentrate on a firm's past behavior, in the main, seeking to ensure the integrity of firms. The grounds (reg.57(1)-(3)) cover convictions for offences related to bribery, corruption and fraud, as well as other serious criminal offences, for example relevant to drug trafficking and slavery. In addition to mandatory grounds, a range of reasons give rise to discretionary powers to exclude (reg.57(4) and (8)), including violations of environmental, social and labor law, such as minimum wage legislation, and where a firm has been guilty of a "grave professional misconduct" that "renders its integrity questionable".

Regulation 58 (selection) is linked to an authority's technical requirements, enabling it to reject firms that lack the capability to deliver. Decisions here must be based on appropriate criteria that ensure firms have the legal and financial capacities and the technical and professional abilities to perform the contract (reg.58(3)).

Determinations, both exclusion and selection, in practice, revolve around a "qualification/selection questionnaire" – the "reality test" (see section 4 above) - which is a standardized document that firms must complete (for exclusion questions, in a tick-box form) (Crown Commercial Service 2016). Questions on compliance with the minimum wage are standard. In addition, in interviews, many spoke of going further, asking questions about local living wage policies. This was not because the authority planned to disqualify on this basis, which could be legally problematic. Instead, it was a means of signaling values.

A prominent criticism of decision-making at this stage, seemingly deriving from a market/professional point on the grid (bottom right of *Table 4*), is that decision-making is "[b]ureaucratic, complex and costly" (Young 2012, 41). Lord Young's reports into access to procurement markets for small firms, from 2012 and 2013, for example, argue that questionnaires often entail "burdensome details and the 'gold plating' of training, health and safety policies and wider objectives of the … authority", and, for the benefit of SMEs, procedures should be put in place to make contracts quicker to award (2013, 21).

Though the above legal provisions are civic in nature, the concept of "self-cleaning" shows some recognition, from a market perspective, of the need for decision-makers to achieve a balance between a bureaucratic and civic approach (top left of *Table 4*), and the market order (bottom right of *Table 4*). Under regulation 57(13)-(17), a firm will not be excluded, even when grounds exist, if it can convince the authority it has taken sufficient measures to demonstrate its reliability. Similarly, though doing little to encourage expert judgement, the "single procurement document" (reg.59) enables firms simply to rely on self-declarations (formal statements) as preliminary evidence (instead of certificates) that qualification requirements are met – meaning the administrative burden of checking compliance only need take place when it is necessary (e.g. after identifying a winning bidder).

In addition, in direct response to Lord Young's findings, despite adopting a one-size-fits-all approach to exclusion, guidance requires that selection questions be relevant and proportionate (Crown Commercial Service 2016, 6). Authorities are legally obliged to have regard to this guidance (reg.107). For low value contracts (mostly outside the EU rules pre-Brexit), the approach is bolder – both forms of suitability questions must be relevant and proportionate, and shortlisting separate to this is forbidden (reg.111).

In general, the procurement managers interviewed were aware of the "bureaucracy" complaint and recognized the desirability of a commercial approach. Despite the introduction of the single procurement document, it had already been "long-standing practice … to request and accept self-declarations … in relation to grounds for mandatory and discretionary exclusion" (Arrowsmith & Smith 2018, 84). Similarly, and consistent with interviewee perceptions of good practice, government guidance now also makes clear that verification of firm declarations, in general, only need to take place with winning bidders (Crown Commercial Service 2016, 1).

The decision-making environment was thus marked by tension between the civic worth and the market worth, especially given the overall buying context. Procurement was a "balancing act", in the words of procurement manager five, involving "hard compliance" matters (including, but not limited to, the procurement regulations, equality law, and value for money) as well as the "fluffy stuff" (e.g. the local living wage, and training and apprenticeships). The apparent bureaucratic approach adopted was a response to system dissonance, coupled with a desire to meet the different regulatory and organizational objectives. This corresponds with how Mashaw, in describing how a "bureaucratic rationality" came to dominate in the administration of disability welfare, points to "dissonance" (value indeterminacy, factual ambiguity and organizational stress), as well as system efficiency concerns (1983, 74). The qualification/selection questionnaire provided an opportunity to recognize diverse (and sometimes competing) objectives, but to do so in a light way (i.e. through tick box-type

questions). Consequently, the qualification stage was about "values-signaling" (Arrowsmith 2020, 6), as opposed to a regulatory tool:

> "[w]e're not law enforcers. All we can do is make sure it's in our documents; make sure people are actually having to sit down and put pen to paper and say, 'yes, I comply with this' (procurement manager 5).

It is arguably appropriate, in view of such shortcomings, to remove these decisions from procurement managers, establishing a centralized debarment system (Arrowsmith 2020; Cabinet Office 2020, 38).

