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LAW AS SIGNAL
REFLECTIONS ON SUSTAINABLE CONSTRUCTION
REGULATION IN SWEDEN

Karsten really is the reason I am a researcher today. He was my supervisor during my PhD studies, but actually he was much more than that. He was a mentor and a fellow being that I could lean on for support and guidance. He allowed space for creativity and mistakes to be made from which I could grow. I greatly appreciated his speech at my PhD graduation dinner and I am happy to give a little something back for all these years of collaboration and support.

Introduction

Sustainable public procurement is today a well-recognised part of the strive towards a sustainable society, globally as well as nationally in Sweden. In Sweden, legislators and practitioners alike are attempting to keep up with a gradually greener market. In sociology of law a question of drivers for development and change is ever present. The area of sustainable public procurement is no exception. It has changed considerably over the last decades and it is relevant to pose the question: what role has law played in this change?

In this text I will highlight particular legislation that regulate this area. Several legislations are relevant and come into play at various stages and in various areas of sustainable construction. The focus for this analysis is on public procurement legislation. Namely, public procurement legislation (Public Procurement Act 2007:1091), which in turn originates from European legislation and will for that reason also include a discussion of the European Union directives of 2014 on public procurement covering public works, products and services (the 'classical' sector) and on procurement by entities operating in the water, energy, transport and postal services sectors.¹ This

¹ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, OJ L94/65; Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, OJ L94/243.

indicates the development within this area of research. The new directives are expected to be implemented in Swedish legislation in early 2017.

The changes to these legislations can be discussed in terms of what they signal to the market actors, be they public or private. According to Posner,² law is a theoretical means for government to influence behaviour in society through signalling, referring to "legal manipulation of symbols" and "government-led norm entrepreneurship". He differentiates between the behavioural effect of the law and the hermeneutic effect of a law, where the former pertains to the effect on behaviour and the latter on people's beliefs about the kind of person who engages in a particular action.³ This chapter focuses on the behavioural effect of the law and the government as a norm-entrepreneur, illustrated through the use of sustainable construction regulation. The analysis is limited to a focus on environmental considerations or 'green' aspects. Albeit, the point of the analysis is no less relevant for sustainable construction or sustainable public procurement.

From competition to sustainability

The title of this section is not entirely accurate or just. In reality there has not been a change to sustainability where the competition aspect of public procurement legislation has disappeared. Rather, the two have coalesced into a view on public procurement as a strategic tool for societal development. To explain this further I will draw on some of the historical developments on public procurement legislation.

Environmental aspects emerge

The preparatory work to the 1992 Swedish Public Procurement Act⁴ highlights the reasonability of procuring more expensive goods and services when integrating environmental considerations.⁵ The author arrives at the conclusion that, in light of the possibility of awarding a contract to the economically most advantageous tender, such a qualitative consideration is possible, provided that the procuring authority has considered how such considerations or factors (*kringomständigheter*) can be valued in economic

² Posner, Eric, A., (1998) *Symbols, Signals, and Social Norms in Politics and the Law*. *Journal of Legal Studies*, vol. XXVII (June 1998), at p. 765.

³ Posner, (1998), at p.778.

⁴ Lag (1992:1528) om offentlig upphandling. The legislation came into force on January 1st 1994.

⁵ Regeringens proposition 1992:93:88 om offentlig upphandling, at p.71.

terms.⁶ It should be noted that the original legislative proposal (Lagrådsremissens lagförslag) did not include any reference to environmental considerations. Rather, it was added with reference to the importance of considering environmental issues in light of, for example, the substitutionary principle (*utbytesregeln*) when considering chemical products.⁷ The final legislation did not, however, include any reference to environmental considerations, albeit other considerations than price are possible when selecting the most economically advantageous bid if clearly published in advance.⁸