The contract

A preferred means of pursuing labor objectives has involved the authority supplementing its technical requirements with "special" contract clauses – for example, by which winning firms contractually undertake to pay a statutory minimum wage or a local living wage. From the interviews, a boilerplate clause requiring compliance with domestic minimum wage law is standard. The discussion in this section therefore focuses on controversy surrounding living wage clauses. Many local authorities, taking a lead from the Greater London Authority, have looked to contract special conditions, in the first instance, as the primary means of using procurement to support the living wage (Centre for Local Economic Strategies 2014; Johnson *et al*. 2019).

A blanket approach to living wage clauses (top left of *Table 4*) can be in tension with commercial objectives (e.g. Pennycook and Lawton 2013). For instance, the living wage may risk deterring competition, pricing small firms, or firms from jurisdictions familiar with lower labor costs, out of the market. It might also be expensive: additional wage costs can be expected to be priced into bids. Resource constraints - a particular concern for UK local authorities due

to severe funding cuts from 2010 onwards (austerity) (see Arnold & Stirling 2019) – can amplify these arguments around price and cost.

From a legal perspective, under EU law there has been less doubt about the leeway available at this stage. Even prior to the 2014 "sustainability" reforms, non-commercial, social clauses were expressly permissible: contract "conditions may include economic, innovation-related, environmental, social or employment-related considerations" (reg.70(2)). There are certain legal limits. In particular, "special conditions" must be "linked to the subject-matter of the contract" (reg.70(1)). This rules out, for example, clauses relating to a firm's general corporate policies – e.g. requiring that firms pay a living wage throughout their operations, as opposed to merely workers on the specific contract being procured. Firms must also be given upfront notice about the special condition/s (reg.70(1)).

A special condition will also need to be compatible with general EU law. In the late-2000s, the Court of Justice ruling in *Rüffert* (2008) cast doubt over the scope of the discretion available. A German federal state law, mandating the inclusion of special conditions, which required compliance with a local minimum wage (set out in a local collective agreement), was held to amount to (indirect) discrimination, incompatible with the free movement of services (art.56 TFEU). According to the Court, the clause was not capable of justification (for instance, for worker protection reasons). In explaining why not, however, the Court appears to suggest that it is down to the fact that the wage was higher than the general minimum wage and only applied to part of the construction sector in the locality - that is, public contracts and not private contracts as well.

A narrow reading of the case, contrary to the wording of reg.70, might broadly rule out the permissibility of living wage clauses. Though later judgments, *Bundesdruckerei* (2014) and

RegioPost (2015), clarify that this is not correct (see Sánchez-Graells 2018b), the immediate reaction to *Rüffert*, in general, was a risk averse approach.

The response in Scotland is illustrative: relying on *Rüffert*, as well as a subsequent opinion from the European Commission, EU law was a key justification behind the Scottish Government's rejection of arguments for Scottish legislation mandating living wage clauses in public contracts (Neil 2012). Instead, representing a compromise between civic and market orders, the Procurement Reform (Scotland) Act 2014, introduced a "sustainable procurement duty" (s.9) – akin to the social value duty in England and Wales – and requirements on community benefits clauses (ss.24 and 25) and a procurement strategy, which must include details on aspects of the authority's approach to social matters (including the living wage) (s.15). The Scottish government also supplemented the legislation with guidance, including on the living wage, which, rather than contract clauses, targets the award stage (see below).

For the authorities in England & Wales interviewed, as a departure from mandatory clauses (a bureaucratic approach - top left of *Table 4*), best practice was described in terms of professional treatment: it involved finding ways to work with bidders on the issue, gaining an understanding of specific markets (e.g. through work done pre-procurement in the run-up to the contract advert), including the opportunities/challenges, and, if feasible, persuading firms to voluntarily sign-up to living wage clauses.

In both Scotland, and in England and Wales, there was clearly more going on than legal rules dictating behavior. In Scotland, for example, opposition parties were quick to point out that the Scottish Government had been prepared to face down the Commission over plans to legislate for the minimum pricing of alcohol. It was not prepared to do so here, even though the risk of challenge (particularly via a reasoned opinion by the Commission (art.258 TFEU)) was less likely. Similarly, for authorities in England and Wales, as explained in interviews, despite the

apparent narrowing of the law, there remained a good degree of freedom in practice: the legal position was uncertain, and the vast majority assessed the challenge risk as minimal.

Though court proceedings represent a systematic process for resolving disputes in the face of uncertainty, according to empirical evidence, procurement litigation by aggrieved bidders is relatively infrequent (Arrowsmith & Craven 2016). Thus, theoretically there was legal risk; however, in reality, this was not the case. This was mainly due to the tight window bidders have in which to commence a challenge: 30 days, from the date of knowledge of the grounds (reg.92). Provided an authority is transparent early on about its plans, bidders must act straightaway. They cannot wait until later when they are sufficiently disgruntled, having not won the contract and having sunk resources into a failed bid. They are, however, likely to be reluctant to challenge early: they want to be awarded the contract and might not want to risk souring relations with the buyer. Even if they do challenge, the authority will often be in a position to review the situation, and, if necessary, avoid a legal dispute by rowing back with minimal disruption.

Rather than the law, for many authorities, concerns to make savings were forcing them to appreciate the financial cost (for authorities as well as suppliers) of a blanket approach to the living wage, even though it might be politically popular. Moving towards a professional treatment mode, the principle of proportionality, as a legal and a commercial concept, would be employed as a means of representing the compromise necessary to navigate "the fine line" … "between our internal policy, our moral objectives and our corporate priorities, the … Public Contracts Regulations and all the other legislation that sits around procurement, like … best value, modern slavery" (procurement manager 26). According to procurement manager 13:

> "It has to be [proportionate] otherwise it can't be delivered. … [A]t the end of the day, everything you put in has got a price implication and we haven't got the money. … [W]e haven't everyone in the world clamoring and bashing our doors down ... If … we … [mandate living wage clauses] people wouldn't bid …".

Lawyer 12 spoke about how, across different markets, there is "a commonality of understanding of what is acceptable and what's not". Consequently, in general, living wage clauses would appear in contracts in high-wage sectors, where the living wage was already an industry norm (such as construction). In other sectors, where paying the living wage could have an uplift on costs (such as social care) or where it would place certain firms (such as SMEs) at a competitive disadvantage, it was arguably unrealistic to expect bidders to agree to pay a living wage, and when some authorities had tried there had been pushback from firms. Thus, rather than litigation, whether the authority had overstepped the mark would be tested by complaints (informal and formal) from disgruntled bidders. Bidders might also choose to exit the market – e.g. concentrating resources on more attractive tendering opportunities. None of the authorities interviewed had experienced a formal legal challenge from requiring a living wage.

In response to the changing economic and legal situation, authorities had therefore shifted away from a bureaucratic (civic) approach to a "professional treatment" compromise. This enabled them to continue to project a commitment to the living wage. However, reflecting on the management and performance of contracts, following contract award (though not directly involved at this stage), few interviewees had confidence that living wage special conditions were a priority for contract managers, noting issues over detection and enforcement. According to interviewees, following the award of the contract, and with dwindling budgets, the concern for contract management teams is core delivery, not contractual extras. Contract delivery generally called for a hard-headed approach, including the need to develop and maintain good

working relationships (bottom right of *Table 4*), rather than bureaucratic adherence to the contract.

Award

In the final stages of a procurement, firms remaining in the process will submit tenders against the authority's technical requirements. The contract must be awarded to the Most Economically Advantageous Tender (MEAT), from the authority's point of view (reg.67). The criteria used to assess the MEAT (for example, relating to price and quality), along with respective weightings, must be disclosed in advance (reg.67(9)).

The main controversy surrounding the award stage, as one of Boltanski & Thévenot's "reality tests" for resolving value uncertainty (section 4 above), has been over the appropriateness of the test itself.

There is a preference for objectivity at this stage. The risk of legal challenge is raised at this point in the process (in contrast to the stages above). Firms are close to securing the contract and potentially will have invested significant time and money into tenders. There can be a sense of unfairness if determinations appear overly subjective, and, unsurprisingly, therefore, a premium is given to bureaucratic values - transparency and equal treatment.

A frequent criticism (more so as austerity persists), bearing the above in mind, is that price – an objective measure of value – carries too much weight, to the detriment of quality considerations and social and environmental values. This derives from the left-hand column in *Table 4*. In the words of the government (Julia Lopez MP), for example, "[t]oo often …. 'value' has been narrowly defined by price without taking into account other important factors such as the number of local jobs or apprenticeships a contractor will provide, the care they show the

environment in their business practices or the number of SMEs involved in their wider supply chain" (2020).

At EU level, broadly, regulatory changes have involved clarification over how much discretionary judgement is available. Prior to the sustainability reforms, authorities had an option to base award decisions on either lowest price or the MEAT. Now, award must be based on a determination of the MEAT (reg. 67(1)). The text of the provision explains, however, that, as well as the tender offering the best price-quality ratio, the MEAT can be the lowest priced tender (reg.67(2)).

In addition, the "linked to the subject matter of the contract" requirement limits the scope of labor objectives at this stage. Previously, the Commission had adopted a narrow (market-based) interpretation of this phrase at award. However, in *Commission v Netherlands* (2012), the Court of Justice rejected the narrow view, and reg.67(5) now clarifies that there is a "link to the subject matter" where award criteria "relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle" (the Commission too has now updated its approach (2021, 51)). The provision thus more clearly parallels the same phrase under the rules on contract special conditions (above).