In 1998, a bill called for an increased importance of green public procurement in Sweden (Bill 1998/99:Fi805).⁹ In its response, the Committee on Finance highlights that goods and services are procured for approximately 300 billion SEK each year and that public procurement "should be an effective instrument to influence market supply, among other things, such that the collection of products more rapidly can be adjusted to requirements of environmental sustainability".¹⁰ (Author's translation) The Committee of Finance also arrives at the conclusion that there is a need for a national policy on public procurement, that the legislation on public procurement needs reviewing, and that it should be investigated how environmental requirements can be added to the public procurement process. In particular regarding eco-label criteria, production processes, transport and local procurement.¹¹

At European level, a ruling by the European Court of Justice (ECJ) arrived at the conclusion that, although the public transport undertaking was the only tenderer with a real possibility of achieving the environmental criteria, this was not in itself a breach of the principle of equal treatment.¹² In other words, ensuring actual competition was not of primary importance to the court. Another indicator of a change in the market and perception of the court is the

⁶ *Ibid*, at p.72.

⁷ *Ibid*, at p.52.

⁸ *Op cit* fn1, ch.1, §22.

⁹ Bill1998/99:Fi805 on Environmental Considerations in n Public Procurement, Motion 1998/99:Fi805, Miljöanpassad offentlig upphandling. Hereinafter Bill 1998/99:Fi805.

¹⁰ Report by the Committee on Finance (parliament of Sweden), Finansutskottet betänkande 1998/99:FiU17.

Hereinafter Committee on Finance Report, 1998.

¹¹ Committee on Finance Report, 1998. It should be noted that an investigation (dir. 1998:58) into the role of the tillsynsmyndighet on public procurement in Sweden, NOU, was expanded through an additional instruction (*tilläggsdirektiv*) (Fi 1999:34) to include what considerations are relevant when awarding the most economically advantageous tender, environmental requirements in public procurement and local procurement.

¹² Case C - 513/99 Concordia Bus Finland Oy Ab v Helsinki Kaupunki and HKL - Bussiliikenne [2002] ECR I-7213 cf. para 72 of the judgement.

conclusion of the court that European development, in terms of public procurement directives and Art. 6 of the EC Treaty, meant that "public procurement law does not exclude the possibility of the contracting authority of using criteria relating to the preservation of the environment when assessing the economically most advantageous tender."¹³ In other words, it was clarified that the criteria establishing the economically most advantageous tender not necessarily have to be in financial terms, albeit still relevant to the subject matter of the contract.

Another development at this time is the discussion in the preparatory work relating to how environmental considerations in public procurement regulation should be formulated. There were discussions in the preparatory work as to whether there should be a requirement, *shall*, to integrate environmental considerations, or a mere encouragement, *may*, to do so. In the end the mandatory requirement was abandoned with a reasoning that it was not possible to foresee the consequences of such a requirement.¹⁴

Removal of business-like behaviour

Another interesting aspect of this change is the removal of the principle of *business-like behaviour* in the Swedish public procurement legislation in 2007. The concept has been thoroughly analysed in relation to public procurement regulation and practice previously, and it has been found that there might be a conflict between the principle of *business-like behaviour* and sustainability considerations in public procurement.¹⁵ The legislator emphasised that the removal of the principle from the Swedish regulations did not alter the meaning of the legislation, but merely was to ensure a rapprochement to the European directives. The European directives on public procurement never stipulated a principle of *business-like behaviour*, but the basic principles of European public procurement legislation were seen to be enough to ensure the objectives of competition and business-like behaviour. Yet it is interesting to note how the discussions prior to removal of the principle were tainted by a fear of signalling that public procurement was no longer to be performed in an effective manner using taxpayers' money.¹⁶

¹³ *Ibid*, cf. para 57 of the judgement.

¹⁴ Swedish Government Bill, proposition 2006/07:128, part 1, at p.157. For a discussion see Wedin, 2009, at p.57.

¹⁵ Karsten Åström and Jan Bröchner, (2007) "Imitating Private Business in Public Procurement: 'Affärsmässigt.'" *Journal of public procurement*, vol.7, issue 2, pp.213-227.