Rather than substantive legal changes, these reforms involve the EU legislature guiding authorities away from competition based on lowest price (for example, through layout changes). A market order (right-hand side of *Table 4*) remains dominant at the award stage, however, and price and costs are invariably prominent features in this environment.

In practice, labor objectives, if included, will invariably form part (as sub-criteria) of a headline "social value" criterion, alongside price and quality criteria. However, due to the above, when wage objectives do enter the decision-making process, they tend only to do so to a negligible extent, without clearly impacting on the outcome of the competition. The market order (bearing

in mind the competitive set up) was dominant, and, ideally, any inclusion of civic values at this stage would need to be in a way that was compatible with price competition. As such, amongst interviewees, there was keen interest in civic values that could be evaluated in a way commensurate with price, including social valuation techniques (Craven 2020, 52).

In addition to the contest between economic and civic values, due to the plurality of regulatory and organizational objectives, civic considerations (left-hand column in *Table 4*), as well as environmental policies, falling within authorities' broader social value goals are themselves not always in harmony. Awarding points to a firm for its living wage policy, for example, potentially advantages larger firms - those with existing corporate social responsibility policies – which might be in tension with a local authority's objectives on promoting SMEs and/or local business. For most of the authorities interviewed, at the time, the local economy was the political priority. It was this that tended to deter those authorities with a bureaucratic mindset – those that maintained a rigid approach to social value criteria and weightings across all procurement – from living wage objectives. This was not the approach taken by all authorities, however. A small number (tending to be authorities with more resources) were more agile: in line with the professional treatment mode, they would adapt social value, analogous to a "graphic equalizer" (according to procurement manager 6), to the situation at hand.

Despite the above limitations, for many interviewees, using the award stage to promote civic values was preferable to contact clauses (above) because, as the basis for the award, these would then be written into the contract as key deliverables. In the delivery of the contract, these objectives are then more visible, and, as key performance indicators, play a more prominent role in directing performance.

CONCLUDING REMARKS

This article has presented a framework for understanding decision-making environments governed under administrative law, particularly areas, like procurement, that involve administrative decision-making by commercial actors. The framework combines insights from Mashaw's *Bureaucratic Justice* with Boltanski & Thévenot's orders of worth. These two distinct theories provide comparable understandings, recognizing that a plurality of normative and ethical frameworks underpin decision-making in economic and social life. The framework proposed in this article regards Mashaw's models – bureaucratic rationality, professional treatment and moral judgment – as embedded within Boltanski & Thévenot's orders of worth. There is scope for arguments within individual orders between decision-making models. There is also scope for more radical critique and compromise when justifications based in one order of worth are subject to criticism from another.

The article demonstrates the analytical framework by considering the UK experience concerning labor objectives in procurement. It studies three decision-making areas: qualification, contract clauses and award. These different situations depict the way in which actors must, in one way or another, manage dissonance. There are clear tensions between the civic and the market, and, within and between these orders, there is competition between bureaucratic and professional modes of decision-making. The resolution to this dissonance, however, varies from one situation to the next.

At the qualification stage, decision-making depends on a standard questionnaire. A bureaucratic approach has been adopted mainly in response to stark conflict, evident in the legal rules themselves, between the civic and the market worth.

In relation to living wage contract clauses, ostensibly in response to the narrowing of available discretion, authorities moved from a bureaucratic to a professional treatment mode of decision-making. This enabled a compromise between the civic and the market on a case-by-case basis,

with the concept of proportionality mediating between the two: conversations with the market essentially came down to a search for agreement on what was proportionate.

Disagreements at the award stage ultimately revolved around the "reality test" and a need to manage value "cacophony" (Stark 2011, 27) in assessing the MEAT. In this compromise, despite the civic critique of decision-making, the market order remained dominant. Here, worth was to be judged by reference to a competition, which prioritized objective measures of value, like price. Civic values would need conform to that competition. Wage objectives faced opposition due to their potential impact on the price of tenders, and because of the way these objectives might be in conflict with separate and competing civic objectives.

Mashaw's *Bureaucratic Justice* is a detailed and rich account of the complexity of administrative justice. This article puts forward a fresh interpretation - grounded in a recognition of the significance of conventions and Boltanski & Thévenot's orders of worth. In doing so, it amplifies arguably overlooked ideas in Mashaw's work - in particular, concentrating on how actors manage what Mashaw terms dissonance. In developing this concept, this article highlights that there is still a great deal for social scientists to take from Mashaw's fascinating study.

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