¹⁶ Swedish Government Bill, SOU 2001:31 *Mera värde för pengarna*, at p.288.

Exhorting sustainability considerations

Needless to say, there has been much debate about the public procurement legislation in Sweden and elsewhere in Europe, partly about the limiting aspects of the European directives and the Swedish legislation on public procurement.¹⁷ This is one of the reasons behind the modernisation of the public procurement regulation in Europe through the public procurement Directives of 2014. Another major reason for the new directives is the "[s]trategic use of public procurement in response to new challenges", referring to "a greater inclusion of common societal goals in the procurement process" such as "environmental protection, social responsibility, innovation, combatting climate change, employment and public health".¹⁸ The new directives were also a codification of several important court cases from the European Court of Justice (ECJ) following the turn of the century.¹⁹ Furthermore, the directives exhort the integration of sustainability considerations in public procurement through requiring that contracts are awarded on the basis of the *most economically advantageous tender* only, removing the option of price, and stating that it

"shall be identified on the basis of the price or cost, using a cost-effectiveness approach, such as life-cycle costing [...] and may include the best price-quality ration, which *shall* be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question."

(Art.67 of Directive 2014/24/EU. Emphasis added.)

¹⁷ Wedin, L. (2009) *Going Green – A Study of Public Procurement Regulation*, PhD Thesis, *Studies in Sociology of Law*, no.32, pp.198; Ahlberg, K. and Bruun, N. (2010) *Upphandling och arbete i EU*. Sieps, 2010:3, at p.9; Kunzlik, P. (2013) Green Public Procurement – European Law, Environmental Standards and 'What To Buy' Decisions. *Journal of Environmental Law*, 2013:25(2): 173-202.

¹⁸ The Council of the European Union press-release: Brussels, 11 February 2014, 6337/14, (OR. en), PRESSE 64.

¹⁹ For a discussion on the court cases, see e.g. Caranta, R. and Trybus, M. (eds), (2010). *The Law of Green and Social Procurement in Europe*. Copenhagen: DJØF Publishing, 2010; Arrowsmith, S. and Kunzlik, P. (Eds.) (2009) *Social and Environmental Policies in EC Procurement Law. New Directives and New Directions*. Cambridge University Press; and Stavenow, C. and Sennström, L. (2013). *Miljö- och sociala hänsyn i offentlig upphandling – Juridik och praktik*. Jure förlag, pp.173.

Posner on Signals

As stated earlier, Posner²⁰ raises the issue of law as a theoretical means for government to influence behaviour in society through signalling and refers to "legal manipulation of symbols" and "government-led norm entrepreneurship". He realises that, "because cooperative behaviour can be highly sensitive to symbols, there are great incentives for the government to regulate symbols". Yet he is hesitant, as the outcome of such attempts are highly unpredictable. Although, he adds, the norm entrepreneur is able to invent new signals later on since there is an element of repetition.

Posner differentiates between the behavioural effect of the law and the hermeneutic effect of a law, where the former pertains to the effect on behaviour and the latter on people's beliefs about the kind of person who engages in a particular action.²¹ This paper focuses on the behavioural effect of the law and the government as a norm-entrepreneur. In terms of limitations of the behavioural effect of the law, there is a risk of the law ambiguating the meaning of the symbol, rather than increasing respect for the symbol. In other words, the effect may be that the meaning of the symbol becomes confused despite a specific intention of the government and legislator. Posner highlights the possibility of the legislator to become a norm entrepreneur and can, as such, for example supply undersupplied socially desirable norms and social meanings or encourage their supply through legal incentives.²² The risk of undesirable effects should be kept in mind, particularly in relation to the severity of the sanction.

Posner highlights four ways in which law's effects are generated: modifying the cost of sending the signal, modify the payoffs from cooperation, modify what receivers of signals believe about the proportion of types in the population, and modifying the norm entrepreneur's payoff from constructing a signal or the law can construct a signal itself. Yet when predicting the effect of a law, several complications must be kept in mind. One of which is *symbol transformation* and they occur because exogenous changes cause old signals to fail,²³ for example changes external to the legislation, including changes in the market and practices. This takes us back to the discussion about public

²⁰ Posner, Eric, A., (1998) *Symbols, Signals, and Social Norms in Politics and the Law*. *Journal of Legal Studies*, vol. XXVII (June 1998), pp. 765-789.

²¹ Posner, (1998), at p.778.

²² Posner, (1998), at p.795.

²³ Posner, (1998), at p.790.

procurement regulation and the role of the European regulators and the Swedish government to act as norm entrepreneurs in this regard.

Discussion

As stated at the outset, the government regulation of the public procurement area has changed considerably throughout the past years. Environmental considerations have gradually become integrated in public procurement practice and regulation, followed by the integration of social considerations more recently. The legislators at European and Swedish levels have continuously revised the legislation in order to clarify where public procurement practice is headed and to adapt to a greater knowledge of the markets, changing practices and new court decisions of the ECJ.

Initially it is clear that an increasing awareness of environmental issues and negative consequences on the environment, influence practice, requirements in public procurement and the reasoning by legislators. This could be considered a symbol transformation in that exogenous changes, environmental awareness, have caused old signals, prioritising price, to fail. According to Posner, this gives room for norm entrepreneurs to discover new signals to replace the old signals. The legislator has the possibility to become a norm entrepreneur in the words of Posner and, as such, for example supply undersupplied socially desirable norms and social meanings or encourage their supply through legal incentives.²⁴

Sustainable public procurement regulation can be seen as a form of government norm entrepreneurship to influence the market to contribute to a sustainable development. The ambition of the legislator is for example to influence "a greater inclusion of common societal goals in the procurement process", as stated earlier. In other words, there is a concerted effort to encourage the supply of socially desired norms through legal clarification of the opportunities for sustainable public procurement practice, or; law as signal.

There have been discussions along the way as to the formulation of the regulation to influence the norms. Were there to be a legal requirement to integrate environmental considerations for example? In the preparatory work 2006 a discussion regarding the formulation of the legal text was discussed, as well as the potential consequences of clearly stating a requirement to integrate

²⁴ Posner, at p.795.

environmental considerations in public procurement practice. This can be related to the discussion regarding the role of the government in terms of intervening to supply socially desirable norms itself or encourage their supply indirectly. The conclusion of the legislator at that time was that the consequences or effects of direct intervention to require environmental considerations were unforeseeable and not investigated enough to warrant it. Consequently, the law was used as a means of creating a symbol for sustainable development; green public procurement was enabled, yet not a mandatory legal requirement. Here the inherent problem of behavioural norms can be identified. The legislator might have been concerned with the balance between enforcing the symbol of the law, or ambiguating it such that the meaning of the law becomes confused. Possibly due to an inability to implement the legislation or to enforce a mandatory requirement, which in turn could undermine the signal and behavioural effect of the law.

Today, the practice is clear in terms of legitimising sustainable public procurement and thus it could be considered an established norm. The leaders within the area are being accompanied by more actors, although there are still laggards who find the threshold of resources, knowledge and legal uncertainty too great to overcome.²⁵ The likely requirement to integrate sustainability considerations in public procurement in the new legislation could thus be argued to be already established social meanings, in the words of Posner. There are however, Posner warns, risks involved when the government sets out to change socially undesirable social meanings when these meanings are sufficiently powerful. In other words, is the signal already strong enough to create a change? Would the strengthening of the signal lead to green wash or an ambiguity in the meaning of the symbol? On the other hand, if mixed signals exist, as has been the case throughout the years with regard to sustainability considerations in public procurement, I would argue that a clear signal from the government might contribute to a change in practice for the laggards within the market.

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²⁵ For a discussion on the threshold or obstacles see: Wedin, 2009.

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